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LEGAL STUDIES

CONCEPT OF RIGHTS AND SECURITY OF NAGORNO-KARABAKH PEOPLE IN LIGHT OF ICJ'S ADVISORY OPINION ON KOSOVO

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Abstract

This article is dedicated to the comparative analysis of the advisory opinion of the International Court of Justice on Kosovo, thereby revealing the criteria of the legality of realization of the right of peoples to self-determination and clarifying the question of their applicability to the Artsakh case. Historical and comparative methods of scientific research were used in the article, by means of which positive and negative aspects of the advisory opinion of the UN Court were highlighted.

The analysis has shown that perhaps for the first time, an attempt was made by the International Court of Justice to define the criteria of the legality of the act of declaration of independence by a national community seeking self-determination, which aims to remove the right of peoples to self-determination from the sphere of political speculation and place it in the realm of legal certainty.

The analysis also showed that the standards developed by the UN Court are fully applicable to Artsakh as well.

The article also made an important record that even in the seemingly non-pro-Armenian stance of the ongoing negotiation process, new negotiation approaches being formed by Armenia are within the context of the legal logic of the UN court and thus have the potential to achieve legal confirmation of the independence of the people of Artsakh, if appropriate diplomatic and military-political work is carried out.

Keywords: self-determination, territorial integrity, advisory opinion, Kosovo, Nagorno-Karabakh, Artsakh.

Introduction

In October 1991 by means of a referendum, Nagorno-Karabakh people declared their independence and then affirmed their right to self-determination during an unequal war unleashed by Azerbaijan planning to suppress the aspirations of Nagorno-Karabakh Armenians to gain independence. As a result of the ceasefire agreement signed in 1994, the war between Nagorno-Karabakh and Azerbaijan stopped, temporarily acknowledging the new delimitation of borders in the South Caucasus region. After the ceasefire agreement, the conflict was transferred from the battlefield to the area of diplomacy and international law and continues till now.

Unfortunately, there is no well-established and universally accepted international legal doctrine which would completely regulate the co-existence of principles of self-determination of peoples and territorial integrity of states, including setting out precise legal bases for the application of the principle of self-determination and the mechanisms of its application. International law has not found the ultimate solution to this problem yet. As a result, the application of these principles is left mainly to the political discretion of the major players in the international law arena and is conditioned by their geopolitical interests.

Though in 2010 a significant step was made towards the development of international law in this area by virtue of the advisory opinion of the International Court of Justice (hereinafter: ICJ) on Kosovo, the issue of its universal application still remains unresolved.

Due to the lack of an internationally accepted unified doctrine of the right of peoples to self-determination, the danger of unfreezing conflicts between former “parent” states and de facto independent national communities and militarily suppressing

national communities' political aspirations increased over time. The result of this was also the tragic 44-day war, in which Azerbaijan, taking advantage of the paralysis of the will of the international community, attempted to "solve" the Artsakh conflict at the cost of military aggression and many other war crimes, which it could not fully implement due to the collective courage of the Armenian people.

At the same time, a radical change in the international political order is currently taking place, which will have an inevitable legal impact on the content of all international legal institutions and the existing structures of ensuring their operation. Therefore, for national communities struggling for self-determination or its international recognition and for states under the auspices of which those national communities survive in one way or another, now is the right time to reconsider the unrealized legal legacy of the recent past and to bring forward new and realistic ideas for the protection of vital rights of indigenous peoples in the period of redistribution of geopolitical power and establishment of a new world order.

In this context, the ICJ's advisory opinion on Kosovo can have a crucial role in triggering the process of setting forth relatively unequivocal legal criteria for the pursuit of the claim for self-determination. Particularly, the ICJ's advisory opinion, adopted on July 22, 2010, is special in that it virtually recognized the legality of the unilateral declaration of independence made by Kosovo (a former province of Yugoslavia) under international law.

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

This will provide an opportunity to enrich the legal arguments of the Armenian side with a new legal concept, especially when the legal and political benchmark of the negotiations process has objectively changed in the post-war period, turning from the demand for recognition of the Artsakh people's right to self-determination to the demand for the recognition and guarantee of rights and security of the Artsakh people, which, however, does not exclude external self-determination.

The ICJ's Legal Doctrine on Kosovo

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

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

On July 22, 2010, the ICJ issued an advisory opinion in response to a question set out in the 63/3 resolution of the UN General Assembly. This advisory opinion promised to be a landmark for the development of international law particularly in the sphere of self-determination of peoples which is one of the most sensitive problems of contemporary international law.

Though the advisory opinion is not compulsory for states and other international actors the authority of the UN court and its political and legal status in framing and developing international law makes this act highly important and de facto mandatory. However, the UN court delivered an advisory opinion that has not fully satisfied the hopes of construing the legal question submitted to it rather narrowly. It covered only a few of the contentious legal issues relevant in the context of the Kosovo case, remaining silent on such problems as the legal effects of the unilateral declaration of independence, particularly, the validity and legal consequences of recognition of Kosovo as an independent state, the question of whether Kosovo is entitled to declare its independence unilaterally under international law, or whether it is lawful within the current international legal order for entities being a constituent part of a state unilaterally to break away from it, and it did not address the extent of the right of self-determination and the existence of a right of "remedial secession". Notwithstanding this and despite various criticisms of the politically motivated approach employed by the ICJ and the narrow scope of its advisory opinion there are certain nuances deserving attention. The scrutiny of the ICJ's wording shows that the legal doctrine of its opinion factually endorses Kosovo's independence and vicariously opens the door for other secessionist movements to reach the desired outcome. The logic of the ICJ's reasoning should be considered in conjunction with the written statements submitted to the UN court by the UN member states on the issue in question. A considerable part of countries including major actors of international relations such as the USA, UK, etc. favored the principle of self-determination and brought quite interesting arguments from political and legal points of view (Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), 2010). These statements partly supplement the gaps and ambiguities of the ICJ's advisory opinion. Besides the statements of the countries expressing their

official approach to the problem of self-determination manifest emerging of *opinio juris* in postcolonial interpretation of this aspect of international law. The subsequent sections will introduce the main legal criteria (the legal doctrine) envisaged by the ICJ.

The issue of the legality of the unilateral declaration of independence under international law

The gist of the ICJ's advisory opinion is the problem of the legality of the unilateral declaration of independence made by the Kosovo parliament. The ICJ's wording on this issue reads: "... The task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law" (Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010). When deciding on this issue the Court used the so-called "Lotus presumption" (Burri, 2010). This legal doctrine was first established in the famous Lotus case in 1927 by the Permanent Court of Justice, a judicial organ of the League of Nations, and then also applied by the ICJ itself in the judgment on the Nicaragua case, in the advisory opinion on the legality of the threat or use of nuclear weapons (1996). Under Lotus presumption what is not prohibited under international law is permitted. This is an international legal manifestation of one of the founding principles of the Constitutional law that emerged in the Anglo-Saxon legal system, which applies to natural persons as opposed to state officials, who can act only in accordance with the internal law of the state concerned. As formulated by the Permanent Court of International Justice, the Lotus Presumption applies to relations between independent states and reads as follows: "International law governs relations between

independent states. The rules of law binding upon states, therefore, emanate from their own free will as expressed in conventions and usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot, therefore, be presumed (The Case of the S.S. "Lotus", 1927). Applying this test, the ICJ does not ask whether there is a legal entitlement under international law to unilaterally declare independence, but just whether there is a rule prohibiting such a declaration per se. As a result of applying this negative test the Court states, that there is no such a rule in international law, which bans unilateral declaration of independence. It means that the unilateral declaration of independence as such does not violate any norm of international law. The application of this principle by the ICJ begs some questions. Firstly, Lotus presumption only relates to states as major actors of international law. From the ICJ's wording, it can be inferred that this principle can apply also to entities not being states yet such as Kosovo when declaring its independence. This approach seemingly aims to strengthen the positions and roles of these subjects and indirectly contributes to the rise of international legitimacy of the self-determination principle.

Judge Simma, one of the ICJ judges, contends the application of Lotus presumption due to its being outdated. He claims, that, as opposed to the beginning of the 20th century, when international law was consensual in nature and therefore precluded restrictions on state's independence, now the international legal order is not exclusively based on states' consent and is strongly influenced by ideas of public law (Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Declaration of Judge Simma, 2010). Judge Simma inter alia implies the emergence of jus cogens norms, which create obligations for states without their consent. But there is a slight incompleteness in this

reasoning because jus cogens norms are a product of the collective activity of the international community, otherwise stated, the peremptory international legal norms are created by means of universal or at least the overwhelming majority consent or acquiescence of states as members of the international legal order. Thus, states' consent is one of the cornerstones of international law stemming from the principle of sovereign equality enshrined in Article 2 of the UN Charter. Thomas Burri also shares Judge Simma's opinion on this problem (2010), but for the justification of his views, he brings the following arguments: the principle "what is not forbidden is permitted" will probably be applicable in the internal legal order of a particular state because the internal legal order is complete and coherent (Burri, 2010). International legal order, despite the efforts in recent decades to unify it still remains fragmented into considerably incoherent parts. And the application of this approach is not the best solution to fill the gaps existing in international law. The next argument is that the soft law should not be underestimated (Burri, 2010). Recommendations, principles, and best practices regularly establish a framework in which international actors may act. If an international actor ignores these soft rules, it might ultimately be held accountable (Burri, 2010). Though Lotus presumption should not be overestimated, it would not be right to completely set aside this principle. Perhaps it should be deprived of its status of general principle (and it is really deprived now), but there can be areas in international law where the application of this norm would have a positive effect. Which areas would they be state practice will show, and the role of international judicial bodies and particularly the ICJ's impact is important in crystallizing the existing state practice and thus contributing to the creation of international customs. The ICJ in some cases mentioned above and also in the case of unilateral declaration of independence as a recent development points out that the Lotus presumption is applicable.

In this context the Court's views on the practice of the UN Security Council as lex specialis on the matter of declaration of independence bear emphasis. The Court mentions that "Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law." (Advisory Opinion 410, at 30,31). Thus acknowledging that the UN Security Council's resolutions are an important source of international law, the Court continues: "Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska. The Court notes, however, that in all of those instances, the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, (by the people seeking self-determination (emphasize added)) in particular those of a peremptory character (jus cogens). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council." (Advisory Opinion 410, at 30,31). It means that the Court, referring to the Security Council's

resolution as a source of lex specialis, points out a precondition for the legality of the unilateral declaration of independence-mandatory requirement that the unilateral declaration of independence shall not be a result of or be connected with the egregious violations of jus cogens and other norms of general international law by the community seeking independence. One more precondition will be discussed below.

The next point, concerning the issue of unilateral declaration of independence, covered by the ICJ, is the link between unilateral declaration of independence and secession. The ICJ has not considered this issue, stating that it is not asked by the General Assembly on the legal effects of the declaration of independence or the right to secession (Advisory Opinion 410, at 30,31). The ICJ restricts its opinion strictly to the narrow formulation of the question submitted by the General Assembly, focusing on the act of declaring independence. A declaration of independence alone is not sufficient for an entity to gain independence since, in the words of the ICJ, sometimes a declaration of independence results in the creation of a new state, and in others it does not. Robert Muhharemi in his article criticizes the ICJ for avoiding stating its opinion on both the legal aspects of secession and the creation of a new state. According to the same author the ICJ thus distinguishes between "declaring" independence and "effecting" it, which seems artificial and unconvincing. The UN court sets forth an approach that a state first declares its independence and then takes steps to actually validate or enforce it. This approach does not indeed reflect the process of the creation of a new state and Kosovo in particular. In June 1999 after the NATO bombing and Miloshevich's capitulation, the UNSC passed Resolution 1244, mandating a UN interim administration (UNMIK) to establish and oversee Kosovo's provisional democratic institutions of self-government within a framework of Yugoslav sovereignty, pending a final settlement. The UNMIC created the provisional institutions of self-government and supported their development to become

properly functioning state bodies (Advisory Opinion 410, at 30, 31). When independence was declared in 2008, all government structures, including a completely new legal framework, were already in place for Kosovo to effectively and independently assume the functions of a state (*International Crisis Group.* Kosovo Conflict History, 2008).

The position, taken by a number of scholars is the right one. The declaration of independence is not an initial, starting point of a state-building process but its logical end, its culmination. The declaration of independence is closely linked with self-determination and secession. This was the case when the Soviet Union collapsed and former Soviet republics including Armenia gained independence. The declaration of independence by these republics and also Armenia was the final step in the process of obtaining statehood i.e. making secession. Thus secession cannot be illegal per se, if the act, which concludes the process of secession, that is the declaration of independence, is considered legal under international law. The ICJ, stating that in not all circumstances the declaration of independence leads to the creation of a state, implies the political means of dispute resolution such as negotiations and recognition i.e. whether the international community of states has recognized an entity in question as a state. Thus the ICJ gives great value to recognition, which in this logic has not only a declarative effect, acknowledging the creation of a new state as an existing fact without any legal effect on the emergence of statehood but also possesses a constitutive asset, meaning that the recognition by other states of an entity is decisive for the statehood to become a fact. This double understanding of recognition can be found in international law theory and also in some international documents such as the Ahtisaary plan on Kosovo (UNOSEK, 2007). The ICJ also recalls Resolution 1244 as lex specialis, where the necessity of political settlement of the Kosovo problem is emphasized. So the ICJ implies the legality of any settlement of territorial dispute including by realizing the principle of self-determination if the

settlement is a product of political compromise of parties involved in the respective conflict. The role of lex specialis under the Court's reasoning is considerable in developing international legal obligations for the parties to the dispute and establishing the order and basic directions of the resolution of the conflict. This was the case in the Kosovo dispute (UNSC Resolution 1244). It can be argued that the ICJ merely restates the status quo. The whole political process per se is a process of bargaining and compromise, where the prospect of success is conditioned by the favorable political situation, the real balance of forces between parties, and the interests of major political poles. But there is a nuance here. The ICJ initially upholds the legality of the claim for secession per se which means that during the political process, the right of peoples to self-determination just crystallizes, concretizes, and is being applied rather than it emerges. Political compromise notwithstanding the issue of the legality of the claim is necessary for the establishment of long-term peace, security, and stability in the world in general and in the region of the dispute in particular.

One more point in the context of the legality of the unilateral declaration of independence, which is addressed in the advisory opinion, is the problem of who possesses the right to declare independence. In this regard, the Court states the following: "The identity of the authors of the declaration of independence... is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law" (Advisory opinion, 410 at 20). The ICJ, ruling on this point, adheres to the international customary rule, that "the right to self-determination must be claimed and exercised by an organization that is representative of the entire people. Thus, as far as external self-determination is concerned, there must be a liberation movement or another type of body representative of the whole people (Cassese, 1995). From the ICJ's line of reasoning, it follows, that one more precondition of the legality of the unilateral declaration of independence is its declaration by

representatives of the people seeking cession. The declaration of independence undoubtedly can be made also by means of a referendum, which can be considered a more authoritative tool since the decision is made directly by the people. The ICJ, touching upon this problem, argues that the Kosovo Assembly, when adopting the declaration, was acting as a body, representing the people of Kosovo rather than as a Provisional Institution of Self-Government (PISG) under the UN supervision. Particularly the Court states, that the declaration refers to the "democratic-elected leaders" of the people, which declare Kosovo an independent and sovereign state." (Advisory opinion, 410 at 39). Thus the Court wants to show, that even if the Kosovo Assembly had been elected under the supervision of the UN Interim Administration (UNMIK) at the time of declaring Kosovo's independence, Kosovo's parliament was already emancipated and acted as a representative body of a state rather than a provisional body of a contentious territory. On this point, the Court's wording reads as follows:" The Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that (UN) emphasize added) legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order." The Court states, that the declaration confers powers on the Kosovo Assembly, which it did not have under the UNMIK regulation on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework") such as external relations, which were vested in the Special Representative of the Secretary-General. The Declaration was not approved by the Special Representative of the Secretary General as it was in the case of acts adopted by the PISG. Also, the procedure of adoption of the declaration differed from the procedure under which the acts of the PISG were adopted (Advisory opinion, 410 at 39). The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as

one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons, who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration (Advisory opinion, 410 at 39).

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

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

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

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

In the 1991 referendum, the Nagorno-Karabakh people by an overwhelming majority voted for independence from Azerbaijan. This act is a unilateral declaration of independence. Moreover, the ICJ established a less ambitious criterion – the declaration of independence by the representatives of the people which in democratic society associates with parliament and forms a type of representative democracy. In 2008 Kosovo parliament adopted the declaration of independence. In Nagorno-Karabakh independence was declared by the people themselves displaying a manifestation of direct democracy, hence Nagorno-Karabakh people not only met the minimum threshold adopted by the ICJ

but took a higher standard of democratic decision-making. It is argued that the plebiscite in Nagorno-Karabakh is not valid since the Azeri community of Nagorno- Karabakh did not participate in it and also because of the absence of international monitoring of the referendum. These allegations are not properly founded. Firstly, the Azeri population constituted at most 25 percent of the whole population of Nagorno-Karabakh at the end of the 1980s being a minority (Bing Bing, 2009). Under customary international law in such cases the position of the majority is conclusive (Bing Bing, 2009). In Kosovo, the declaration of independence was proclaimed even though the 10 Serb members of the Assembly boycotted the voting (Cassese, 1995). The deputies boycotted the voting represented the Serb minority of Kosovo but their absence did not affect the outcome of the voting because the deputies representing the ethnic majority of the province voted for independence. The correlation between representatives of ethnic majority and minority and the lack of opportunity for the parliamentary minority to influence the results of the voting for independence in the Kosovo assembly greatly resembles the situation in Nagorno-Karabakh. In both cases the decision of the ethnic majority obtained legitimacy. The absence of a minority in the decision-making process could not anyway be decisive in the sense of the outcome. The difference is the procedural - the process of decision-making. In Nagorno-Karabakh, the ethnic majority made the political decision directly by means of a plebiscite whereas in Kosovo the decision was made by the representatives of the ethnic majority.

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

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

The violations of international law at the abovementioned level can be unlawful use of force, outrageous human rights violations, etc. Obviously, Nagorno-Karabakh Armenians were not engaged in any such internationally wrongful act. The liberation movement in Nagorno-Karabakh was peaceful, upholding internal and international law (Advisory opinion, 410, at 37, 39). On the contrary Azerbaijani authorities used force against the Armenian minority lawfully striving for self-determination. Awful massacres, killings, pillages, mass deportations of the Armenian population of Azerbaijan and Nagorno-Karabakh and finally war unleashed against Nagorno-Karabakh Armenians are apparent displays of egregious violations of international legal norms perpetrated by Azerbaijan. It can be surely said that the Armenian population of Nagorno-Karabakh had the status of victim and not the aggressor. The declaration of independence together with active measures of self-defense was the only means of overcoming the aggressive policy of Azerbaijan and thus is not a result or is not connected with any international wrongdoing. Thus, Nagorno-Karabakh's unilateral declaration of independence through a plebiscite on December 10, 1991, meets the criteria of legality mentioned in the ICJ's well-known advisory opinion.

Notwithstanding the legality of unilateral declaration of independence is the core legal issue handled by the UN court it is worth touching upon the legal implications of the ICJ's other considerations which can be valuable for Nagorno-Karabakh conflict resolution. The Court makes a distinction between the principle of territorial integrity being applicable to states and the principle of self-determination, at the same time implying the importance of political settlement of a territorial dispute. To put it in other words, the Court does not inhibit the resolution of a

dispute on the basis of self-determination principle but makes it important to reach such a solution by means of political negotiations and compromise between parties and recognition by the international community of the secession of a separatist region (Advisory opinion, 410, at 37, 39).

The ICJ's advisory opinion a priori has the potential to strengthen the positions of Nagorno-Karabakh and Armenia in the sense that it does not prohibit the claim on secession and is permitted to use it in the process of negotiations if properly grounded. Azerbaijan's statements that territorial integrity is predominant over the principle of self-determination and the Armenian claims contradict international legal norms are not lawful and are ill-grounded according to the reasoning of the ICJ's advisory opinion.

Correlations of the concept of guaranteeing the rights and security of the people of Artsakh and the legal position of the UN International Court

In the post-war period, Armenia embarked on restoring the shaken negotiating positions and developing a realistic concept for the settlement of the Artsakh problem, corresponding to the current reality. It is, in fact, summarized in the following provisions: 1. ensuring the rights and security of the people of Artsakh by Azerbaijan, 2. formation of a structure of dialogue between the elected authorities of Artsakh and the representatives of Azerbaijan on the said issue, 3. creation of international guarantees for fixing and ensuring the agreements reached on these issues (Armenpress, Armradio, 2023). In essence, the above-mentioned theses do not neutralize the right to self-determination of the people of Artsakh, and the problem is more etymological and is related to Armenia's weak military potential and the radical geopolitical, strategic, and geo-economic revisions taking place within power centers in the international mixed situation, which made it a vital necessity for the Armenian side to soften the tone and have a tactical break to form

negotiation approaches with international legitimacy and to correct the military-political and economic situation of the state. In the current situation, it is very important for Armenia to be comprehensible to the main international actors and propose a negotiation package that will first of all find the support of the international community and will be realistic enough to neutralize Azerbaijan's lobbying and other countermeasures against that package.

The negotiation tactics chosen by Armenia are quite flexible in this regard, and the chosen diplomatic vocabulary is also flexible enough to include all tools important for the protection of the vital interests of the people of Artsakh. In particular, if we delve into the content of the concept of "guaranteeing the rights and security of the people of Artsakh", we will see that the latter includes all options for realizing the right to self-determination of the people of Artsakh, including the legal confirmation of secession from Azerbaijan. Particularly, the scope of Armenia's claim for recognition and support to the maintenance of rights and security of Artsakh Armenians depends on the respective behavior of Azerbaijan. Being conditioned upon Azerbaijan's attitude towards the vital rights of the Artsakh Armenians, the agreement to be reached with the support of the international community will record the optimal version of the status of Artsakh that will guarantee the vital rights and interests of Artsakh Armenians.

It is obvious that along with the increasing danger of ethnic cleansing, the self-determination of Artsakh within the framework of the concept of "remedial secession" may become more and more unequivocal. Legal and ideological appeals of the mentioned approach can be found in the advisory opinion of the UN International Court of Justice in the case of Kosovo, which considers the status of the national community, seeking independence, as being a "victim" of, parent, state's intense violence and aggression, endangering the life and development of the people. This is one of the main elements of the legitimacy of

the declaration of independence of the national community. In other words, viewing the demand for the secession of Artsakh as not an unconditional and one-time act, but a legal and political consequence equivalent to the intensity of the violation of fundamental rights of the Artsakh Armenians by Azerbaijan, is in fact consistent with the spirit and internal logic of the advisory opinion of the UN court. Moreover, the Kosovo case had similar evolutionary development, and it was Yugoslavia's forceful rejection of Kosovo Albanians' basic rights, amounting to ethnic cleansing which became the climax making Kosovo's independence inevitable (UN Security Council Report, 2007; Security Council Resolution 1244, 1999; Human Rights Watch, 2001; 2010).

In this context, important steps are being taken by Armenia towards legal registration of Azerbaijan's xenophobic policy against Artsakh Armenians at the European Court of Human Rights and at the UN International Court of Justice, where the applications submitted by the Armenian Government refer to massive violations of Artsakh Armenians' fundamental rights at the individual and collective level: the right to life, the right to dignity, the right to property, discrimination on the basis of nationality, etc. All this is very important for the international de-legitimization of Azerbaijan's legal claims against Artsakh.

The efforts of the Armenian side to create a format of Artsakh-Azerbaijani dialogue are related to the criterion of the legality of external self-determination proposed by the UN International Court of Justice for Kosovo: declaration of independence by legitimate representatives of the national community. The proposed dialogue format, apart from the current need for Artsakh's security, will also resolve the issue of the status of Artsakh as a legitimate subject of international law from a strategic perspective. That is also the reason why Azerbaijan rejects any proposal of dialogue with Artsakh on the principle of equality. As for the international guarantee mechanisms for the resolution of the Artsakh issue, it is known from the Kosovo case

itself. Both the OSCE Minsk Group in the case of Artsakh and the famous Troika in the case of Kosovo have tried for years to reach a fundamental resolution to the Kosovo conflict, but in the end, such a solution was guaranteed mainly by the US and NATO, which backed the creation of a new governmental, political and economic structure in Kosovo. The issue of the institutional guarantor of the peace agreement with Azerbaijan, including the issue of Artsakh, is extremely important for Armenia, which is located in the Greater Middle East region, which is made up of states with an asymmetric resource base as well as with diverse historical and cultural roots. Otherwise, the agreements reached can remain on paper.

Conclusion

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

The hypothetical application of the legal doctrine of the ICJ's advisory opinion to the Nagorno-Karabakh case has revealed that

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

In a political sense weighted by the ICJ's advisory opinion Armenian and Azeri parties are far from reconciliation. After the 44-day war Azerbaijan occupied around half of the former NKAO, that is the actual territory of Artsakh. Now Azerbaijan endeavors to formalize the consequences of the war meaning that Azerbaijan completely rejects any status of Artsakh and even negates the existence of a compact territory with the name Nagorno Karabakh. Moreover, Azerbaijan has put forward territorial pretensions against Armenia. As a result, Armenia now has to invest resources in two dimensions: the issue of rights and security of Artsakh Armenians and the protection of the territorial integrity of Armenia – a fact that has never existed before the recent war.

At the same time notwithstanding Azerbaijan's ongoing reluctance to humble with self-determination of the Nagorno-Karabakh people and arrange a mutually acceptable negotiation agenda with Armenia, it is time for taking active political measures to eventually reform the negotiation concept in such a way that will ensure support of the international community and boost the rights of Artsakh Armenians. In this way, it is crucial to base negotiation policy on international law and keep distance from pure political bargaining: Azerbaijan has much more financial resources and political leverage for that. On the contrary, international human rights, democracy, and the rule of law are indispensable assets that make Armenia and the international community, mainly the West confederates and by

means of which Armenia can challenge and balance Azerbaijan's post-war self-confidence and arrogance and eventually pull it to the negotiation table.

ICJ's advisory opinion on Kosovo may provide profound institutional prerequisites for pursuing the rights and interests of the Artsakh people. The paradigm offered by the UN court is both relatively flexible and concrete having the potential to accommodate to political realities of certain cases. The ICJ's legal logic is to connect the outcome of the self-determination case with the "parent" and the state's behavior. Thus the burden of proof that the ethnic community may safely co-exist with the titular nation is on the government of that nation. The less trustworthy the proofs the more legitimate the claim for independence.

The Armenian government must take into consideration the flows of the past and take measures to set up a new paradigm of protection of Artsakh people which will encompass setting up mechanisms of protection of rights and security of Artsakh Armenians under international law and political arrangements of boosting punitive actions by the international community against Azerbaijan in case of the latter's reluctance to negotiate.

One thing is straightforward – self –determination implies three phases: a significant process of foundation of the issue, gradual transformation of the international community's attitude towards favoring the community seeking salvation by means of independence, and eventual legal and political guarantees for that independence. Armenia and Artsakh are at the second stage of the process and only patriotic commitment and diplomatic craft may keep the chances of success viable.

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