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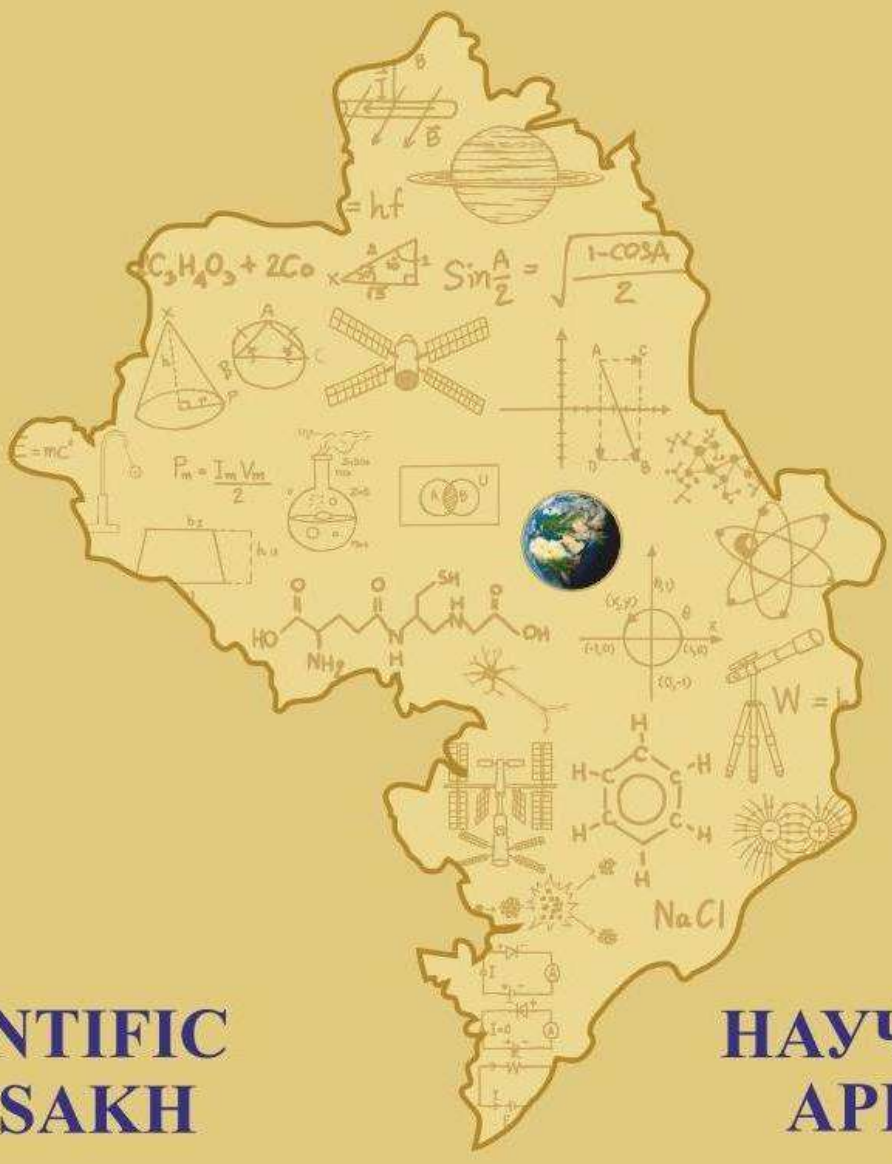

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«Գիտական Արցախ» *պարբերականն ընդգրկված է Հայաստանի Հանրապետության Բարձրագույն որակավորման կոմիտեի (ՀՀ ԲՈԿ) սահմանած դոկտորական և թեկնածուական ատենախոսությունների հիմնական արդյունքների ու դրույթների հրատարակման համար ընդունելի գիտական պարբերականների ցանկում:*

*The **«Scientific Artsakh»** journal is included in the list of scientific periodicals acceptable for publication of the main results and provisions of doctoral and candidate theses established by the Higher Attestation Committee of the Republic of Armenia (HAC RA).*

*Журнал **«Научный Арцах»** включен в список научных периодических изданий, приемлемых для публикации основных результатов и положений докторских и кандидатских диссертаций, установленных Высшим аттестационным комитетом Республики Армения (ВАК РА).*

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Հրատարակության է երաշխավորվել Երևանի պետական համալսարանի գիտական խորհրդի որոշմամբ

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«Գիտական Արցախ» պարբերականի 2019թ. 1-ին համարում տեղ են գտել հասարակական գիտությունների արդի հիմնախնդիրների վերաբերյալ Հայաստանի Հանրապետությունը, Արցախի Հանրապետությունը, Բելառուսի Հանրապետությունը, Իրանի Իսլամական Հանրապետությունը, Լեհաստանը, Շվեյցարիան և Ռուսաստանի Դաշնությունը ներկայացնող 50 անվանի ու երիտասարդ գիտնականների աշխատանքները:

In the first issue of the «Scientific Artsakh» journal in 2019 the works on topical issues of social sciences by 50 well-known and young scientists representing Republic of Armenia, Republic of Artsakh, Republic of Belarus, the Islamic Republic of Iran, Poland, Switzerland and the Russian Federation are published.

В первом номере за 2019-ый год журнала «Научный Арцах» опубликованы работы по актуальным проблемам общественных наук, авторами которых являются 50 известные и молодые ученые, представляющие Республику Армения, Республику Арцах, Республику Беларусь, Исламскую Республику Иран, Польшу, Швейцарию и Российскую Федерацию.

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ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ, JURISPRUDENCE, ЮРИСПРУДЕНЦИЯ

SELF-DETERMINATION: A FOUNDATIONAL PRINCIPLE OF TODAY'S INTERNATIONAL ORDER THAT CONFIRMS ARTSAKH'S RIGHT TO INDEPENDENCE*

UDC 341.01

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The article deals with the issue of the right of self-determination as a key principle of a peaceful, democratic and equitable international order. Its realization constitutes an effective conflict-prevention strategy and a contribution to local, regional and international stability. The precedents of the given principle realization for several countries, such as Estonia, Latvia, Lithuania, Slovenia, Croatia, Bosnia and Herzegovina, Kosovo are viewed and the possibility of the same right application for Artsakh people is discussed based on the corresponding regulatory and legal framework of the international law.

It is emphasized that the people of Artsakh have the same right of self-determination as the people of Slovenia, Croatia, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Estonia, Latvia and Lithuania, all of whom live today as independent peoples. Armenians must not be subject to discrimination. Thus, the solution for the Karabakh conflict is to recognize the primacy of the right of self-determination worldwide and to work for peaceful cooperation among all peoples and nations.

Keywords: *Territorial integrity, self-determination, international law, violation of international law, UN Charter, Nagorno Karabakh, discrimination, military confrontation.*

The progressive development of international law responds to economic, social and political needs of peoples and nations. New conventions, UN Security Council and General Assembly resolutions, judgments and advisory opinions of the International Court of Justice continuously advance international law, as does the actual practice of States, which generates legal precedents.

The principle of self-determination in the international law has evolved substantially since the adoption of the UN Charter in 1945. It is no longer what it was at the time of the GA Resolutions on decolonization in the late 1950's and 1960's[293], or at the time of the Advisory

* Հոդվածը ներկայացվել է 08.05.2019թ., գրախոսվել՝ 20.05.2019թ., տպագրության ընդունվել՝ 17.06.2019թ.:

[293] https://www.un.org/en/decolonization/ga_resolutions.shtml.

Opinions of the International Court of Justice respecting Namibia[294], Western Sahara[295], the Wall built by Israel on Palestinian land[296], or the judgment in the contentious case *Portugal v. Australia* concerning the people of Timor Leste[297]. The practical application of the right of self-determination experienced an substantial leap forward when the Soviet Union and Yugoslavia dissolved into multiple State entities, and when Czechoslovakia split into the Czech Republic and the Slovak Republic – in an act of friendly divorce.

The tension between the principle of territorial integrity of States and the right of peoples of self-determination was partly resolved in the watershed advisory opinion of the ICJ on the Legality of Kosovo's declaration of independence[298], which clarified that the principle of territorial integrity is for external application, and can be invoked to reject annexations of foreign territory, to prevent country A from encroaching on the territorial integrity of country B. The principle, however, has no internal application and cannot be invoked to prohibit the exercise of the right of self-determination by peoples who do not want to continue living under the sovereignty of other peoples, frequently of a different ethnic, religious or linguistic origin. This right of self-determination, anchored not only in the UN Charter but also in common article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, is recognized as peremptory international law (*jus cogens*) by most international law professors[299].

Paragraph 80 of the Advisory Opinion elucidates the scope of application of the principle of territorial integrity in a manner that will have increasing application and already has been applied in numerous parts of the world, even though there are still some international law "negationists", who refuse to recognize that the Kosovo Advisory Opinion and the reality of Kosovo's existence as an independent entity gave rise to valid international law precedents, and that in the name of the noblest goal of the United Nations -- namely promotion and protection of local, regional and international peace -- the right of self-determination necessarily must take precedence over the principle of territorial integrity:

"Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that :"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." In General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", which reflects customary international law (Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference)

[294] https://www.icj-cij.org/files/case-related/53/5597.pdf.
[295] https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf.
[296] https://www.icj-cij.org/en/case/131.
[297] https://www.icj-cij.org/en/case/84/judgments.
[298] https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.
[299] McWhinney, Edward (2007). Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-Building and the Alternative, Federal Option. Martinus Nijhoff Publishers. p. 8. ISBN 9004158359.

stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States"[300].

Paragraphs 118 and 119 of the Advisory Opinion conclude that notwithstanding the text of Security Council Resolution 1244, which reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia",[301] and notwithstanding the commitment to reach a political settlement between the peoples of Kosovo and Serbia, the Court observed that the term "political settlement" is subject to various interpretations, and concluded "that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition… against declaring independence. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999)."

It is futile to pretend that Kosovo is "*sui generis*" and that its emergence as a new State did not set a precedent. The genie is out of the bottle and cannot be forced back in. On the other hand, it is unnecessary to go along the mavericks of international law who contend that *faits accomplis* necessarily evolve into law according to the postulate *ex factis oritur jus.* In any event, we cannot ignore the reality that *de facto* States do exist, that peoples do succeed in separating from former State entities and do function within the international community as new State entities, even if they do not enjoy international recognition or membership in the United Nations. Recognition remains a desirable but is not a constitutive element of statehood. This applies clearly to the people of Nagorno Karabakh and justifies their existence as an independent State entity, which, according to the right of self-determination of peoples, certainly can be reunited with Armenia, if it so wishes.

While the UN Charter serves as a kind of world Constitution and article 103 stipulates that the Charter prevails over all other international agreements, the political narrative does not always conform to this legality. There is a degree of "fragmentation" in international law, which States invoke self-servingly to apply international law selectively, violating other general principles of law -- not by accident, but deliberately and calculatingly, just to see how far they can go and whether they can get away with it. Any historical observer will confirm that the application of international law *à la carte* was not uncommon in the past. What has always been missing is an effective enforcement mechanism, and in their absence States will continue breaching international law with impunity, even in matters of *jus cogens* like flouting the prohibition of the use of force laid down in article 2(4) UN Charter, or flouting the right of self-determination – e.g. of the Igbo people of Biafra[302], that was crushed by Nigeria in the war of 1967-70, or the Tamil population of Sri Lanka[303], who were similarly massacred by the Singhalese government of Sri Lanka, while the world community watched.

There is no doubt that in the international law of the 21st century, the right of self-determination plays and will continue to play a crucial role. It is a key principle of a peaceful, democratic and equitable international order. Its realization constitutes an effective conflict-prevention strategy and a contribution to local, regional and international stability.

[300] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.

[301] https://www.un.org/Docs/scres/1999/sc99.htm.

[302] Toyin Falola, *Writing the Nigeria-Biafran War*, Boydell and Brewer, 2016. https://www.jstor.org/stable/10.7722/j.ctt1c3gxm9.

[303] https://www.bbc.com/news/world-south-asia-12004081.

My 2014 report to the General Assembly[304] is devoted to the theory and practice of the right of self-determination and formulates the criteria how and under what conditions the right can be implemented. The report demonstrates that countless wars since 1945 found their origin in the unjust denial of self-determination, and argues that the United Nations should have exercised its responsibilities under Chapter VII of the UN Charter and adopted preventive measures to avert the outbreak of hostilities that have endangered local, regional and international peace. Pursuant to the UN's overarching objective of achieving sustainable peace, the UN could and should offer its good offices to facilitate dialogue and, where appropriate, organize self-determination referenda. It reflects badly on the United Nations, and on the international community in general, that UN self-determination referenda in Ethiopia/Eritrea, East Timor, and Sudan were organized only after tens of thousands of human beings had been killed.

Rights holders of self-determination are "all peoples". Common Article 1(1) of the International Covenant on Civil and Political Rights and of the Covenant on Economic, Social and Cultural Rights, stipulates that "All peoples have the right of self-determination." Neither the text nor the *travaux preparatoires* limit the scope of "peoples" to those living under colonial rule or otherwise under occupation. Pursuant to article 31 of the Vienna Convention on the Law of Treaties, "All peoples" means just that -- and cannot be arbitrarily restricted. Admittedly, the concept of "peoples" has never been conclusively defined, notwithstanding its frequent use in United Nations fora. Participants at a UNESCO expert meeting on self-determination in 1998 endorsed what has been called the "Kirby definition", recognizing as a "people" a group of persons with a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, or common economic life. To this should be added a subjective element: the will to be identified as a people and the consciousness of being a people. A people must be numerically greater than just "a mere association of individuals within the State". Their claim becomes more compelling if they have established institutions or other means of expressing their common characteristics and identity. In plain language, the concept of "peoples" embraces ethnic, linguistic and religious minorities, in addition to identifiable groups living under alien domination, or under military occupation, and indigenous groups who are deprived of autonomy or sovereignty over their natural resources. Without a doubt, the people of Nagorno Karabagh are a "people" for purposes of article 1 of the ICCPR.

Pursuant to common article 1(3) of the Covenants, duty bearers of the right of self-determination are all States parties to the Covenants, who are not merely prohibited from interfering with the exercise of the right, but "shall promote" its realization proactively. In other words, States cannot pick and choose according to their whims and do not have the prerogative to grant or deny self-determination claims *ad libitum*. They must not only respect the right, but implement it. Moreover in modern international law, self-determination is an *erga omnes* commitment stipulated in numerous articles of the UN Charter and in countless Security Council and General Assembly resolutions. The empowerment of peoples to enjoy human rights without discrimination and to exercise a degree of self-government is crucial for national and international stability. Otherwise, a significant potential for conflict remains.

Even though self-determination has emerged as a *jus cogens* right, superior to many other international law principles, including territorial integrity, it is not self-executing. There have been many legitimate claimants to the right of self-determination who have seen their right denied with impunity by occupying powers, notably the Kurds, the Sahraouis, the Palestinians, the Kashmiris, the Catalans, the Corsicans. Others possessing all the elements of entitlement, including the Igbos of Biafra and the Tamils of Sri Lanka, have valiantly fought for their culture and identity and suffered disenfranchisement and even genocide. Others, like the Bangladeshis,

[304] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/497/95/PDF/N1449795.pdf? Open.

did succeed in obtaining their independence from Pakistan, but they had to fight a nearly genocidal war in 1971, with estimates of civilian deaths ranging from 300,000 to three million human beings.

Over the past decades, some peoples have achieved self-determination through effective separation from the State entities with which they had hitherto been associated, but their international status remains inchoate because of the political bickering among the great powers and consequent lack of international recognition. Among these are the Russian-Ukrainian entities of Lugansk and Donetsk, the Republic of Pridnestrovia (Transnistria-Moldavia), the Republic of Artsakh (Nagorno Karabagh), Abkhazia, and Southern Ossetia. One day, when the Permanent members of the Security Council decide to give precedence to human rights over geopolitical considerations, there will be a political solution whereby the United Nations will welcome into its ranks not only the Kosovars, but also the Kurds, the Biafrans, the Abkhazians, Ossetians, Catalans -- and the people of Artsakh.

Focusing on the historical conflict concerning the Republic of Artsakh[305]

When evaluating the self-determination aspirations of different peoples, many facets have to be examined. First and foremost the will of the people today. And in order to determine that, it is important to conduct objective investigations and rely on referenda far from propaganda and manufactured consent[306]. It is crucial that the United Nations and the OSCE take a more active role in organizing and monitoring referenda, so as to assure the democratic legitimacy of the process.

It is also important to know the history of each people aspiring to self-determination. Alas, most politicians seldom have historical knowledge, and when they reject a self-determination claim out of hand, it is frequently because they have no clue about hundreds or even thousands of years of history that have contributed to a specific identity, culture, traditions and hence sense of belonging together and a desire not to be subjected to foreign rule.

The history of Nagorno Karabagh goes back thousands of years and its Armenian population have an identity that they have nurtured and developed through the centuries. When the Russian empire annexed Karabagh in 1805, they found a "people" with a defined identity that continued through the 19th century until the collapse of Tsarist rule in 1917, leading to the emergence of the briefly independent republics of Armenia and Azerbaijan. Historically it is from this time that Azerbaijan asserts claims over the more than 300,000 Armenians of Karabagh, who had declared the region self-governing and, in August 1919, by decision of the Karabagh National Council, entered into a provisional treaty with the Azerbaijani government, which was repeatedly violated by Azerbaijan, culminating in March 1920 with the massacre of some 20,000 Armenians in Karabagh's former capital Shushi. Thereupon the Karabagh Assembly denounced the treaty and pronounced its union with Armenia. Indeed, from 1918 to 1920 Karabagh possessed all the necessary attributes of statehood – population, territory, government, relations with other State entities, as well as an army. The League of Nations neither recognized the sovereignty of Azerbaijan over Karabagh nor accepted Azerbaijan as a member state. In November 1920 the sovietised government of Azerbaijan initially recognized Karabagh as a part of Armenia, but soon reversed the decision and started exercising authority over the territory, while the Soviet Republic of Armenia declared Karabagh as it integral part on the basis of the will of its population. In 1923 Karabagh had a population of 158,000 – 95 percent of which were Armenians – and Soviet Azerbaijan unilaterally dismembered the territory so as to geographically separate it from Armenia, a separation giving rise to protests

[305] https://www.cfr.org/interactive/global-conflict-tracker/conflict/nagorno-karabakh-conflict.
[306] Edward Herman and Noam Chomsky, *Manufacturing Consent,* Pantheon books, 1988.

both from Karabagh and from the Republic of Armenia. In 1966 a petitions campaign led to a request by Armenia for the return of Karabagh.

31 years ago, in February of 1988, the Karabagh Armenians began to break free from Azerbaijani control. On 20 February 1988, the People's Deputies of the Nagorno Karabagh Autonomous Oblast officially requested the USSR to transfer Karabagh to Armenian sovereignty. The Azerbaijani response was a military suppression of the Armenians in Sumgait. On 15 June the Armenian Supreme Soviet approved Karabaghs proposal, but on 18 July 1988 the USSR Supreme Soviet decided to leave Karabagh within Azerbaijan. On 1 December 1989 at the joint session of Parliaments of Armenia and Karabagh, the reunification was decided and the Karabagh assembly voted for secession from Azerbaijan, a decision which the Supreme Soviet of Azerbaijan declared to be illegal.

In 1989 according to the official USSR census, Karabagh had 189,000 inhabitants of whom 76.9 percent were Armenians and 21.5 percent Azerbaijanis, an intermingling that reflected the demographic manipulations that had occurred during the Soviet period, and which in 1991 were intensified by the destruction of Armenian villages accompanied by forced population transfers[307]. On 18 October 1991 the Azerbaijani Republic declared itself independent from the Soviet Union and adopted a resolution abolishing the Nagorno Karabagh Autonomous Oblast. On 10 December 1991 the Nagorno Karabagh Republic held a referendum on independence in the presence of international observers, resulting overwhelmingly in independence, and on 6 January 1992 the Parliament declared independence. Thereupon Azerbaijan conducted indiscriminate bombardment and shelling of Karabagh and launched ground attacks, occupying half the territory by the summer of 1992. The Karabagh Armenians broke the Azerbaijani blockade and established a land link with Armenia across the Lachin region. On 20 September 1992 the Nagorno Karabagh Parliament requested recognition from the United Nations and the Commonwealth of Independent States. Following a negotiated cease-fire in 1994, Nagorno Karabagh continued demonstrating its ability to maintain governmental institutions, political parties and free local and parliamentary elections. On 28 December 1994 the post of President of the Republic was established and in November 1996 national elections were held with the presence of international observers.

The mediation by the Russian Federation and the Commonwealth of Independent States led to the establishment of a cease-fire in May 1994. Meanwhile the Security Council had adopted resolutions 822, 853, 874 and 884 calling for cessation of all hostilities and accompanied by proposals for a peaceful settlement[308]. The OSCE and the Minsk Group contributed by establishing a multinational OSCE peacekeeping force to support the cease fire- At the 1996 Lisbon Summit OSCE chairman made a non-binding statement that a settlement of the conflict should be based on the territorial integrity of the Republics of Armenia and Azerbaijan. This statement proved counter-productive for the peace process since ever since Azerbaijan has insisted on its fictional territorial integrity and has invoked it to justify its blockade of Nagorno Karabagh.

On 14 March 2008, the UN General Assembly adopted resolution 62/243 on Nagorno Karabagh[309], condemning the "occupation" of Nagorno Karabagh by Armenia. This rather unbalanced resolution was adopted by a mere 39 votes in favour, 7 against and 100 abstentions, while 46 States did not even vote, because they were not in the room. The resolution reaffirmed "continued respect and support for the sovereignty and territorial integrity" of Azerbaijan "within its internationally recognized borders". It is clear that the ICJ's Advisory Opinion on

[307] Alfred de Zayas, "Forced Population Transfer" in *Max Planck Encyclopedia of Public International Law*, Oxford, 2012, Vol. IV, pp. 165-175.

[308] https://karabakhfacts.com/karabakh-and-un-security-council-resolutions/ https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/List_of_United_Nations_Security_Council_resolutions_on_the_Nagorno-Karabakh_conflict.html.

[309] https://www.un.org/press/en/2008/ga10693.doc.htm.

Kosovo renders this Resolution obsolete. On 26 September 2018 Secretary General Antonio Guterres encouraged the Armenians and Azerbaijanis to take confidence-building steps and to continue peaceful dialogue.[310]

At this juncture it is useful to recall that neither the right of self-determination nor the principle of territorial integrity is absolute. Both must be applied in the context of the UN Charter and human rights treaties so as to serve the purposes and principles of the United Nations and promote and protect the human dignity of all persons concerned.

It is undisputable that international law is not a static concept and that it continues to evolve through practice and precedents. The independence of the former Soviet republics and the secession of the peoples of the former Yugoslavia created important precedents for the implementation of self-determination. These precedents cannot be ignored when modern self-determination disputes arise. It is not possible to say yes to the self-determination of Estonia, Latvia, Lithuania, Slovenia, Croatia, Bosnia and Herzegovina, Kosovo, but then say no to the self-determination of the people of Abkhazia, Southern Ossetia or Nagorno Karabagh. All these peoples have the same human rights and must not be discriminated against. As in the case of the successful claimants, these peoples also unilaterally declared independence. There is no justification whatever deny them recognition by applying self-determination selectively and making frivolous distinctions that have no base in law or justice. Unquestionably, the principle of territorial integrity was significantly weakened when many countries, especially European countries, not only accepted the destruction of the territorial integrity of the Soviet Union, but rushed to recognize the unilateral declaration of independence of its parts, ditto with regard to the unilateral declarations of the Yugoslav republics. Most significantly, in 1999 NATO countries undertook a frontal attack on the territorial integrity of the Federal Republic of Yugoslavia, when it bombarded Yugoslavia without any resolution of the UN Security Council under Chapter VII. This massive violation of international law has remained unpunished to this day. But one clear consequence of that war was the tacit consent to the abandonment of the sacrosanct principle of territorial integrity. Although the "remedial theory" of self-determination may have some appeal, especially if one considers the universal desire for justice and the general rejection of impunity for gross human rights violations, it is difficult to apply "remedial self-determination", because there is no objective measuring-stick and no one has defined where lies the threshold of violation under which self-determination would not be envisaged and above which it would require separation as *punishment*. It is far more practical to see self-determination as a fundamental human entitlement, not dependent on anyone's wrongdoing. It is a stand-alone right. All peoples have the right because they are peoples with their own culture, identity, traditions – not because someone committed a crime or otherwise violated international law. The right attaches to peoples by their very ontology. Similarly, the doctrine of "responsibility to protect" does not help our analysis, because R2P is highly subjective and can be easily abused, as the debate in the General Assembly on 23 July 1999 amply demonstrated[311].

The aspiration of peoples to fully exercise the right of self-determination did not end with decolonization. There are many indigenous peoples, non-self-governing peoples and populations living under occupation who still strive for self-determination. Their aspirations must be taken seriously for the sake of conflict prevention. The post-colonial world left a legacy of frontiers that do not correspond to ethnic, cultural, religious or linguistic criteria. This is a continuing source of tension that may require adjustment in keeping with Article 2 (3) of the Charter. The doctrine of *uti possidetis* is obsolete and its maintenance in the twenty-first century without possibility of peaceful adjustments may perpetuate human rights violations. In any event, *uti possidetis* is clearly incompatible with self-determination, and any treaty pretending to maintain

[310] https://www.un.org/press/en/2018/sgsm19266.doc.htm.

[311] See my 2012 report to the General Assembly, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/457/95/PDF/N1245795.pdf?OpenElement, para 14.

it against self-determination would be void under article 64 Vienna Convention on the Law of Treaties[312].

Pursuant to the UN Charter, the United Nations has a crucial role to play, and States should appeal to the Secretary General to take the initiative and assist in the preparation of models of autonomy, federalism and, eventually, referenda. A reliable method of determining public opinion and avoiding manufactured consent must be devised so as to ensure the authenticity of the expression of public will in the absence of threats of or the use of force. Long-standing historical links to a territory or region, religious links to sacred sites, the consciousness of the heritage of prior generations as well as a subjective identification with a territory must be given due weight. Agreements with persons who are not properly authorized to represent the populations concerned, and agreements with puppet representatives are *a fortiori* invalid. In the absence of a process of good-faith negotiation or plebiscites, there is a danger of armed revolt.

In order to ensure sustainable internal and external peace in the twenty-first century, the international community must react to early warning signs and establish conflict-prevention mechanisms. Facilitating dialogue between peoples and organizing referenda in a timely fashion are tools to ensure the peaceful evolution of national and international relations. Inclusion of all stakeholders must be the rule, not the exception.

The people of Artsakh have the same right of self-determination as the people of Slovenia, Croatia, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Estonia, Latvia and Lithuania, all of whom live today as independent peoples. Armenians must not be subject to discrimination. And yet geopolitical considerations frequently contravene human rights and government lawyers rush to make all sorts of specious arguments to escape clear *erga omnes* obligations to respect the right of self-determination and to condemn the use of force. Recent statements from Baku give reason to concern, because there are those in Azerbaijan who would use force to destroy the independence of the people of Artsakh[313]. In February 2019 Azerbaijan's ambassador to Ukraine, Azer Khudiev, said that Azerbaijan could use force to restore its territorial integrity: "We don't see constructive steps by the Armenian leadership regarding the conflict's settlement", adding that while Baku desires a peaceful settlement, military options are not off the table. Military options would, of course, violate Article 2(4) of the UN Charter and would constitute the crime of aggression under the Rome Statute to the International Criminal Court[314]. This, however, would not be enough to deter Baku from such dangerous adventures. The best deterrence is history: In August 2008 Georgia thought that it was possibly to bombard the civilian population of South Ossetia and take it over by force[315]. The response was immediate. Russia pushed back Georgia's aggression and formally recognized South Ossetia and Abkhazia as independent States. I doubt whether Azerbaijan wants to risk a military confrontation with Russia. Bottom line: as argued above, the solution is to recognize the primacy of the right of self-determination worldwide and to work for peaceful cooperation among all peoples and nations.

In conclusion, let us celebrate the realization of the right self-determination of all peoples on this planet, let us promote it as a conflict-prevention strategy. Indeed, self-determination is an expression of democracy, as democracy is a form of self-determination**.**

[312] https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

[313] https://caspiannews.com/news-detail/azerbaijani-envoy-says-force-may-be-used-to-end-nagorno-karabakh-conflict-2019-2-21-12/.

[314] https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/default.aspx.

[315] https://www.rferl.org/a/1069982.html;https://www.youtube.com/watch?v=MzglBQep5sI; https:// www.youtube.com/watch?v=R-Oj6vx8Q2Q; https://www.foreignaffairs.com/articles/russia-fsu/2014-08-18/why-ukraine-crisis-west-s-fault.

ANNEX I

Excerpts from my 2014 report to the General Assembly A/69/272

63. Any process aimed at self-determination should be accompanied by participation and consent of the peoples concerned. It is possible to reach solutions that guarantee self-determination within an existing State entity, e.g. autonomy, federalism and self-government.[316] If there is a compelling demand for separation, however, it is most important to avoid the use of force, which would endanger local, regional and international stability and further erode the enjoyment of other human rights. Therefore, good-faith negotiations and the readiness to compromise are necessary; in some cases these could be coordinated through the good offices of the Secretary-General or under the auspices of the Security Council or the General Assembly.

64.To address the multiple and complex issues involved in achieving self-determination, a number of factors have to be evaluated on a case-by-case basis. In this context, it would be useful if the General Assembly were to request the International Court of Justice to issue advisory opinions on the following questions: What are the criteria that would determine the exercise of self-determination by way of greater autonomy or independence? What role should the United Nations play in facilitating the peaceful transition from one State entity to multiple State entities, or from multiple State entities to a single entity?

65. Some of the factors to be taken into consideration in the context of unification, autonomy or secession are described in the following paragraphs.

66. Self-determination has emerged as a *jus cogens* norm and is enshrined in Article 1 of the Charter as one of the purposes of the Organization. The right is not extinguished with lapse of time because, just as the rights to life, freedom and identity, it is too important to be waived. All manifestations of self-determination are on the table: from a full guarantee of cultural, linguistic and religious rights, to various models of autonomy, to special status in a federal State, to secession and full independence, to unification of two State entities, to cross-border and regional cooperation.

67.The implementation of self-determination is not exclusively within the domestic jurisdiction of the State concerned, but is a legitimate concern of the international community.

68.The rule of law entails more than positivism, which is seldom adequate to solve complex political situations that require flexibility and compromise. More important is the spirit of the law, those principles that underlie the codification of norms as an approximation of justice …

74. A consistent pattern of gross and reliably attested violations of human rights against a population negates the legitimacy of the exercise of governmental power. In case of unrest, dialogue must first be engaged in the hope of redressing grievances. States may not first provoke the population by committing grave human rights abuses and then invoke the right of self-defence in justification of the use of force against them. That would violate the principle of

[316] See the rationale for the judgement of the Supreme Court of Canada concerning Québec, available from www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=25506.

estoppel (*ex injuria non oritur jus*), a general principle of law recognized by the International Court of Justice. Although all States have the right of self-defence from armed attack under Article 51 of the Charter, they also have the responsibility to protect the life and security of all persons under their jurisdiction. No doctrine, not that of territorial integrity nor that of self-determination, justifies massacres; neither doctrine can derogate from the right to life. Norms are not mathematics and must be applied with flexibility and a sense for proportionality in order to reduce and prevent chaos and death.

75. Secession presupposes the capacity of a territory to emerge as a functioning member of the international community. In this context, the four statehood criteria of the Montevideo Convention on the Rights and Duties of States (1933) are relevant: a permanent population; a defined territory; government; and the capacity to enter into relations with other States.[317] The size of the population concerned and the economic viability of the territory are also relevant. A democratic form of government that respects human rights and the rule of law strengthens the entitlement. The recognition of a new State entity by other States is desirable but it has declaratory, not constitutive, effect.

76. When a multi-ethnic and/or multi-religious State entity is broken up, and the resulting new State entities are also multi-ethnic or multi-religious and continue to suffer from old animosities and violence, the same principle of secession can be applied. If a piece of the whole can be separated from the whole, then a piece of the piece can also be separated under the same rules of law and logic. The main goal is to arrive at a world order in which States observe human rights and the rule of law internally and live in peaceful relations with other States.

Annex II

Excerpts from my 2018 report to the UN Human Rights Council A/HRC/37/63

Principles of international order

14. The reports of the Independent Expert have been guided by numerous General Assembly Resolutions, notably resolutions 2625 and 3314, which, together with the UN Charter, propound a vision of a democratic and equitable international order. Based on the work of the mandate, the following should be generally recognized as principles of international order:

(a) *Pax optima rerum*.[318] The noblest Principle and Purpose of the United Nations is promoting peace, preventively and in case of armed conflict, facilitating peace-making, reconstruction and reconciliation.

(b) The UN Charter takes priority over all other treaties (UN Charter Article 103).

(c) Human dignity is the source of all human rights, which, since 1945, have expanded into an international human rights treaty regime, many aspects of which have become customary international law. The international human rights treaty regime takes priority

[317] See www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xm.
[318] Peace is the highest good (motto of the Peace of Westphalia 1648).

over commercial and other treaties (A/HRC/33/40 paras.18-42). The right of self-determination of peoples, constitutes jus cogens and is affirmed in the UN Charter and in article 1 common to the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Rights holders of self-determination are peoples. Duty bearers are States. The exercise of self-determination is an expression of democracy and attains enhanced legitimacy when a referendum is conducted under UN auspices. Although the enjoyment of self-determination in the form of autonomy, federalism, secession or union with another State entity is a human right, it is not self-executing. Timely dialogue for the realization of self-determination is an effective conflict-prevention measure (A/69/272, paras. 63-77).

(d) Statehood depends on four criteria: population, territory, government and ability to enter into relations with other countries. While international recognition is desirable, it is not constitutive but only declaratory. A new State is bound by the principles of international order, including human rights.

(e) Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. Already in 1510 the Spanish Dominican Francisco de Vitoria[319], Professor of law in Salamanca, stated "All nations have the right to govern themselves and can accept the political regime they want, even if it is not the best."[320]

(f) Peoples and nations possess sovereignty over their natural resources. If these natural resources were "sold" or "assigned" pursuant to colonial, neo-colonial or "unequal treaties" or contracts, these agreements must be revised to vindicate the sovereignty of peoples over their own resources.

(g) The principle of territorial integrity has external application, i.e. State A may not invade or encroach upon the territorial integrity of State B. This principle cannot be used internally to deny or hollow-out the right of self-determination of peoples, which constitutes a jus cogens right (A/HRC/33/40).

(h) State sovereignty is superior to commercial and other agreements (A/HRC/33/40).

(i) States 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 (UN Charter Article 2(4)).

(j) States have a positive duty to negotiate and settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered. (UN Charter Art. 2(3)).

(k) States have the duty to refrain from propaganda for war (Article 20(1) ICCPR).

(l) States shall negotiate in good faith for the early conclusion of a universal treaty on general and complete disarmament under effective international control (A/HRC/27/51).

(m) States may not organize or encourage the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

[319] http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1325&context=ilj.

[320] http://www.academia.edu/7222085/The_Foundations_of_Human_Rights_Human_natureand_jus_gentium_as_articulated_by_Francisco_de_Vitoria.

(n) States must refrain from intervening in matters within the domestic jurisdiction of any State.

(o) No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

(p) No State may organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state. (ICJ 1986 Judgment in Nicaragua v. United States[321])

(q) The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

(r) The ontology of States is to legislate in the public interest. The ontology of business and investment is to take risks to generate profit. A treaty that stipulates one-way protection for investors and establishes arbitration commissions that encroach on the regulatory space of States is by nature *contra bonos mores*. Hence, the Investor-State-Dispute-Settlement mechanism cannot be reformed. It must be abolished (A/HRC/30/44 and A/70/285).

(s) States must respect not only the letter of the law, but also the spirit of the law, as well as general principles of law (ICJ Statute, article 38), such as good faith, the impartiality of judges, non-selectivity, uniformity of application of law, the principle of non-intervention, estoppel (*ex injuria non oritur jus*), the prohibition of abuse of rights and the prohibition of contracts or treaties that are *contra bonos mores*. It is not only the written law that stands, but the broader principles of natural justice as already recognized in Sophocles' Antigone, affirming the unwritten laws of humanity (αγραφος νομος), and the concept of a higher moral law prohibiting unconscionably taking advantage of a weaker party, which could well be considered a form of economic neo-colonialism or neo-imperialism (Annex II).

(t) States have the duty to cooperate with one another, irrespective of the differences in their political, economic, and social systems, in order to maintain international peace and security and to promote international economic stability and progress. To this end, States are obliged to conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention. State should promote a culture of dialogue and mediation.

(u) The right to access to reliable information is indispensable for the domestic and international democratic order. The right of freedom of opinion and expression necessarily includes the right to be wrong. "Memory laws"[322] which pretend to crystalize history into a politically correct narrative, and penal laws enacted to suppress dissent are anti-democratic, offend academic freedom and endanger not only domestic but also international democracy (A/HRC/24/38, para 37).

(v) States have a duty to protect and preserve nature and the common heritage of mankind for future generations.

[321] http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.
[322] United Nations Human Rights Committee, General Comment 34, paragraph 49.

ԻՆՔՆՈՐՈՇՈՒՄ. ԺԱՄԱՆԱԿԱԿԻՑ ՄԻՋԱԶԳԱՅԻՆ ԿԱՐԳԻ ՀԻՄՆԱՐԱՐ ՍԿԶԲՈՒՆՔ, ՈՐԸ ՀԱՍՏԱՏՈՒՄ Է ԱՐՑԱԽԻ ԱՆԿԱԽՈՒԹՅԱՆ ԻՐԱՎՈՒՆՔԸ

ԱԼՖՐԵԴ ԴԵ ԶԱՅԱՍ

ՄԱԿ-ի ժողովրդավարական ևարդար միջազգային կարգի խթանման նախկին անկախ փորձագետ (2012-2018), ի.գ.դ., Հարվարդ, փ.գ.դ., Գոթինգեն, ՄԱԿ-ի Մարդու իրավունքների կոմիտեի նախկին քարտուղար, Ժնևի դիվանագիտության դպրոցի իրավունքի պրոֆեսոր, ՄԱԿ-ի Մարդու իրավունքների գերագույն հանձնակատարի վարչության հանրագրերի բաժնի նախկին պետ, 9 գրքի հեղինակ, այդ թվում՝ «Հայոց ցեղասպանությունը և ցեղասպանության մասին 1948 թվականի կոնվենցիայի արդիականությունը» (Haigazian University Press, Beirut, 2010),

ԱՄՆ և Շվեյցարիայի քաղաքացի, բնակվում է Ժնևում, Շվեյցարիա

Հոդվածում քննարկվում է ինքնորոշման իրավունքի՝ որպես խաղաղ, ժողովրդավարական և արդար միջազգային կարգի առանցքային սկզբունքի հարցը, դրա իրականացումը, հակամարտությունների կանխարգելման արդյունավետ ռազմավարությունն ու ներդրումը տեղական, տարածաշրջանային ու միջազգային մակարդակներում կայունության ապահովման գործում: Դիտարկվում են այս սկզբունքի իրագործման նախադեպերը մի շարք երկրներում, ինչպիսիք են Էստոնիան, Լատվիան, Լիտվան, Սլովենիան, Խորվաթիան, Բոսնիա և Հերցեգովինան, Կոսովոն, ինչպես նաև քննարկվում է միջազգային իրավունքի համապատասխան նորմատիվ-իրավական բազայի հիման վրա ինքնորոշման իրավունքի կիրառման հնարավորությունն Արցախի ժողովրդի համար:

Ընդգծվում է, որ Արցախի ժողովուրդն ունի ինքնորոշման նույն իրավունքը, ինչ Սլովենիայի, Խորվաթիայի, Բոսնիա և Հերցեգովինայի, Կոսովոյի, Մակեդոնիայի, Չեռնոգորիայի, Էստոնիայի, Լատվիայի և Լիտվայի ժողովուրդները, որոնք այսօր ապրում են որպես անկախ ժողովուրդներ. հայերը չպետք է խտրականության ենթարկվեն: Այսպիսով՝ ղարաբաղյան հակամարտության լուծումն ամբողջ աշխարհում ինքնորոշման իրավունքի գերակայության ճանաչման և բոլոր ժողովուրդների միջև խաղաղ համագործակցության ջանքերի մեջ է:

Բանալի բառեր՝ *տարածքային ամբողջականություն, ինքնորոշում, միջազգային իրավունք, միջազգային իրավունքի խախտում, ՄԱԿ-ի կանոնադրություն, Լեռնային Ղարաբաղ, խտրականություն, ռազմական դիմակայություն:*

САМООПРЕДЕЛЕНИЕ: ОСНОВОПОЛАГАЮЩИЙ ПРИНЦИП СОВРЕМЕННОГО МЕЖДУНАРОДНОГО ПОРЯДКА, ПОДТВЕРЖДАЮЩИЙ ПРАВО АРЦАХА НА НЕЗАВИСИМОСТЬ

АЛЬФРЕД ДЕ ЗАЙАС

Бывший независимый эксперт ООН по поощрению демократического и справедливого международного порядка (2012-2018), доктор юридических наук (Гарвард), доктор философии (Геттинген), бывший секретарь Комитета ООН по правам человека, профессор права Женевской школы дипломатии, бывший начальник отдела петиций Управления Верховного комиссара ООН по правам человека, автор 9 книг, в том числе книги «Геноцид армян и актуальность Конвенции 1948 года о геноциде» (Haigazian University Press, Beirut, 2010), гражданин США и Швейцарии, проживает в Женеве, Швейцария

В статье рассматривается вопрос о праве на самоопределение как ключевом принципе мирного, демократического и справедливого международного порядка. Его реализация представляет собой эффективную стратегию предотвращения конфликтов и вклад в обеспечение стабильности на местном, региональном и международном уровнях. Рассматриваются прецеденты реализации данного принципа для ряда стран, таких как Эстония, Латвия, Литва, Словения, Хорватия, Босния и Герцеговина, Косово, и обсуждается возможность применения того же права для народа Арцаха на основе соответствующей нормативно-правовой базы международного права.

Подчеркивается, что народ Арцаха имеет такое же право на самоопределение, как и народы Словении, Хорватии, Боснии и Герцеговины, Косово, Македонии, Черногории, Эстонии, Латвии и Литвы, которые сегодня живут как независимые народы. Армяне не должны подвергаться дискриминации. Таким образом, решение карабахского конфликта заключается в признании приоритета права на самоопределение во всем мире и в усилиях по мирному сотрудничеству между всеми народами и нациями.

Ключевые слова: территориальная целостность, самоопределение, международное право, нарушение международного права, Устав ООН, Нагорный Карабах, дискриминация, военное противостояние.