
How to Mediate an Enduring Peace for Nagorno-Karabakh

*In Commemoration of the Sumgait Pogroms,
the Prospects for Artsakh Independence¹*

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BACKGROUND TO THE CONFLICT

The Nagorno-Karabakh Region (NKR) in Azerbaijan sits at the crossroads of Europe and Asia, which has historically facilitated commercial exchanges on the Silk Road, interactions between the region's overlapping ethnicities, and invasions by Arab, Persian, Mongol, and Turkish armies. In spite of these various interactions—or maybe because of them—many attempts have been made to separate ethnic Armenians from Azeris or, in some cases, to extinguish them from the region. NKR's historical claim to autonomy rests on the right to self-determination. Although it currently functions as an independent state under the provisions of the Montevideo Convention, NKR still stands to gain from recognition by the international community. Great Power support—that is, support of the permanent members of the Security Council and other nations with a historical interest in the region—under the framework of the Responsibility to Protect (R2P) is needed to increase NKR's chances for formal autonomy and statehood.

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Today, NKR is comprised primarily of ethnic Armenians speaking an Armenian dialect. During the era of Soviet Union control, however, NKR was placed within the Azerbaijan Soviet Socialist Republic (Azerbaijan SSR).³ However, in light of popular demand from NKR inhabitants in the late 1980s, NKR's Council of Peoples' Deputies appealed to the Azerbaijan SSR to secede and unite with Armenia. This request led Azerbaijani nationalists and the state to sanction "pogroms, mass killings, and actions of a genocidal character" in various cities including Sumgait, Baku, Kirovabad, Shamkhor, and Mingechaur.⁴ In one such massacre in February 1988, victims included hundreds of Armenians from Shahumia.⁵ Over 400,000 ethnic Armenians were also forced to flee Baku, northern NKR, and more rural areas in Azerbaijan.⁶ Today, February 28 is the Commemoration Day of the Armenian pogroms organized by, at different times, Azerbaijani nationalists and the Azerbaijan state. As evidence of the continued nature of this persecution, in January 1990, the further killing of 200 ethnic Armenians in Baku resulted in the loss of the city's Armenian population.⁷ Moreover, some historians include these pogroms and mass killings within the systematic persecution committed by the Ottoman Turks against Armenians in the Armenian Genocide that began in 1915. Currently, Turkey and Azerbaijan are still allied against Armenia. Turkey supports Azerbaijan militarily, economically, and politically, and also enforces a blockade against Armenia. Additionally, Turkey and Azerbaijan are ethnically similar, and have even been described as one nation with two states.

While the USSR has acknowledged the utility of temporary NKR governance and of preserving its status as an autonomous region within Azerbaijan SSR, Azerbaijan launched further operations from April to October 1991 to force out ethnic Armenians from NKR in an attempt to maintain control. Their Operation Ring removed ethnic Armenians from twenty-four NKR villages.⁸ Thereafter, social unrest led to the outbreak of the Nagorno-Karabakh War, an effort by Armenia and Nagorno-Karabakh

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Armenians to protect NKR's ethnic Armenians from alleged state persecution and by Azerbaijan to preserve its territorial integrity, bringing allegations of ethnic cleansing from both sides. As outsiders, the Great Powers—that is, the major world powers involved in the region—have primarily wanted access to the Caspian Sea for oil exploration and development, but have not been particularly interested in reconciling the ethnic strife between

Armenian Karabakhs and Azeris. In effect, the issue of reconciliation has been constantly postponed or ignored in favor of geostrategic interests.

In a 1991 referendum, Karabakhs strongly supported independence for NKR, secession by then-Nagorno Karabakh Autonomous Oblast (NKAO) from Azerbaijan, and unification with Armenia.⁹ From an international law perspective, the traditional criterion for a valid unilateral secession—a people subject to historical and persistent state-sponsored human rights abuse with no viable alternative within existing channels—appears to be satisfied if the allegations of state sponsorship are legitimate. The 1991 referendum indicated that relief through domestic legal channels had been sought before the referendum was submitted to a vote. These efforts were ignored, however, even within the existing framework of the Azerbaijan SSR and the Soviet SSR to give voice to popular will and to peaceably effectuate a transfer from Azerbaijan to Armenia. Azerbaijan's government responded with state-sponsored ethnic cleansing of its Armenian element. Because self-determination and the call for independence were not respected domestically, Karabakhs had only one alternative: to secede by invoking the doctrine of external self-determination. During the ensuing war, over 30,000 people were killed.¹⁰ Ultimately, Armenian and Karabakh forces seized Shushi, the historical Azerbaijani capital of NKR, and Lachin, which thereby linked NKR to Armenia. Hundreds of thousands of Azerbaijani refugees also fled as these troops advanced to control most of NKR and the adjoining areas.¹¹ The United Nations Security Council called for the immediate withdrawal of all occupying forces, adopted resolutions to end hostilities, provided for unimpeded humanitarian relief efforts, and procured a peacekeeping force.¹² Armed conflict ended with a ceasefire brokered by Russia on May 5, 1994. That ceasefire was, for the most part, effective until April 2, 2016 when clashes at the border brought fresh blood, reportedly killing hundreds on both sides.¹³ This outbreak was again quelled by a ceasefire mediated by Russia on April 5, 2016. However, gunfire exchanges continue at night with resulting fatalities.¹⁴

EXTERNAL SELF-DETERMINATION

Because the International Bill of Human Rights enshrined the right to self-determination,¹⁵ international law in this area has traditionally focused on non-secessionist situations. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide for the universal right of self-determination in the form of representative democracy, and

call upon states to promote the realization of that right and to respect it.^{16, 17} However, this concept has also been used to support secessionist struggles, like external self-determination, where domestic avenues of representation are deemed to be effectively unavailable, futile, or have been exhausted. Secession was denied for Quebec, for example, because Canada represents its people equally without discrimination and thus was entitled to deference to its own right to territorial integrity. Moreover, the UN Declaration on Friendly Relations provides all people with the right to determine their own political status.¹⁸ Thus, an existing state's claim to territorial integrity can be negated where it does not conduct itself, "in compliance with the principle of equal rights and self-determination of peoples" and does not allow a subject people "to pursue their economic, social, and cultural development."¹⁹ However, such an outcome is only available as "a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."²⁰

The prospects for guaranteeing human rights and allowing the Karabakh Armenians to pursue their economic, social, and cultural development under Azerbaijani rule, even with Azerbaijani assurances of local autonomy, are not very promising. Ethnic Armenian efforts at representation within Azerbaijan have been thoroughly exhausted and frustrated. However, they have planted the seeds for the present struggle. Under these circumstances, NKR's claim to a right to external self-determination appears to be legitimate.

IS NKR ALREADY INDEPENDENT?

The Montevideo Convention on Rights and Duties, an accepted source of international law, sets out the factual criteria for determining the existence of an independent state. These criteria are without regard to recognition by other states and are deemed hallmarks of *de facto*—not *de jure*—independence. For an independent state to exist under the Montevideo Convention, it must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.²¹

Since the war, NKR has existed as a *de facto* independent state, with help from Armenia, and it has also developed executive, judiciary, and legislative arms of government. It controls a defined territory with a permanent population. NKR's president and legislature are democratically elected. Its government controls the armed forces and engages with foreign states through its representative offices and at peace talks led by the Organization for Security and Co-operation in Europe (OSCE). As with the Republic

of China (ROC) in Taiwan, NKR has representative offices in a variety of major industrialized states including the United States, France, Russia, Lebanon, Australia, and Armenia. Additionally, NKR's development of military and civil forces, which withstood a war, is a testament to the state's durability. Thus, we presently have an NKR state that functions independently, yet lacks formal recognition by most major nations. The OSCE Minsk Group was founded to address this issue, with co-chairs Russia, France, and the United States leading peace talks and working exclusively toward a peaceful resolution of NKR's status.²²

FUNCTIONAL INDEPENDENCE VERSUS INTERNATIONAL RECOGNITION

For the stability of foreign relations, the international community should be able to unanimously conclude whether or not a given state should be recognized as a matter of law (*de jure*), as this facilitates predictability in military, diplomatic, trade, and political relations with third party nations. Although the Montevideo Convention is clear that, “[t]he political existence of the state is independent of recognition by the other states,”²³ international recognition is nonetheless deemed valuable. Such recognition accomplishes four goals. First, it expands a state's own self-perception of its national interests, regional and international relevance, and overall potential. Second, it creates estoppel, in the sense that it prevents a recognizing party from later contesting or denying the legal personality of the new state, (i.e., contracts that a recognizing party has entered into with the recognized state are enforceable against the recognizer). Third, it supports the state's credibility on the world stage; this is often a function of its recognition status and exhibited by a seat at the UN or official embassies. Fourth, when a state recognizes another state, this typically allows the recognized state to enjoy customary privileges and immunities within its borders. Consequently, there are significant political advantages to gaining international recognition. To that end, large communities of expatriate citizens tend to exert pressure on foreign governments to recognize their home states.

In NKR's case, the sizeable presence of an Armenian diaspora in Uruguay²⁴ could make that nation the first non-regional state to recognize NKR. Since the only nations that currently recognize NKR are non-Great Powers in the surrounding region—South Ossetia, Transnistria, and Abkhazia—such a designation by Uruguay would set a new precedent, and might lead the rest of the world to adopt a similar stance. The fact that Uruguay has not officially gone forward with such recognition, however,

underscores the importance of Great Powers' exercise of the traditional leadership role that is expected of them. More specifically, Uruguay recently stated that it will await the OSCE Minsk Group's decision on NKR, even though over the past twenty years the Group has not produced anything more than a demand for de-militarization.

REGIONAL CUSTOMS OF STATE RECOGNITION

Another source of international law is custom, which can be regional, and the hallmark of customary international law is obligation. The Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union ("Guidelines")²⁵ are instructive for determining whether a custom of diplomatic engagement or recognition exists in NKR. As long as a state provides for its subjects' human rights and does not attempt to impinge upon the territorial claims of its neighbors, it has a strong argument in favor of recognition. The presence of all Montevideo Convention criteria would further support this finding. However, the Badinter Commission and the lessons of Yugoslavia indicate respect for the principle of *uti possidetis*: that the former boundaries should become international borders so as to affect inter-state relations as little as possible.²⁶ By contrast, the Badinter Commission's findings on self-determination also favor characterization of a "minority group" as a "people" within the definition of the UN Charter, so as to support their ability to determine their own nationality. These appear to be the customary regional principles of recognition.

These principles bring mixed news for NKR's secession movement. Although NKR certainly meets all four Montevideo Convention criteria, the heart of its claim inevitably conflicts with *uti possidetis*, as the pre-conflict borders place NKR squarely within Azerbaijan in spite of historical evidence showing the region's autonomy and common heritage with Armenia. Under similar circumstances, in spite of the presence of the Montevideo Convention criteria, Kosovo was denied international recognition early in its independence movement due to Serbia's conflicting territorial claim that Kosovo was contained within its borders. As in the NKR scenario, Kosovo's movement for secession arose out of ethnic tension. There was a predominance of ethnic Serbs in northern Kosovo and of ethnic Albanians elsewhere in the Balkans region. After years of unsuccessful negotiations with Serbia and a NATO bombing campaign, Kosovo was brought under UN administration.²⁷ Subsequently, Kosovo's inhabitants declared a Republic of Kosovo. The regional custom in the Balkans thus appears to favor self-determination efforts under the Guidelines'

principles of respect for the rule of law, democracy, and human rights. However, historical borders are also respected. As to the NKR conflict, although the parties are still negotiating under the OSCE's Minsk Group, there is little hope of resolution as the "Basic Principles"²⁸ outlined by the Minsk Group envision tangible, immediate concessions without tangible, immediate returns.

THE NEED FOR GREAT POWER SUPPORT

A further difficulty exists: as a *de facto* independent state, NKR would no longer be subject to persecution by Azerbaijan, but in the absence of Great Power assistance, a military build-up by oil-rich Azerbaijan could again easily threaten NKR Armenians' basic rights to human dignity and self-determination. This is especially possible in light of the waiver to the Freedom Support Act's Section 907, which would otherwise prevent United States assistance to Azerbaijan due to Azerbaijan's role in the NKH conflict.²⁹

The case of the former Yugoslavia provides an example of what works to obtain Great Power support. In that case, the international community initially rejected secessionist claims in favor of Yugoslavian territorial integrity. Subsequently, however, many

countries quickly recognized the former constituent states even while armed struggle continued. This is apparently the result of the UN Security Council's characterization of the struggle's continuation as an imminent threat to international peace and security, pursuant to Article 39 of the UN Charter. As the international community was unwilling to recognize the Federal Republic of Yugoslavia under those circumstances, the secessionist struggles were all but guaranteed recognition and support. Moreover, no Great Power interest opposed such an interpretation.

The lesson from this appears to be that, generally, the presence of all four criteria from the Montevideo Convention is largely necessary—although not sufficient—for international recognition. However, if an additional "positive trump card" is present, as in the case of the former Yugoslav states, certain struggles for autonomy that do not obviously exhibit all four Montevideo Convention criteria might nonetheless be granted recognition out of greater

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concern for international peace. In such cases the “positive trump card” is a dispute’s effect on international peace. By contrast, if an additional “negative trump card” is present, as in the case of Taiwan, Chechnya, South Ossetia, and Abkhazia, international recognition might be denied despite exhibiting all four Montevideo Convention criteria.

In the case of NKR, strong oil interests put Armenia in a less favorable position, as much of the industrialized world sees Azerbaijani oil as an alternative source for their energy needs. Although Azerbaijan does not have widespread international influence, it has been able to successfully exercise some influence over the Great Powers due to its strategic access to oil. Thus, NKR potentially has a “negative trump card” in the form of Azerbaijan’s influence on global powers. Hence, it might be politically expedient in some countries to ignore NKR’s call for self-determination. Moreover, there is not currently a Yugoslavia-type civil war in NKR; tensions on the battlefield have been in large part subdued, and only minor border clashes continue. The conflict does not constitute a threat to international peace and security, which could otherwise serve as the basis for a call for concerted UN Security Council economic or military intervention.

There is no “positive trump card” that can compel the UN Security Council to intervene without the express invitation of both parties. On the other hand, the history of state persecution of NKR ethnic Armenians

The history of state persecution of NKR ethnic Armenians by the Azerbaijani authorities provides a powerful “positive trump card” under the Responsibility to Protect (R2P) Doctrine with its concomitant responsibility to prevent future imminent regional strife.

by the Azerbaijani authorities provides a powerful “positive trump card” under the Responsibility to Protect (R2P) Doctrine with its concomitant responsibility to prevent future imminent regional strife.³⁰ To make matters worse, religious differences—ethnic Armenians are mainly Christian and ethnic Azers are predominantly Muslim—make the struggle for NKR, just as in Kashmir and Kosovo, a symbolic one tinged with ideology. Other factors might also prompt states to favor NKR’s recognition. For example, with world oil prices at a historic low, reliance on Azerbaijani oil

could become less compelling, freeing states to recognize NKR without fearing an oil export backlash from Azerbaijan.

R2P IN ACTION: RESPONSIBILITY BY POSITIVE ACT

Some leading powers have quickly recognized or dismissed similar independence conflicts on the basis of humanitarian concerns. Humanitarian crises have engendered a strong tradition of Great Power affirmative involvement and engagement with emerging states in their recognition efforts. The UN General Assembly has related this concept, commonly referred to as R2P, to the UN Security Council's Chapter VII concept of "threat to peace" in providing for assistance of states under stress before these situations erupt into crisis or conflict.³¹ R2P was enacted in 1991 by a UN-sanctioned coalition that launched an offensive in northern Iraq on behalf of the Kurds who were allegedly persecuted by the Iraqi government.³² NATO also received a UN mandate to intervene in Kosovo in 1999 based on the R2P doctrine due to Serbia's publicized persecution of ethnic Albanian Muslims.³³ In 2008, activists argued for intervention in Burma after local authorities failed to respond adequately to Cyclone Nargis; some countries claimed that the intentional denial of humanitarian assistance by the Burmese government amounted to a crime against humanity and triggered R2P.³⁴ Similarly, this doctrine was used to invoke international humanitarian assistance in Haiti in the aftermath of the 2008 earthquake as a "threat to peace" with its concomitant refugee problems.³⁵ In each of these instances, a humanitarian crisis had occurred or was imminent.

In the case of NKR, despite the history of the Armenian genocide after the First World War and substantial evidence of related pogroms and targeted ethnic cleansing by Azerbaijan that could support a fear of future persecution, there has been little international intervention. As the situation on the ground has stabilized, the international community nonetheless continues to have a strong case in favor of intervention on behalf of NKR's Armenians to prevent the recurrence of a new humanitarian crisis. The justification is particularly relevant in light of Azerbaijani threats to shoot down NKR civilian aircraft flights, which are currently planned for summer 2016. This follows from the commitment to prevent, which is inherent in the R2P doctrine. Although such an act might be viewed as unnecessary because no large-scale human rights violation is currently occurring, the Great Powers

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have in the past exercised their responsibility to lead the world in dealing with novel situations before they occur. Activists suggest only that the Great Powers engage diplomatically with the NKR government in order to resolve, once and for all, the question of secession.

There is no mandate that the Great Powers take any action to recognize NKR; rather, they need only to engage NKR and each other unilaterally. Ultimately, the Great Powers' own fact-finding, as well as domestic politics and actions of other nations, will determine whether or not they recognize NKR. The world's Great Powers have an enhanced responsibility to independently evaluate whether they should extend diplomatic recognition to NKR. This responsibility can only be executed unilaterally or through concerted action within the UN, in example, without regard to the OSCE-led talks. Recognition may include producing a written declaration, entering into diplomatic or treaty negotiations with NKR, and exchanging agents. The failure of the international community to act when needed is a failure of the international system itself and can have far-reaching repercussions. Let us not allow the opportunity to finally end a conflict rooted in genocide and pogroms slip by, such that regional tension again breaks out into war.*f*

ENDNOTES

- 1 Excerpts of this address can be found on the Armenia 1 television station clip, available at <https://www.youtube.com/watch?v=Q0CWuDsXjd8>.
- 2 I would like to thank the Armenian National Committee of America for their interest in my Artsakh research and for inviting me to speak. This paper is an adaptation of my lecture on the same topic at New York University on February 25, 2016, and also draws on my paper "Superpower Responsibility for State Recognition," published in the Boston University International Law Journal, Vol 31. I would also like to acknowledge the spirited support of New York University's Armenian Student Association, Columbia University's Armenian Society and the New York Armenian Youth Federation's "Hyortik" Chapter.
- 3 "Establishment of Soviet Rule," Nagorno-Karabakh Conflict, Office of the Nagorno-Karabakh Republic, http://www.nkrusa.org/nk_conflict/soviet_rule.shtml (accessed April 19, 2016).
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- 5 Ibid.
- 6 *Republic of Nagorno-Karabakh: Process of State Building at the Crossroad of Centuries*, Institute of Political Research, 11 (2009)
- 7 Ibid.
- 8 Thomas De Waal, *Black Garden: Armenia and Azerbaijan Through Peace and War* (New York: New York University Press, 2003)

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- 12 UN Security Council Resolution 884, November 12, 1993.
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- 17 *International Covenant on Economic, Social and Cultural Rights*, United Nations General document, December 16, 1966, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> (accessed April 12, 2016).
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- 20 Ibid
- 21 *Convention on Rights and Duties of States* , Article 1, Treaty Series 881, 49 Stat. 3097, December 26, 1933, <http://avalon.law.yale.edu/20th_century/intam03.asp> (accessed April 12, 2016).
- 22 "OSCE Minsk Group," <http://www.osce.org/mg> (accessed April 19, 2016).
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- 32 UN Security Council Resolution 688, April 5, 1991.
- 33 UN Security Council Resolution 1244, June 10, 1999.
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