



The Promise Institute
for Human Rights

UCLA School of Law

SELF-DETERMINATION REMEDIAL SECESSION AND INTERNATIONAL LAW

**THE ARTSAKH CRISIS IN
COMPARATIVE CONTEXT**

FALL 2021



On April 29, 2021, the Promise Institute for Human Rights at UCLA School of Law hosted an event on Self-Determination, Remedial Secession, and International Law: The Artsakh Crisis in Comparative Perspective. The panel was comprised of John Dugard, former United Nations Special Rapporteur on the Human Rights Situation in the Occupied Palestinian Territories, Milena Sterio, Charles R. Emrick Jr.-Calfee Halter & Griswold Professor of Law at the Cleveland-Marshall College of Law and Managing Director of the Public International Law and Policy Group, Sheila Paylan, an international criminal law, humanitarian law and human rights lawyer based in Armenia, and Geoffrey Robinson, Professor of History at UCLA and former Political Affairs Officer with the United Nations in Dili, East Timor. The panel was moderated by Aslı Ü Bâli, Professor of Law and Faculty Director of the Promise Institute for Human Rights at UCLA School of Law and included remarks from Ralph Bunche, General Secretary of the Unrepresented Nations and Peoples Organization. This short report memorializes the conversation and captures some key take-aways that may inform how the people of Nagorno-Karabakh/Artsakh proceed.

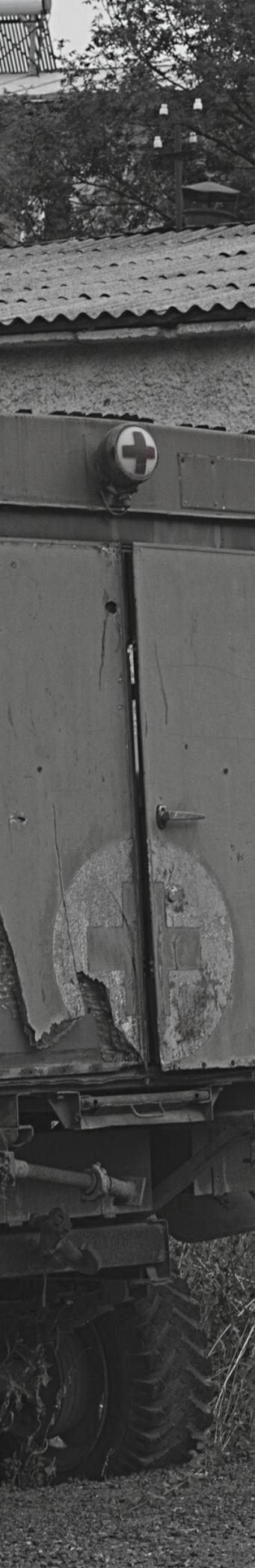
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INTRODUCTION

The hostilities in Nagorno-Karabakh/Artsakh that broke out in Fall 2020 and raged from September 27 to November 10 were the immediate trigger for this panel and report. The terms of the ceasefire that ended that conflict allowed Azerbaijan to maintain control of areas that it seized and required the withdrawal of Armenia from adjacent territories. But these terms in no way settled the core issues at the heart of the conflict, which have to do with demands for self-determination and protecting the human rights of the Armenian community in this territory. International law has often promised more than it can deliver in managing the relationships between sovereignty, territorial integrity, and the rights of self-determination. Nagorno-Karabakh/Artsakh is hardly the only context in which this is true and international law framings have served to freeze in place existing conflicts that threaten minority communities. Moreover, even where formal bodies tasked with interpreting and enforcing international law such as international courts or the United Nations Security Council have explicitly recognized a right of self-determination, as in the cases of Palestine or Western Sahara, such recognition has not guaranteed the realization of such rights.

The goal of this panel was to explore in comparative perspective the question of self-determination and remedial secession for communities whose human rights protections are fundamentally at risk under present territorial arrangements. Drawing on recent examples ranging from the experiences in Kosovo and East Timor to Palestine and beyond, as well as Nagorno-Karabakh/Artsakh itself, the panel examined a variety of global contexts in which these issues have arisen and the international law responses they have occasioned, to shed new light on the possible precedents and resources available for seeking to address the crisis in Nagorno-Karabakh/Artsakh through international law.





IS REMEDIAL SECESSION LEGAL UNDER INTERNATIONAL LAW?

In opening the conversation, Milena Sterio focused her remarks on the question of whether international law allows, tolerates, or prohibits remedial secession. She concludes that international law does not contain a positive law norm that recognizes that peoples or other groups have the explicit right to secession. However, it might be argued that international law tolerates secession, is neutral on secession, or accepts successful secession as a *fait accompli*, such as in the case of Kosovo. What is clear is that international law prohibits secession accomplished through the use of force, such as in the case of Northern Cyprus.

Sterio outlined two norms that are pertinent to the issue of secession: self-determination and territorial integrity. Self-determination, which is enshrined in the United Nations Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and several UN Declarations, including the 1970 Declaration on Friendly Relations Amongst States, is the right of all peoples to determine their political fate. Self-determination exists in an internal form, which entails autonomy for the relevant people within the territory of an existing larger state. Self-determination also exists in an external form, which entails remedial secession for the people.

Self-determination was the theoretical and legal underpinning of decolonization in the 1960s and 1970s and it remains clear that, under international law, colonized peoples whose governments are not representative of their interests have the right to self-determination and its external form through the exercise of secession. However, Sterio suggests that whether the right to self-determination applies to the same extent in the non-decolonization paradigm remains undertheorized in international law. In the context of the proposed secession of Quebec, in 1998 the Canadian Supreme Court suggested that oppressed peoples might have the right to external self-determination through remedial secession in extreme circumstances of oppression. Thus far, the International Court of Justice (ICJ) has not directly opined on this issue, but Sterio suggests that the Kosovo Advisory Opinion of 2010 can be read as implicitly recognizing the right

to external self-determination and remedial secession. Consequently, it can be argued in light of the Kosovo precedent, international law recognizes the right to external self-determination for oppressed peoples as a last resort. However, this is a controversial interpretation.

For the purposes of self-determination, it is necessary to determine what constitutes a “people.” International law does not define the term, but most scholars agree that it refers to a group of individuals who hold a subjective belief that they form a single unit and share objective commonalities, such as the same language, culture, religion, and/or ethnicity, as well as oftentimes a claim to a predefined territorial unit.

An additional question is if a people is able to exercise its right to external self-determination, does it automatically form a state? The Montevideo Convention on the Rights and Duties of States 1933 outlines four criteria for statehood including a defined territory, a permanent population, a government, and the capacity to enter into international relations. These four criteria are intended to be purely legal and divorced from the geopolitical practice of recognition of states. However, in practice, Sterio argues that it is impossible for any entity to satisfy the fourth criterion of statehood – the capacity to enter into international relations – without other states being willing to treat that entity as a sovereign partner.

How are these inquiries helpful in determining the status of Nagorno-Karabakh/Artsakh? Many in Nagorno-Karabakh/Artsakh feel that they share a common Armenian ethnicity and have possession of a territory; that they are a people with the right to self-determination under international law. We also know that the people of Nagorno-Karabakh/Artsakh declared independence in the early 1990s, but this was not recognized by any state and that lack of recognition may prevent a secessionist entity from acting as a state in the international arena. Additionally, it can be argued that the people of Nagorno-Karabakh/Artsakh have been oppressed by the Azerbaijani government and that it is not very plausible that the current Azerbaijani government will grant them any meaningful autonomy or internal self-determination.

Sterio contends that, if one accepts the argument that non-colonized, oppressed peoples have the right to external





self-determination through remedial secession, one will then have to acknowledge and conclude that the people of Nagorno-Karabakh/Artsakh have the right to external self-determination through remedial secession.

The second pertinent norm of international law in this context is the principle of the territorial integrity of states. Until the ICJ Kosovo Advisory Opinion, the right to self-determination had never been interpreted as trumping the norm of territorial integrity of existing states, other than in the decolonization paradigm. The argument that non-colonized oppressed peoples have the right to external self-determination through remedial secession is controversial as it threatens and potentially undermines the norm of territorial integrity of existing states. For Nagorno-Karabakh/Artsakh's remedial secession to be successful, one would have to accept that the territorial integrity of Azerbaijan will be disrupted, and the norm of territorial integrity would be jeopardized.

Moreover, the legal principle of *uti possidetis*, which has been applied in the context of the dissolution of the former Yugoslavia and the former Soviet Union, dictates that territorial borders cannot be changed by force. Azerbaijan was a republic in the Soviet Union and Nagorno-Karabakh/Artsakh belonged to Azerbaijan. The application of *uti possidetis* in this context dictates that Azerbaijan's borders remain unchanged unless there is a negotiated change in those borders.

Sterio concludes that the Nagorno-Karabakh/Artsakh people have the right to self-determination, which they ought to have been able to exercise it at the time of the dissolution of the USSR, which was akin to a decolonization process. In other words, the people of Nagorno-Karabakh/Artsakh should have been able to exercise their right to self-determination in the early 1990s and to determine their political fate through a plebiscite. In fact, an independence referendum did occur in 1991, with Nagorno-Karabakh/Artsakh declaring independence at that time. However, that act was not recognized by the international community. If one is willing to equate the situation of oppressed people, such as the people of Nagorno-Karabakh/Artsakh, to a colonized peoples then it becomes easier to advance the argument that these people also deserve the right and have the right to external self-determination, which can be exercised through remedial secession.

DRAWING LESSONS FROM THE EXPERIENCE OF EAST TIMOR

Geoffrey Robinson's intervention focused on East Timor as an eventually successful case study for self-determination and remedial secession. East Timor is a former Portuguese colony, a tiny half-island in Southeast Asia, just north of Australia, that achieved its independence in 1999. There are some differences between Nagorno-Karabakh/Artsakh and East Timor, but East Timor's experience may have something useful to tell us about that case and others like it.

First, it is necessary to understand a brief history of the East Timorese independence movement. In late November 1975, East Timorese leaders declared independence after approximately three centuries of Portuguese colonial rule. Just a few days later, Indonesia, a much larger, neighboring country, at that time governed by a military regime, invaded East Timor and went on to occupy the territory for the next 24 years. During that occupation, somewhere in the region of 200,000 people – roughly one-third of the population – died; this was unquestionably a genocide. Interestingly, Indonesian sovereignty in East Timor was never recognized by the United Nations, so the occupation was illegal for its duration. Throughout the occupation resistance to Indonesian rule, both at home and abroad, continued to grow. Eventually, the demand for independence in East Timor received wide support from a broad global network that included the Catholic Church, human rights organizations, various trade unions, and even some States. In 1998, the military regime in Indonesia collapsed, and the very next year the new Indonesian government gave East Timor an opportunity to vote on the question of independence through a referendum.





The referendum was held in August 1994 and was supervised and carried out by the United Nations. Despite very serious violence in the run up to the referendum and intimidation about what would happen after the results, the population voted overwhelmingly in favor of independence. That result led to even further violence on the part of the pro-Indonesian forces: in the space of two weeks, approximately 70% of all the structures in the entire country were burned to the ground. Roughly half of the population, or 400,000 people at that time, were forcibly displaced from their homes and about 1,500 people were killed. Against that background, the United Nations Security Council voted unanimously in favor of intervention to stop the violence, using its authority under Chapter VII of the UN Charter. Within a week or two - almost unprecedented in speed - a multinational force was deployed to East Timor, and a week or two later it brought the violence to an end. After a period of UN transitional administration, East Timor finally won its independence in 2002.

Strictly speaking, this was not a case of remedial secession as Indonesia's claim to sovereignty over East Timor was never recognized by the United Nations. This is more clearly an example of external self-determination from Portugal as, even in 1999, Portugal was still considered by the United Nations to be the governing authority because East Timor had never properly been decolonized. However, Robinson suggests that the example of East Timor offers a useful point of comparison for understanding the historical and political conditions under which calls for remedial secession or external self-determination, including Nagorno-Karabakh/Artsakh, might or might not succeed.

One of the conditions that made external self-determination possible was East Timor's status under international law. Because it was considered a non-self-governing territory at the time, East Timor remained on the agenda of various United Nations bodies, most notably the Special Committee on Decolonization, which East Timor came before well into the 1990s. The fact that the decolonization process was not complete was the legal basis on which East Timor could claim its right to external self-determination. And it was also the basis on which the United Nations could serve as a peace broker between Indonesia, Portugal, and the Timorese.

It also may be the reason why the Security Council in 1999 paid such close attention to the situation in East Timor and took the highly unusual decision to invoke Chapter VII and authorize armed intervention. However, its status in international law was not the only thing that opened the door to East Timorese independence.

Another contributing factor was the changing political context in which the claims were articulated, and Robinson argues that it is this historical and political context, rather than the legal status or validity alone, which is crucial in determining the outcome of other cases of remedial secession and self-determination. There were three particular political and historical conditions that made a difference in East Timor. First, between 1975-1999 there were significant changes in the nature of international civil society networks. In 1975, the size and reach of human rights groups and other NGOs were very limited, with only a small number highlighting the plight of the Timorese and fewer still actually advocating for its independence. Human rights organizations like Amnesty International, for example, took no position on East Timor's independence at that time, but only argued that the human rights situation should be addressed. By 1999, a powerful transnational human rights network had emerged which connected domestic rights activists with international ones, and which had the ear of top decision makers in powerful states within the United Nations and in other intergovernmental bodies. When those networks were mobilized in 1999, largely in the form of massive protests globally, they had a profound effect. The main result was a temporary shift in the political calculus of key states, including the United States. For so long, the political calculus had led the US to favor Indonesia, but in the face of civil society protests they now briefly favored the Timorese claims.

The second important change was in international norms with respect to humanitarian intervention. In 1975 when the invasion took place, there was no discussion about intervention on humanitarian grounds.





On the contrary, the United States and others aided and abetted the invasion and the occupation, and sought to downplay or deny the fact of genocide. By contrast, 1999 marked a high point for the norm of humanitarian intervention, a principle that was routinely invoked by major powers, by UN officials and the heads of other governmental bodies, and further strengthened by key figures, including Kofi Annan, Bill Clinton, and Madeleine Albright, who were anxious not to repeat their own catastrophic failure to act in Rwanda five years before.

Finally, there were important changes in the Indonesian domestic political context. In 1975, Indonesia's military government was in a position of strength with substantial domestic and international backing. By 1999, it was in a state of economic and political crisis and collapse. The longtime military leader, General Suharto, had been forced to step down in 1998 in the face of massive pro-democracy and human rights protests and the major Asian financial crisis. As a consequence, the new government was uniquely vulnerable to domestic and international pressures which were coming from the newly invigorated international network. That vulnerability opened the door to the UN brokered referendum, and to the Security Council authorized military intervention.

Robinson concludes that the East Timor example highlights that the viability of other cases of remedial secession and external self-determination depends crucially on the political and historical context in which it is made. Secession and self-determination are political questions in which legal questions play a role but are not determinative. The East Timor case seems to suggest that such claims may be more likely to succeed when three conditions are met. First, when that claim is supported by a strong, global civil society network. Second, when the claim is consistent with prevailing international norms and aligns with the interests of the most powerful states. Third, when the oppressor state is economically and politically weakened and therefore vulnerable to political pressures.

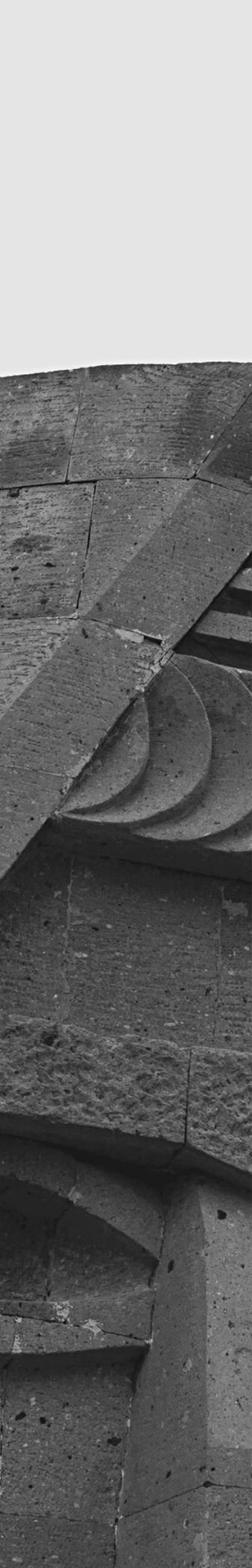
DEFINING STATEHOOD

John Dugard explained that a central question relevant to self-determination and remedial secession is how we define statehood. The Montevideo Convention 1933 describes the characteristics of a state but offers no clear definition. To a large extent, the question of whether an entity qualifies as a state or not depends on whether it is accepted, or recognized, by other states. Clearly, if an entity is a member of the United Nations, that will be regarded as conclusive evidence of statehood, but if it is not, there are always questions about whether an entity qualifies as a state or not. For example, Palestine is recognized by 138 states but is not a member of the UN, with a result that its statehood is in question. The United States and most European Union states do not recognize it and when the question arose whether the ICC might exercise jurisdiction over Palestine, there was and continues to be significant debate over the legitimacy of Palestine's acceptance of jurisdiction of the Court.

A similar issue arises with respect to Kosovo. It has been recognized by 98 states but is not a member of the UN and debate continues as to whether or not it is a state. Dugard suggests that, when it comes to Nagorno-Karabakh/Artsakh, the problem is even more acute. Prior to the Fall 2020 conflict, Nagorno-Karabakh/Artsakh was recognized by only three states, and those were of doubtful statehood – South Ossetia, Abkhazia, Transnistria. Even Armenia did not recognize Nagorno-Karabakh/Artsakh as a state itself. Consequently, Nagorno-Karabakh/Artsakh has a difficult task in obtaining full independent statehood.

Given these recognition challenges, Dugard suggests that it is pertinent to consider whether Nagorno-Karabakh/Artsakh should become an independent state or whether it is more likely that it become part of Armenia or remain part of Azerbaijan. Nagorno-Karabakh/Artsakh is a very small state with a population of 120,000. There was a time during the League of Nations and the early days of the United Nations when there were objections to so-called “mini-states.” To a large extent, that problem has fallen away and today the UN has several mini-state members, for example, several states in the south pacific have populations of less than 20,000. One of the problems is that most of the very small states that





are part of the UN are island states and the question arises as to whether a state that has no maritime borders will be viewed favorably when it comes to the question of independence.

Another problem is that Nagorno-Karabakh/Artsakh has two neighboring states that have competing claims - Armenia and Azerbaijan. To determine which of these states are likely to have the better claim, we must look to the content of their rival claims: Armenia's claim is based on the right of self-determination of the Armenian people of Nagorno-Karabakh/Artsakh, whereas Azerbaijan's claim is based on the principle of territorial integrity, bearing in mind that Nagorno-Karabakh/Artsakh was placed within the boundaries of Azerbaijan by the Soviet Union in the 1920s. Contrary to Sterio's view, Dugard believes that it can be argued today that self-determination trumps territorial integrity. Indeed, some of the more recent examples of secession provide examples in which self-determination prevailed, e.g., in the cases of Bangladesh and South Sudan. Dugard stresses that the ICJ Kosovo Advisory Opinion 2010 has weakened the principle of territorial integrity: there was a time when the international community, and particularly the Security Council, viewed the principle of territorial integrity as sacrosanct, that it prohibited a state from intervening in the domestic affairs of another state and violating that state's territorial integrity, and that it also prohibited a people within a state claiming the right to self-determination. However, in the Kosovo opinion, the Court held that the principle of territorial integrity only applies to relations between states, and consequently, does not prevent people within a territory from exercising the right to self-determination and by implication pressing for secession.

This raises the question of whether international law prohibits secession or not and Dugard argues that it is clear that international law has not taken a position on whether secession is lawful or unlawful. Clearly, when secession is negotiated, as it was in the case of South Sudan, there is no problem. Less clear is what is likely to happen where there is no negotiated settlement. Dugard suggests that under these circumstances, such as in the case of Nagorno-Karabakh/Artsakh, the self-determination unit will have to establish its right to self-determination very clearly.

Nagorno-Karabakh/Artsakh may be able to accomplish this. The people of Nagorno-Karabakh/Artsakh can show very clearly that they are ethnically and historically Armenian, that they share a common religion – Christianity – with Armenia, and that they have occupied the territory of Nagorno-Karabakh/Artsakh since time immemorial. But is this enough for external self-determination? Could it still be argued that some way should be found to allow the people of Nagorno-Karabakh/Artsakh to exercise internal self-determination within the territory of Azerbaijan, giving it some degree of autonomy and independence? Dugard argues that, in addition to showing that the claim to self-determination is strong, something more is required, which would best be found in the concept of remedial secession.

The principle of remedial secession is controversial in international law. The ICJ in the 2010 Kosovo Opinion very carefully avoided pronouncing on the subject. But, interestingly, in that case, over 40 states made interventions before the international court and many of those states, including Russia, accepted the principle of remedial secession, so there does seem to be some support amongst states for a right of remedial secession. Despite this support, a successful exercise of remedial secession would be subject to strict conditions. First, the entity in question must show that it is a self-determination unit with the corresponding right. Second, it must show that it occupies a distinct territory. Nagorno-Karabakh/Artsakh meets both these criteria. More problematic is that, in addition, the Armenian population of Nagorno-Karabakh/Artsakh will need to show that they have been denied internal self-determination by Azerbaijan and possibly that they have been subjected to human rights violations. For Dugard, that raises questions because he does not consider it very clear that Azerbaijan has denied internal self-determination or human rights to the people of Nagorno-Karabakh/Artsakh. While there may be evidence of human rights violations and internal self-determination denial historically, he suggests that there is less evidence of that more recently. Moreover, we must remember that it is argued that the Armenians of Nagorno-Karabakh/Artsakh were themselves responsible for atrocities committed during the 1991-1994 war. A final requirement is that it must be shown that there is no prospect of a negotiated settlement.





Dugard also considers this potentially problematic due to the existence of the Minsk Group, established in 1991. Even though the Minsk Group does not appear to have been very successful, it is nevertheless a possible body that might contribute to a peaceful settlement, and so the people of Nagorno-Karabakh/Artsakh will have to show that the Minsk Group is not the answer in this respect.

Dugard concludes that he does not think there is a clear case of remedial secession from Azerbaijan on the part of the people of Nagorno-Karabakh/Artsakh. Yet, he considers that there is strong support for the view that Nagorno-Karabakh/Artsakh is a clear self-determination unit - that it has occupied the territory historically, and there is evidence in history of violations of human rights by Azerbaijan. He suggests that the tipping point may be the request for a referendum on the part of the people of Nagorno-Karabakh/Artsakh. The United Nations does contemplate a referendum in cases involving self-determination under Resolution 1541 of 1960 and it would be wise of the people of Nagorno-Karabakh/Artsakh to request a referendum. Whether that referendum should relate to a request for the full independence of Nagorno-Karabakh/Artsakh or whether it should relate to integration with Armenia is an open question. In Dugard's view, a request for integration into Armenia is more likely to succeed.

THE PERSPECTIVE FROM THE REGION

Sheila Paylan closed the discussion by offering a unique perspective - reflecting her experience currently living and working in Armenia and providing a first-hand account of the relevant facts on the ground. One of the most important factual circumstances that has changed the status quo in Nagorno-Karabakh/Artsakh is the presence of Russian peacekeepers in the region, following the signing of a tripartite peace agreement between Armenia, Azerbaijan, and Russia on November 10, 2020. She believes that the importance of this new development in the future of Nagorno-Karabakh/Artsakh cannot be overstated, especially as Nagorno-Karabakh/Artsakh is understandably weakened in the aftermath of the recent conflict, somewhat more detached geographically from Armenia, and that the Armenian people in Nagorno-Karabakh/Artsakh remain under threat from Azerbaijan. She suggests that the need for a decisive and definitive resolution of the status of Nagorno-Karabakh/Artsakh has never been more urgent or pressing than it is now, and yet the international community response continues to be passive.

Paylan suggests that the doctrine of the responsibility to protect (R2P) has a role to play in resolving the situation. R2P essentially stipulates that if a country is unable or unwilling to protect its civilian population from mass atrocities, then the international community must act swiftly to fill the protection void. R2P contains three pillars, including non-military tools like diplomatic conversations, negotiations and statements designed to prevent the escalation of atrocity crimes; unfortunately, Paylan suggests that it is too late for these measures to be successful in Nagorno-Karabakh/Artsakh.





However, R2P also allows for the use of more robust tools such as sanctions, the establishment of a peacekeeping mission, or even the authorization of military action with the express purpose of protecting civilians. Paylan suggests that it is these measures that should be utilized by the international community. She observes that while some robust measures are now being taken by Russia and their peacekeeping forces, the rest of the world remains on the sidelines, despite reports of atrocity crimes being committed, against a background of state-sponsored anti-Armenian violence and hate speech, as well as cultural genocide. She urges the international community to revitalize the R2P doctrine to intervene in Nagorno-Karabakh/Artsakh in order to have a real and meaningful impact on the humanitarian welfare of the Armenian population there.

CONCLUSION

Remedial secession is intertwined with other well-developed international law norms including self-determination and what constitutes a “people,” how to define statehood, the primacy of territorial integrity, and the principle of uti possidetis. Yet the status of the right to remedial secession remains unsettled under international law, with no existing positive international legal norm recognizing such a right. As the ongoing situation of Nagorno-Karabakh/Artsakh exemplifies, resolving this question under international law has high stakes. The case studies of Palestine, East Timor and Kosovo provide diverse perspectives on how to approach the issue of remedial secession, which we hope can be instructive for this continuing dialogue.



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