REGIONAL CONFLICTS

NAGORNO-KARABAKH CONFLICT: LEGAL ASPECTS OF A SETTLEMENT

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Intentio inservire debet legibus, non leges intentioni (*Lat.*).

Intentions ought to be subservient to the laws, not the laws to intentions.

Introduction

Any international conflict can be resolved only when the world community makes an objective political and legal assessment of that conflict. A thorough study of the root causes of the confrontation and a comprehensive analysis of the current situation is absolutely essential for:

(1) the adoption of a fair decision by the parties (with the participation of mediators);

(2) legally correct and effective use of generally recognized rules of international law; and

(3) the establishment of a stable and lasting peace guaranteed by the international community as represented by authoritative international organizations such as the United Nations, OSCE, European Union, Council of Europe, NATO and others.

Their immediate duty is to maintain and restore peace and stability both on a global scale and in various parts of the world, and to apply sanctions against the aggressor state.

On 25 January, 2005, the Parliamentary Assembly of the Council of Europe adopted its Resolution 1416 (2005), "The Conflict over the Nagorno-Karabakh Region Dealt with by the OSCE Minsk Conference"[1] (rapporteur David Atkinson). In this document, the Assembly ac-

[1] See: [http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1416.htm /accessed 2005-03-31/].

knowledges the occupation of a significant part of Azerbaijan's territory by Armenian troops and reiterates that "the occupation of foreign territory by a member state constitutes a grave violation of that state's obligations as a member of the Council of Europe." Consequently, this resolution can be hopefully regarded as the first, albeit belated, step in this direction. Such documents containing a political and legal assessment of the Nagorno-Karabakh conflict should also be adopted by other international organizations, primarily the OSCE, which provides the framework for the ongoing Minsk negotiation process. The lack of an objective assessment does not encourage the parties to the conflict to show goodwill for the purpose of resolving it and serves (as is the case today) to prolong the confrontation and to create illusions among certain forces that in this way it is possible to overstep the rules of international law, to occupy a sovereign state's internationally recognized territory and, once these acts have been committed, to draw the desired dividends from the negotiation process. It should be remembered that Azerbaijan and Armenia signed the Helsinki Final Act, so recognizing, in accordance with their constitutions, the supremacy of the provisions of this Act in both internal and external legal relationships and the principles of inviolability of borders and territorial integrity of states.

Only an objective position of the world community will make it possible to withdraw the armed forces deployed in the conflict zone and to resolve the conflict by peaceful means, without military pressure, on the basis of the principles of international law.

Approach to the Problem

The importance of studying the legal aspects of a settlement of ethnoterritorial and ethnopolitical conflicts in Europe and other regions of the world is due to several factors. First, such conflicts have existed (Aland Islands in Finland, Flanders in Belgium) and continue to exist (Basque Country in Spain, Northern Ireland in the United Kingdom, Corsica in France) for decades and sometimes even for centuries. Second, throughout mankind's entire history such conflicts have often been resolved by means of specific legal solutions pivoted on a distribution of powers between different levels of authority, between the center and the region, the state and the autonomy, the federation and its constituent entity. Theoretically speaking, the range of distribution of these powers stretches from "full sovereignty" to "total lack of authority." Naturally, a conflict can hardly be resolved if only one of these categories is ensured, so that in practice its fair settlement (at a particular stage) should lie somewhere in the middle of the given range. A characteristic example here is provided by the recent history of Belgium, which used to be a unitary state but, with a gradual phase-in of appropriate changes, has turned first into a regional state and then into a federation.

In the event, we take into account that the situation in Azerbaijan's Nagorno-Karabakh differs from the situation in Finland, Belgium, Spain, Britain or any other country or region.

On the Right of Peoples to Self-Determination

It should be noted in this context that, basing ourselves on the norms of international law, we categorically rule out from the very outset, for a number of well-known reasons, the possibility of applying the "self-determination of peoples" principle to the problem of Nagorno-Karabakh.

- First, Nagorno-Karabakh is part of the territory of Azerbaijan. The Republic of Azerbaijan as a sovereign state is the result of an expression of the will and the self-determination of the entire Azer-baijani people (including ethnic Armenians) living throughout the whole territory of the republic, and not of a part of this people. A part of the people cannot make decisions that are crucial to the future of the whole people. In accordance with U.N. General Assembly Resolution 47/135 of 18 December, 1992, "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities," the principle of self-determination of peoples is not included among the rights of national minorities; the international community did not consider it possible or necessary to reflect this principle in the Declaration.[2]
- Second, having signed the Helsinki Final Act in 1975, the countries of Europe, the U.S. and Canada tied in the principle of equal rights and self-determination of peoples, as written into the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (24 October, 1970), with the principle of territorial integrity of states. The Declaration says that effective application of the principle of equal rights and self-determination of peoples "is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality." The principle of self-determination can find its solution only in the context of the principle of territorial integrity of states. The Declaration proclaims that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter."[3] This is precisely why the Helsinki Final Act put this principle in eighth place (out of ten) and called it "the principle of equal rights and self-determination of peoples."
- Third, Nagorno-Karabakh is a region of Azerbaijan where, prior to the ethnic cleansing organized by Armenians, there were two communities (Armenian and Azeri) constituting the population of Nagorno-Karabakh, but by no means a "people." "People" is a political category, and peoples in this context are the Armenians and the Azerbaijanis, who have already implemented their right to self-determination within the framework, respectively, of the Republic of Armenia and the Republic of Azerbaijan. The term "people" cannot be applied to the population of Nagorno-Karabakh as part of the Azerbaijan Republic.
- Fourth, even if we assume the impossible and say that the population of Nagorno-Karabakh consisting of Armenians and Azeris is a people with a right to self-determination, this will not mean that Nagorno-Karabakh should secede from the Azerbaijan Republic. In the 1970 Declaration on Principles of International Law, advocacy of the principle of self-determination is not equivalent to encouragement of secession or fragmentation of countries. This document explicitly states that the principle of self-determination can and must find its solution within the framework of the principle of inviolability of borders and the principle of territorial integrity of states. This principle "should not 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… Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country."[4]

[2] See: [http://www.un.org/documents/ga/res/47/a47r135.htm /accessed 2005-03-31/].
[3] See: [http://www.sam.sdu.dk/samnet3/jura/F05_Folkeret_valgfag/UN_GA_resolution_2625_XXV.pdf /accessed 2005-03-31/].
[4] Ibidem.

- And fifth, neither the theory nor the practice of international or constitutional law has ever had to deal with cases of repeated exercise of the right of peoples to self-determination. If we assume the impossible and such a precedent is actually created, the world community will be faced with the inevitability of Armenian self-determination in Russia, the U.S., France, Turkey, Canada, Australia, Iran, Georgia, Uzbekistan, Kyrgyzstan, Ukraine, Spain, Holland, Bulgaria, Lebanon, Syria and many other countries.

In view of the above, I would venture to disagree with "self-determination without the right to secession," a formula suggested by R. Mamedov for the solution of the "Karabakh problem."[5] The right to self-determination belongs to the people. A settlement of the Armenian-Azerbaijani (Nagorno-Karabakh) conflict should be based exclusively on compliance with the generally recognized principles of inviolability of borders and territorial integrity of states. Among the indisputable principles of such a settlement should be guaranteed protection of the rights of national minorities, their security and existence within the Azerbaijan Republic.

Form of Government

Questions connected with the concept, subject and even the terminology of territorial structure are reflected in the legislation of different states with considerable diversity, which is due not only to difference of opinion between these states, the fact of their belonging to different legal systems or the domination of a particular legal conception, but also to certain political motivations.

The former U.S.S.R. is a case in point. Thus, the concept of constitutional law in the U.S.S.R. was replaced with the concept of state law, and this had an effect on all institutions within the given sphere, particularly on the institution of territorial structure, renamed "state structure" in the narrow sense of the term, which did not include the political aspects of the problem. In 1977, this unfortunate term introduced into legislation by Stalin's 1936 Constitution, was replaced with two other terms: "national-state structure" and "administrative-territorial division," which covered both the political and the territorial aspect of the given problem.

Another example is when the desire of some states to ensure their sovereignty and territorial integrity and to assert their rights to the natural resources located in the territory belonging to them has led to an actual description in their constitutions of the geographic territory of these states (such as the Philippines, Cuba, etc.).

As a result of the evolution of society and law, the component parts of the state, just as the state as a whole, have their own public authorities, which are interconnected by systems of mutual relations regulated by the rules of constitutional law. Today's self-governing territorial units (subnational entities) often enjoy a measure of autonomy under the basic or other law. Such entities are designated by the generic term "territorial autonomy."

So, in some cases the geographical parts of a state are its administrative-territorial units devoid of political autonomy, and in others, they are state-like entities (statoids) with their own legislation. The decisions of the public authorities or the population of such entities adopted within the limits of their autonomous rights established by the constitution (or law) often cannot be overruled by any government or public bodies of the larger structure that includes the given entity.

[5] See: "Vremia rabotaet na nas. Karabakhskaia problema mozhet i dolzhna reshat'sia na osnove mezhdunarodnogo prava (Kruglyi stol)," *Azerbaidzhanskie izvestia*, 25 January, 2005, p. 2.

In the current classification of forms of territorial state structure (government) based on the relationship between the state as a whole and its component parts, two main forms predominate: unitary and federal. Naturally, we take into account that confederation as a community of states (associated states) has no direct bearing on the problem of territorial state structure, since it is an association of sovereign countries and not of the component parts of a single state. The doctrine of constitutional and international law is sufficiently conservative in its definitions. That is why scholars have tried for many decades to fit all the models of actually existing states into the framework of the concepts of "confederation," "federation" and "unitary state." However, a political and legal analysis of empirical reality shows that in pure form these categories are virtually nonexistent and that their elements are interlinked to an extent resulting in the emergence of various hybrid forms. For example, there are generally recognized federal states whose constituent entities are entitled to conclude international treaties (Austrian lands, territorial entities of Bosnia-Herzegovina).

At the same time, use of inductive methods to investigate these problems leads to certain definitive generalizations. In my view, an analysis of the various methods of state organization suggests the conclusion that, depending on the relations between the state and its component parts, today we can speak of the following generalized forms of state structure (forms of government by autonomy of regions): confederation, federation, unitary regional state and unitary state with special autonomous status for some of its territories. In this context, a "blind" approach to traditional concepts, definitions and classifications often produces an opposite effect. An attempt to fit current realities into a definitive framework could lead to a simplification or, even worse, to a distortion of today's constitutional diversity, and in the process of conflict resolution this could become an obstacle blocking the way to a settlement. That is why in resolving an ethnoterritorial or ethnopolitical conflict one should bear in mind the doctrinal concepts and definitions of constitutional and international law, consider the constitutional and international legal realities existing in the world, and be prepared to make unorthodox, non-routine decisions in order to resolve the given conflict.

Federalism

As a legal means for resolving the Nagorno-Karabakh conflict between Armenia and Azerbaijan, this form of government (state structure) has been repeatedly examined at different levels: mass media, expert, scientific, diplomatic and political, including the very top. It should be pointed out in advance that Azerbaijani society takes a negative view of federation as a form of government for the republic. There are many reasons for this, primarily the existence of aggressive separatism, which has been a feature of life in the country for many years.

However, the introduction of federal relations has made it possible to settle a number of ethnopolitical conflicts in Europe (Belgium, Britain, Spain). It is precisely federalism (in a form yet to be elaborated) that can enable us to resolve the Nagorno-Karabakh conflict based on the principles of liberation of the occupied territories and retention of Nagorno-Karabakh within the Azerbaijan Republic. At the same time, a concession on the part of the Azerbaijan Republic (incidentally, there is much talk in the world community about the need for such concessions) could theoretically consist in a renunciation of vertical relations between the Nagorno-Karabakh region and Azerbaijan's central authorities. In this case, relations between the center and the autonomy would depend on the distribution of legislative powers. The scientific concept of federation implies that each level of government derives its authority from the constitution, that is, there are no relations of direct administrative subordination between them. Any changes in the distribution of legislative powers between the levels of government are possible only with the direct or indirect participation of both the subnational entity and the federal center.

It is quite obvious that upon the resolution of the conflict the relations between the Azerbaijan Republic and the Nagorno-Karabakh region will include elements of a federation, even if the peace agreement does not contain such terms as federalism, federation or federal.

Some Forms of Federal Relations and Autonomy

In drawing a distinction between unitary and federal states, let us note that the component parts of a federation (its entities) usually have their own constitutions (as, for example, the states of the U.S., the lands of Germany or the republics of the Russian Federation) or laws (such as the charters of RF regions, territories and autonomies). That is how the system of government bodies of federal entities, their powers, etc., is established in these countries. Dr. Konrad Hesse, a professor at Freiburg University, formulated this idea as follows: "Despite common structural principles, each federal state is a historically-specific individuality."[6]

The system of government bodies of administrative-territorial units in a unitary state and their powers are established by the constitution and laws of the whole state.

In contrast to the component parts of a unitary state, the constituent entities of a federation have a large degree of political and state autonomy. But it would be a mistake to think that public administration in all unitary states is centralized, whereas federal states are characterized by decentralization and a clear division of powers between the center and the regions. Every unitary and federal state has its own specific features, which are often very significant. For example, in such unitary countries as Spain and Italy the highest-level territorial units enjoy a greater measure of state autonomy than the constituent entities of some federal states. In this context, one could recall the practices of the U.S.S.R., Yugoslavia and Czechoslovakia in the conditions of totalitarian regimes, where all power was in effect monopolized by the central authorities.

The status of some component parts of unitary and federal states often differs from the status of other component parts of the same state. This means that territorial state structure can be either simple (symmetric) or complex (asymmetric). Under a symmetric structure, all the component parts of the state have equal status. For example, the lands (states) of Austria and Germany, the provinces of Poland and the regions of Belarus have equal rights. Under an asymmetric structure, the component parts of the state have unequal status. Thus, alongside regions with equal status, unitary Ukraine includes the Crimean Autonomous Republic, which has been granted special status. Sicily, Sardinia, Venezia Giulia and other regions of Italy (under the country's constitution) enjoy special forms and conditions of autonomy by virtue of their special status approved by constitutional laws. In Spain, autonomy has been granted to the Basque Country, Catalonia, Galicia, Andalusia and other regions. Each of the self-governing regions has its own assembly elected by its population, which issues laws that are effective in the given territory. The United Kingdom, being a unitary state, consists of historically evolved parts: England, Scotland, Wales and Northern Ireland. As regards their administrative-territorial division, England and Wales are divided into counties, Northern Ireland into districts, and Scotland into council areas. Greater London is a separate administrative-territorial unit (local government area).

Consequently, as noted above, the degree of territorial autonomy may differ, and depending on that degree such autonomy may be divided into two forms: state (legislative) and local (administrative). Under the former, the given territorial entity has the outward signs of a state: parliament, government, sometimes constitution, citizenship, etc., with the range of legislative powers of the auton-

[6] K. Hesse, *Osnovy konstitutsionnogo prava FRG*, Yuridicheskaia literature Publishers, Moscow, 1981, p. 114.

omous parliament usually established by the constitution of the whole country. The local form of autonomy has no such signs, and the range of autonomous rights of territorial units is established, as a rule, by ordinary laws. Constitutions and other laws usually provide that autonomous units are entitled to draft (and sometimes also to adopt) basic normative acts determining their internal structure (constitutions, statutes, self-government charters, etc.).

Territorial units with a large proportion of people of different ethnic origin with their own specific features of daily life determined, say, by the insular position of the given territory are often granted special autonomous status, characterized in certain cases as national-territorial or ethnic-territorial. For example, such autonomy is enjoyed by the Swedish-speaking Aland Islands in Finland, by insular and border regions in Italy, autonomous areas in China (mostly inhabited by indigenous non-Han peoples), the Eskimo island of Greenland in Denmark, Zanzibar in Tanzania, and others.

In particular, the Aland Islands, which are a province of Finland, have their own parliament and government with guaranteed powers, guaranteed territorial integrity and their own citizenship (native Alanders automatically acquire Finnish citizenship, whereas other Finnish citizens, even when they settle on these islands, do not automatically acquire Aland citizenship). At the same time, the president of Finland has a right to veto Aland laws. The law on the autonomy of the Aland Islands is adopted by a two-thirds majority of the Finnish parliament, and the Aland parliament approves it by the same majority. Another noteworthy fact relates to autonomous Greenland: in 1985, it withdrew from the European Economic Community, while Denmark remained a member.

A territorial government model largely similar to the Finnish and Danish systems will be found in the United Republic of Tanzania, which in the literature is usually referred to as a federation. In actual fact, there is no reason to call it so, in spite of the treaty origins of that united state. Tanganyika, the mainland part of the country, does not have any special government bodies of its own that would operate alongside the state authorities. In effect, Tanzania is a unitary state with Zanzibari autonomy.

Scotland's autonomy within the United Kingdom also has its peculiarities. Scotland has no legislative or executive bodies, but under the 1707 Act of Union it is entitled to have its own legal and judicial system, its own (Presbyterian) church, and special representation in the House of Lords (in the House of Commons, Scotland is represented on a general basis).

Territorial or national autonomy or self-government can range from very broad to very narrow. Examples of very broad self-government are provided by Switzerland, the U.S. and partly England. The Swiss republic consists of separate states or cantons, and each of these enjoys full autonomy: its elected government is entitled to run local affairs without permission or authorization from the central government. This includes matters of war and peace, cooperation with other states, railroads, industrial legislation, telegraph services, finances, customs and other areas.

The Powers of the State and the Autonomy

In the distribution of powers between the state and the autonomy (autonomous community), it is necessary, in my opinion, to specify the following: the exclusive powers of the central authorities; the exclusive powers of the autonomy; the possibility for granting residual powers either to the central authorities or to the autonomy; the conditions for applying a legislative technique known as "concurrent powers" without the granting of residual powers either to the central authorities or to the auton-

omy; and the possibility for the adoption by the central authorities of framework laws specifying the law-making powers of the autonomy.

The principle of concurrency without the granting of residual powers either to the central authorities or to the autonomy was used to resolve the problems of the Aland Islands. Nevertheless, in my view, its implementation is a technically difficult matter and can subsequently lead to complications: it is very difficult in practice to draw up an exhaustive list of powers and then to divide them between the state and the autonomy. At the same time, the object of division in the case of Finland and the Aland Islands was legislative and executive power. Matters of judicial power are not covered by the agreement on self-government, so that the application of Aland laws is referred to the competence of Finnish courts, including the country's Supreme Court and Supreme Administrative Court.

As I see it, the division of legislative powers between the state and its autonomous entities should be based on a clear delimitation of the exclusive powers of the state and the autonomy. In other areas, it is possible to take several paths: to create competing powers, when the autonomous entity will be entitled to adopt legislative acts on matters that are not regulated by the relevant laws of the state; to adopt framework laws; and to delegate (by mutual consent under an authorizing law) a number of the state's legislative or administrative powers to the autonomous region.

International practice shows that such areas as foreign policy, defense, monetary system, customs services, intellectual property, bankruptcy and some other areas remain under the jurisdiction of the state (the central authorities).

The adoption by the central authorities of framework laws specifying the law-making powers of the autonomy means that the central authorities establish certain limits for the operation of the autonomous authorities. Within these limits, the central authorities cannot intervene in the activities of the autonomy, and beyond these limits all power belongs to the center.

Compromises

On the part of the Republic of Armenia:

(1) an end to the occupation and a withdrawal of its armed forces from the territory of the Azerbaijan Republic;

(2) disbandment and disarmament of the armed formations of Nagorno-Karabakh.

On the part of the Republic of Azerbaijan:

(1) granting of the highest autonomy status to Nagorno-Karabakh;

(2) renunciation of claims to the Republic of Armenia at the International Court of Justice for the rehabilitation of areas destroyed during the war or for payment of compensation for the more than thirteen years of forced expulsion of their inhabitants, for the inflicted economic and moral damage;

(3) consent to the temporary stationing of U.N. peacekeeping forces in Nagorno-Karabakh;

(4) consent to the establishment of horizontal relations between the center and the Nagorno-Karabakh autonomy with clear division of powers under one of the aforesaid variants.