ON THE PRINCIPLES OF *SELF-DETERMINATION* AND SO-CALLED *"TERRITORIAL INTEGRITY"* IN PUBLIC INTERNATIONAL LAW (THE CASE OF NAGORNO-KARABAKH)

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We are not going to negotiate over the right of the people of Artsakh (Karabakh) to self-determination.
Serzh Sargsyan,
President of the Republic of Armenia,
1 June 2010

It is for the people to determine the destiny of the territory and not the territory the destiny of the people.
Judge Hardy Dillard,
International Court of Justice,
16 October 1975

The notions of *"self-determination"* and *"territorial integrity"* are often used with regard to the Nagorno-Karabakh conflict. Unfortunately, these legal terms are largely misused mostly due to political motives. One of the grave misinterpretations of the said notions was by Ambassador-to-be (or not to be) Matthew Bryza when he declared: *"There's a legal principle of territorial integrity of states, there's a political principle of self-determination of peoples."* As a matter of fact, it is just the opposite. There is a legal principle of *self-determination* and there is no such principle of *territorial integrity*. Article 2(4) of the UN Charter declares merely: *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".* Thus, this has nothing to do

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with absolute *"territorial integrity",* (i.e. preservation of the territory of a state intact) but, according to authoritative interpretation of the United States Foreign Relations Law, it is simply the rule against intervention, a *"prohibition of use of force"*[1] and purely calls to refrain from *"the use of force by one state to conquer another state or overthrow its government."*[2]

In order to have adequate understanding of the status, scope and content of the principles of *"self-determination"* and so called *"territorial integrity"* in contemporary international law, we need to elaborate more on the issue.

Self-determination

Self-determination: Historical Background

Self-determination is an ancient political right that is cherished by every people. The word *"self-determination"* is derived from the German word *"selbstbestimmungsrecht"* and was frequently used by German radical philosophers in the middle of the nineteenth century. The political origins of the concept of self-determination can be traced back to the American Declaration of Independence of July 4, 1776. The American Revolution is considered to be *"an outstanding example of the principle of self-determination."*[3] The principle of self-determination was further shaped by the leaders of the French Revolution. During the nineteenth and in the beginning of the twentieth century, the principle of self-determination was interpreted by nationalist movements as meaning that each nation had the right to constitute an independent State and that only nationally-homogeneous States were legitimate.[4] During World War I, President Wilson championed the principle of self-determination as it became crystallized in Wilson's Fourteen Points (8 January 1918) and consequently was discussed in the early days of the League of Nations. The Mandate system was a compromise to some degree between outright colonialism and principles of self-determination.

While discussion of the political right and principle of self-determination has a long history, the process of establishing it as a principle of international law is of more recent origin. Since the codification of International Law today is mostly

[1] Restatement of the Law (Third), The Foreign Relations Law of the United States, The American Law Institute, Washington, 1987, v. 2, § 905(7), p. 389.
[2] Ibid., p. 383.
[3] Umozurike O.U. Self-Determination in International Law, 1972, Connecticut, 1972, p. 8.
[4] Thurer D. Self-Determination, in R. Bernhardt (ed.), Encyclopaedia of Public International Law, vol. IV, Amsterdam, 2000, p. 364.

achieved through an international convention drawn up in a diplomatic conference or, occasionally, in the UN General Assembly or similar forum on the basis of a draft with commentary prepared by the International Law Commission or some other expert body[1], we must follow the development of the discussed notions through international instruments. It must be stressed that if the rules, incorporated in the form of articles in the conventions, reflect the existing customary international law, they are binding for states regardless of their participation in the conventions[2].

Self-determination: Development under the Aegis of the United Nations

1. Incorporation into the UN Charter

The principle of self-determination was invoked on many occasions during World War II. It was proclaimed in the *Atlantic Charter* (14 August 1941). The provisions of the *Atlantic Charter* were restated in the *Washington Declaration* of 1942, in the Moscow Declaration of 1943 and in other important instruments of the time. Owing to these declarations already at the days of establishment of the United Nations, the notion of self-determinations was seen as a principle of international law.

Ultimately, *"the principle of equal rights and self-determination of peoples"* was incorporated into the United Nations Charter. The Charter [Article 1(2)] clearly enunciated the principle of self-determination: *"The purposes of the United Nations are: To develop friendly relations among nations based on respect for the principle of equal rights and self-determinations of peoples"* and self-determination is conceived as one among several possible *"measures to strengthen universal peace."*[3] Chapter IX *(International Economic and Social Co-operation, Article 55)* lists several goals the organization should 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 respect for the principle of equal rights and self-determination of peoples." Under Article 56, "all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."*

The principle of self-determination, as it follows from Article 55 of the UN Charter, is one of the fundamentals of peaceful and friendly international relations. In other words, there can be no such relations without the observance of this principle. The same article says it is the duty of the United Nations to promote respect for

[1] Rosenne S. Codification of International Law, in R. Bernhardt (ed.), Encyclopaedia of Public International Law, v. I, Amsterdam, 1992, p. 633.
[2] Ibid.
[3] Thurer D. *op. cit.,* p. 365.

fundamental human rights (para. c) and, consequently, for the nations' right to self-determination. And since the establishment of friendly relations between peoples and the promotion of respect for human rights figure among the United Nation's most important tasks, it is obvious that this organization is entitled to raise the question of a people's self-determination[1].

The Charter is dominant over all the other international documents. This provision is set down in Article 103 of the Charter, and is accepted by all the members of the UN. It is clear that the UN considers the self-determination of peoples (self-determination, not just the right of people for self-determination, i.e. the application of this right) as not only one of its basic principles but also as a basis for friendly relations and universal peace. Hence, rejection of self-determination hinders friendship and universal peace. In addition, Article 24, Point 2 holds: *"In discharging these duties [the maintenance of international peace and security] the Security Council shall act in accordance with the Purposes and Principles of the United Nations."* It means that, in the maintenance of international peace and security, the Security Council must be guided by self-determination of peoples because it is one of its principles.

2. Development through UN Practice

The concept of self-determination was further developed by the United Nations. Through its resolutions the United Nations has expounded and developed the principle of self-determination. In Resolution 637A(VII) of December 16, 1952 the General Assembly declared that: *"the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights."* The General Assembly recommended, *inter alia,* that *"the States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations."*

In 1960, the General Assembly adopted Resolution 1514(XV) entitled *Declaration on the Granting of Independence to Colonial Countries and Peoples* which declares that: [para. 2]. *"All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."* The Declaration regards the principle of self-determination as a part of the obligations stemming from the Charter, and is not a *"recommendation",* but is in the form of an authoritative interpretation of the Charter[2].

[1] Starushenko G. The Principle of Self-determination in Soviet Foreign Policy, Moscow, 1963, p. 221.

[2] *Recueil des cours de l'Academie de droit international*, The Hague, 1962, II, p. 33. Annual Report of the Secretary-General , 1960, 2. Chief Judge Moreno Quintana, International Court of Justice Reports, 1960, pp. 95-96.

Later on, the principle was incorporated in a number of international instruments. In 1966 two conventions on human rights entered into force – the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.* The Covenants have a common Article 1 which states: *"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

Consequently the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among the States in accordance with the Charter of the United Nations* [General assembly Resolution 2625 (XXV), 1970] confirmed the principle that self-determination is a right belonging to all peoples and that its implementation is required by the UN Charter: *"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."*

M. Zahovic, *rapporteur* for the *Special Committee on Principles of International Relations concerning Friendly Relations and Co-operation among the Nations*, remarked: *"Nearly all representatives who participated in the debate emphasised that the principle was no longer to be considered a mere moral or political postulate; it was rather settled principle of modern international law. Full recognition of the principle was a prerequisite for the maintenance of international peace and security, the development of friendly relations and cooperation among the States, and the promotion of economic, social and cultural progress throughout the world."*[1]

Self-Determination: The Principle and Human Rights

The principle of self-determination developed from a philosophical to political concept in international relations and has now matured into a fundamental principle of positive international law. It has developed recently as an aspect of human rights belonging to the group rather than to the individual[2] and therefore rightly belongs to both Covenants of Human Rights, as it was mentioned.

On 25 June 1993, representatives of 171 States adopted by consensus the *Vienna Declaration and Programme of Action of the World Conference on Human Rights (June 14-25, 1993).* The final document agreed to in Vienna, which was

[1] Umozurike O.U. *op. cit.,* p. 192.
[2] Ibid., p. 271.

endorsed by the forty-eighth session of the General Assembly (resolution 48/121, of 1993), reaffirms the principles that have evolved during the past 45 years and further strengthens the foundation for additional progress in the area of human rights. The document recognizes interdependence between democracy, development and human rights, including the right to self-determination. The final document emphasizes that the Conference considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right[1] [para. 2]: "*The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right".*[2] Armenia, Azerbaijan, Turkey, and co-sponsors of the OSCE Minsk group as well (Russian Federation, USA, France) are parties to this convention.

International organizations which are concerned with human rights and world peace have given full recognition to the fact that respect for self-determination is a condition for world peace. Fundamental human rights are meaningful in the context of a people enjoying self-determination.[3]

The *raison d'être* for the principle of self-determination is the enjoyment by all peoples, regardless of race, religion, or sex, of full democratic rights within the law, free from internal or external domination. It seeks to provide the opportunities for the political, economic, social, and cultural development of all peoples. The basic objective of the principle is to guarantee that all peoples have a government to their choice that responds to their political, economic, and cultural needs[4]. Thus, denial of the right to self-determination is a human rights violation and constitutes a breach of international law.

Self-determination: Development of the Principle through Other Organizations

The International Commission of Jurists (affiliated to the International Court of Justice) has held numerous conferences on the rule of law attempting to provide a clear and comprehensive definition of rule of law and better measures of implementation in the context of protecting human rights. Its first congress was held in Athens in 1955, where the participants gave effect to the Act of Athens which resolved: *"(9) The recognition of the right to self-determination being one of the great achievements of our era and one of the fundamental principles of international law,*

[1] Hillier T., Sourcebook on Public International Law, London-Sydney, 1998, p. 192.
[2] Documents, UN General Assembly, A/CONF.157/23; 12 July 1993.
[3] Umozurike O.U. *op. cit.,* p. 188.
[4] Ibid., p. 273.

its non-application is emphatically condemned. (10) Justice demands that a people or an ethnic or political minority be not deprived of their natural rights and especially of the fundamental rights of man and citizens or of equal treatment for reasons of race, color, class, political conviction, caste or creed".[1]

The First World Conference of Lawyers on World Peace through Law, in their *Declaration of General Principles for a World Rule of Law* (Athens, July 6, 1963), adopted a resolution which stated: *"In order to establish an effective international legal system under the rule of law which precludes resort to force, we declare that: (…) (6) A fundamental principle of the international rule of law is that of the right of self-determination of the peoples of the world, as proclaimed in the Charter of the United Nations."*[2]

Self-determination: Development of the Principle Through the ICJ

The principle of self-determination is exemplified in the decisions by the International Court of Justice (ICJ). For example, in the South-West Africa Cases (December 26, 1961, and July 18, 1966) Judge Nervo, dissenting, expressed the belief that the concept of equality and freedom *"will inspire the vision and the conduct of peoples the world over until the goal of self-determination and independence is reached."*[3]

The Advisory Opinion of the International Court relating to the Western Sahara Case (October 16, 1975) reconfirmed as well *"the validity of the principle of self-determination"* in the context of international law.[4]

Also in the decision of June 30, 1995, concerning the *East Timor Case* (Portugal v. Australia) the International Court reaffirmed that the principle of self-determination of peoples is recognized by the UN Charter and by its own jurisprudence as being *"one of the essential principles of contemporary international law."[Para. 29]*[5]

[1] Ibid., p. 185.
[2] Declaration of General Principles for a World Rule of Law, American Journal of International Law, 58, (1964) pp. 138-151, at 143.
[3] International Court of Justice, Reports, 1966, v. IV, p. 465.
[4] ICJ Reports (1975) 12 at 31-33. See also the Namibia Opinion, *ibid.* (1971), 16 at 31; Geog K. v. Ministry of Interior, ILR 71, at 284; and the Case Concerning East Timor, ICJ Reports (1995) at 102.
[5] Thurer D. *op. cit.*, p. 370.

Self-Determination: Status, Scope and Content in Contemporary International Law

Both the United Nations and the majority of authors are alike in maintaining that the principle of self-determination is part of modern international law. Due to developments in the United Nations since 1945, jurists now generally admit that self-determination is a legal principle.[1] The principle has been confirmed, developed and given more tangible form by a consistent body of State practice and has been embodied among *"the basic principles of international law"* in the Friendly Relations Resolutions.[2] The generality and political aspect of the principle do not deprive it of legal content.[3] Furthermore, having no doubts that the principle of the self-determination of peoples is a legal principle, currently many declare self-determination to be a *jus cogens* (peremptory) norm of international law.[4] Accordingly, no derogation is admissible from the principle of self-determination by means of a treaty or any similar international transaction.[5]

It must be underlined that the right of self-determination is the right to choose a form of political organization and relations with other groups. The choice may be: independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state.[6] A situation involving the international legal principle of self-determination cannot be excluded from the jurisdiction of the United Nations by a claim of domestic jurisdiction. International customary law is binding on all states regardless of consent; and in any event, states have bound themselves under the Charter to respect the principle.[7] The claims of the states that the implementation of the principle of self-determination infringes on their rights or is contrary to their *"constitutional processes"* cannot be made a pretext for depriving other peoples of their right to self-determination.[8] Presently self-determination as a principle is truly universal in scope.[9] It is also unconditional because most of the UN members also hold that realization of the right to self-determination should not have

[1] Brownlie I. Principles of Public International Law, Oxford, 1998 (5th ed.), p. 600.
[2] Thurer D. *op. cit.*, p. 366.
[3] Brownlie I. *op. cit.*, p. 600.
[4] Hillier T. *op. cit.*, p. 191. Supporters of the view that the right of self-determination is part of *jus cogens* include: I. Brownlie, *op. cit.,* (4th ed.), Oxford, 1991, p. 513. A. Cassese, International Law in a Divided World, Oxford, 1989, p. 136; J. Craword, "The Rights of Peoples: Some Conclusions", in J. Crawford, (ed.), The Rights of Peoples, Oxford, 1988, pp. 159-175, at p. 166; H. Gros Espiell, The Right to Self-Determination, Implementation of United Nations Resolutions (1978), para. 85; and the UK's and Argentina's statements in the context of the Falklands/Malvinas dispute (1982) 53 British Yearbook of International Law, pp. 366-379.
[5] Cassese A. Self-determination of Peoples, Cambridge, 1995, p. 134-35.
[6] Brownlie I. *op. cit.*, p. 599.
[7] Umozurike O.U. *op. cit.*, p. 196.
[8] Starushenko G. *op. cit.*, p. 209.
[9] Thurer D. *op. cit.*, p. 369.

any strings attached to it.[1]

All these conceptions were summarized in the statement by Hans Brunhart, Head of Government and Minister of Foreign Affairs of the Principality of Liechtenstein, during the Forty-Seventh Session of the General Assembly of the United Nations (September 23, 1992, UN Doc. A/47/PV.9) [para. 6]: *"The right to self-determination as principle is now universally accepted. I would recall not only that self-determination is one of the foundations of the Charter, but also that most States represented in this Assembly are already under certain specific legal obligations in this area by virtue of Article 1 of each of the great human rights conventions of 1966.* [i. e. the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.] *There it is formally and with legally binding effect acknowledged that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*[2]

Despite all this, and with some notable exceptions, the practical and peaceful application of the principle of self-determination has often been lacking. Time and again have dominant powers hindered oppressed peoples from availing themselves of their right to self-determination despite the obligations assumed in signing the UN Charter. So how is one to establish that a people wants to be the master of its own destiny?

There are different ways of establishing the will of the people demanding self-determination. The will of the people may be determined by a plebiscite. A plebiscite or, what amounts to the same thing, a referendum means the right of the majority of the population to determine the political and legal status of the territory it inhabits.[3] The will of people may be expressed by parliament or by any other representative institutions elected by the self-determining people.[4]

By and large there are plebiscites without a popular vote on the questions concerned. In such cases, the population of the self-determining territory elects a representative organ which then expresses the people's will. If the elections to these organs and the vote in them are conducted on a democratic basis, this method of expressing the people's will is quite legitimate.[5] This is the situation that we had lately (23 May 2010) in Nagorno-Karabakh during the elections of the Parliament of the

[1] Starushenko G. *op. cit.*, p. 210.
[2] Self-Determination and Self-Administration, A Sourcebook, (ed. W. Danspeckgruber and A. Watts), London, 1997, Appendix 2, The Liechtenstein Initiative at the UN, p. 405.
[3] Starushenko G. *op. cit.*, p. 214.
[4] Ibid., p. 213.
[5] Ibid., p. 215-6.

Republic of Nagorno-Karabakh (Artsakh).

The will of the people may also be expressed in the form of mass protests (civil disobedience, demonstrations, rallies, newspaper articles, etc.). Lastly, it may find expression in armed uprisings or wars for national liberation. The latter is an extreme measure and people resorts to it only if forced to do so. A rule of customary international law has emerged, according to which the principle of self-determination includes a right of secession and, as a consequence, the legality of wars of national liberation and third party interventions on behalf of the secessionist movements.[1] The use of force to achieve self-determination and for the assistance of national liberation movements has increasingly been claimed as legitimate in recent years, on the ground that it furthers the principles of the UN Charter.[2]

There is no rule of international law forbidding revolutions within a state, and the United Nation's Charter favors the self-determination of peoples. Self-determination may take the forms of rebellion to oust an unpopular government, of colonial revolt, of an irredentist movement to transfer territory, or of a movement for the unification or federation of independent states.[3] It should be especially stressed that whatever way is chosen, no *"central authority"* or any other people can solve the problem for the self-determining people, for that would be contrary to the very principle of self-determination.[4]

While establishing the scope of self-determination, a question must be answered: Are the peoples and nations which have already implemented their right to self-determination subjects of this right? The answer is *"Yes",* inasmuch as the UN Charter recognizes the right to self-determination of all peoples and nations, without distinguishing between those which have attained statehood and those which have not. The question is answered analogically in the General Assembly resolution on the inclusion of the clause on human rights in the International Covenant on Human Rights.[5] It has been strongly advocated that a nation which has been divided into States by outside interference and without the clear consent of the population still possess the inherent right of self-determination including the right of reunification.[6]

Furthermore, infringement of the right to self-determination has been used by the European Community as a potential ground for withholding recognition of an entity as a State and hence to deny the legitimacy of a government or a State which

[1] Thurer D. *op. cit.*, p. 368.
[2] Hillier T. *op. cit.*, p. 612.
[3] Self-Determination, Digest of International Law (ed. M. Whiteman), Washington, 1974, v. 5, § 4, p. 39.
[4] Starushenko G. *op. cit.*, p. 214.
[5] Resolution 545 (VI) of February 5, 1952.
[6] Thurer D. *op. cit.*, p. 368.

does not protect the right of self-determination. In the EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (December 16, 1991), there is the requirement that a potential new State has constitutional guarantees of democracy and of *"the rights of ethnic and national groups and minorities"* before recognition by the EC States would be granted. Moreover, a new rule of international law holds that a State established in violation of the right of self-determination is a nullity in international law.[1]

Another question which concerns the self-determination of peoples is: Can the right of self-determination be applied to non-colonial entities? Certainly the main objective of the right of self-determination was to bring a speedy end to colonialism. However, since codification of that principle in the UN Charter, not one of the major international instruments which have dealt with the right of self-determination, have limited the application of the right to colonial situations. For example, the common Article 1 of the two International Human Rights Conventions of 1966 (*International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights)* applies the right to *"all peoples"* without any restriction as to their status, and the obligation rests on all States. Likewise, principle VIII of the Final Act of the Helsinki Conference 1975 includes: *"by virtue of the principle of equal rights and self-determination of peoples, all peoples have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development".* State practice also supports a broader application of the right of self-determination beyond strictly colonial confines. Indeed, the international Commission of Jurists, in its report on Bangladesh's secession, stated that: *"if one of the constituent peoples of a State is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive".*[2] In the Treaty on the Final Settlement with Respect to Germany (12 September 1990), which was signed by four of the five Permanent Members of the Security Council, it was expressly mentioned that the *"German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a State*", [Preamble, para. 11], despite the fact that neither East nor West Germany was a colony. It was also been applied by States in the context of the break-up of the former Soviet Union and former Yugoslavia.[3]

[1] Ibid., p. 369.

[2] The Secretariat of the International Commission of Jurists, Report on "Events in East Pakistan, (1971)", Geneva, p. 69.

[3] McCorquodale R. Self-Determination: Human Rights Approach, The International and Comparative Law Quarterly, vol. 43, # 4 (Oct. 1994), p. 861.

Territorial Integrity and Political Independence

"Territorial Integrity": Evaluation and Content

The notion of *"territorial integrity"* has been employed only three times in international instruments. All other cases are only references to these said documents.

The concepts of territorial integrity and political independence emerged during the years immediately following the end of World War I. Article 10 of the Covenant of the League of Nations stipulated that: *"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".*[1] The same understanding of *"territorial integrity"* was reaffirmed in the UN Charter: "*2(4). All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."* The other important international instrument which is often referred to is the Helsinki Final Act (adopted on August 1, 1975) which requires the following: *"The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State…".*

It is obvious that the Helsinki Final Act, likewise the UN Charter and League of Nations Covenant earlier, condemns merely the use of force against territorial integrity and does not unconditionally advocate for the absolute maintenance of territorial integrity. It makes clear that use of external force or threat of use against territorial integrity and political independence is unacceptable. Meanwhile, the Helsinki Final Act (Chapter 1) specifically holds that: *" <u>frontiers can be changed</u>, in accordance with international law, by peaceful means and by agreement."*

It is apparent that ever since the first time that the notion of *"territorial integrity"* appeared within the domain of international law, it has been closely intertwined with the question of the use of external force. In other words, the principle of *"territorial integrity"* is traditionally interwoven with the fundamental principle of the prohibition of the threat or use of force[2] and not with the absolute preservation of the territory of a state intact. As it was mentioned above, it is just

[1] Rozakis Ch. Territorial Integrity and Political Independence, in R. Bernhardt (ed.), Encyclopaedia of Public International Law, v. IV, Amsterdam, 2000, p. 813.
[2] Ibid., pp. 812-13.

the *"prohibition of use of* [external] *force"*[1] and the renunciation of *"the use of force by one state to conquer another state or overthrow its government."*[2]

"Territorial Integrity": Scope, Limitation and Status under International Law

In modern political life there are repeated wrongful attempts to present "territorial integrity" as a general limitation on the right to self-determination. The basis for such limitation is false because the government of a State which does not represent the whole population on its territory without discrimination cannot succeed in limiting the right of self-determination on the basis that it would infringe that State's territorial integrity.[3]

Moreover, state practice shows that territorial integrity limitations on the right of self-determination are often ignored, as seen in the recognition of the independence of Bangladesh (from Pakistan), Singapore (from Malaysia) and Belize, *"despite the claims of Guatemala".*[4] In addition, after the recognition by the international community of the disintegration of the Soviet Union and Yugoslavia, recognition of East Timor and Eritrea, recognition to a certain extent of Kosovo, Abkhazia and South Ossetia, it could now be the case that any government which is oppressive to peoples within its territory may no longer be able to rely on the general interest of territorial integrity as a limitation on the right of self-determination.

Therefore there is a clear-cut understanding: only a government of a State which allows all its peoples to decide their political status and economic, social and cultural development freely has an interest of territorial integrity which can possibly, only possibly, limit the exercise of a right of self-determination. So territorial integrity, as a limitation on the exercise of the right of self-determination, can apply only to those States in which the government represents the whole population in accordance with the exercise of internal self-determination.[5] Thus, there is an apparent conceptual link between democracy and self-determination. Democracy is often viewed as internal self-determination, and secession as external self-determination, that is, as the right of a people to govern itself, rather than be governed by another people.[6]

Moreover, it is clear that those deprived of the right of self-determination can seek forcible international support to uphold their right of self-determination and no

[1] Restatement of the Law (Third), *op. cit.*, p. 389.
[2] Ibid., p. 383.
[3] McCorquodale R. *op. cit.*, p. 880.
[4] Maguie J. "The Decolonization of Belize: Self-Determination v. Territorial Integrity" (1982) 22 Virginia Journal of International Law, p. 849.
[5] McCorquodale R. *op. cit.*, p. 880.
[6] Moore M. National Self-Determination, Oxford, 1998, p. 10.

State can use force against such groups. As it was referred above, the Declaration on Principles of International Law provides that *"every State has the duty to refrain from any forcible action which deprives peoples … of their right of self determination and freedom and independence"*. The increase in actions by the international community which could be classed as humanitarian intervention, such as in Somalia and with the creation of *"safe havens"* for the Kurds North of the 36th parallel in Iraq[1] (1991-2003), indicates the reduced importance given by the international community to the territorial integrity of a State when human rights, including the right of self-determination, are grossly and systematically violated.[2] The right of self-determination applies to all situations where peoples are subject to oppression by subjugation, domination and exploitation by others. It is applicable to all territories, colonial or not, and to all peoples.[3] Indeed, many of the claims for self-determination arose because of unjust, State-based policies of discrimination and when the international legal order failed to respond to the legitimate aspirations of peoples.

Self-Determination: Human Rights and the Right to Secession

One of the supposed dangers of self-determination is that it might encourage secession. First of all, there is no rule of international law that condemns all secessions under all circumstances. Self-determination includes the right to secede.[4] In a situation when the principle of territorial integrity is clearly incompatible with that of self-determination, the former must, under present international law, give way to the latter.[5] For instance, if a majority or minority insists on committing an international crime, such as genocide, or enforces a wholesale denial of human rights as a deliberate policy against the other part, it is submitted that the oppressed party, minority or majority, may have recourse to the right of self-determination up to the point of secession.[6]

As Azerbaijan used force in answer to the free and peaceful expression of the will of the people of Nagorno-Karabakh (rallies, referendums, claims, appeals), took inadequate means of punishment, perpetrated massacres of the Armenian citizens of Azerbaijan in Sumgait, Baku, Kirovabad, and waged a ruthless war with Ukrainian, Afghan, Russian mercenaries and sustained defeat, it cannot expect that the people

[1] Security Council Resolution 688 (April 5 1991).
[2] McCorquodale R. *op. cit.*, p. 882.
[3] Ibid., p. 883.
[4] M. Moore, *op. cit.*, p. 23.
[5] O.U. Umozurike, *op. cit.*, p. 187.
[6] Ibid., p. 199.

of Nagorno-Karabakh will renounce their lawful right and will not exercise their right of self-determination.

Actually, the world community is under legal and moral obligation to recognize the political self-determination of the people of Nagorno-Karabakh, i.e. to recognize the Republic of Nagorno-Karabakh; if a *de facto state* has crystallized, refusal to recognize it may be tantamount to a denial of self-determination. Moreover, there is a clear understanding in international law: after the international requirements for the recognition of belligerency have been fulfilled (as it was done with regard to Nagorno-Karabakh by the Bishkek Protocol (May 5, 1994), and by the Cease-fire Agreement, (May 12, 1994)), a duty of recognition of belligerency necessarily follows, and refusal of recognition is interference with the right of political self-determination of the people of a State, and therefore constitutes illegal intervention.[1] This obligation arises from the understanding that the principle and rules on self-determination are *erga omnes*, that is, they belong to that class of international legal obligations which are not *"bilateral"* or reciprocal, but are in favor of all members of the international community.[2]

In the *Loizidou v. Turkey Case,* a 1996 judgment of the European Court of Human Rights, Judge Wildhaber identifies an emerging consensus that the right of self-determination, more specifically secession, should be interpreted as remedial for certain human rights abuses: "*Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy".*[3] As Judge Wildhaber attests, there is increasing agreement among authors that the right of self-determination provides the remedy of secession to a group whose rights have been consistently and severely abused by the state.[4] The self-determination of the people of Nagorno-Karabakh must certainly be assessed as an act of corrective justice as well.

So a minority's entitlement to self-determination can and must be judged within a human rights framework. Self-determination postulates the right of a peo-

[1] A.V.W. Thomas and A.J. Thomas, Non-Intervention: The Law and its Import in the Americas, Dallas, 1956, p. 220.
[2] A. Cassese, *op. cit.*, p. 134.
[3] *Loizidou v. Turkey (Merits), European Court of Human Rights, 18 December, 1996, (1997) 18 Human Rights Law Journal 50 at p. 59.*
[4] K. Knop, Diversity and Self-Determination in International Law, Cambridge, 2002, p. 74.

ple organized in an established territory to determine its collective political destiny in a democratic fashion.[1]

It is legal nonsense to presume that self-determination should take place within previous administrative borders, without regard for the cultural, linguistic or ethnic identity of the people there. Internal boundaries in the former Soviet Union were often drawn in a way which ensured that many members of the titular nation were outside the boundaries of their (titular) republic, as it was with Nagorno-Karabakh.[2] A politically disempowered distinct group in a specific region has the right to independence,[3] regardless of whether or not they are organized in an administrative unit. There is no doubt that the people of Nagorno-Karabakh (not only the people of the Nagorno-Karabakh Autonomous Region) are entitled to independence as their choice of self-determination due to the extreme discrimination that they faced under Azerbaijan.

Summary

- Self-determination is an ancient political right. Presently the right to self-determination is a well-established principle in public international law. The principle has been confirmed, developed and given more tangible form by a consistent body of State practice and has been embodied in various international instruments.
- The principle of self-determination is exemplified in the decisions by the International Court of Justice (ICJ).
- The principle of self-determination is one of the fundamentals of peaceful and friendly international relations. Respect for self-determination is a condition for world peace. Those deprived of the right of self-determination can seek forcible international support to uphold their right of self-determination.
- Self-determination as a principle of international law is universal in scope. The right of self-determination applies to all situations where peoples are subject to oppression by subjugation, domination and exploitation by others – all peoples and nations, without distinguishing between those which have attained statehood and those which have not.
- The principle of the self-determination of peoples is a legal principle and is a *jus cogens* (peremptory) norm of international law.

[1] Ibid., p. 85.
[2] M. Moore, *op. cit.*, p. 140.
[3] T.M. Frank, The Power of Legitimacy among the Nations, New York, 1990, p. 171.

- The right of self-determination is the right to choose a form of political organization and relations with other groups. Denial of the right of to self-determination is a human rights violation and constitutes a breach of international law.
- The right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights. Therefore the General Assembly recommended that the member states of the United Nations uphold the principle of self-determination of all peoples and nations.
- Article 2(4) of the UN Charter has nothing to do with absolute *"territorial integrity",* but is simply the rule against intervention, a *"prohibition of use of force"* and purely calls to refrain from *"the use of force by one state to conquer another state or overthrow its government."*
- Self-determination includes the right to secede. The people of Nagorno-Karabakh (not only the people of the Nagorno-Karabakh Autonomous Region) are entitled to independence as their choice of self-determination.
- Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion.

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