Applying International Law on Frozen Conflicts. Case Study: Nagorno-Karabakh

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Abstract: Identity and the need for autonomy or independence are recurrent in international relations. Numerous times, the impossibility to achieve sovereignty leads to conflicts, many of them manifesting from time to time as a new political agenda. The conflict over Nagorno-Karabakh determined over time new political and legal positions on international arena, by evaluating the principles of international law regarding different dimensions of the conflict. This paper aims to answer some of the questions regarding frozen conflicts based on the claim of the right to self-determination and secession of residents, focusing on the frozen conflict of Nagorno-Karabakh and the application of international law.

Keywords: self-determination, secessionism, frozen conflicts, international law

Overview

Frozen conflicts are various, found in many secessionist situations formed in the last decades. They are the result of debates regarding the possibility of a community to obtain the same privileges of self-determination or even secession as others, as an internal incentive, and eventually, of course, recognition, as an external purpose. This desire of autonomy and independence is strongly linked to the concept of liberty itself, most of the times in opposition to the security dimension of another entity, and thus remaining in many situations without a precise answer. The purpose of this article is to emphasize the international law can be applicable to frozen conflicts. Scholars are defining frozen conflicts as situations where groups failed to gain the main conditions for self-determination or secession and thus, for a better understanding of a frozen conflict we need to emphasize its moral and legal legitimacy. In order to explain this, I've chosen the situation of Nagorno-Karabakh, mainly because the military dispute in 2020 projected the idea that the conflict between Armenia and Azerbaijan is far from being over, placing it as a best-case study in which we can analyse the conditions for self-determination, and how the international law can be applied to such case. For a better understanding of the topic, this paper will briefly try to

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establish the moral foundation of self-determination and what are the conditions for secession, based on political or legal grounds, and how these conditions can be related to the situation of the frozen conflict of Nagorno-Karabakh.

Background

The frozen conflict of Nagorno-Karabakh has many security implications, mainly geopolitical, diplomatic or military, but considering the topic chosen, this article will depict only the legal aspects of the conflict in order to project a possible evolution of the conflict from the perspective of international law. Moreover, for a better understanding on applying the international law to the conflict of 2020 and the future situation of the region, the main implications and legal effect of the political and military history of the region should be mentioned.

The region Nagorno-Karabakh has a very complex and, in some cases, confusing situation of a political legacy, dealing with a strong ethnic mixture of migrant population within the region in the past century. The independence of the two states, Armenia and Azerbaijan, after the fall of the Russian Empire created tensional viewpoints regarding historical territories, minorities and ethnical rights etc. With a majority of Armenians, during the Soviet Union the territory of Nagorno-Karabakh was placed under the political leadership of the Azerbaijan Soviet Socialist Republic as Nagorno-Karabakh Autonomous Oblast (NKAO).

From a national law perspective, the fall of the Soviet Union could have established new political dynamics, but unfortunately the constitution of the USSR and the Soviet Secession Law were not very clear regarding the possibility that an autonomous region (*oblast*) could invoke the secession. An *oblast* was part of a Union Republic (in this case Azerbaijan Soviet Socialist Republic), and any self-determination without the consent of the Union Republic would have represented a violation of the USSR Constitution. The turmoil of the fall of the USSR left no many options for self-determination for an *oblast*. (Kruger 2014: 241)

Nowadays, most of the territories of the former NKAO are controlled by the self-proclaimed Republic of Artsakh established after a referendum from 1991, being the main source of the conflicts, as considered by some an internationally recognized Azerbaijan territory, but behaving like an Armenian enclave. The military conflict that began in 1991 ended with Armenia's victory on several aspects, a situation unrecognized or accepted by Azerbaijan. The Minsk Group within the Organization for Security and Cooperation in Europe has failed to mediate a peace agreement. In 2011, a *document on basic principles* was prepared, taking *into account a reasonable compromise based on the principles of the*

Helsinki Final Act on the non-use of force, territorial integrity and equal rights and self-determination of peoples. The main features of the document, as understood by the OSCE, are the following (OSCE Minks Group):

- the return of the territories surrounding Nagorno-Karabakh to Azerbaijani control;
- an interim status for Nagorno-Karabakh providing guarantees for security and self-governance;
- a corridor linking Armenia to Nagorno-Karabakh;
- future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will;
- the right of all internally displaced persons and refugees to return to their former places of residence; and
- international security guarantees that would include a peacekeeping operation.

Although some of these criteria tried to identify legal international principles upon which the conflict should end, neither of the parties agreed, leaving occasionally challenges for the security and international arena and a projection of a failed international law. However, what are actually the principles of international law regarding self-determination and which are the main criteria to establish the possibility of secession? There is a different approach when it comes to justify morally the right to secession or how the instruments of international law allow secession or even the recognition for such an event. In the following this paper analyses which of the theories on the moral foundation of secession can be applied to Nagorno-Karabakh and after that, what could be the instruments of international law applicable to this frozen conflict.

Moral justification

Lie in very secessionist situation, an analysis on the moral ground's secessionist claim should be approached. Nagorno-Karabakh is no exception, having a complex dynamic. Being a territory that historically and politically belonged to a state, with an ethnic group that proclaim independence based on a referendum internationally not recognized. This frozen conflict projects the moral claims and legal basis that each party invokes: the right to self-determination vs the right to territorial integrity. In this case how self-determinism is seen could explain how international law can be applied.

Being a debate between liberalism and nationalism, these three stages of independence: self-determination, secessionism and recognition, must answer

three main questions: *who* is entitled to invoke self-determinism? *Where* is entitled to have this claim? And *what* is the purpose and effects of this action? Regarding the first question, based on historical analysis, the two world wars resolute that "the people", entitled to self-determination, were selected on ethnic and post-colonial terms focusing on linguistic and cultural boundaries. That lead to the more confusing aspect regarding territory, because there is no perfect match between homogenous ethnical groups and territories they claim to have. Also, the prerogative for self-determination can destabilize political security and international arena if there are no legitimate foundations on the claim. Some of the theories are emphasizing the conditions and criteria to be taken into consideration.

At first glance, self-determination and secession are similar, probably identical when it comes to effects. There are national events that require or claim at some point international recognition. Self-determination is based on a moral force that people have in order to establish their rights. (Tomuschat 2009: 23) And, as Christian Tomuschat analysed de the concept of self-determination represents "people by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Declaration *on the Granting of Independence to Colonial Countries and Peoples*) (United Nations, General Assembly Resolution 1514(XV). It may seem that the right to secession comes after establishing a right to self-determination. In this sense, secession reaches the concrete form of autonomy, opening the path for sovereignty.

Scholars have classified the right to secession based on three main categories of theories: (1) choice theories; (2) just-cause theories; and (3) national self-determination theories. The first category of theories promotes secessionism based on the ethnical concentration of people on a certain territory, having common features and are entitled to secession. In this sense, the people must organize a plebiscite or a referendum in order to secede. Another important aspect is that the group was not victim of oppression, but in this perspective, all must agree on the cause, and should be an almost match between the people and the territory (Moore 1998: 5)

The second category, the just-cause theories, "argue that the right to secede is only legitimate if it is necessary to remedy an injustice: prior occupation and seizure of territory; some on serious violations of human rights, including genocide; others view discriminatory injustice as sufficient to legitimate secession." The problem with these theories is that they do not take into consideration the main cultural and linguistical links among the group. And finally, the third category of theories, on national self-determination, fails to explain the situation where there isn't a direct

desire by the individual to secede as long there is a state that protects his/her rights. So self-determinism is just a concept for the nations, and it is too large to always reach the individual (Moore 1998: 7).

These different categories of theories establish criteria on how to evaluate claims to secede. The first one is referring to minimal realism in which a proposal for secession should have a progressive moral ground, projecting the idea that it can be eventually adopted. The second kind of criteria is consistency with well-entrenched, morally progressive principles of international law that can be adopted contextually. The third one is absence of perverse incentives in which any proposal should "not encourage behaviour that undermines morally sound principles of international law or of morality". And the fourth is about moral accessibility, in which the proposal or the claim should "not require acceptance of a particular religious ethic or of ethical principles that are not shared by a wide range of secular and religious viewpoints" (Buchanan, 1997: 31).

In a more briefly analysis on the right to secede, Alex Buchanan raises two major ethical questions: What are the conditions for o group to have the moral right to secede and what are the conditions that a group can be recognized? So, the first question claims a more moral approach on the answer, but the last one is seeking legal basis. Thus, in order to answer these questions, Buchanan proposes the analysis of two main theories: Remedial Right Only Theories envisage that the right to secede belongs to that group who suffered many injuries and Primary Right Theories in which no injuries are needed in order to have a general right to secede (Buchanan, 1997: 38). So in the first case there is a necessity of wrongdoings towards a certain group and in the case of the second type of theories, the right to secede exists even when the group benefits from the state they wish to secede.

Few of these theories manage to create links to international law, and "appear unaware of the gap between their arguments concerning the justification and scope of a moral right to secede and the requirements of a sound proposal for reforming international law" (Philpott 1995: 354). Self-determination having a moral foundation became an *erga omnes* norm being considered an international *jus cogens* norm, limiting the right to territorial integrity, but taking into consideration the necessity for the people with clear identity to have the desire to secede. This will to secede needs to have a moral political purpose (Espinosa 2017: 45).

Applying international law

From the perspective of international law several legal points need to be analysed. First of all, the concept of *frozen conflict* attributed mainly to situations that appeared after the fall of the Soviet Union, does not have a clear legal ground in the international law. Frozen conflicts are mainly defined in political or diplomatic terms, or by international relations scholars (Grant: 2017). There

are many definitions given to frozen conflicts but in general, they are to be considered as a static state of war in which the opponents maintain their original claims in *an interim* situation. A frozen conflict still needs to respect all the provisions of international law on every level, but maintains the possibility of outbreak occasionally, like Nagorno-Karabakh in 2020, without being bound by legal consequences of a treaty or an accord. A frozen conflict remains in different stages of de-escalation when there is no resolution of the war. Incompatibilities of conflicts between a central government and sub-state actor are determined either by ideological differences or ethnical ties (Coyle 2018:9).

The second legal aspect is regarding self-determination through the instrument referendum as used in 1991 by the majority of Armenian ethnic group from the region. Self-determination is affirmed by the United Nations Charter in article 1(2) and (55) which establishes the possibility of people to pursue freely their cultural, economic and political determination (UN Charter). These rights are emphasized also by the General Assembly in several Resolutions (General Assembly Resolutions 1514, 2625 and 37/43) or other international treaties (International Covenant of political and economic rights). Indeed, these treaties guarantee the possibility of self-determination, but they do not lead immediately to the right to secede. As the International Court of Justice pointed out in Kosovo Advisory opinion "*is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it*" (International Court of Justice, Kosovo Advisory Opinion). This means that international law recognizes the right to self-determination, but that doesn't mean that independence and recognition will be gained. The referendum does not lead immediately to self-determination or secession in the lack of other conditions.

The Montevideo Convention on the Rights and Duties of States (1933) establishes that a state must possess a permanent population, a defined territory, a government, and the capacity to enter into relations with other states (Montevideo Convention). However, a self-determination process inevitable affects the territorial integrity of another state, and it may be considered an act of aggression as established by the UN Charter in article 73. Azerbaijan may claim that the self-proclamation of independence by the Republic of Artsakh is an act against its territorial integrity. The Republic of Artsakh may claim that the resolution for independence and the referendum for self-determination is prior to the resolution and independence of Azerbaijan from the USSR, having the same legitimacy to seek self-determination and further independence. Yet, the

secession of the USSR is in relation to its member states, or self-determination and independence by *autonomous oblast* do not have the same legitimacy since it was not a signatory member of the USSR. The request for self-determination is against Azerbaijan, and not USSR, so in this situation, Nagorno-Karabakh fail to achieve all the Montevideo conditions.

In this case of self-determination against the principle of territorial integrity, both the parties, Azerbaijan and Armenia, are accusing each other of violating international law regarding war crimes and occupation. In such cases, different international regulations, such as the 2000 United Nations Millennium Declaration or the 1975 Helsinki Final Act urge parties to seek a peaceful solution according to UN Charter (Buchanan, 1997: 43). It appears that in the case of Nagorno-Karabakh the right to territorial integrity, assumed by the state of Azerbaijan prevails in the light of international law against the right to secession. When it comes to emphasizing the right based on a systematic violation of human rights, scholars are reserved in supporting such a hypothesis because of the lack of evidence of repression by another group. Indeed, there were victims of the war, internally displaced persons but these are the results of mutual battle confrontation and not unilateral strategic domination and tyranny of an ethnic group against another (Popjanevski 2017: 30).

Frozen conflicts, especially those created after the fall of the Soviet Union, have a sensitive side. A good example is Nagorno-Karabakh. Though international law fails to foresee all the situations, it cannot find applicability, where not even moral grounds are not well established. Most scholars recognize that the claim of self-determination based on the referendum and the presence of the Armenian forces in Nagorno-Karabakh does not fulfil all the requirements of international law for self-determination or even secession of this territory.

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