The False Dichotomy between Territorial Integrity and Self-Determination: How the *Kosovo* Case further Clarifies the Relationship between these Concepts at International Law

Dr. Thomas J. Samuelian

Dean, Law Department, American University of Armenia

for the

INTERNATIONAL AND COMPARATIVE LAW CENTER

LEGAL ASPECTS OF ARTSAKH'S SELF-DETERMINATION IN THE CONTEXT OF CONTEMPORARY INTERNATIONAL LEGAL CHALLENGES: BEFORE AND AFTER KOSOVO

11 DECEMBER 2010

Abstract:

In international political discourse, the Karabagh Conflict is often presented as a legal stalemate of counterbalancing rights: territorial integrity vs. self-determination. This paper examines the distinct spheres of application of the principle of territorial integrity and the right of self-determination. The ICJ's 2010 Kosovo *decision confirmed and clarified well-established international law on the relationships between these concepts and sovereignty. At least as applied to NKR, the right of self-determination is controlling as a matter of law. While the false dichotomy between territorial integrity and self-determination may have been introduced as a diplomatic mediation maneuver, it has outlived its usefulness as a negotiating framework and is delaying resolution of the conflict at great cost to all parties. In conclusion, as shown by the* Kosovo *decision, the "legal" stalemate is not well-founded at international law and the right of self-determination is dispositive for resolution of the Karabagh Conflict.*

For many years now, the rhetoric of both the Minsk Group and other parties has fallen into the intellectually sloppy habit of treating territorial integrity and self-determination as counterbalancing rights, as if there were some kind of legal equipoise where two contradictory rights created a legal deadend and a situation from which there is no exit at law. How many times have we heard, the imprecise formulation of the "dilemma" of NKR independence: Azerbaijan's right of territorial integrity vs. NKR's right of self-determination? That world powers who are either interested in currying favor with oil-rich countries or their ethnic allies, or that seek to benefit from continuing turmoil in the region, misapply these terms for their political interest is only to be expected. International law is both a logical structure of justice and a narrative tool of expedience, and its practitioners commonly mix the two, almost instinctively to achieve the outcomes that are in their interest. This is particularly true in negotiation contexts where mediators and other players seek to manipulate the parties and their constituencies through

half-truths, half-threats, and half-promises. The Wikileaks revelations of this kind of duplicity is fortuitous and provides further evidence of this kind of manipulation, which was painfully obvious to any informed or objective observer. I will not discuss how the press misses not only the nuances, but even the essential facts, since journalists have long since ceased to demonstrate the diligence, intelligence or integrity to analyze anything, preferring rather, out of ignorance or sloth, to be mouthpieces for their sources or sponsors, shoehorning all situations into their stock narratives, impoverished knowledge bases and skewed world views. This is particularly problematic, since the correct and just application international legal rights and duties depends on accurate facts, and when the facts are blurred and muddied in the court of public opinion, the legally relevant conclusions of law are obscured. The one forum where it might be possible to clarify the essential legal nature of these concepts and the mixed conclusions of fact and law involved the analysis of sovereignty and its subsidiary attribute, territorial integrity, on the one hand, and self-determination, on the other, is a judicial forum. Not that courts are immune to the above ills, but they are less susceptible than the other kinds of international mechanisms – assemblies and ad hoc bodies. That is why what the Kosovo Case says about territorial integrity is so significant: it scrapes away the layers and layers of misstatements, misapplications, misperceptions and misconceptions.

Before addressing what the Kosovo Case says about territorial integrity, I would like to point out that the concept of territorial integrity is misapplied to the Karabagh Conflict from the outset. Technically, at international law, NKR was never part of the Republic of Azerbaijan, which only emerged as an independent state after the fall of the Soviet Union. How this misconception gained currency is a topic for another day. For today, however, I wish to make clear that nothing in this presentation should be misinterpreted to support the notion that NKR is an integral part of the Republic of Azerbaijan. I am addressing the territorial integrity issue only because it has been injected into the international discourse about NKR's rightful claim to self-determination as a diversionary tactic and needs to be disentangled so that the region can finally have a lasting, stable peace and protect the Armenian population of NKR from abusive, foreign rule by a failed sovereign. Baku's track record with respect to Armenians over nearly a century gives little basis to believe it can govern Artsakh fairly or peaceably. The legally controlling, material fact is that the population itself reached this same conclusion peacefully and lawfully before the conflict began. When all the inhabitants were on the land in the soviet era, a valid petition was held in late 1987, and the population expressed its will overwhelmingly for rule by Yerevan, not Baku, as further confirmed by the internationally monitored referendum in December 10, 1991 in favor of independence. However, even if Azerbaijan had some colorable claim of sovereignty with respect to NKR, NKR's right to self-determination would prevail under well-accepted principles of international law, which the Kosovo Case eludicates and reinforces.

The Kosovo Case, relying on uncontroversial, existing international law, disentangles self-determination from territorial integrity, rejecting outright the contention of "several participants" that "a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity." Citing the UN Charter Art. 2(4), Nicaragua v. United States,

ICJ Reports 1986 pp. 101-103, para. 191-193, General Assembly Res 2625 (XXV), adopting the ruling of this case, and the Helsinki Final Act, Art. IV, the court concludes that territorial integrity is a principle "confined to the relations between states." In short, it is not a separate right that logically or legally can be counterbalanced against the right of self-determination. It is a rule of reciprocal conduct among sovereigns, an instrumental norm. Its pre-requisite is that the sovereign has acted properly.

This is not new law. This is reflected in one of the more conservative sources of international law, the Restatement (3rd) of the Foreign Relations of the United States, Sec. 201, comment 1, where territorial integrity is treated as but one of the attributes of sovereignty, along with the remedies for violations, set forth in Secs. 702, 703, including customary and treaty law remedies, such as self-determination, and the right of humanitarian intervention as an extension of the right of self-defense and enforcement of human rights, i.e., third-party defense of the rights in the case of gross violations of human rights. Yet, for nearly two decades, the Minsk Group and to our dismay various representatives of parties to the process, have propagated the misconception that there is a contradiction between territorial integrity and self-determination.

Sovereignty is not absolute, nor is it simply a bundle of rights. It is a bundle of rights that is contingent on fulfillment of a bundle of duties. Whether those duties are fulfilled is a mixed conclusion of fact and law. Among those duties is the duty of honoring its treaty obligations, respecting the human rights of its population, protecting the life, liberty, property, and rights of all of its population, on a non-discriminatory basis, which entails equal protection of the law, equal opportunity for economic development, and meaningful participation in that population's self-governance, regardless of race, religious, ethnic origin, social class, etc. In sum, sovereignty is not an absolute right; it is a contingent right that accrues to a state with respect to a population or territory based on a mixed finding of fact and law as to its fulfillment of its duties.

Honoring treaty obligations and customary international law, which include human rights, is one of the duties and one of the inducements upon which sovereign rights are recognized. When a sovereign fails in its duties, there is a remedy at international law: that is, self-determination. When asserted in a manner justified under the circumstances (another mixed conclusion of fact and law), in order to permit the remedy of self-determination, the community of nations suspends its recognition of certain the aspects of sovereignty. Sovereignty ends where the right and remedy of self-determination begin. When sovereignty is in abeyance, that is, when the community of nations reaches the mixed conclusion of law and fact that the sovereign in question is unwilling or unable to fulfill its duties before the community of nations with respect to the population and territory in question, the principle of respect for territorial integrity among states of good standing ceases to have legal effect for two reasons: first, to permit the operation of the remedy of self-determination; second as sanction, an expression of community disapproval of the misbehavior of member of the community of nations. Since, as the Kosovo ruling points out, territorial integrity is confined to the "relationship among states," it is an instrumental norm designed to promote peace and good relations among states, not an inherent right that a state can invoke against its own people. Like all instrumental rights, cessante ratione, cessat ipsa lex. The reason ceasing, the law itself ceases.

Once a mistreated population invokes the remedial right of self-determination, self-determination becomes the controlling norm with respect to the population and the territory on which that population lives as a polity at international law. In short, there is no logical basis for the legal equipoise or conundrum of territorial integrity vs. self-determination. When one is in force, then the other cannot be, and vice versa. They are complementary, not overlapping, legal concepts.

However, both failure of sovereign duty and justified assertion of the right and remedy of self-determination are mixed conclusions of law and fact. At international law, the fact finding process is not usually a pure legal inquiry before a disinterested arbiter of law and fact. It is political in the etymological sense of the word. The finder of fact is the community of nations, a jury of the sovereign's and emerging sovereign's peers, who are, unlike a real jury, not disinterested and rarely recuse themselves and are rarely disqualified by others. Indeed, they are not only the jury and the judge, but are also the sole recourse on appeal, thus they are judges in their own case (whether directly or through various channels of influence and pressure on facially independent decision-makers).

When mediators or international organizations, world powers or ethnically tied neighbors become involved in the fact-finding, there is a high likelihood of outcome determinative fact finding. Some typical tactics of international legal and political advocacy are the following.

As to the failure of sovereign duty:

- the finding of failure of sovereign duty is blurred or downplayed; the potential for rehabilitation or resuming its duties is overestimated;
- the universal tactic of wrong-doers, reasonable doubt, is in full play;
- the consequences of an adverse finding are exaggerated, that is, calling the wrong-doing a wrongdoing will be so offensive that it will harm the community's interests and make matters worse, perhaps even result in uncontrollable retaliation for which the community is unwilling to take preventive or protective measures.

As to the justification of self-determination the typical arguments used to muddy the waters:

- the emerging sovereign or its allies have unclean hands,
- self-determination should avoid rewarding external manipulation,
- lack of capacity for self-rule,
- the parade of horribles, slippery slope argument that it will set off a domino effect on similar, perhaps less meritorious, situations. In short, the current injustice to the oppressed population is outweighed by the specter of more headaches for the community of nations and possible heartache for other captive populations

> inspired by the example of liberation to pursue the vain or unrealistic hope of freedom and human dignity before the community of nations deems it convenient or expedient.

Because this is a "community of nations" discourse largely shaped in the court of public opinion, how these tactics are used could be outcome determinative for the resolution of the conflict.

Out of such a system, bias is not only to be expected as a deviation from the norm, but it is built in to the very system by design, thus the players are permitted and expected to act in their own interests. To disguise their interests, they package, color and spin the facts and create a spurious legal conundrum to delay just resolution so that (or until) they could extract oil and other military and geo-political benefits from Turkey and Azerbaijan. It is important to note that this is temporally limited and contingent posturing, a composite of dynamic power and interest vectors, not eternal incontrovertible truths, but dilatory tactics and discourses that evolve over time as interests change. In short, the legal conundrum of the 1990s may be cast aside as "facts" are reexamined in light of changing interests that dictate different outcomes.

The impossibility of a legal equipoise can also be reached by a slightly different line of argumentation. Territorial integrity and sovereignty are legal concepts of different orders. Territorial integrity is not an independent right; it is an attribute of sovereignty, and sovereignty is actually a subordinate species of the people's right of self-determination. If territorial integrity were superior there could be no sovereignty or self-determination.

Self-Determination is a jus cogens human right. While life, liberty and property are all legally protected interests under international law, the order of enumeration is also the order of their priority at law. Life is accorded the highest protection, then liberty, and finally property. The right to be secure in one's person, not to be subjugated, abused, discriminated against, and to have equal protection of the law, are all higher rights than property rights. These rights impose a corresponding duty on the sovereign to not merely to refrain from violation, but to affirmative prevent violation and assure protection. Azerbaijan and its ally Turkey have failed to fulfill these sovereign duties with respect to the Armenians over decades, indeed centuries, and there is no reasonable basis to conclude that they are capable of fulfilling those sovereign duties now or in the future, especially, in the aftermath of these tense times, the flights of fancy of certain of their allies notwithstanding. In this respect, they are failed sovereigns, from which, as in the case of the United States, the only option is independence. Some perhaps well-intentioned, but apparently immoral diplomats and analysts, say it is a new Turkey and new Azerbaijan, despite the overwhelming counter evidence, and with a straight face urge a social experiment on human subjects in order to test their hypothesis that Baku and Ankara can fairly treat the Armenians. This is intellectual hubris or self-interest that turns innocent Armenians into means for their ends – to prove that the Turks in Azerbaijan and Turkey have changed, to prove that their grand theories of multinationalism can work, to find a quick fix that appeases an erstwhile ally or potential oil supplier, to avoid a domino effect precedent for self-determination. It is completely and indefensibly immoral to treat human beings instrumentally, as Kant made clear more than 300 years ago.

In conclusion, as the Kosovo Case points out, self-determination is a jus cogens human right at international law that was the legal basis for the entire de-colonialization movement of the 20th century.

Territorial integrity is an expedient measure aimed at promoting good relations among nations, peace and stability. It came to the fore as a Cold War compromise in the Helsinki Final Act in 1975. It is properly applicable only to the extent that it promotes stability. When it ceases to do so or undermines stability, it engenders the violation of international law known as colonialism, whose remedy at international law is self-determination.

Therefore, any analysis of the rights of the Armenians of Artsakh must start and end with the right of self-determination in conformity with the will of the majority who are indigenous to that land, which has already been expressed in peaceful petitions and referenda and costly military defense against the Azeri and Turkish revanchist aggressors. It is time for the de facto independence of NKR to be recognized de jure as the only just and practical path to protecting the population's life, liberty and property and achieving lasting peace and stability in the region. Continuing to toy with Azerbaijan and Turkey's psyche by keeping unrealistic and unfounded claims of Azerbaijani sovereignty over NKR alive in the negotiation process only prolongs the suffering of the population of NKR, feeds the instability in the region and increases the risk of renewed conflict for a "principle of territorial integrity" that never applied in the first place.