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## NAGORNO-KARABAGH'S RIGHT TO POLITICAL INDEPENDENCE UNDER INTERNATIONAL LAW: AN APPLICATION OF THE PRINCIPLE OF SELF-DETERMINATION

[T]he struggle of Artsakh [Nagorno-Karabagh] is an autonomous struggle for freedom based on the principles of international law. Those principles of international law are quite abstract; in and by themselves, they do not resolve the problem, of course, especially if there is no interested power standing behind them. But these principles are recognized by the whole world and no state can ignore them; these principles constitute the legal and moral foundation for a given national liberation struggle.

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For Azerbaijan the issue of Karabakh is a matter of ambition, for the Armenians of Karabakh it is a matter of life and death.

Andrei Sakharov<sup>2</sup>

### I. INTRODUCTION

In February of 1988 massive demonstrations were held in Yerevan, the capital of Soviet Armenia.<sup>3</sup> According to some reports, as many as one million people--nearly one-third of Soviet Armenia's population--participated in the week-long public protests, despite \*184 Moscow's efforts to stop them.<sup>4</sup> The unprecedented protests were organized to demand that Nagorno-Karabagh (Karabagh),<sup>5</sup> an "autonomous region" within Soviet Azerbaijan, be united with Soviet Armenia.<sup>6</sup> Since the protests, the conflict over Karabagh has been a frequent news item of the international media, and it has escalated from a political struggle to an undeclared war between the Armenians of Karabagh and Azerbaijan.<sup>7</sup>

This Comment will apply principles of international law to an analysis of the Karabagh conflict. Part II provides historical back-ground of the region and the conflict. Part III examines the substantive legal issues raised by the conflict. The principles discussed in Part III will then be applied to the Karabagh conflict in Part IV. Finally, concluding observations and remarks will be made in Part V. The author hopes that this Comment will not only provide insight into the legal dimensions of the Karabagh conflict, but will also help illustrate the development and shortcomings of international law regarding the creation of new states.

### II. HISTORICAL BACKGROUND

### A. Before Sovietization

The mountains of Karabagh form the eastern edge of the Armenian plateau<sup>8</sup> in the far eastern part of historical Armenia.<sup>9</sup> Karabagh \*185 and the surrounding lowlands were part of the provinces of Artsakh and Utik in ancient and medieval Armenian kingdoms formed on and around the plateau.<sup>10</sup> The strategic importance of the plateau, however, led to repeated foreign invasions.<sup>11</sup> The long and turbulent history of ancient and medieval Armenia was described by a prominent historian of the region in the following way:

From the west came the armies of the Macedonian, Roman, and Byzantine empires; from the east, the armies of the Persian, Turkic, and Mongol empires; from the south, the armies of the Seleucid, Arab, and Mamluk empires. Yet the tribulations of the Armenians produced a sturdy stock, people who throughout the generations retained many of their national characteristics, repeatedly restored the prosperity of their homeland following years of havoc, and, after the invaders had been swept away, reestablished native rule.<sup>12</sup>

After the invasion by the Seljuk Turks in the 11th century,<sup>13</sup> another Armenian independent state was not formed on the plateau until 1918.<sup>14</sup> During this time, Armenia, a Christian nation since the 4th century, fell under the rule of two Muslim empires: the Sunni-dominated Ottoman (Turkish) Empire and the Shia-dominated Iranian Empire.<sup>15</sup> However, Karabagh retained substantial autonomy until the early 19th century, when the region was incorporated into the Russian Empire.<sup>16</sup> The Armenian *meliks* [[[princes] of Karabagh even began a campaign to liberate the Armenian plateau from the Ottoman Empire with the help of the Christian West in the 17th and 18th centuries.<sup>17</sup> \*186 Thus, for the Armenians, Karabagh had a particular importance because it represented a vestige of freedom while Armenia was under foreign control.<sup>18</sup>

Karabagh was also an important Armenian region because it retained a homogenous Armenian population. Beginning in the 11th Century A.D., Turkic people began to settle in Armenia, and Armenians began to emigrate from their homeland to escape the oppressive conditions created by their foreign overlords.<sup>19</sup> The population of Karabagh, however, remained ninety-five percent Armenian up until the beginning of the 20th century.<sup>20</sup>

At the outbreak of World War I in 1914, the western part of historical Armenia was part of the Ottoman Empire, while the eastern part of Armenia, including Karabagh, was part of the Russian Empire.<sup>21</sup> By the end of the war, however, both empires had disintegrated, and the fate of the Armenian people was forever changed.<sup>22</sup> In April of 1915, the Ottoman (Turkish) authorities began the systematic genocide of the Armenians living within the empire,<sup>23</sup> which resulted in the death of over a million Armenians, and the elimination of Armenians from ninety percent of historical Armenia.<sup>24</sup>

The Armenians who lived in the Russian Empire (including those in Karabagh), however, escaped the Turkish atrocities.<sup>25</sup> After the disintegration of the Russian Empire and the Communist Revolution of 1917, the Armenians were able to form an independent republic in the eastern edge of historical Armenia between 1918-1920.<sup>26</sup> At the same time, the Azerbaijanis were able to establish the first \*187 Azerbaijani independent state in history.<sup>27</sup> It was during this time (1918-1920) that the modern struggle over Karabagh began. Both Armenia and Azerbaijan claimed Karabagh, and engaged in a continuous struggle for the territory<sup>28</sup> until both Republics were incorporated into the Soviet Union in 1920.<sup>29</sup>

The Azerbaijanis claimed that the mountains of Karabagh were strategically vital to Azerbaijan because if the area were under control, Azerbaijan would be perpetually vulnerable.<sup>30</sup> Furthermore, Azerbaijan advanced arguments that Karabagh was “historically” part of Azerbaijan. Karabagh was part of the Elisavetpol *guberniia* [province] of the Russian empire, which included the flatlands to the east that were indisputably part of Azerbaijan.<sup>31</sup> Also, modern Azerbaijani intellectuals have claimed that Karabagh was a “cradle of Azerbaijani art,” which produced numerous Azeri musicians and poets.<sup>32</sup>

The Armenians disputed every argument raised by the Azerbaijanis. The mountains of Karabagh formed the eastern edge of the Armenian plateau, and control of Karabagh was just as strategically important to Armenia as it was to Azerbaijan.<sup>33</sup> Furthermore, Azerbaijan's arguments that Karabagh was "historically" part of Azerbaijan rather than Armenia were tenuous at best. Karabagh had never been part of an independent Azerbaijani state because the republic of Azerbaijan formed in 1918 was the first Azerbaijani state in history.<sup>34</sup> The Azerbaijanis did not establish a settlement in Karabagh until 1750 and constituted less than five percent of the population of \*188 Karabagh (ninety-five percent of the population was Armenian).<sup>35</sup> Conversely, Karabagh had been part of independent Armenian states in ancient and medieval times and was a center of Armenian autonomy and identity up until the 20th century.<sup>36</sup> Finally, the Armenians argued that the dispute over Karabagh had to be viewed in the context of all of the territorial disputes in Transcaucasia. While Armenia's territorial claims were relatively proportional to the population of the Armenians in the region, Azerbaijan's territorial claims were disproportional and voracious.<sup>37</sup>

### ***B. Karabagh Under Soviet Azerbaijani Rule: 1920-1988***

The political struggle over Karabagh continued during the first years of the U.S.S.R. After initially announcing that Karabagh would be part of Soviet Armenia, Soviet authorities decided in July of 1921 to organize Karabagh as an "autonomous Armenian region" within the Azerbaijani Soviet Socialist Republic.<sup>38</sup> The decision to include \*189 Karabagh as part of Soviet Azerbaijan was affirmed and finalized in July of 1923.<sup>39</sup>

Under Azerbaijani rule the Karabagh Armenians were generally isolated from Soviet Armenia. The boundaries of Karabagh were drawn so that there was a narrow corridor separating the autonomous region from Armenia.<sup>40</sup> Moreover, the transportation and communication routes were linked to the Azerbaijani capital, Baku, not to the Armenian capital, Yerevan.<sup>41</sup>

Under Azerbaijani control the Karabagh Armenians endured much hardship.<sup>42</sup> Efforts by the Karabagh Armenians to develop the economy of the region were continuously thwarted by Azerbaijani authorities, and Armenian schools and cultural institutions were neglected.<sup>43</sup>

Armenians charged that Azerbaijan suppressed the region and conducted a campaign of violence and intimidation in an effort to force the Armenians out of Karabagh.<sup>44</sup> Armenian fears were fueled by the activities of Azerbaijani historical revisionists.<sup>45</sup> Certain Azerbaijani scholars claimed that the Karabagh Armenians were not \*190 Armenians at all.<sup>46</sup> Instead, they were Caucasian Albanians who were forcibly Armenianized.<sup>47</sup> Since the Azerbaijanis were allegedly the descendents of the Caucasian Albanians, the Karabagh Armenians were actually Azerbaijanis, and the 1500 Armenian architectural monuments in Karabagh were Azerbaijani treasures!<sup>48</sup>

Armenian anxiety about the Azerbaijani scheme to drive the Armenians out of Karabagh was reinforced by demographic reports. The Armenian population in Karabagh decreased from ninety-five percent of the total population in 1926, to seventy-five percent of the population in 1976.<sup>49</sup> To the Armenians, the pattern was all too familiar. The Armenian population in Nakhichevan, another autonomous region which was part of Azerbaijan, had been reduced from forty percent to two percent.<sup>50</sup> Thus, Nakhichevan, like the other ninety percent of the historical Armenia, was becoming an "Armenia without \*191 Armenians."<sup>51</sup> The Karabagh movement, which started in 1988,<sup>52</sup> was an attempt to save Karabagh from the same fate.<sup>53</sup>

### ***C. 1988 to the Present***

The current struggle over Karabagh began in February of 1988 when the Karabagh Armenians, encouraged by *perestroika* and *glasnost*, began to take bold steps to break free from Azerbaijani control.<sup>54</sup> On February 20, 1988 the Karabagh regional soviet voted to formally request the soviets of Armenia and Azerbaijan to annex Karabagh to Armenia.<sup>55</sup> Massive demonstrations were held for the next week in Yerevan to support the Karabagh Armenians.<sup>56</sup> In June, the Armenian Supreme Soviet voted for the re-attachment of Karabagh to Armenia, but the Supreme Soviet of Azerbaijan quickly rejected the re-attachment.<sup>57</sup> Less than a month later, the legislature of Karabagh voted to secede from Azerbaijan and rename the territory "Artsakh."<sup>58</sup>

The struggle over Karabagh grew progressively more intense. As the political battle over Karabagh heated up, violent confrontations \*192 between Armenians and Azerbaijanis increased in number and seriousness.<sup>59</sup> Azerbaijan began a blockade of food and fuel into Karabagh and Armenia, which continues to the present.<sup>60</sup> Thousands of Armenians living in Azerbaijan and Azerbaijanis living in Armenia fled to their respective homelands.<sup>61</sup>

Moscow was slow and indecisive in its response to the growing dispute over Karabagh. Finally, on January 12, 1989, the U.S.S.R. Supreme Soviet granted a “special administrative status” to Karabagh, whereby the territory remained part of Azerbaijan, but was administered directly from Moscow.<sup>62</sup> In November of 1989, however, the Special Administration was abolished, and Karabagh was again under Azerbaijani control.<sup>63</sup>

By September of 1991 Moscow's position on the official status of Karabagh became moot because the Soviet Union had disintegrated and all of the Soviet Republics, except for Russia, had declared independence.<sup>64</sup> Two days after Azerbaijan declared independence,<sup>65</sup> the governing council of Karabagh proclaimed the “Nagorno-Karabakh Republic” on September 2, 1991.<sup>66</sup> Karabagh's independence was supported almost unanimously by a referendum in the territory on December 10, 1991.<sup>67</sup>

### III. SUBSTANTIVE LEGAL ISSUES

The central legal issue raised by the Karabagh conflict is whether the people of Karabagh have a “right” to an independent state under \*193 international law. The establishment of an independent and sovereign state is an implementation of the principle of self-determination.<sup>68</sup>

#### *A. The Existence of the Right to Self-Determination*

Self-determination was not generally considered a *legal* right until after World War II.<sup>69</sup> The traditional view of the principle of self-determination was adopted by the International Commission of Jurists appointed by the Council of the League of Nations to evaluate whether the inhabitants of the Aaland Islands had a right to hold a plebiscite regarding the territory's potential separation from Finland and unification with Sweden.<sup>70</sup> The Commission reported that although the principle of self-determination was an important concept in modern political thought, it was not incorporated into the Covenant of the League of Nations and was not a positive rule of the Law of Nations.<sup>71</sup>

Since the establishment of the United Nations, however, self-determination has evolved into a principle of international law. The principle of self-determination was recognized in the United Nations Charter itself. Article I of the Charter states that one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>72</sup> Article 55 also recognizes “the principle of equal rights and self-determination of peoples.”<sup>73</sup> Article 73, which addresses the rights of peoples in “Non-Self-Governing Territories,” also implicitly recognizes the principle of self-determination by stating that members of the United Nations must “ensure . . . the culture of the peoples concerned [and] their political, economic, social, and educational \*194 advancement,” and “take due account of the[ir] political aspirations.”<sup>74</sup>

State practice since World War II has elevated the principle of self-determination to a customary norm of international law. Customary international law is established “from a general and consistent practice among states followed by them from a sense of legal obligation [*opinio juris sive necessitatis*].”<sup>75</sup> In the wake of twenty years of decolonization following World War II, the right to self-determination for all peoples was formally recognized in 1966 by the International Covenant on Civil and Political Rights<sup>76</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>77</sup> Although many states have not ratified either treaty, there has been significant acceptance by non-signatories of their legally binding nature.<sup>78</sup>

The right to self-determination was also recognized by the United Nations General Assembly with resolution 1514(XV)<sup>79</sup> in 1960 and resolution 2625(XXV)<sup>80</sup> in 1970. While these declarations are not binding, they are arguably an authoritative interpretation of the U.N. Charter and evidence of state acceptance of the legally binding nature of the principle of self-determination.<sup>81</sup>

\*195 In the *Namibia Opinion*, in 1971, the International Court of Justice held that the “development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.”<sup>82</sup> Judge Ammoun, writing separately, opined that “the struggle of peoples in general has been one, if not indeed the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized.”<sup>83</sup> The court affirmed its recognition that self-determination had developed into a customary norm of international law in the *Western Sahara*<sup>84</sup> case in 1975 and the *Frontier Dispute*<sup>85</sup> case in 1986. Although the court's opinions are not, of course, legally binding precedent,<sup>86</sup> most scholars agree that the principle of self-determination is now a positive rule of international law.<sup>87</sup>

### ***B. Beneficiaries of the Right to Self-Determination***

A more controversial matter is defining the “self” or the “people” who can exercise self-determination. While it has been generally accepted that people under “colonial” domination have a right to self-determination, the application of self-determination to “peoples” \*196 within an existing state has been much more controversial.<sup>88</sup> The distinction between people under “colonial rule” and those under “alien domination,” however, has long been criticized as arbitrary.<sup>89</sup> Moreover, state practice, especially since the fall of communism in Eastern Europe and the Soviet Union, has supported the right to self-determination for non-colonial peoples.<sup>90</sup>

The definition of “peoples” who are an appropriate candidate for self-determination has also been a subject of great scholarly dispute. Buchheit, for example, argues that in addition to a group's “subjective perception of distinctness,” objective characteristics, such as linguistic, racial, religious, and historic differences between the group seeking self-determination and other groups must be analyzed in order to determine whether the group is an appropriate candidate for self-determination.<sup>91</sup> Pomerance<sup>92</sup> and Hannum,<sup>93</sup> on the other hand, argue that state practice supports the rule that territorial units, rather than ethnic or religious groups, may exercise self-determination. Murswiek combines the above two principles and argues that a group is not an appropriate candidate for self-determination unless it is ethnically distinct and forms a clear majority in a coherent territorial unit.<sup>94</sup> Cassese also seems to combine the ethnic and territorial principles and argues that “peoples” have a right to self-determination if they are a distinct ethnic group within a multinational state (not a minority), and have “a distinct legal status within the constitutional framework” (e.g. the republics within the former U.S.S.R., the former Yugoslavia, or perhaps India).<sup>95</sup> Other scholars have expressed different views.<sup>96</sup>

### **\*197 C. Boundaries of Newly Independent States**

The boundaries of former colonies and/or predecessor states, no matter how arbitrary or artificial, have usually been maintained and recognized as the boundaries of newly formed states.<sup>97</sup> In other words, the principle of “territorial” self-determination has, for the most part, triumphed over the principle of “ethnic” self-determination.<sup>98</sup> However, the principle of *uti possidetis*<sup>99</sup> has not been completely supported by state practice, and the issue remains open and controversial.<sup>100</sup>

In the *Frontier Dispute*<sup>101</sup> case, the International Court of Justice discussed the principle of *uti possidetis* in some detail. By Special Agreement Burkina Faso and Mali asked a Chamber of the Court to resolve their dispute concerning their common borders.<sup>102</sup> In dicta, the Chamber recognized that *uti possidetis* has developed into a general principle of international law.<sup>103</sup> However, the Chamber also acknowledged an “apparent contradiction” between the principles of *uti possidetis* and self-determination.<sup>104</sup> Unfortunately, the Chamber did not fully elaborate on this statement because it was limited by an agreement of the parties to resolve their dispute on the basis of the “principle of intangibility of frontiers inherited from colonization.”<sup>105</sup>

In a separate opinion, however, Judge François Luchaire opined that the exercise of the right of self-determination “does not necessarily lead to the independence of a state with the same frontiers as a colony.”<sup>106</sup> The frontiers of an independent state emerging from colonization may differ from the frontiers of the colony which it replaces, Luchaire argued, because the colonial process is over once the inhabitants \*198 of the colony have been able to exercise their right of self-determination.<sup>107</sup> However, Judge Luchaire limited his comments by noting that the term “decolonization” should be used with great caution and should not be confused with accession to independence.<sup>108</sup>

#### *D. Conflict With the Principle of Territorial Integrity*

The controversy over defining the “self” which can exercise self-determination is related to the controversy over the “right” to secession by non-colonial peoples from an existing state. From the perspective of non-colonial peoples attempting to secede (e.g. the Kurds or Basques), the principle of self-determination gives them the right to establish their own independent states. In such cases, however, the principle of self-determination conflicts with another principle of international law--the territorial integrity of sovereign states. The principle of territorial integrity (i.e. the inviolability of the borders of sovereign states) is recognized by the U.N. Charter<sup>109</sup> and is considered by most scholars and jurists as a well-established norm of international law, vital to the stability and peace of the world community.<sup>110</sup> The recognition of the right of a “people” to secede from an existing state necessarily entails the denial of the right of that state to territorial integrity.<sup>111</sup>

The conflict between the principles of self-determination and territorial integrity which arises when a non-colonial group or political unit attempts to secede from an existing state has not been resolved by international law.<sup>112</sup> However, there has been no shortage of proposals \*199 to resolve the controversy. Ofuatey-Kodjoe<sup>113</sup> and Cassese<sup>114</sup> view self-determination as fundamentally a human rights issue and argue that in order to claim the right of self-determination a group must be “oppressed” (i.e. denied civil and political rights). Hannum<sup>115</sup> and Murswiek<sup>116</sup> call for a “right to autonomy” before secession movements arise in order to satisfy both the right of peoples to self-determination and the right of states to sovereignty and territorial integrity. Buchheit proposes that “legitimate” claims to self-determination be determined by inquiring into “the nature of the group, its situation within its governing State, its prospects for an independent existence, and the effect of its separation on the remaining population and the world community in general.”<sup>117</sup> Pomerance advocates a similar approach and calls for a “balancing of conflicting principles.”<sup>118</sup>

The declarations the United Nations General Assembly have not made matters much clearer. In resolution 1514 (XV), the General Assembly first proclaimed the right to self-determination of all peoples, but subsequently retreated by stating that “[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”<sup>119</sup> This apparent inconsistency is not reconciled by the content of the declaration itself. In resolution 2625 (XXV), the General Assembly took a similarly cautious approach with the following provision:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples* as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.<sup>120</sup>

\*200 This declaration apparently supports the argument that “peoples” have a right to self-determination, notwithstanding the principle of territorial integrity, if they are “oppressed.”<sup>121</sup> However, state practice does not fully support the connection between the right to self-determination and human rights.<sup>122</sup>

### *E. De Facto Independence*

The controversy over secession involves additional issues when the claimant group has reached *de facto* independence. The Commission of Jurists on the Aaland Islands case reported:

From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law . . . . This transition from a *de facto* situation to a normal situation *de jure* cannot be considered as one confined entirely within the domestic jurisdiction of a State. It tends to lead to readjustments between the members of the international community and to alterations in their territorial and legal status. <sup>123</sup>

If an entity makes the transition from a *de facto* to a *de jure* state, the conflict between the principles of self-determination and territorial integrity evaporates because sovereign states indisputably have a right to self-determination and political independence. <sup>124</sup>

The traditional criteria for an entity to become a state were set forth by article 1 of the Montevideo Convention on Rights and Duties of States, which provides that “a state, as a person of international law, should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.” <sup>125</sup> The *Restatement (Third) of the Foreign Relations Law of the United States* has adopted virtually the same criteria for statehood. <sup>126</sup>

While the criteria for statehood are relatively clear, the issue of whether an entity requires recognition by existing states in order to \*201 become a state itself has not been settled. <sup>127</sup> Under the so-called “constitutive” theory, a territory is not a state unless it is generally recognized as such by other states. <sup>128</sup> But under the “declaratory” theory, an entity is a state if it satisfies the traditional requirements of statehood, regardless of recognition by other states. <sup>129</sup> However, “the practical differences between the two theories has grown smaller.” <sup>130</sup> Even the advocates of the declaratory theory concede that as a practical matter, recognition by other states is necessary for an entity to function as a state. <sup>131</sup> And some advocates of the constitutive theory have accepted the view that states have an obligation to treat as a state any entity which satisfies the traditional characteristics of statehood. <sup>132</sup>

## IV. APPLICATION OF INTERNATIONAL LAW TO THE KARABAGH CONFLICT

The foregoing substantive law primarily developed in the context of colonialism. Armenia's and Azerbaijan's relationship with the Russian Empire and the Soviet Union, however, was somewhat different than classic colonialism, which typically involved economic exploitation and the large-scale transfer of wealth, resources, and capital from the colony to the colonial power. <sup>133</sup> Nevertheless, developments in international law in the post-colonial world support the application of the principle of self-determination and related legal principles to noncolonial contexts such as the Karabagh conflict. <sup>134</sup>

### *A. De Facto Independence*

The debate over the right of Karabagh to self-determination versus the right of Azerbaijan to maintain its territorial integrity must be analyzed in view of the *de facto* independence Karabagh has attained. <sup>135</sup> \*202 Karabagh meets all of the traditional requirements for statehood set forth by the Montevideo Convention and the *Restatement (Third) of the Foreign Relations Law of the United States*. <sup>136</sup> It has a “defined territory” <sup>137</sup> which encompasses about 1760 square miles. <sup>138</sup> Its population of approximately 189,000, <sup>139</sup> like that of other mini-states such as the Vatican City, satisfies the “permanent population” requirement. <sup>140</sup> The Karabagh Parliament, which, *inter alia*, controls the Karabagh defense effort, issues passports to its “citizens,” and engages in discussions with foreign states, <sup>141</sup> is a “government.” <sup>142</sup> Finally, Karabagh has the “capacity to

conduct international relations.”<sup>143</sup> Comment (e) of section 201 of *The Restatement (Third) of the Foreign Relations Law of the United States* explains that an entity satisfies the capacity requirement if it has the authority within its own constitutional system and the “political, technical, and financial capabilities” to conduct international relations.<sup>144</sup> Thus, Karabagh satisfies this requirement because it has repeatedly demonstrated that it is ready, willing, and able to conduct negotiations with Azerbaijan with the mediation of the Conference on Security and Cooperation in Europe (CSCE), despite Azerbaijan's refusal to recognize the delegates from Karabagh as representatives of another state.<sup>145</sup>

\*203 Whether Karabagh is a sovereign state under international law is unclear. Under the constitutive theory,<sup>146</sup> Karabagh is not a sovereign state because it has not been recognized as such by any states,<sup>147</sup> including Armenia.<sup>148</sup> Under the declaratory theory,<sup>149</sup> however, the lack of international recognition does not necessarily mean that Karabagh is not a state under international law.

### ***B. Karabagh is an Appropriate Candidate for Self-Determination***

Karabagh is an appropriate entity for self-determination according to the criteria identified by most scholars. The Armenians of Karabagh are objectively distinct from the Azerbaijanis (satisfying the criterion to become a candidate for self-determination identified by Buchheit<sup>150</sup>). The Karabagh Armenians speak a dialect of Armenian,<sup>151</sup> an Indo-European language,<sup>152</sup> while the Azerbaijanis speak a Turkic dialect,<sup>153</sup> which is part of the Altaic language group.<sup>154</sup> The Karabagh Armenians are predominantly Christians, while the Azerbaijanis are predominantly Shi'i Muslims.<sup>155</sup> And most importantly, the Karabagh Armenians share the ancient culture and historical experience of the Armenian people,<sup>156</sup> while the Azerbaijanis are \*204 now developing a national identity and share the culture and historical experience of Turkic peoples.<sup>157</sup>

Karabagh also has a long tradition of being a distinct territorial unit (satisfying the criterion to become a candidate for self-determination identified by Pomerance and Hannum).<sup>158</sup> The region of Karabagh (Artsakh) was organized as one of the fifteen provinces of historical Armenia and was also a separate “Melikdom” under both the Iranian Empire and Ottoman Empire.<sup>159</sup> However, after Karabagh was incorporated into the Russian Empire in the early 19th century, it became part of the province of Elisavetpol which included the lowlands east of the Armenian plateau occupied primarily by Azerbaijanis.<sup>160</sup> Nevertheless, Karabagh regained its distinct territorial identity under the Soviet Union, when it was organized as an “autonomous region.”<sup>161</sup> The Nagorno Karabakh Autonomous Region of the U.S.S.R. arguably satisfied Cassese's requirement of a distinct ethnic territory within a multinational state<sup>162</sup> because it was organized by the Soviet authorities as an “ethno-territorial administrative division.”<sup>163</sup>

### ***C. The Azerbaijani Argument***

The Azerbaijanis argue that political independence for Karabagh violates the right of Azerbaijan, as the successor to the Azerbaijani Soviet Socialist Republic,<sup>164</sup> to territorial integrity.<sup>165</sup> Alternatively, it is Azerbaijan, not Karabagh, that is the “self” which can claim self- \*205 determination. State practice has favored the “territorial” principle over the “ethnic” principle for determining which “self” may claim self-determination.<sup>166</sup> Karabagh, which was part of Soviet Azerbaijan, is therefore part of the Republic of Azerbaijan because under the principle of *uti possidetis* the borders of the Republic of Azerbaijan should be the same as the borders of Soviet Azerbaijan.

Azerbaijan's claims, however, are problematic. The application of the principle of *uti possidetis* in determining the borders of newly formed states-- which is the basis for Azerbaijan's claim that the secession of Karabagh violates its territorial integrity-- has not been universally accepted by scholars or jurists.<sup>167</sup> Indeed, in the *Frontier Dispute* case, the International Court of Justice acknowledged an “apparent contradiction” between *uti possidetis* and self-determination.<sup>168</sup> In a separate opinion, Judge Luchair opined that the frontiers of states emerging “from colonization may differ from the frontiers of the colony which it replaces.”<sup>169</sup> Moreover, even those scholars who argue that state practice supports “territorial” self-determination concede that in the “harder cases,” where an ethnic group seeks self-determination, the issue is complex and unresolved.<sup>170</sup>

The status of Karabagh is one of those “harder cases” in which the application of the territorial principle is difficult and complex because Karabagh is itself an appropriate candidate for self-determination.<sup>171</sup> Furthermore, it is difficult to determine just when, if ever, Azerbaijan acquired territorial sovereignty over Karabagh because Karabagh has never been under both the legal and actual control of an independent Azerbaijani state.

\*206 Arguably, Azerbaijan acquired territorial sovereignty over Karabagh on three different occasions.<sup>172</sup> First, the Republic of Azerbaijan of 1918-1920 (the first Azerbaijani state in history) claimed Karabagh as part of its territory.<sup>173</sup> However, this claim was disputed by the Republic of Armenia and the borders between Armenia and Azerbaijan were never agreed upon by the two republics or the international community before the region fell under Soviet control in 1920.<sup>174</sup> Moreover, the people of Karabagh elected their own governing body<sup>175</sup> and exercised *de facto* control over the territory until they were forced by military pressure and threat of massacre to submit to Azerbaijani rule<sup>176</sup> with the signing of the “Provisional Accord between the Armenians of Karabagh and the Government of Azerbaijan” on August 22, 1919 (“Accord”).<sup>177</sup>

Neither the signing of the Accord nor the claimed annexation of Karabagh by the first Republic of Azerbaijan provide much support for Azerbaijan's current claim to sovereignty over Karabagh. The current Republic of Azerbaijan probably cannot claim to be a successor state to the Republic of Azerbaijan of 1918-1920 because the first republic's relatively brief period of independence was not universally recognized, and the continuity of the two republics was interrupted by Azerbaijan's incorporation into the Soviet Union.<sup>178</sup> Moreover, the \*207 Accord of August of 1919 was signed by representatives of the Seventh Assembly of Karabagh, not the representatives of the Republic of Armenia.<sup>179</sup> Therefore, the Accord was not a “treaty” under international law because Karabagh, which was not a state at that time, did not have standing to enter into an international agreement.<sup>180</sup> Furthermore, the Accord and the claimed annexation of Karabagh were arguably void because both were the result of coercion and threat of force.<sup>181</sup> Finally, assuming *arguendo* that the Accord was valid and that the current Republic of Azerbaijan was the successor state to the first Republic of Azerbaijan, the former could probably not claim to be the beneficiary of the Accord under the “clean slate” theory adopted by the Vienna Convention of Succession of States in Respect of Treaties<sup>182</sup> and the *Restatement (Third) of the Foreign Relations Law of the United States*.<sup>183</sup>

The second occasion when Azerbaijan arguably acquired territorial sovereignty over Karabagh was the incorporation of Karabagh into Soviet Azerbaijan in July of 1923.<sup>184</sup> However, the legitimacy of the cession of Karabagh to Soviet Azerbaijan was undermined by the fact that the decision to do so was capricious and arbitrary, and against the will of the vast majority of the people of Karabagh.<sup>185</sup> Moreover, Soviet Azerbaijan was not capable of acquiring title to \*208 Karabagh in 1923 because it was not a sovereign state under international law.<sup>186</sup>

The third and final occasion when Azerbaijan could have acquired territorial sovereignty over Karabagh was when it became an independent state in August of 1991.<sup>187</sup> However, when Azerbaijan declared its independence, Karabagh had already obtained *de facto* independence from Azerbaijan,<sup>188</sup> and within two days formally declared its own independence.<sup>189</sup> In other words, the current Republic of Azerbaijan has never had actual control over Karabagh and has always had a competing claim to sovereignty over Karabagh with the Karabagh Armenians. The Azerbaijanis argue, on the other hand, that Karabagh's *de facto* independence is not relevant because the so-called “Republic of Nagorno-Karabagh” has not been recognized by other states and is an illegal attempt to violate the territorial integrity of Azerbaijan.<sup>190</sup>

#### ***D. The Human Rights Issue***

The Karabagh Armenians have argued that the denial of their cultural and economic rights by Soviet Azerbaijan,<sup>191</sup> and their repeated protests against Azerbaijani rule,<sup>192</sup> undermines the claim by the Republic of Azerbaijan that the secession of Karabagh violates its territorial integrity. Since the Karabagh movement for independence began in 1988, the human rights violations against the Armenians of Karabagh have intensified.<sup>193</sup> The Azerbaijani response to the \*209 Karabagh movement for independence has been reminiscent of the way the Ottoman (Turkish) Empire responded to Armenian aspirations for freedom in the late 19th century and 20th century.<sup>194</sup> Pogroms, deportations and other atrocities have been initiated against

Armenians living in Azerbaijan,<sup>195</sup> and calls for pan-Turkic ideals have been renewed.<sup>196</sup> The danger of these developments was recognized by human rights activist and Nobel Peace Prize winner Andrei Sakharov, who warned in November of 1988 that the “Armenian people are again facing the threat of genocide.”<sup>197</sup>

A claim to territorial integrity is arguably negated if a state does not conduct itself “in compliance with the principle of equal rights and self-determination of peoples” and does not allow a subject people “to pursue their economic, social and cultural development” as required by United Nations General Assembly Resolution 2625(XXV).<sup>198</sup> The Karabagh Armenians argue that the prospects for guaranteeing human rights and allowing the Karabagh Armenians to pursue their “economic, social and cultural development” under Azerbaijani rule, with or without Azerbaijani assurances of local autonomy, are not very promising. Hence, the Karabagh Armenians have a claim to independence to assure their political, cultural and economic rights, if not their physical security, which should supersede Azerbaijan's claim to territorial integrity. However, the connection between the legitimacy of a secessionist movement and human rights, while logical and persuasive, does not fully correspond with state practice.<sup>199</sup>

### *E. Claims for Equity and Justice*

In addition to a strong case for independence based on positive rules of international law, the Armenians of Karabagh have a compelling \*210 case for independence based on equitable grounds.<sup>200</sup> The Karabagh conflict must be viewed within the context of modern Armenian history. After enduring centuries of oppression in their own homeland,<sup>201</sup> the Armenians became victims of genocide and were forced out of the western ninety percent of their historic lands.<sup>202</sup> However, there were no “Nuremberg Trials” to punish the perpetrators of the Armenian Genocide.<sup>203</sup> Moreover, the Armenian people have never been compensated for the Turkish atrocities or for the massive destruction and confiscation of their property by the Turkish government.<sup>204</sup> The independence movement of Karabagh, at its core, is the struggle of the Karabagh Armenians to live as Armenians on their historic lands, and to escape the oppression, expulsion, and outright massacre experienced by the Western Armenians.<sup>205</sup> While the Western Armenians are, as one historian observed, “with few exceptions, either . . . dead or in exile,”<sup>206</sup> the Karabagh Armenians have tenaciously survived and continue to live on their ancestral lands. To deny the Karabagh Armenians the political, cultural, and economic freedom they yearn, and to subjugate them to Azerbaijani rule, is to deny the Karabagh Armenians, and indeed the Armenian people, the justice and fairness that international law must protect.

### **\*211 V. CONCLUSION**

The Karabagh conflict illustrates the need to develop clear criteria under international law for determining the legality of a claim to political independence. Karabagh is, by the standards identified by most scholars, an appropriate candidate for self-determination.<sup>207</sup> Conversely, Azerbaijan's claim that the independence of Karabagh violates its territorial integrity is questionable,<sup>208</sup> and it appears to be outweighed when balanced against Karabagh's compelling claim to self-determination. Hence, Karabagh arguably, though not conclusively, has a right to political independence under international law. Unfortunately, the issue cannot be definitively resolved because there is no clear resolution of the conflicting principles of self-determination and territorial integrity under the existing rules of international law.

Currently, the creation of new states, for all practical purposes, depends on the military success of the independence movement and recognition by existing states.<sup>209</sup> This process is unsatisfactory because state recognition is a product of political expediency rather than guiding principles of law, and the application of standard criteria which balance the principles of self-determination and human rights on one hand, and territorial integrity, peace, and stability on the other.

The author agrees with the position of the *Restatement (Third) of the Foreign Relations Law of the United States*<sup>210</sup> that the declaratory approach to recognition (i.e., recognition is unnecessary if an entity meets the traditional criteria for statehood) is the better rule. If the constitutive approach is adopted (i.e., recognition is required), the right to self-determination will be denied to many peoples. Existing states are extremely reluctant to recognize new states because it may help create new rules which may be contrary to their national interest or may threaten their own existence.<sup>211</sup> Thus, the constitutive approach effectively creates an inflexible rule which does not provide a just resolution of competing interests.

\*212 From the point of view of existing states (the creators of international law), the problem with the declaratory approach is that it may have destabilizing consequences. Military conflicts and “ethnic cleansing” may be encouraged by rewarding those entities which achieve *de facto* independence with the status of statehood. However, this danger can be reduced if the declaratory approach is limited to those entities which are appropriate candidates for self-determination, by analyzing objective criteria and the subjective will of the “people” prior to the initiation of a military struggle for independence. Unfortunately, the principles and mechanisms of international law have not developed to the point where “legitimate” claims to self-determination can be readily distinguished from “illegitimate” claims.

### Footnotes

- 1 Vazgen Manukian, *It Is Time to Jump off the Train*, HAYK (Nos. 15, 16, 17 and 18, May-June 1990), reprinted in ARMENIA AT THE CROSSROADS, DEMOCRACY AND NATIONHOOD IN THE POST-SOVIET ERA, ESSAYS, INTERVIEWS AND SPEECHES BY THE LEADERS OF THE NATIONAL DEMOCRATIC MOVEMENT IN ARMENIA 80, 81-82 (Gerard J. Libaridian ed., 1991) [hereinafter CROSSROADS] (Manukian was an original member of the “Karabagh Committee” and the first Prime Minister of the second Republic of Armenia).
- 2 CAROLINE COX & JOHN EIBNER, ETHNIC CLEANSING IN PROGRESS: WAR IN NAGORNO KARABAKH (back cover) (1993) [hereinafter COX].
- 3 *Id.* at 35; DAVID MARSHALL LANG ET AL., ARMENIA AND KARABAGH: THE STRUGGLE FOR UNITY 124 (Christopher J. Walker ed., 1991) [hereinafter ARMENIA & KARABAGH].
- 4 William J. Eaton, *1 Million Reportedly Take Part As Protests Continue in Armenia*, L.A. TIMES, Feb. 26, 1988, at A17.
- 5 The name “Nagorno-Karabagh” means “mountainous black garden”: *nagorno* is Russian for “mountainous”; *kara* is Turkish for “black”; and *bagh* is Iranian for “garden” [hereinafter Karabagh]. ARMENIA & KARABAGH, *supra* note 3, at 69. The term “Karabagh” (“Karabakh” in Russian and “Gharabagh” in Armenian) historically has denoted both the mountains and the plains of the region. *Id.* at 71-72. Since the establishment of the official Soviet territory “Nagorno Karabakh Autonomous Oblast [region]” in 1923, however, the term Karabagh has generally been used to describe only the smaller mountainous region within the area historically known as Karabagh. *Id.* This Comment will use the term “Karabagh” to refer to the area formerly known as Nagorno-Karabakh Autonomous Oblast. While “Karabagh” has been the term used to describe the area since the 15th century, the area was once part of the ancient and medieval Armenian province of “Artsakh.” Richard G. Hovannisian, *Nationalist Ferment in Armenia*, FREEDOM AT ISSUE, Nov.-Dec. 1988, at 29 [hereinafter *Nationalist Ferment*]. Thus, when the Nagorno-Karabagh Soviet declared its independence from Azerbaijan in July of 1988, it renamed the territory “Artsakh.” *Id.*; see *infra* note 48 and accompanying text.
- 6 *Gorbachev Urges Calm in Armenia: But Thousands Ignore Unprecedented Public Plea, Take To Streets*, L.A. TIMES, Feb. 26, 1988, at A2.
- 7 See *infra* notes 43-51 and accompanying text.
- 8 See RONALD G. SUNY, LOOKING TOWARD ARARAT: ARMENIA IN MODERN HISTORY 193 (1993). The Armenian plateau lies between the Pontus and Taurus mountains in eastern Anatolia. See RICHARD G. HOVANNISIAN, ARMENIA ON THE ROAD TO INDEPENDENCE, 1918, at 1-2 (1967) [hereinafter ROAD TO INDEPENDENCE]. The Armenians have lived on the plateau since ancient times. While many scholars argue that the Armenians migrated to the plateau some 5000 years ago and merged with the indigenous people, other scholars maintain that the Armenians are indigenous to the area and have lived there for at least 7000 years. See John A.C. Greppin, *A New View of Armenian Origins*, NAASR JOURNAL OF ARMENIAN STUDIES, Spring/Summer 1985, at 7; see also Stephan H. Astourian, *In Search of Their Forefathers: National Identity and the Historiography and Politics of Armenian and Azerbaijani Ethnogenesis*, in NATIONALISM AND HISTORY: THE POLITICS OF NATION BUILDING IN POST-SOVIET ARMENIA, AZERBAIJAN AND GEORGIA 41, 43-52 (forthcoming 1994) [hereinafter ASTOURIAN].
- 9 See generally GARBIS ARMEN ET AL., HISTORICAL ATLAS OF ARMENIA (1987).

- 10 See ARMENIA & KARABAGH, *supra* note 3, at 73-80; *Nationalist Ferment*, *supra* note 5, at 29.
- 11 See ROAD TO INDEPENDENCE, *supra* note 8, at 2.
- 12 *Id.* See also ARMEN, *supra* note 9, at 1; ELISABETH BAUER, ARMENIA PAST AND PRESENT 6 (Frederick A. Leist trans., 1981); see generally DAVID MARSHALL LANG, ARMENIA: CRADLE OF CIVILIZATION (1970); CHRISTOPHER J. WALKER, ARMENIA: THE SURVIVAL OF A NATION 19-34 (1980).
- 13 See ROAD TO INDEPENDENCE, *supra* note 8, at 4.
- 14 *Id.* at 186. Armenian self-rule continued three centuries longer in Cilicia, where an Armenian principality (1080-1198) and Armenian kingdom (1198-1375) were formed. *Id.* at 4.
- 15 *Nationalist Ferment*, *supra* note 5, at 29.
- 16 *Id.*; SUNY, *supra* note 8, at 193-94.
- 17 See ARMENIA & KARABAGH, *supra* note 3, at 79-80; 1 RICHARD G. HOVANNISIAN, THE REPUBLIC OF ARMENIA, THE FIRST YEAR, 1918-1919, at 81 (2d ed. 1974) [hereinafter 1 HOVANNISIAN].
- 18 *Nationalist Ferment*, *supra* note 5, at 29.
- 19 See ROAD TO INDEPENDENCE, *supra* note 8, at 4-6.
- 20 ARMENIA & KARABAGH, *supra* note 3, at 81.
- 21 See ARMEN, *supra* note 9, at 24 (map of Armenia from 1828-1915).
- 22 See generally ROAD TO INDEPENDENCE, *supra* note 8, at 40; WALKER, *supra* note 12, at 243-330.
- 23 See generally RICHARD G. HOVANNISIAN ET AL., THE ARMENIAN GENOCIDE IN PERSPECTIVE (Richard G. Hovannisian ed., 2d ed. 1987); ROBERT F. MELSON, REVOLUTION AND GENOCIDE: ON THE ORIGINS OF THE ARMENIAN GENOCIDE AND THE HOLOCAUST (1992); ROGER W. SMITH ET AL., THE ARMENIAN GENOCIDE: HISTORY, POLITICS, ETHICS (Richard G. Hovannisian ed., 1992); ARNOLD J. TOYNBEE, ARMENIAN ATROCITIES: THE MURDER OF A NATION (1917); WALKER, *supra* note 12.
- 24 *Nationalist Ferment*, *supra* note 5, at 29, 34.
- 25 COX, *supra* note 2, at 25. See generally ROAD TO INDEPENDENCE, *supra* note 8.
- 26 See generally 1 HOVANNISIAN, *supra* note 17; 2 RICHARD G. HOVANNISIAN, THE REPUBLIC OF ARMENIA, FROM VERSAILLES TO LONDON, 1919-1920 (1982) [hereinafter 2 HOVANNISIAN].
- 27 Mark Saroyan, *The "Karabakh Syndrome" and Azerbaijani Politics*, PROBLEMS OF COMMUNISM, Sept.-Oct. 1990, at 14, 16. The Azerbaijanis (previously known as the "Tatars") are a Turkic people originally from central Asia who are predominantly Shia-Muslim and are the "ethno-linguistic cousins" of the Turks in Turkey. ARMENIA & KARABAGH, *supra* note 3, at 71; see also 1 HOVANNISIAN, *supra* note 17, at 78 (the Azerbaijani Turks arrived in the region beginning in the 11th century A.D.).
- 28 See generally 1 HOVANNISIAN, *supra* note 17, at 156-96; 2 HOVANNISIAN, *supra* note 26, at 168-240.
- 29 *Nationalist Ferment*, *supra* note 5, at 31-32.
- 30 See 1 HOVANNISIAN, *supra* note 17, at 81-83.
- 31 *Id.*
- 32 See AUDREY L. ALSTADT, THE AZERBAIJANI TURKS: POWER AND IDENTITY UNDER RUSSIAN RULE 207-08 (1992) [hereinafter ALSTADT]. It should be noted, however, that "Azerbaijani" identity was largely the result of the Soviet nationalities policy. See *infra* note 48. During the period of the Republic of Azerbaijan of 1918-1920 "Tatar"

or “Azeri” national consciousness was primarily limited to an elite group of intellectuals. Most inhabitants of the region simply called themselves “Muslims” or “Turks.” See ASTOURIAN, *supra* note 8, at 52-53, 71-72.

33 See 1 HOVANNISIAN, *supra* note 17, at 80.

34 See *supra* note 27 and accompanying text.

35 See ARMENIA & KARABAGH, *supra* note 3, at 81; *Nationalist Ferment*, *supra* note 5, at 33 (according to the 1926 Soviet census, 95% of the population of Karabagh was Armenian).

36 See *supra* notes 8-20 and accompanying text.

37 When the republics of Georgia, Armenia, and Azerbaijan were formed in 1918, Transcaucasia was a heterogenous stew of ethnic groups. See 1 HOVANNISIAN, *supra* note 17, at 66-67. The Azerbaijanis constituted 23.6% of the population and were the largest ethnic group, followed by the Georgians (22.9%) and the Armenians (22.2%). *Id.* at 4. Each republic made territorial claims which conflicted with the claims of the other two republics. *Id.* at 290. Under the Armenian proposal, 38% of Transcaucasia was given to Azerbaijan, 33% to Georgia, and 29% to Armenia. *Id.* at 54. However, if Azerbaijan realized all of its claims, Azerbaijan would have obtained nearly two-thirds of Transcaucasia, leaving Armenia with only about 5000 square miles and totally surrounded by Azerbaijan. *Id.* at 92; 2 HOVANNISIAN, *supra* note 26, at 191-95. In other words, Azerbaijan was claiming more than 55% of the territory which became Soviet Armenia and the current republic of Armenia. See Marko Milivojevic, *Crisis of Nationalism*, GEOGRAPHICAL MAGAZINE, Nov. 1990, at 23, 25 (Armenia is approximately 11,500 square miles) [hereinafter Milivojevic]. Today, the territory of Karabagh (i.e. the territory of the former autonomous region) comprises less than five percent of Azerbaijan. See THE ZORYAN INSTITUTE FOR CONTEMPORARY ARMENIAN RESEARCH & DOCUMENTATION, THE KARABAGH FILE: DOCUMENTS AND FACTS ON THE QUESTION OF MOUNTAINOUS KARABAGH 138 (Gerard J. Libaridian ed., 1988) [hereinafter ZORYAN].

38 See ZORYAN, *supra* note 37, at 34-36, which reprints excerpts from the following materials: HRAND AVETISIAN, ANDRKOVKASI KOMERITMIUTIUNE PROLETARAKAN INDERNATSIONALISMI DROSHI NERKO [The Communist Youth League of the Transcaucasus Under the Proletarian Flag of Internationalism] (Yerevan 1968) (change in Soviet policy regarding the status of Karabagh); SIMON VRATZIAN, HAYASTANI HANRAPETUTUIN [Republic of Armenia] 500 (1928) (Vratzian was the last prime minister of the first Republic of Armenia); Announcements of Armenian-Azerbaijani Agreement on Disputed Territories, Archives of the Historical Museum of Yerevan, June 12, 1921; KOMUNIST, Dec. 2, 1920, no. 2 (Telegram sent by the Soviet Azerbaijani government to the Armenian republic); SOVETAKAN HAIASTAN [Soviet Armenia], June 19, 1921, no. 106 (official journal of Soviet Armenia); see also COX, *supra* note 2, at 8, 31; SUNY, *supra* note 8, at 194.

39 See G.A. HOVHANNISIAN, SOVETAKAN ISHKHANUTIAN HASTATUME LERNAYIN GHARABAGHUM [The Establishment of Soviet Rule in Mountainous Karabagh] (1971), reprinted in ZORYAN, *supra* note 37, at 37. It has been argued that Joseph Stalin created ethnic enclaves like Karabagh in an attempt to counter the separatist tendencies of the Transcaucasian peoples. The ethnic rivalries which resulted prevented the various subject peoples from uniting against the center, and provided a pretext for a Russian military presence in the area. See, e.g., Milivojevic, *supra* note 37, at 25.

40 See ZORYAN, *supra* note 37, at 141 (map of the region).

41 *Nationalist Ferment*, *supra* note 5, at 33.

42 ANDREI SAKHAROV, MOSCOW AND BEYOND 46 (1970).

43 *Id.*; Saroyan, *supra* note 27, at 14, 16-17; SUNY, *supra* note 8, at 205-06 (in the wake of the Armenian protests of February 1988, it was widely conceded by Soviet authorities that Azerbaijan had discriminated culturally and economically against the Armenians of Karabagh); Shahen Mkrtchian, *Witnesses to History*, ARMENIAN INT'L MAGAZINE, June 1992, at 40-41 (destruction of Armenian monuments in Karabagh by Azerbaijani authorities); ZORYAN, *supra* note 37, at 39-52, which includes excerpts from the following: HARATCH (Paris), Feb. 15, 1928 (eyewitness account of events in Karabagh); ASBAREZ (Fresno), Sept. 1, 1961 (eyewitness account of events in Karabagh); THE ARMENIAN REVIEW, Autumn 1968 (petition of May 19, 1964 from the Armenians of Karabagh to Prime Minister Nikita Khrushchev); ASBAREZ (Los Angeles), Sept. 19, 1967 (appeal by residents of Karabagh to the People and Government of Armenia, Central Committee of the Party, and Public Authorities); ZARTONK (Beirut), Oct.

15, 1977 (letter by the novelist Sero Khanadian on Karabagh addressed to Leonid Brezhnev); Raymond H. Anderson, *Armenians Ask Moscow for Help, Charging Azerbaijan With Bias*, N.Y. TIMES, Dec. 11, 1977; see also HRAIR BALIAN, HUMAN RIGHTS ADVOCATES, INC. (NGO located in Berkeley, CA), NAGORNO-KARABAGH: HUMAN RIGHTS CONCERNS 5-9 (working paper submitted to the UN Economic and Social Commission on Human Rights, 46th session Jan.-Mar. 1990).

44 ARMENIA & KARABAGH, *supra* note 3, at 113-22; *Nationalist Ferment*, *supra* note 5, at 33.

45 *Nationalist Ferment*, *supra* note 5, at 33.

46 *Id.*

47 *Id.*

48 *Id.* The Caucasian Albanians, not to be confused with the Albanians of the Balkans, were a people who lived to the east of historical Armenia and the province of Artsakh (Karabagh). *Id.* Due to the close cultural and religious ties between the two peoples (Albania adopted an Armenian brand of Christianity and an alphabet created by an Armenian monk), the Albanians merged with the Armenians, and at some point between the 7th and 11th century A.D. the separate identity of Albanians was lost. See ARMENIA & KARABAGH, *supra* note 3, at 73-79; SUNY, *supra* note 8, at 193; ZORYAN, *supra* note 37, at 3. The alleged link between the Caucasian Albanians and the Azerbaijani Turks (who arrived in the region in large numbers after the 11th century A.D.) can best be understood within the context of the Soviet nationalities policy and contemporary politics. Soviet authorities encouraged the development of national identities for Turkic peoples such as the Azerbaijanis, Uzbeks and Kazakhs (e.g. the language spoken by the people of Azerbaijan was renamed from “Turkish” to “Azerbaijani” in 1937) to undermine pan-Turkic and pan-Islamic ideals, and ties to Turkey. The “Albanian theory” and other spurious theories regarding the origins of the Azerbaijanis were developed after the Sovietization of Azerbaijan in order to support the creation of an Azerbaijani national identity, and to justify the borders of Soviet Azerbaijan and various other Azerbaijani territorial claims. However, these theories contradict each other, and they have not been accepted by virtually any non-Azerbaijani scholars. See generally ASTOURIAN, *supra* note 8; see also Clive Foss, *The Turkish View of Armenian History: A Vanishing Nation*, in THE ARMENIAN GENOCIDE: HISTORY, POLITICS, ETHICS 250 (Richard G. Hovannisian ed., 1992) (overview of Turkish historical revisionism, including the claims that the Turks founded the civilizations of China, India, Mesopotamia, Crete and Egypt, and that the Armenian Genocide never occurred). For the Azerbaijani view, see ALSTADT, *supra* note 32, at 1-14.

49 *Nationalist Ferment*, *supra* note 5, at 33.

50 *Id.*

51 *Id.* For an informative analysis of Armenian and Azerbaijani collective memories of the history of Karabagh, see Nora Dudwick, *Armenian-Azerbaijani Relations and Karabagh: History, Memory, and Politics*, in THE ARMENIAN REVIEW (forthcoming 1994).

52 See *infra* note 54 and accompanying text.

53 The fact that the ideology of pan-Turkism (the unification of the Turks of modern Turkey with their ethnic cousins in Azerbaijan and central Asia) played an important role in the development of the genocidal policies of the Ottoman Turks, see, e.g., Robert Melson, *Provocation or Nationalism: A Critical Inquiry into the Armenian Genocide of 1915*, in THE ARMENIAN GENOCIDE IN PERSPECTIVE 61 (Richard G. Hovannisian ed., 2d ed. 1987), has had a significant impact on the psyche of the Karabagh Armenians. See CROSSROADS, *supra* note 1, at 151-54 (speech by Zori Balayan). As Professor Hovannisian aptly wrote, “[t]he trauma of Armenian history makes the Azerbaijani a Turk and makes Karabakh the besieged and invested fortress that has to be liberated before it is too late.” *Nationalist Ferment*, *supra* note 5, at 34. However, many Azerbaijanis, “eager to establish a distinctive national identity,” resent being categorized as simply “Turks.” Dudwick, *supra* note 51. Moreover, while Azerbaijan's ties to Turkey and the central Asian Turkish republics are strong, the ideology of pan-Turkism of the early twentieth century arguably is no longer a significant political factor. See CROSSROADS, *supra* note 1, at 155-56 (speech by Levon Ter Petrosian); but see COX, *supra* note 2, at 17-18 (Pan-Turkism continues to be a powerful factor in Turkey and Azerbaijan).

- 54 See SAKHAROV, *supra* note 42, at 46-47. The Karabagh Movement was led by the famous “Karabagh Committee,” which eventually institutionalized into the Armenian National Movement. See CROSSROADS, *supra* note 1, at 2; see also *Members of the Karabakh Committee Five Years Later*, ARMENIAN INT’L MAGAZINE, Apr.-May 1993, at 21.
- 55 ARMENIA & KARABAGH, *supra* note 3, at 123.
- 56 See *supra* notes 4, 6 and accompanying text.
- 57 ARMENIA & KARABAGH, *supra* note 3, at 126.
- 58 Felicity Barringer, *Legislature in Armenian Enclave Votes to Secede from Azerbaijan*, N.Y. TIMES, July 13, 1988, at A2. “Artsakh” was the name of the Ancient and Medieval Armenian province which encompassed the territory. See *supra* note 5.
- 59 ARMENIA & KARABAGH, *supra* note 3, at 129; COX, *supra* note 2, at 52-56. See generally *Got Tanks, Will Travel: Karabakh’s Spring Surprise*, ARMENIAN INT’L MAGAZINE, Apr.-May 1993, at 16.
- 60 The blockade of food and fuel to Armenia by Azerbaijan has been devastating to the people of Armenia and Karabagh. COX, *supra* note 2, at 37-38. See Celestine Bohlen, *Blockade and Winter Deepen Misery in Armenia*, N.Y. TIMES, Feb. 7, 1993, at A12.
- 61 SAKAHAROV, *supra* note 42, at 49-50. The conflict has caused over 10,000 deaths and 1.3 million refugees. See CAROL MIGDALOVITZ, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, ARMENIA-AZERBAIJAN CONFLICT, Jan. 5, 1994 (Summary Page).
- 62 ARMENIA & KARABAGH, *supra* note 3, at 128; SAKHAROV, *supra* note 42, at 54.
- 63 ARMENIA & KARABAGH, *supra* note 3, at 129.
- 64 Urs W. Saxer, *The Transformation of the Soviet Union: From Commonwealth Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT’L & COMP. L.J. 581, 674 (1992).
- 65 Azerbaijan declared independence on August 30, 1991. Bill Keller, *Soviets Prepare to Design a New System: Debate Expected on Transition and Baltics*, N.Y. TIMES, Sept. 1, 1991, at A1, A10.
- 66 *Republic of Karabagh?*, ARMENIAN INT’L MAG., Oct. 1991, at 8. The official name of the republic is “Artsakh,” the ancient Armenian name for the region. COX, *supra* note 2, at 8.
- 67 COX, *supra* note 2, at 51; Tony Halpin & Vartan Oskanian, *Karabagh Fever: Temperatures Are Rising--Can Cooler Heads Prevail?*, ARMENIAN INT’L MAG., Jan. 1992, at 10, 14.
- 68 The principle of self-determination may be implemented by a variety of means, including autonomy, minority rights, or outright independence. See MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 3 (1982); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 11-12 (1978). The U.N. General Assembly *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, proclaimed that “[t]he establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.” G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970).
- 69 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 575 (2d ed. 1973).
- 70 International Committee of Jurists, Report on the Aaland Islands Question, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 5 (1920).
- 71 *Id.*
- 72 U.N. CHARTER art. 1, ¶ 2.

- 73 U.N. CHARTER art. 55.
- 74 U.N. CHARTER art. 73, ¶ a-b (alterations in original).
- 75 [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102\(2\) \(1986\)](#) (alteration in original). *See generally* J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-40 (9th ed. 1984).
- 76 International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, ¶ 1, 999 U.N.T.S. 171, 173.
- 77 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, ¶ 1, 993 U.N.T.S. 3, 5.
- 78 *See* Curtis G. Berkey, [International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples](#), 5 HARV. HUM. RTS. J. 65, 78 (1992) (acceptance of the covenants by non-signatories “arguably elevates the right of self-determination to the status of customary international law”). While the Soviet Union signed both covenants, it is unclear whether the covenants are binding on former Soviet republics such as Azerbaijan and Armenia. *See* Saxer, *supra* note 64, at 691-92; *see also* Vienna Convention on Succession of States in Respect of Treaties, art. 16-30, U.N. Doc. A/Conf. 80/31 (1978), reprinted in 72 AM. J. INT’L L. 971, 971-81 (this convention is not yet in force); [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 208, 210 \(1986\)](#).
- 79 *Declarations on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 14, at 66, U.N. Doc. A/4478 (1960).
- 80 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (xxv) U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).
- 81 BROWNLIE, *supra* note 69, at 576. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 45 (1990); Elihu LauterPacht, *Some Concepts of Human Rights*, 11 How. L.J. 264, 271-72 (1965). *See also* UMOZURIKE OJI UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 190 (1972). However, it can be argued that while the declarations may create custom, the requisite state practice and *opinio juris* has not been established to create customary international law. *See* POMERANCE, *supra* note 68, at 63-65; W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 182-83 (1977). *See generally* JORGE CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (Alba Amoia trans., 1969).
- 82 [Legal Consequence for States of the Continued Presence of South Africa in Namibia \(South West Africa\) notwithstanding Security Council Resolution 276 \(1970\)](#), 1971 I.C.J. 3, 31 (Order No. 1 of Jan. 26) (request for advisory opinion).
- 83 *Id.* at 70 (separate opinion of Judge Ammoun).
- 84 [Western Sahara, 1975 I.C.J. 3, 31-33 \(Order of Jan. 3\)](#) (advisory opinion). For an analysis of the Western Sahara case and the Namibia Opinion, *see* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 95-102 (1979).
- 85 [Case Concerning The Frontier Dispute \(Burkina Faso v. Mali\)](#), 1986 I.C.J. 554, 566-67 (Dec. 22).
- 86 Article 59 of the Statute of the International Court of Justice states that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055. Although the Court does not follow the principle of *stare decisis*, its decisions are evidence of customary international law. *See* [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103\(2\)\(a\) cmt. b \(1986\)](#).
- 87 *See, e.g.*, BROWNLIE, *supra* note 69, at 577; CRAWFORD, *supra* note 84, at 101; HANNUM, *supra* note 81, at 45; KODJOE, *supra* note 81, at 183-84; POMERANCE, *supra* note 68, at 63; UMOZURIKE, *supra* note 81, at 180; Otto Kimminich, *A “Federal” Right of Self-Determination?*, in MODERN LAW OF SELF-DETERMINATIONNNNN

83, 83 (Christian Tomuschat ed., 1993); *but see* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 211 (1980) (some writers still dispute the “legal right” of self-determination).

88 *See* HENKIN, *supra* note 87, at 211-12. *See generally* Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992).

89 Cass, *supra* note 88, at 21. *See also* OFUATEY-KODJOE, *supra* note 81, at 188; UMOZURIKE, *supra* note 81, at 190-91. The *travaux préparatoires* of the International Covenant on Civil and Political Rights indicate that the words “all peoples have a right to self-determination” of Article I was not limited to colonial peoples. Antonio Cassese, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS 92, 94 (Louis Henkin ed., 1981) (emphasis).

90 *See* Berkey, *supra* note 78, at 79 n.88; Cass, *supra* note 88; Kimminich, *supra* note 87, at 83; Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in MODERN LAW OF SELF-DETERMINATION 1, 2-8 (Christian Tomuschat ed., 1993); Gary J. Simpson, *Judging The East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 340 (1994).

91 BUCHHEIT, *supra* note 68, at 9-11.

92 POMERANCE, *supra* note 68, at 18.

93 HANNUM, *supra* note 81, at 454.

94 Dietrich Murswiek, *The Issue of a Right of Secession--Reconsidered*, in MODERN LAW OF SELF-DETERMINATION 21, 37 (Christian Tomuschat ed., 1993).

95 Cassese, *supra* note 89, at 95.

96 *See, e.g.*, UMOZURIKE, *supra* note 81, at 195; Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 850-54 (1976).

97 *See* HANNUM, *supra* note 81, at 454; POMERANCE, *supra* note 68, at 18.

98 *See supra* notes 91-96 and accompanying text.

99 *Uti possidetis* is the general rule “that leaves, in the hands of the winner of a war, that which has been captured.” JAMES R. FOX, DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW 466 (1992). The term *uti possidetis* is most commonly used to refer to the narrower principle that states become independent within their former colonial boundaries. *See, e.g.*, [Case Concerning the Frontier Dispute \(Burkina Faso v. Mali\)](#), 1986 I.C.J. 554, 565 (Dec. 22).

100 *See* POMERANCE, *supra* note 68, at 19.

101 [Case Concerning The Frontier Dispute \(Burkina Faso v. Mali\)](#), 1986 I.C.J. 554 (Dec. 22).

102 *Id.* at 562.

103 *Id.* at 565.

104 *Id.* at 567.

105 *Id.* at 565.

106 *Id.* at 652.

107 *Id.* at 653.

108 *Id.* at 652.

109 The U.N. Charter prohibits the use of force “against the territorial integrity . . . of any state.” U.N. CHARTER art. 2, ¶ 4.

- 110 See, e.g., [Military and Paramilitary Activities \(Nicar. v. U.S.\)](#), 1986 I.C.J. 14, 106 (June 27) (Judgment); Murswiek, *supra* note 94, at 35-36; Suzuki, *supra* note 96, at 782-83.
- 111 The problem may be formulated in a number of ways. As Pomerance states:  
It may be said that the demand for secession or separate determination by one “self” clashes with the claim to territorial integrity and political independence put forward by the unit of which the first “self” is felt to be a part. Or it may be said that “self-determination” by the smaller unit conflicts with the “self-determination” to which the larger unit claims to be entitled. Or again, it may be contended that there is an opposition between two claims to territorial integrity--that of the larger as against the smaller unit.  
POMERANCE, *supra* note 68, at 2-3; see also CHRISTOPHER O. QUAYE, *LIBERATION STRUGGLES IN INTERNATIONAL LAW* 215 (1991).
- 112 Crawford writes that “secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be, regulated internationally.” CRAWFORD, *supra* note 84, at 268. See also Tomuschat, *supra* note 90, at 7-8.
- 113 KODJOE, *supra* note 81, at 181-90.
- 114 Cassese, *supra* note 89, at 101.
- 115 HANNUM, *supra* note 81, at 473-74.
- 116 Murswiek, *supra* note 94, at 38-39.
- 117 BUCHHEIT, *supra* note 68, at 217-18.
- 118 POMERANCE, *supra* note 68, at 73-74.
- 119 *Declaration on the granting of independence to colonial countries and peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 14, at 66, U.N. Doc. A/4478 (1960).
- 120 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) (emphasis added).
- 121 Oppressed, in this context, is defined as denying equal rights without distinction of race, creed or color.
- 122 See QUAYE, *supra* note 111, at 220.
- 123 Committee of Jurists, Report on the Aaland Islands Question, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 6 (1920).
- 124 For a discussion of sovereignty and statehood, see HANNUM, *supra* note 81, at 14-23.
- 125 Signed Dec. 26, 1933, 49 Stat. 3097, 3100. See generally BROWNLIE, *supra* note 69, at 74-76; Crawford, *supra* note 84, at 31-74; STARKE, *supra* note 75, at 91-94.
- 126 [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201](#) (1986).
- 127 “[T]he subject . . . at this stage of the development of international law, can be presented less as a collection of clearly defined rules or principles than as a body of fluid, inconsistent, and unsystematic state practice.” STARKE, *supra* note 75, at 125.
- 128 [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202](#) reporters' note 1 (1986).
- 129 *Id.*
- 130 *Id.*

- 131 *Id.* The Restatement adopts the declaratory theory, but notes that “[a]s a practical matter, however, an entity will fully enjoy the status and benefits of statehood only if a significant number of other states consider it to be a state and treat it as such.” *Id.* § 202 cmt. b.
- 132 *Id.* § 202 reporters' note 1.
- 133 SAXER, *supra* note 64, at 637-38.
- 134 *See supra* notes 88-90 and accompanying text.
- 135 *See* SUNY, *supra* note 8, at 206.
- 136 *See supra* notes 124, 125 and accompanying text (An entity must have a (a) defined territory; (b) permanent population; (c) government; and (d) capacity to conduct international relations.).
- 137 [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201](#) cmt. b (1986).
- 138 Halpin & Oskanian, *supra* note 67, at 15 (A Story of Numbers). *See also supra* note 4 and accompanying text.
- 139 The population of Karabagh was 189,000 according to 1989 Soviet census, but that figure has almost certainly changed due to the turbulence of the *de facto* war with Azerbaijan. *See* COX, *supra* note 2, at 5; Halpin & Oskanian, *supra* note 67, at 15 (A Story of Numbers).
- 140 [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201](#) cmt. c, reporters' note 7 (1986).
- 141 *See* Armenian Assembly of America, *Nagorno-Karabagh Political Affairs*, MONTHLY DIG. OF NEWS FROM ARMENIA, Spring 1993, at 35-39; *see* Armenian Assembly of America, *Nagorno-Karabagh Regions*, MONTHLY DIG. OF NEWS FROM ARMENIA, June 1993, at 39-46; Armen Baghdasarian, *Practicing State: The Ins and Outs of a Young Republic*, ARMENIAN INT'L MAG., Feb. 1994, at 18.
- 142 The Restatement defines “government” as “an authority exercising governmental functions and able to represent the entity in international relations.” [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201](#) cmt. d (1986).
- 143 *Id.* § 201 cmt. e.
- 144 *Id.*
- 145 *See* Peter Balalian & Gourgen Khajagian, *From Shusi to Rome: A Chronicle*, ARMENIAN INT'L MAG., Aug.-Sept. 1992, at 22.
- 146 *See supra* note 128 and accompanying text.
- 147 The official response of the international community to Karabagh's claim to independence is typified by U.N. Security Council Resolution 822, which “*not[ed]* with alarm the escalation in armed hostilities . . . by local Armenian forces . . . [and] *reaffirm[ed]* the respect for sovereignty and territorial integrity of all States in the region [as well as] the inviolability of international borders.” S.C. Res. 822, U.N. SCOR, 3205th mtg. at 1 (1993). *See also* COX, *supra* note 2, at 61.
- 148 While supporting Karabagh's right to self-determination, Armenia has not officially recognized Karabagh as an independent state. *See Conflict in Karabakh*, L.A. TIMES, Sep. 25, 1993, at B15 (letter to the editor by Rouben Shugarian, Ambassador of Armenia to the United States). Armenia's policy toward Karabagh has been severely restrained by Armenia's precarious military, political, and economic situation. It cannot risk openly supporting Karabagh's independence because in doing so it may open the door to a greater regional war. *See* Tony Halprin, *Precious Burden: How International Crisis and the Karabakh Conflict Determine Armenia's Foreign Relations*, ARMENIAN INT'L MAG., Jan. 1994, at 16.
- 149 *See supra* note 129 and accompanying text.

- 150 *See supra* note 86 and accompanying text.
- 151 ARMENIA & KARABAGH, *supra* note 3, at 70.
- 152 *Id.* at 9.
- 153 WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 133 (Deluxe 2d ed. 1983).
- 154 *Id.* at 1971.
- 155 COX, *supra* note 2, at 11-13. The religious differences between the Karabagh Armenians and the Azerbaijanis, however, have been generally overemphasized in the Western media and have not played a very important role in the conflict. *See* Ronald G. Suny, *What Happened in Soviet Armenia*, MIDDLE EAST REPORT, July-Aug. 1988, at 37, 40.
- 156 Like the Armenians in other mountainous regions such as Sasun and Zeitun, the Karabagh Armenians kept a strong Armenian identity, despite centuries of foreign rule. ARMENIA & KARABAGH, *supra* note 3, at 70. However, while the Armenian populations in Sasun and Zeitun were wiped out during the massacres of 1894-96 and the genocide of 1915, the Karabagh Armenians continue to live on their ancestral lands. *See supra* note 23.
- 157 *See* HOVANNISIAN, *supra* note 17, at 78-79; SUNY, *supra* note 8, at 193; Astourian, *supra* note 8, at 52-67; Dudwick, *supra* note 51.
- 158 *See supra* notes 92-93 and accompanying text.
- 159 *Nationalist Ferment*, *supra* note 5, at 29-30.
- 160 *Id.* *See generally* 1 HOVANNISIAN, *supra* note 17, at 79-86; 2 HOVANNISIAN, *supra* note 26, at 191-95.
- 161 *See* G.A. HOVHANNISIAN, SOVETAKAN ISHKHANUTIAN HASTATUME LERNAYIN GHARABAGHUM [The Establishment of Soviet Rule in Mountainous Karabagh] (1971), *reprinted in* ZORYAN, *supra* note 37, at 37.
- 162 *See supra* note 95 and accompanying text.
- 163 *See* HOVHANNISIAN, *supra* note 161 (letter by Vice President of the Central Executive M. Gasumov and Secretary M. Khanpudaghov which states Karabagh is an “autonomous Armenian region”) (emphasis added); Saroyan, *supra* note 27, at 14-16 (territorial administrative units within the Soviet Union were linked to ethnicity).
- 164 *See* Saxer, *supra* note 64, at 689-94 (succession of former Soviet republics). Territorial sovereignty may be acquired by the succession of a new state to the territory of its predecessor. *See* LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 8-11 (1974); RICHARD N. SWIFT, INTERNATIONAL LAW: CURRENT AND CLASSIC 110-11 (1969); STARKE, *supra* note 75, at 154.
- 165 *See generally* Saroyan, *supra* note 27, at 14. *See also* ALTSTADT, *supra* note 32, at 192-219; SUNY, *supra* note 8, at 207.
- 166 *See supra* notes 91-108 and accompanying text.
- 167 *See supra* notes 91-108 and accompanying text.
- 168 [Case Concerning The Frontier Dispute \(Burkina Faso v. Mali\), 1986 I.C.J. 554, 567 \(Dec. 22\).](#)
- 169 *Id.* at 652.
- 170 POMERANCE, *supra* note 68, at 19.
- 171 *See supra* notes 149-62 and accompanying text. It should be noted, however, that the legal status of Karabagh and Azerbaijan within the Soviet Union was substantially different. Azerbaijan, as a union republic, had a right to secede from the U.S.S.R. under the 1924 (Article 4) and 1977 (Article 72) Soviet Union Constitutions. *See* Konst SSSR 1924 & Konst SSSR 1977, *reprinted and translated in* ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR: A GUIDE TO THE SOVIET CONSTITUTIONS (1982). The autonomous region of Karabagh, on the other

hand, had direct representation at the federal level, but did not have a right to secede under the Soviet Constitutions. See HANNUM, *supra* note 81, at 358-60.

- 172 There are five traditional and generally recognized ways of acquiring territorial sovereignty: occupation (establishing sovereignty over *terra nullius*--territory not under the authority of another state); annexation (conquering or subjugating the territory of another state); accretion (the addition of territory through natural causes such as windblown sand); cession (transfer of territory from one sovereign state to another); and prescription ("the peaceable exercise of *de facto* sovereignty for a very long period over territory subject to the sovereignty of another"). HANNUM, *supra* note 81, at 153-62. The acquisition of territorial sovereignty by newly emerged states, however, is *sui generis*, and does not fall neatly within one of the traditional categories. STARKE, *supra* note 75, at 162-63; see also CRAWFORD, *supra* note 84, at 397-98.
- 173 See *supra* notes 26-37 and accompanying text.
- 174 See *supra* notes 26-37 and accompanying text; see also CHRISTOPHER J. WALKER, ARMENIA: THE SURVIVAL OF A NATION 255-330 (2d ed. 1990).
- 175 In August of 1918, the First Assembly of the Karabagh Armenians elected the so-called People's Government of Karabagh. 1 HOVANNISIAN, *supra* note 17, at 83.
- 176 *Id.* at 184-87. See generally *id.* at 83-86, 156-96; 2 HOVANNISIAN, *supra* note 26, at 191-95.
- 177 1 HOVANNISIAN, *supra* note 17, at 186-87.
- 178 See CRAWFORD, *supra* note 84, at 389-90, 414-16 (the doctrine of retroactive sovereignty is applied in very limited circumstances); Saxer, *supra* note 64, at 690-91 (the independent states of the former Soviet Union, with the possible exception of the Baltic states, are newly independent states, not states which are re-activating previous statehood). Before Karabagh became an autonomous region of Soviet Azerbaijan, three significant events occurred which interrupted Azerbaijan's claimed sovereignty over Karabagh. First, Azerbaijan relinquished its claim to Karabagh in 1920. See *supra* note 38. Second, the Soviet authorities awarded Karabagh to Armenia in 1921 (but reversed their policy the same year and made a final decision to award Karabagh to Soviet Azerbaijan in 1923). See *supra* notes 38-39. Third, under the Union Treaty of 1922, the international legal personality of Azerbaijan, and its claims to territorial sovereignty, were extinguished. See Saxer, *supra* note 64, at 613-14.
- 179 See 1 HOVANNISIAN, *supra* note 17, at 184-89.
- 180 See Vienna Convention of the Law of Treaties, adopted Jan. 27, 1980, art. 2(1)(a), 1155 U.N.T.S. 332, 333 (treaties are concluded "between States") [hereinafter Vienna Convention]. The Convention "constitutes both codification and progressive development of international law." *Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/CN.4/SER.A/1966.
- 181 See Vienna Convention, *supra* note 180, art. 52 ("A treaty is void if its conclusion has been procured by the threat or use of force. . . ."); STARKE, *supra* note 75, at 148-51.
- 182 See Vienna Convention on Succession of States in Respect of Treaties, adopted Aug. 23, 1978, art. 16-30, U.N. Doc. A/Conf. 80/31, reprinted in 72 AM. J. INT'L L. 971 (1978) (this convention is not yet in force). The "clean slate" theory adopted by the Convention basically provides that a new state has neither the rights nor obligations of its predecessor state, but does, of course, have an obligation to comply with customary rules of international law.
- 183 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 cmt. f (1986) (adopting the same approach as the Vienna Convention on the Succession of States in Respect of Treaties).
- 184 See *supra* note 39.
- 185 See COX, *supra* note 2, at 33; *supra* notes 38-39 and accompanying text.
- 186 See STARKE, *supra* note 75, at 162-63 (until a state comes into being it is not capable of taking title); Saxer, *supra* note 64, at 613-14 (after the Union Treaty of 1922, Soviet Azerbaijan was not a sovereign state under international law).

- 187 *See supra* note 65.
- 188 *See* SUNY, *supra* note 8, at 206.
- 189 *See supra* note 66 and accompanying text.
- 190 Exactly how a newly formed state acquires territorial sovereignty has not been clearly explained by legal scholars. *See supra* note 171. Thus, it is unclear what effect, if any, Karabagh's *de facto* independence at the time of Azerbaijan's secession from the Soviet Union has on Azerbaijan's claim to territorial sovereignty over Karabagh. *See supra* notes 135-49 and accompanying text for a discussion of the ramifications of the lack of international recognition of Karabagh as an independent state.
- 191 *See supra* notes 43-53 and accompanying text.
- 192 *See* COX, *supra* note 2, at 33; Republic of Armenia Archives, File No. 9, reprinted in ZORYAN, *supra* note 37, at 27-29 (Memorandum of the Armenian political situation in Karabagh presented by the Eighth Assembly of Karabagh to the representatives of the Allied Powers and Transcaucasian Republics, Mar. 4, 1920); *The Armenian Review*, Autumn 1968, reprinted in ZORYAN, *supra* note 37, at 42-46 (Petition from the Armenians of Mountainous Karabagh to Prime Minister Nikita Khrushchev, May 19, 1964).
- 193 *See* ARMENIA & KARABAGH, *supra* note 3, at 130; COX, *supra* note 2, at 35-37, 45-50, 66-67; *In Brief USSR: In Nagorno-Karabakh; Forced Deportations, Abuses Continue* (Int'l League for Human Rights, New York, N.Y.), No. 37, July, 1991; *The Nagorno-Karabakh Crisis: Prospects for Resolution: Hearing Before the Commission on Security and Cooperation in Europe* (1991) (statements of Baroness Caroline Cox, Yelena Bonner and others); *see also* 1 THE SUMGAI TRAGEDY: POGROMS AGAINST ARMENIANS IN SOVIET AZERBAIJAN (Samvel Shahmuratian ed. & Steven Jones trans., 1990) (eyewitness accounts of the massacre of Armenians in Baku suburb of Sumgait).
- 194 ARMENIA & KARABAGH, *supra* note 3, at 130; COX, *supra* note 2, at 34.
- 195 *See supra* note 193.
- 196 *See supra* note 53.
- 197 COX, *supra* note 2, at 42 (citing HRAIR BALIAN, NAGORNO-KARABAKH AND SOVIET NATIONALITIES-CONFLICTS: HUMAN RIGHTS 22-23 (1991)).
- 198 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970). *See also supra* notes 113, 114, 121 and accompanying text.
- 199 QUAYE, *supra* note 111, at 220.
- 200 The concept of equity has a role in international law. The International Court of Justice, for example, may “decide a case *ex aequo et bono* [according to justice and fairness], if the parties agree thereto.” Statute of the International Court of Justice, June 26, 1945, art. 38(2), 59 Stat. 1055, 1060. *See generally* CHARLES S. RHYNE, INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE § 1-6.5, at 54 (1971).
- 201 Under the *millet* system of the Ottoman Empire, the Armenians were victims of official and unofficial discrimination and persecution. *See, e.g.*, WALKER, *supra* note 174, at 87-89.
- 202 *See supra* notes 23, 24 and accompanying text.
- 203 *See* Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, YALE J. INT'L L. 221, 226 (1989). The lack of international response to the Armenian Genocide, in fact, may have influenced the development of Nazi ideology. *See* Max M. Laufer, *A Tale of Two Genocides*, NAASR JOURNAL OF ARMENIAN STUDIES, Fall/Winter 1985-86, at 75, 84. Adolph Hitler, before ordering the German invasion of Poland and the initiation of the Jewish Holocaust, confidently remarked, “[w]ho,

after all, speaks today of the annihilation of the Armenians?" KEVORK B. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* 1 (1985).

- 204 For an analysis of the rights of the Armenian people to reparations for the Genocide of 1915 and the restoration of their historic lands in eastern Turkey/western Armenia, see SHAVARSH TORIGUIAN, *THE ARMENIAN QUESTION AND INTERNATIONAL LAW* (2d ed. 1988).
- 205 There are two principal dialects of Armenian: Western Armenian and Eastern Armenian. The Western Armenians were the primary victims of the genocide of 1915-1918. *See* WALKER, *supra* note 174, at 11-12.
- 206 *Id.* at 12.
- 207 *See supra* notes 150-63 and accompanying text.
- 208 *See supra* notes 167-99 and accompanying text.
- 209 *See* QUAYE, *supra* note 111, at 240; STARKE, *supra* note 75, at 125-26.
- 210 *See supra* note 130. For a thoughtful discussion of both the constitutive theory and the declaratory theory, see CRAWFORD, *supra* note 84, at 15-25 (Crawford is also of the opinion that the declaratory theory is the better view); *see also* STARKE, *supra* note 75, at 128-29 (the bulk of international practice supports the declaratory theory).
- 211 *See* Tomuschat, *supra* note 90, at 10. In fact, the principle of self-determination itself was reluctantly adopted by existing states and only in response to “the potential explosiveness” that a denial of the principle may have caused; *see* KODJOE, *supra* note 81, at 184.

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