THE ARTSAKH ISSUE IN ITS HISTORICAL-LEGAL DEVELOPMENT

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Abstract

Artsakh or Karabagh is an integral part of historic Armenia. Felling under the rule of various conquerors throughout history, Artsakh remained Armenian, sometimes possessing also a semi-independent status. The legal history of the Artsakh dispute can be traced back to the 1813 Treaty of Gulistan, when Persia ceded sovereignty of Artsakh to the Russian Empire. After the collapse of the Russian Empire, during 1918-1920 Artsakh was disputed by the Republics of Armenia and Azerbaijan, because of the administrative policy of the former Russian Empire to unite the national territories into mixed administrative unites.

After being incorporated into the Soviet Union, again because of the same administrative police, the Armenian populated Artsakh was incorporated into Soviet Azerbaijan as an autonomous district (marz). Utilizing Article 3 of the "Law on Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR," which provides right to the people of autonomous republics and autonomous formations to independently decide their future state-legal status, on 2 September, 1991, a joint session of the People's Deputies of the Nagorno-Karabagh Autonomous Region and Shahumyan regional councils, declared the establishment of the Nagorno-Karabagh Republic (NKR). This move was followed by a referendum, where 99,9% voted for independence of NKR.

After this vote until now, Azerbaijan tries to seize Artsakh by force, which is contrary to international law.

This article aims to study the status of Artsakh in the context of the above historical-legal developments. It clearly demonstrates that the right of people of Artsakh to independence is undisputable. The article will also present the false dilemma of the concepts of territorial integrity and self-determination and will argue for the use of remedial secession in the case of Artsakh.

Keywords: external self-determination, territorial integrity, remedial secession, ethnic cleansing, racial hatred.

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Introduction

Without going deep into history, it should be mentioned that Artsakh (Karabagh) is an integral part of historic Armenia.[1] It was the 10th province of the ancient Armenian Kingdom. Felling under the rule of various conquerors throughout the history, Artsakh remained Armenian, sometimes possessing also a semi-independent status (Karabagh Melikdom). Before being ceded to Russia Karabagh Khanate was an administrative unit within Persia.

The legal history of the Artsakh dispute can be traced back to the 1813 Treaty of Gulistan. Under this treaty, that ended the First Russian-Persian War, Persia ceded sovereignty of the Artsakh along with the other North Eastern provinces of Armenia to the Russian Empire. By 1826 Treaty of Turkmenchai, the remaining territories of Eastern Armenia and Persian occupied Georgia were likewise ceded to Russia. Under Russian jurisdiction and policy of divide and rule, the province of Nakhijevan formed part of the administrative region of Yerevan, whilst Artsakh and Zangezur were at first part of the Caspian district, but later, by the administrative reform of 1840, were incorporated into the new Elisavetpol district.[2]

WWI and the Bolshevik Revolution created a new political-historical situation in Transcaucasia. On 15 November 1917, the Bolshevik government adopted a Declaration on the Rights of the Peoples of Russia declaring also the right of secession and formation of independent states from the territory of the Russian Empire. In November 1917, the first government of an independent Transcaucasia (Armenia, Georgia, Azerbaijan) was created – the Transcaucasia Committee and the Transcaucasia Commissariat (Seim). On 22 April 1918, the latter declared the Transcaucasian Democratic Federative Republic, which, however, did not live long. On 26 May 1918, Georgia declared its independence, which was followed by the declarations of independence of Azerbaijan and Armenia.

There were a lot of territorial claims and conflicts during nearly 2-3 years of existence of these short-lived republics. By the subsequent sovietization and incorporation of the three republics into the Soviet Union resulted in the new forced status for Nagorno-Karabagh – that is its autonomous status within the Soviet Azerbaijan.

The collapse of the Soviet Union in 1991 that resulted in the transformation of the world political map also gave rise to many territorial and statehood problems for former Soviet territories. The Nagorno-Karabagh (Mountainous Karabakh) or Artsakh conflict is one of such examples.

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1 For more on the history of Artsakh see e.g. Levon Chorbajian, Patrick Donabedian and Claude Mutafian, *The Caucasian Knot: The History and Geopolitics of Nagorno-Karabagh* (London and New Jersey: Zed Books, 1994); Ohannes Geukjian, *Ethnicity, Nationalism and Conflict in the South Caucasus: Nagorno-Karabakh and the Legacy of Soviet Nationalities Policy* (New York: Routledge, 2016).

2 Michael Croissant, *The Armenia-Azerbaijan Conflict: Causes and Implications* (London: Praeger, 1998), 12–13.

Exercising its right to self-determination based on Soviet law, on 2 September 1991 Nagorno-Karabagh adopted the declaration on the "Independence of Nagorno-Karabagh", which was later confirmed by referendum. However, the Supreme Council of the newly independent Azerbaijan Republic adopted a declaration stating that the independence of Azerbaijan dated back to 1918-1920. Thus, Azerbaijan became the successor to the Azerbaijani Democratic Republic (hereinafter ADR) that existed between 28 May 1918 and 27 April 1920. On 18 October 1991, based on the abovementioned declaration, the Azerbaijani Republic adopted a constitutional act on withdrawal from the USSR, which defined the existence of the Soviet authority in Azerbaijan from 1920-1991 as an annexation, occupation and forced shift of legal authorities.[3] By denying the legal heritage of 1920-1991, the Azerbaijani Republic abandons all the political and legal decisions made in the period of 27 April 27 1920 and 18 October 1991, including the decision to transfer Nagorno-Karabagh to Azerbaijan.

The aim of this article is to study the status of Artsakh during 1918-1920, the declaration of independence of Artsakh in 1991, as well as present a brief overview of the concepts of territorial integrity and self-determination (internal and external), while considering also the concept of remedial succession.

Legal Status of Artsakh (Nagorno-Karabagh) in 1918-1920

The status of Nagorno-Karabagh in 1918-1920, as well as the stance of the international community and international institutions, clearly demonstrates that the land was never under the authority of Azerbaijani Democratic Republic.

WWI and the Bolshevik Revolution created a new political-historical situation in Transcaucasia. On 15 November 1917, the Bolshevik government adopted a Declaration of the Rights of the Peoples of Russia, which among other provisions declared the right of secession and the formation of independent states from the territory of the Russian Empire.[4] Taking advantage of this in sync with the establishment of Transcaucasia republics, the First Congress of Armenians of Nagorno-Karabagh declared the region a separate administrative unit on 22 July 1918.[5] From 1918 to 1920 the legislative governance of Nagorno-Karabagh was carried out by the local Armenian Congress, which

3 Concerning the issue of succession, the international community accepts that the Baltic States could not be considered as successors of the USSR, because they were annexed in an unlawful manner. According to the same logic, any change that occurred during the Soviet period is not applicable to the current Azerbaijani Republic, because the latter considers the Soviet dominance unlawful, referring to it as an occupation of Azerbaijani territory. Hubert Beemelmans, "State Succession in International Law: Remarks on Recent Theory and State Praxis," *Boston University International Law Journal* 15, no. 1 (1997): 71.

4 Aleksandar Pavkovic, Peter Radan, *Creating New States: Theory and Practice of Secession* (New York: Routledge, 2007), 19.

5 Yeghishe Ishkhanian, *Լեռնային Ղարաբաղը 1917-1920* [Mountainous (Nagorno) Karabagh in 1917-1920] (Yerevan: Hayastan, 1999) 81-83.

refused to comply with the English-forced supervision of the Azerbaijani Democratic Republic and demanded to wait until the final solution of the issue at the Paris Peace Conference.[6]

The international community also considered the region as a disputed territory in 1918-1920. So, the Supreme Council of Allied states when de facto recognizing the governments of the Republic of Armenia and Azerbaijani Democratic Republic, clearly mentioned that *the recognition did not imply the final definition of the borders and that the issue should be solved via the mutual agreement of the neighboring states.*[7]

Later this was confirmed in Article 92 of the Treaty of Sevres which stated:

> The frontiers between Armenia and Azerbaijan and Georgia respectively will be determined by direct agreement between the States concerned.
> If in either case the States concerned have failed to determine the frontier by agreement at the date of the decision referred to in Article 89, the frontier line in question will be determined by the Pricipal Allied Powers, who will also provide for its being traced on the spot.[8]

The legal stance of the international community on the status of Nagorno-Karabagh was also expressed in the context of membership of Armenia and Azerbaijan to the League of Nations.[9] According to its founders, the League of Nations was intended to become a legal platform to confirm and give a legal effect to the existence of states and the relations between them.[10] The Transcaucasia republics sought recognition by the international community as an important element in consolidating their statehood and security and the membership to the League of Nations was perceived as a solution.

In regard to the application submitted by Azerbaijan, the Secretary-General stated that the territory of the Republic, which occupied a superficial area of 40,000 sq. miles, had never formerly constituted a state. Rather, it had been part of Mongol or Persian territories and, since 1813, was incorporated into the Russian Empire. The report also noted that the name Azerbaijan chosen for the new republic was the same as that of a neighboring

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6 More on these see Grigor Hovhannisyan, *Սովետական իշխանության հաստատումը Լեռնային Ղարաբաղում* [Establishment of Soviet Rule in Nagorno-Karabagh] (Yerevan: YSU Publishing House, 1971); Alik Gharibyan, *Լեռնային Ղարաբաղի հիմնախնդիրը 1918-1920 և Մեծ Բրիտանիան* [The Issue of Mountainous Karabagh and the United Kingdom] (Yerevan: YSU Publishing House, 2012).

7 Karapet Izmirlian, *Հայ ժողովրդի քաղաքական ճակատագիրը անցյալին և ներկային (քննական տեսություն)* [Political Destiny of the Armenian Nation in the Past and Present (Analytical Essay)] (Beirut: Sevan, 1964), 202.

8 The Treaty of Sèvres, 1920 (The Treaty of Peace Between The Allied And Associated Powers And Turkey Signed At Sèvres August 10, 1920), https://www.dipublico.org/100760/the-treaty-of-sevres-1920-the-treaty-of-peace-between-the-allied-and-associated-powers-and-turkey-signed-at-sevres-august-10-1920/, accessed 14.02.2021.

9 See the detailed discussion of the issue in Edita Gzoyan "Nagorno-Karabakh in the Context of Admitting Armenia and Azerbaijan to the League of Nations," *The Armenian Review* 55 no. 3-4 (2017): 19-39.

10 *The League of Nations Starts, an outline by its organizers* (London: Macmillan and Co., 1920), 134-135.

Persian province.[11] Furthermore, the Secretary-General identified two legal issues: "Whether the declaration of independence of the Republic of Azerbaijan in May 1918 and the recognition accorded by the Allied Powers in January 1920 was sufficient to constitute Azerbaijan *de jure* a "full self-governing State"? and if the Assembly established the status of Azerbaijan as a "fully self-governing state", whether the delegation which made the application possessed the necessary authority to represent the legitimate government of the country to make this application and whether that government could undertake international obligations and give guarantees required by membership?"[12]

The overall attitude of the report was clearly negative. When the Assembly of the League first convened in November 1920, the questions of membership of Armenia, Azerbaijan and Georgia were referred to the third sub-committee of the Fifth Committee. [13]

The sub-committee report on Azerbaijan was again unfavorable. It stated that the application was made by the government that had been forced to evacuate the capital and to take refuge to Ganja since 27 April 1920, while the Bolshevik government took the power in Baku.[14] The report mentioned also Azerbaijani territorial disputes with neighboring Armenia and Georgia. With Armenia the point of struggle was over Nagorno-Karabakh, Zangezur, and Nakhijevan; with Georgia it was over the region of Zaqatala.[15] The sub-committee stated that despite some agreements concluded between the neighbors, they were not far-reaching and the issue of stable state boundaries was deemed highly questionable.[16]

The report on Armenia was openly positive, although the sub-committee seemed not to absolutely answer all questions. It indicated that although Armenia's frontiers were not fixed definitively, Article 89 of the Treaty of Sèvres provided for their arbitration and the territory of the republic could greatly expanded.[17] The report also mentioned that Armenia was *de facto* recognized by Allies, while the Argentina and U.S. both recognized Armenia *de jure*.[18] It should be noted that there was no mention of territorial disputes with

11 League of Nations Archives at United Nations Office at Geneva (hereinafter UNOG), Admission of Azerbaijan to the League of Nation, Memorandum by Secretary General. Sec. 28, Dos. 8466, doc. 8466.

12 Ibid.

13 Andre Mandelstam, *La Societe de nations e le puisanse devan le problem Armenien* (Beirut: Association Libanaise des universitaires Armeniens, 1970), 95–96.

14 UNOG, *The records of the First Assembly Plenary Meetings* (Geneva: League of Nations, 1921), 664-665.

15 Jeremy Smith, *The Bolsheviks and the National Questions 1917-1923* (London: Macmillan Press, 1999), 56-65; Harun Yilmaz, "An Unexpected Peace: Azerbaijani-Georgian Relations, 1918-1920," *Revolutionary Russia* 22, no. 1 (2009): 41.

16 UNOG, *The records of the First Assembly Plenary Meeting*s, 664-665.

17 According to the article "Turkey and Armenia as well as the other High Contracting Parties agree to submit to the arbitration of the President of the United States of America the question of the frontier to be fixed between Turkey and Armenia in the vilayets of Erzerum, Trebizond, Van and Bitlis, and to accept his decision thereupon, as well as any stipulations he may prescribe as to access for Armenia to the sea, and as to the demilitarization of any portion of Turkish territory adjacent to the said frontier."

18 UNOG, Admission of New Members to the League of Nations. Armenia. Report presented by the 5th Committee to the Assembly. 20/4/39, Section 2, dossier 8350, doc. 3421.

neighboring states in case of Armenia, and also – Georgia.[19]

The sub-committee's reports on the memberships of Armenia and Azerbaijan were discussed by the Fifth Committee on 1 December 1920. Regarding the admission of Azerbaijan, the Committee adopted the following resolution:

> Azerbaijan. The Committee decided that though the request of Azerbaijan to be admitted was in order, it was difficult to ascertain the exact limits of the territory within which the Government of Azerbaijan exercised its authority. Frontier disputes with the neighboring States did not permit of an exact definition of the boundaries of Azerbaijan. The Committee decided that the provisions of the Covenant did not allow of the admission of Azerbaijan to the League under present circumstances.[20]

Thus the League of Nations not only confirmed the disputed status of Nagorno-Karabagh but based its rejection of Azerbaijan's membership also on this very argument.

Legal Status of Artsakh (Nagorno-Karabagh) in Soviet and Post-Soviet Era

On 29 November 1920, the Revolutionary Committee of Armenia declared the sovietization of Armenia. The next day, the Soviet Government of Azerbaijan adopted a Declaration on recognition of Nagorno-Karabagh, Zangezur and Nakhijevan as part of Soviet Armenia.[21] The following statements and declarations also indicate that Soviet Azerbaijan recognizes Artsakh's self-determination, in this case, unity with Soviet Armenia.[22] By the Decree of 15 June 1921, the Central Committee of Communist Party of Armenia declared Nagorno-Karabagh as an inseparable part of the Armenian SSR. Thus, Nagorno-Karabagh was not part of the Azerbaijan SSR, neither during the sovietization of Azerbaijan, nor after the establishment of the Soviet power in Armenia, while Baku recognized Artsakh as Armenian.

Soon, however, the Azerbaijani SSR insisted on examining the Nagorno-Karabagh issue at the Plenary Session of the Caucasian Bureau (Kavbureau) of the Central Committee of the Russian Communist (Bolshevik) Party, which happen on 4 July 1921. The Committee, also ruled to "include Nagorno-Karabagh in the Armenian SSR, and

19 For more on the membership issue see Edita Gzoyan, "The Admission of the Caucasus States to the League of Nations: the Role of Soviet Russia," *Caucasus Survey* 6, no. 1 (2018): 1-17.

20 UNOG, *An Extract from the Journal N17 of the First Assembly* (Geneva: League of Nations, 1920), 139.

21 Newspaper "Коммунист" [Communist] (Yerevan), 1 December 1920, N 1, cited in Shahen Avakian, *Nagorno-Karabakh: Legal Aspects* (Moscow: MIA Publishers), 13, 66 and also *Нагорный Карабах в международном праве и мировой политике. Документы и комментарии. Том 1* [Nagornyi Karabagh in International Law and World Politics. Documents and Commentary. Volume 1], ed. and comp., author of Forward and Commentary Yuri Barsegov (Moscow: Krug, 2018), 601.

22 Ibid., 600-605.

to conduct a plebiscite only in Nagorno-Karabagh."[23] However, the next day a new decision dictated by Moscow was drafted, stating that a) in order to establish national peace between Muslims and Armenians and economic ties between Upper and Lower Karabaghs, Nagorno-Karabagh should be left in the Azerbaijan SSR, with wide regional autonomy and Shushi as its administrative center; b) instruct the Central Committee of Azerbaijan Communist party to determine the boundaries of the autonomous region and submit for approval to the Caucasian Bureau of the Central Committee of the Russian Communist (Bolshevik) Party; c) instruct the Presidium of the Caucasus Bureau of the Central Committee to talk with the Central Committee of Armenian Communist Party and the Central Committee of Azerbaijani Communist Party about the candidate for the emergency committee of Nagorno-Karabagh; while d) the scope of the autonomy of Nagorno-Karabagh to be determined by the Central Committee of Azerbaijan Communist Party and submitted for approval by the Caucasian Bureau of the Central Committee of Russian Communist (Bolshevik) Party.[24] Decision of 5 July 1921, however, is illegal, as it was neither discussed nor voted upon, as Moscow's representative Josef Stalin did not get the approval of the majority of the members of the Plenary Session.[25]

Thus, again Russia's divide-and-rule strategy was implemented, by leaving Zangezur to the Armenia and transferring Nakhijevan to Azerbaijan, while granting Artsakh an autonomous status within Azerbaijan. According to Hratch Chilingirian, this aimed at also pleasing Turkey (the Bolsheviks wanted to proliferate the revolution into Turkey and other Muslim inhabited territories), thus they weakened Armenia and strengthened Turkey's ethnic kin, the Azeris. "It was a way of implanting troublesome and dissident populations within minority republics and pitting ethnic groups against each other, thereby undermining the possibility of minority nationalities working together against the central government."[26]

Further, on 7 July 1923, the Transcaucasian Socialist Federative Republic[27] created the Nagorno-Karabagh oblast. The northern Shahumyan district and western territories were made part of Azerbaijan, thus isolating Artsakh and making it an enclave surrounded by its former counties.[28]

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23 Ibid., 638-639.

24 Ibid., 639.

25 Avakian, *Nagorno-Karabakh*, 14.

26 Hratch Tchilingirian, "Nagorno-Karabagh: Transition and the Elite," *Central Asian Survey* 18, no. 4 (1999): 435-461, https://oxbridgepartners.com/hratch/index.php/publications/journal-articles/58-nagorno-karabakh-transition-and-the-elite, accessed 16.05.2022.

27 The Transcaucasian Socialist Federative Soviet Republic (Transcaucasian SFSR or TSFSR) was created on 12 March 1922 and comprised Armenia, Azerbaijan and Georgia. The TSFSR was one of the four republics to sign the Treaty on the Creation of the USSR establishing the Soviet Union in 1922. The TSFSR was dissolved by the 1936 Soviet Constitution and its constituent republics became separate republics of the Soviet Union. See *USSR*, *Sixty Years of the Union, 1922-1982* (Moscow: Progress Publishers, 1982), 259.

28 Arman Sarvarian, "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law," *Melbourne Journal of International Law* 9, no. 1 (2008): 196.

The Armenians of Artsakh never adapted to this situation, however their complains about the increasing economic, social and cultural difficulties in the enclave remain unheard.[29] In one such instance, in 1965 "Letter of the Thirteen", leading Artsakh Armenian intellectuals complained of economic, political, cultural and social discrimination, discrepancies and unfair development measures against the Artsakh Armenians. They stressed the importance to transfer Artskah to Armenian SSR to avoid Nakhijevan destiny. [30] These appeals were, however, denied referring to Article 78 of the Soviet Constitution, which prohibited any changes of a Soviet Republic's territory without its consent.[31]

Thus, during the Soviet period, Armenians of Karabagh continued to struggle against the forcefully conferred status of Artsakh and despite the totalitarian soviet regime and the fears associated with it, they raised their voice against the unjust status.

During Gorbachev's *glastnost* and *perestroika* in the 1980s, the Artsakh issue entered a new phase. Protests of the Artsakh Armenians to be unified with Soviet Armenia and demonstrations of unity in Yerevan escalated into violence and war.

On 2 September 1991, a joint session of the People's Deputies of the Nagorno-Karabagh Autonomous Region and Shahumyan regional councils, declared the establishment of the Nagorno-Karabagh Republic (NKR), which was followed by a referendum. This was in full conformity with the USSR Constitution and the Law on Secession.

According to Article 3 of the "Law on Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR" (Supreme Council of the USSR, 3 April 1990, N 1409-I):

> In a Union republic that includes within its structure autonomous republics, autonomous oblasts, or autonomous okrugs, the referendum is held separately for each autonomous formation. The people of autonomous republics and autonomous formations retain the right to decide independently the question of remaining within the USSR or within the seceding Union republic, and also to raise the question of their own state-legal status.[32]

According to USSR Constitution of 1977 "An Autonomous Oblast is a constituent part of a Union Republic or Territory" (Article 86), while Article 87 stipulates that "[…]

29 For a more detailed analysis about the situation during the Soviet period, see Ronald Suny, *The Revenge of the Past: Nationalism, Revolution, and the Collapse of the Soviet Union* (Stanford: Stanford University Press, 1993), 132–138.

30 Tchilingirian, "Nagorno-Karabagh," 441-442.

31 Sarvarian, "The Artsakh Question," 197.

32 Закон СССР от 3 апреля 1990 г. N 1409-I "О порядке решения вопросов, связанных с выходом союзной республики из СССР" ["Law on Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR" (Supreme Council of the USSR, 3 April 1990, N 1409-I)], at https://base.garant.ru/6335629/, accessed 20.05.2021.

The Azerbaijan Soviet Socialist Republic includes the Nagorno-Karabagh Autonomous Oblast (Region)."[33]

Thus, based on the Law of Secession from the USSR, Nagorno-Karabagh as an autonomous oblast declared its' independence. Again, based on the law, the referendum of independence was held on 10 December 1991. The percentage of voters was 82.2% of the total number of voters. The question posed during the referendum was "Do you agree that the proclaimed Nagorno-Karabagh Republic be a sovereign state, independently determining the forms of its cooperation with other states and communities?" The answer of 99,9% of the voters was "Yes". It should be mentioned that the referendum was monitored by more than 40 international observers and was assessed as fair and democratic.[34]

On 18 October 1991, the Supreme Council of Azerbaijan adopted a Declaration of Independence that was affirmed by a nationwide referendum on 25 December 1991. Thus, the Declaration of Independence of Azerbaijan and the subsequent referendum were carried out later, after Artsakh has lawfully implemented the procedure of succession and declaration of independence. Consequently, it was not within the Republic of Azerbaijan when the latter was formed.

To avoid the consequences of the declaration of Artsakh independence, the Supreme Council of Azerbaijan adopted a declaration that its independence dated to 1918-1920. Thus, Azerbaijan became the successor to the Azerbaijani Democratic Republic that existed between 28 May 1918 and 27 April 1920. On 18 October 1991, based on the abovementioned declaration, the Azerbaijani Republic adopted a Constitutional Act on withdrawal from the USSR. It defined the existence of the Soviet authority in Azerbaijan from 1920-1991 as an "annexation by the Soviet Russia", an occupation of Azerbaijani territory and a forced shift of legal authorities of the country.[35] On 23 November 1991, Azerbaijan abolished the autonomy of Karabagh, which was declared unconstitutional by the USSR Constitutional Oversight Committee.[36]

However, as was demonstrated in the beginning of the article Artsakh was not within the territory of the Azerbaijani Democratic Republic during its existence.

33 Chapter 11 of the Constitution of the Union of Soviet Socialist Republic "The Autonomous Region (Oblast) and Autonomous Area (Okrug)," see Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation on 7 October 1977 (Moscow: Novosti Press Agency Publishing House, 1982), 47.

34 Ministry of Foreign Affairs, Republic of Artsakh, http://www.nkr.am/en/independence-referendum-in-karabakh, accessed 05.06.2021.

35 Constitutional Act of the Azerbaijan Republic, https://cis-legislation.com/document.fwx?rgn=2889, accessed 11.05.2022.

36 Avakian, *Nagorno-Karabakh*, 15.

Empty Discrepancy or False Dilemma: Territorial integrity vs. Self-determination

The two international law principles that are constantly used within the Artsakh case – self-determination and territorial integrity – will briefly touch upon these two concepts.

Territorial integrity and self-determination of nations are two principles of the international law, which raise a lot of debates because of a supposed contradiction. Territorial integrity refers to the protection of an independent state's territory from aggression of other states, while self-determination is defined as a right of nations to freely decide their sovereignty and political status without external compulsion or outside interference.[37] Thus, territorial integrity is closely connected with a basic order in interstate relations among sovereign independent states, while self-determination is a fundamental human right and refers to the relations between an independent state and a people.

The principle of territorial integrity

The birth of the modern approach to the principle of territorial integrity (*uti possidetis*) dates back to 1648 Peace of Westphalia. The territory of the state was considered to be the main factor, determining the security and wealth of the state. The principle was included in Article 10 of the League of Nations Covenant, by which the members of the League "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." After WWI the principle was stated in several declarations and treaties. The importance of this principle is very great in interstate relations – to protect the state territory against foreign aggression. It is based on the principle of non-interference in the internal affairs of states and achieving and maintaining international security and stability in the world through establishing status quo.[38]

This principle was formulated in the Charter of the UN, prohibiting the threat or use of force against the territorial sovereignty of states and its political independence.[39] Among the documents that speak about the concept is the 1960 UN Declaration that states: "any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN."[40] In the 1970 declaration of International Law principles the territorial integrity was not wholly mentioned, but its several parts were explained. The 1975 Helsinki Final Act

37 Malcolm Nathan Shaw, *International Law* (Cambridge: Cambridge University Press, 2003), 443-445; Iñigo Urrutia Libarona, "Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo," *Revista d'estudis autonòmics i federals* 16 (2012): 109-110.

38 For more on this see Vita Gudelevičiūtė, "Does the Principle of Self-Determination Prevail over the Principle of Territorial Integrity?" *International Journal of Baltic Law* 2, no. 2 (2005): 50-54; Jure Vidmar, "Territorial Integrity and the Law of Statehood," *The George Washington International Law Review* 44 (2012): 697-747.

39 United Nations Charter, https://www.un.org/en/about-us/un-charter, accessed 05.06.2021.

40 Ibid.

implies that frontiers can only be changed, in accordance with the International Law, by peaceful means and agreements.

Self-determination

The roots of the self-determination concept go back to the political ideas of Aristotle, later John Locke and Jean-Jacques Rousseau.[41] The core philosophical meaning of the principle was that every human being has a right to control his/her own destiny. The concept was also included in Marxist doctrine as a right of working class to liberate from capitalism.[42] The further development of the idea brought to its political implications after WWI. The advocates of the principle in its political aspect, as paradoxical as it sounds, were Vladimir Lenin and Woodrow Wilson. Although not explicitly the concept of self-determination is connected with the American president Woodrow Wilson and his famous *Fourteen Points*, the phrase cannot be found in the document or his speeches and writings of the time.[43] The Soviet leader Vladimir Lenin was another advocate of the principle and was arguing not for "the self-determination of peoples and nations in general, but the self-determination of the proletariat as it existed within every nationality."[44]

The traces of the concept can be found in the United States Declaration of Independence (1776), which states the natural right of individuals to choose their own form of government. Interestingly, the declaration mentions "… when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government."[45] Another mention of the idea is in the Joint Declaration of the US president and UK prime minister of 14 August 1941 – the Atlantic Charter.[46] Point second of the Charter mentions the territorial changes that should be only in accord with the freely expressed wishes of the peoples concerned, while the parties

41 Richard Ryan, Frank Martela, "Eudaimonia as a Way of Living: Connecting Aristotle with Self-Determination Theory," in *Handbook of Eudaimonic Well-Being. International Handbooks of Quality-of-Life*, ed. Joar Vittersø (New York: Springer, 2016), 109-122; Michael Wehmeyer, Karrie Shogren, Todd Little, Shane Lopez, "Introduction to the Self-Determination Construct," in *Development of Self-Determination through the Life-Course*, eds. Michael Wehmeyer, Karrie Shogren, Todd Little, Shane Lopez (New York: Springer, 2017), 3-16.

42 Rainer Forst, "Noumenal Alienation: Rousseau, Kant and Marx on the Dialectics of Self-Determination," *Kantian Review* 22, no. 4 (2017): 523-551.

43 For more on this see Trigve Throntveit, "The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination," *Diplomatic History* 35, no. 3 (2011): 445–481.

44 Rudolf Mark, "National Self-Determination, as Understood by Lenin and the Bolsheviks," *Lithuanian Historical Studies* 13, no. 1 (2008): 21-39.

45 *Declaration of Independence: A Transcription*, https://www.archives.gov/founding-docs/declaration-transcript. Accessed 08.11.2022.

46 The Atlantic Charter was a statement that set out American and British goals for the world after the end of WWII.

announce to "respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."[47]

The term self-determination of people is mentioned officially in the Charter of the United Nations (in Article 1, paragraph 2 and Article 55).[48] It is also formulated in the UN General Assembly Resolutions, International Covenants on human rights, as well as in other documents. Every year, since 1980, the General Assembly of the UN has adopted a resolution on the right of self-determination.[49] The right of self-determination has also been recognized in other international and regional human rights instruments such as Part VII of the Helsinki Final Act 1975 and Article 20 of the African Charter of Human and Peoples' Rights, as well as the Declaration on the Granting of Independence to Colonial Territories and Peoples, etc.

Within the concept, there are internal and external self-determination. While the internal self-determination is about the status inside the boundaries of the existing state, the external self-determination is about secession and thus changes of boundaries and territorial integrity.

Epilogue: Remedial Secession

According to modern international law the right to self-determination did not involve necessarily a right to independence, but rather the recognition of "every right accorded to minorities under international convention as well as national and international guarantees consistent with the principles of international law" in other words: internal self-determination.[50] The UN 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States* underlines that territorial integrity is defended only when the state performs its obligations to provide a "government representing the whole people belonging to a territory without distinction as to race, creed or color."[51] Once the latter guarantee fails, the people shall have the right to self-determination, even if it lends itself to secession.

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47 Atlantic Charter, https://avalon.law.yale.edu/wwii/atlantic.asp, accessed 08.11.2022.

48 Article 1: "The purposes of the United Nations are: …2. To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Article 55 points out the objectives the UN shall promote "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on the respect for the principles of equal rights and self-determination."

49 Antonio Cassese, *International Law* (New York: Oxford University Press, 2005), 10-12.

50 Bernhard Knoll-Tudor *and* Daniel Mueller, "At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh," *Blog of the European Journal of International Law,* 17 November 2020.

51 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, https://digitallibrary.un.org/record/202170.

Further, the right to secession does not arise in each case of oppression or discrimination; the oppression and discrimination must cross a certain threshold that threatens the survival of the group.[52] Secession as a response to gross human rights violations has been termed as remedial secession – "secession accomplished in an attempt to remediate an ongoing situation."[53]

Not going deep into the analysis of remedial secession, it should be noted that state and judicial practice demonstrates the existence of the right to remedial secession conditioned upon some requirements. The most important case related to secession is the Quebec case. In its decision (1998) the Supreme Court of Canada indicated that when "a definable group is denied meaningful access to the government to pursue their political, economic, social and cultural development they are entitled to a right to external self-determination."[54] Although the Court also asserted that, a right to unilateral secession arises only in the extreme cases and under very carefully defined circumstances. In other words, if internal self-determination (regarding democratic values, culture, language, economy, stability, security etc.) is not met, the people have the legitimate right to external self-determination as a last resort.

This approach of the Canadian Court, however, was not new in international law. The seeds of remedial secession and its requirements have been planted in a famous Aaland Islands Case.[55] Here the International Committee of Jurists "articulated the following requirements for justifiable secession when the parent state opposes it: 1) those wishing to secede were "a people"; 2) they were subject to serious violations of human rights at the hands of the parent state; and 3) no other remedies were available to them."[56]

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52 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 119-120; Joshua Castellino, *International Law and Self-Determination – The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (The Hague, Boston, London: Martinus Nijhoff Publishers, 2000).

53 For more on the concept see e.g. Steven R. Fisher, "Towards 'Never Again': Searching for a Right to Remedial Secession under Extant International Law," *Buffalo Human Rights Law Review* 22, no. 261 (2016): 261-296; Simone van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustice?* Human Rights Research Series 61 (Cambridge: Intersentia, 2013); Jure Vidmar, "Remedial Secession in International Law," *St Antony's International Review* 6, no. 1 (2010): 37-56.

54 Lina Laurinavičiūtė and Laurynas Biekša, "The Relevance of Remedial Secession in the Post-Soviet 'Frozen Conflicts,'" *International Comparative Jurisprudence* 1 no. 1 (2015): 66-75.

55 The Aaland Islands dispute was one of the first arbitration cases considered by the League of Nations. The Council of the League of Nations entrusted the International Committee of Jurists with the task of giving an advisory opinion on the legal aspects of the Aaland Islands question. Aaland's population had demanded self-determination and the transfer of sovereignty of the island from Finland to Sweden. Although the Jurists ruled against self-determination, international guarantees were given to allow the population to pursue its own culture and relieve the threat of forced assimilation by Finland.

56 Aaron Kreuter, "Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession," *Minnesota Journal of International Law* 19, no. 2 (2010): 370.

Another important judicial case was connected with the Declaration of Independence of Kosovo.[57] Again, without going deep into the legal analysis, it should be mentioned that the International Court of Justice, in essence, accepted the legality of secession. Moreover, in a separate opinion presented by some judges in a case when a group is subjected to systematic repression, crimes against humanity, persecution, discrimination or tyranny by its parent state, people are entitled to external self-determination. Another important implication connected with the case is that in the *opinio juris* presented by the states, 17 out of 43 recognized or did not reject the existence of the right to remedial secession.[58]

The fact that the population of Bangladesh (East Pakistan) was subjected to an excessive violence and genocide was another crucial moment for recognizing the legitimacy of Bangladesh declaration of independence in 1971 by the international community.[59]

Given the violent history of the conflict, persistent persecutions, massacres and discrimination against the Armenians of Artsakh, more recently the 2020 war and the violence against the civilians, persistent eradication of Armenian cultural heritage in order to erase any trace of Armenian presence and the rhetoric from Baku,[60] the threat of ethnic cleansing and even genocide is very real and imminent. The provisional verdict by the ICJ on 7 December 2021 is quite indicative of the long list of flagrant human rights violations committed by Azerbaijan against the Armenian population of Artsakh.[61] Thus, even if considering the Artsakh issue within the self-determination territorial integrity dilemma, a remedial secession of Artsakh from an autocratic, totalitarian Azerbaijan is not only in full conformity with international law, both explicitly and normatively, but it is also the only viable solution to avoid the ethnic cleansing or a new genocide against the indigenous Armenian population.

57 For more on the issue see Accordance with international law of the unilateral declaration of independence in respect of Kosovo. Overview of the Case, https://www.icj-cij.org/en/case/141. Accessed 23.07.2021.

58 Laurinavičiūtė and Biekša, "The Relevance of Remedial Secession," 66-75.

59 George Jain Abhimanyu, "Bangladesh and the Right of Remedial Secession," in *Research Handbook on Secession,* eds. Jure Vidmar, Sarah McGibbon and Lea Raible (Northampton, Massachusetts: Edward Elgar 2022), 321-330.

60 For more on this see Naira Sahakyan, "The Rhetorical Face of Enmity: the Nagorno-Karabakh Conflict and the Dehumanization of Armenians in the Speeches by Ilham Aliyev," *Southeast European and Black Sea Studies* (2022), DOI: 10.1080/14683857.2022.2153402.

61 International Court of Justice Reports of Judgments, Advisory Opinions and Orders Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia V. Azerbaijan) Request for the Indication of Provisional Measures Order of 7 December 2021, https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf.

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