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## SUPERPOWER RESPONSIBILITY FOR STATE RECOGNITION: CHARTING A COURSE FOR NAGORNO-KARABAKH

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*“With great power comes great responsibility.”*  
- Peter Parker, *Spiderman* (2002)<sup>1</sup>

*“To recognize a community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, existing States are under the duty to grant recognition.”*  
- Hersch Lauterpacht, *Recognition of States in International Law*<sup>2</sup>

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<sup>1</sup> This quote is also associated with Benjamin Parker, commonly referred to as Uncle Ben, who often lectured Peter. In fact, New York City mayor-elect Thomas Francis Gilroy used this phrase in an 1892 interview in which he was asked to comment on the recent Democratic victory. *See Tammany is Satisfied: Mr. Gilroy Interviewed at New Orleans*, N.Y. TIMES, Nov. 3, 1892, at 1.

<sup>2</sup> H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 385 (1944).

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#### ABSTRACT

*This article criticizes the international community's current wait-and-see approach with regard to Nagorno-Karabakh Region (NKR) and Organization for Security and Co-operation in Europe (OSCE) talks, and suggests an alternative by drawing on the lessons of historical recognition efforts and existing scholarship on NKR's self-determination efforts. Rather than continue to hope for an OSCE outcome twenty years after talks began, the Great Powers have an independent responsibility to keep up the pressure by overseeing the transition unilaterally. Moreover, this responsibility requires that the Great Powers not base decisions solely upon their own geopolitical interests; instead, both international customary law and regional custom governing former Soviet states obligates them to abide by norms that might lead to outcomes counter to their own preferences. The failure of the international community to act when needed is a failure of the international system itself, and can have far-reaching repercussions. The Great Powers must therefore act when they have a duty, express or implied, to do so.*

*After placing the NKR struggle in historical context, the article reviews the value of diplomatic recognition and proceeds to query whether international law and custom mandate such recognition if MC criteria have been satisfied. Next, it asks whether the Great Powers have an enhanced responsibility to unilaterally engage with NKR, in spite of the OSCE-led negotiation effort or any concerted action through the United Nations. The article concludes that custom mandates Great Power diplomatic engagement with NKR, though not necessarily recognition, with the expectation that such direct engagement will lead to a relatively quick resolution.*

#### I. INTRODUCTION

Nations routinely refrain from intervening in one another's domestic affairs in accordance with international law out of mutual respect for territorial integrity and international comity.<sup>3</sup> On this basis, the international community has, since 1994, determined to not recognize the Nagorno-Karabakh region ("NKR") as independent from the Republic of Azerbaijan, with the understanding that this view might change if a negotiation sponsored by the Organization for Security and Co-operation in Europe ("OSCE") determines that NKR should gain *de*

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<sup>3</sup> U.N. Charter art. 2, para. 4.

*jure* independence rather than obtain a semi-autonomous status within Azerbaijan.<sup>4</sup> By contrast, some of the world's leading powers have quickly recognized or dismissed similar independence struggles, where doing so was guided by their own strategic interests<sup>5</sup> without respect for fellow states' territorial concerns.<sup>6</sup> One reason is that Great Powers have recognized or dismissed similar independence struggles is based on humanitarian concerns that implicate a responsibility to protect as well as commitments to prevent, react, and re-build.<sup>7</sup>

In any case, recent experience in other religion- and ethnicity-based conflicts suggests that a wait-and-see approach in NKR is more likely to exacerbate and prolong regional tension and human suffering than to

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<sup>4</sup> The Organization for Security and Cooperation in Europe's Minsk Group was formed in 1992 and tasked with mediating peace talks between Armenia and Azerbaijan after the Nagorno-Karabakh War ended in 1994. The United States, Russia and France are current co-chairs. See *Overview – Minsk Group*, ORG. FOR SECURITY AND CO-OPERATION IN EUR., <http://www.osce.org/mg/66926> (last visited Oct. 9, 2012).

<sup>5</sup> One classic example is the case of Taiwan, which major world powers in the 1970s decided to de-recognize in favor of the People's Republic of China (the "PRC")'s claims to territorial integrity. See Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L L. 765, 769 (2007). In spite of the PRC's failure to exercise any control of Taiwan, the existing government of the Republic of China (the "ROC") has been denied diplomatic recognition by all but twenty-three nations. *Background Note: Taiwan*, U.S. DEPT. OF STATE (February 8, 2012) <http://www.state.gov/outofdate/bgn/taiwan/196574.htm>. The PRC characterizes this situation as an "internal" issue within "One China." See generally Hsieh, *supra* (arguing that the ROC meets all four Montevideo Convention factors, discussed *infra* note 9, to make it a state, that various international courts recognize the ROC, and that therefore international law should govern relations between the ROC and PRC). By contrast, Israel was admitted to the United Nations even before it had full control over the region currently within its disputed borders in part out of concern for the mass settlement of Holocaust emigrées. G.A. Res. 273 (III), U.N. Doc. A/RES/273(III) (May 11, 1949). Such premature recognition can potentially interfere with a state's internal affairs. For example, the Arbitration Commission on Yugoslavia in 1992 found that Croatia met the necessary conditions for statehood; however, as it only controlled one-third of its claimed territory, some criticized Austria's recognition of it. See Conference on Yugoslavia Arbitration Commission Opinion No. 5, 31 I.L.M. 1494, 1503.

<sup>6</sup> The de-recognition of the ROC demonstrates a lack of respect for a hitherto fellow state's interests, based on the potential for a stronger and more prosperous ally embodied by the PRC. See generally Hsieh, *supra* note 5.

<sup>7</sup> See discussion *infra* Part IV.C; for a discussion of the term Great Power, see *infra* note 11.

engender amity.<sup>8</sup> Moreover, the precepts of the Montevideo Convention (the “MC”), with regard to the criteria for determining the existence of an independent state,<sup>9</sup> have become universally accepted and now form international law regarding human rights.<sup>10</sup> In circumstances where there is some ambiguity regarding whether emerging states fall within the MC criteria, the leadership of the world’s superpowers (the “Great Powers” or “Superpowers”) in this regard is deemed dispositive.<sup>11</sup> In

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<sup>8</sup> The Kashmir dispute is a prime example of this anticipated outcome. See Amit K. Chhabra, *Breakthrough or Breakdown: U.S.-Pakistan Military Alliance of 1954*, FOREIGN POL’Y J. (Nov. 22, 2011), <http://www.foreignpolicyjournal.com/2011/11/22/breakthrough-or-breakdown-u-s-pakistan-military-alliance-of-1954/> (describing the inevitable continuance of the conflict as a reflection of Indian and Pakistani ideology and interests in maintaining territorial integrity, thereby leading to ever-increasing suspicion and animosity among Indians, Pakistanis and Kashmiris).

<sup>9</sup> These criteria include (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states. Convention on Rights and Duties of States adopted by the Seventh International Conference of American States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention on Rights and Duties]. Scholars have also posited that an additional criterion – the moral opinion of the world community – has acted to bar recognition of such governments as Rhodesia and apartheid-based Bantustan governments established by South Africa to forcefully remove, divide and rule black people in an effort to eliminate them as a responsibility of South Africa. See SF Khunou, *Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism Beyond Apartheid*, 12 POTCHEFSTROOM ELECTRONIC L.J. 80, 86 (2009).

<sup>10</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 201 cmt. a (2012); see also Amichai Cohen, *UN Recognition of a Palestinian State: A Legal Analysis*, THE ISRAEL DEMOCRACY INST. (Sept. 10, 2011) <http://en.idi.org.il/analysis/articles/un-recognition-of-a-palestinian-state-a-legal-analysis>.

<sup>11</sup> As discussed *supra* notes 5-6, the world’s leading powers gradually abandoned recognition of the ROC in Taiwan due to pressure from the PRC to choose it or the ROC for purposes of diplomatic relations; in effect, only twenty-three nations now officially recognize statehood for Taiwan. See generally Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Secession, and the Great Powers’ Rule*, 19 MINN. J. INTL. L. 137, 140 (2010) (arguing that peoples struggling for independence need to show that they have been oppressed, that their central government is relatively weak, that they have been administered by an international organization, and, most importantly, that they have gained the support of the Great Powers). The support of the Great Powers – due to their heavy media involvement, ability to provide military aid, and Security Council influence – was able to ensure independence for the Kosovars and Timorese (both due to human rights violations and no “Great Power” in opposition) but denied it for Chechens (due to Russia’s opposition as a

practice, we find an established custom of the world community to engage with states that may or may not objectively meet the MC's defined legal criteria, but only if they are favored by the Great Powers politically.<sup>12</sup>

Due to the influence of their decisions, such leading states can thus be said to have a heightened responsibility to facilitate conflict resolution and to elucidate acceptable objective criteria so that their determinations do not appear to be based only on self-interest or whim. In light of the binding effect of the U.N. Security Council's resolutions, promulgated under Articles 41 and 42 of the U.N. Charter,<sup>13</sup> the permanent members of the U.N. Security Council – the United States, the United Kingdom, Russia, China, and France – are members of this group along with other G-8 nations: Germany, Italy, and Japan.<sup>14</sup>

The purpose of this article is to criticize the international community's current wait-and-see approach to NKR and OSCE talks and to suggest an alternative by drawing on the lessons of historical recognition efforts and existing scholarship on NKR's self-determination efforts.<sup>15</sup> Rather than continue to hope for an OSCE outcome twenty

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“Great Power”), South Ossetians and Abkhazians (both in part due to fears of Russian expansionism though in the face of strong separatist movements and human right violations). *Id.* at 158. In this Article, I borrow Sterio's and others' term “Great Power.”

<sup>12</sup> *Id.* at 176.

<sup>13</sup> See U.N. Charter arts. 41-42.

<sup>14</sup> Sterio, *supra* note 11, at 154.

<sup>15</sup> Substantial scholarship has already reviewed whether Nagorno-Karabakhs have a right to self-determination, right of secession and whether existing concerns can be addressed by the NKR remaining within Azerbaijan as a semi-autonomous territory. See, e.g., THE PUB. INT'L LAW & POLICY GRP. & THE NEW ENGLAND CTR. FOR INT'L LAW & POLICY, THE NAGORNO-KARABAGH CRISIS: A BLUEPRINT FOR RESOLUTION (June 2000) (finding a right to self-determination based on objective and subjective criteria; extending it to a right of secession where the governing state is unrepresentative, has committed substantial human rights atrocities against the seceding entity, and even instituted an economic blockade, and where the seceding entity is already *de facto* independent; and applying the MC's traditional criteria for statehood to find that the NKR is entitled to *de jure* state recognition); Argam DerHartunian, *Negotiation and Settlement in Nagorno-Karabak: Maintaining Territorial Integrity or Promoting Self-Determination?*, 7 PEPP. DISP. RESOL. L.J. 295 (2007) (reviewing the historical interests of the parties and the failed negotiation efforts); and Gerard J. Libaridian, *The Elusive 'Right Formula' at the 'Right Time': A Historical Analysis of the Official Peace Process*, in THE LIMITS OF LEADERSHIP: ELITES AND SOCIETIES IN THE NAGORNY KARABAKH PEACE PROCESS 34, 37 (Laurence Broers ed., 2005) (concluding that a solution depends on “the degree of urgency felt by the parties to reach a solution; sufficient political

years after talks began, the Great Powers have an independent responsibility to keep up the pressure by overseeing the transition unilaterally.<sup>16</sup> Moreover, this responsibility requires that the Great Powers not base decisions solely upon their own geopolitical interests; instead, international customary law (“ICL”) and regional custom governing the former Soviet states obligates them to abide by norms that might lead to outcomes counter to their own preferences.<sup>17</sup> The failure of the international community to act when needed is a failure of the international system itself and can have far-reaching repercussions.<sup>18</sup> The Great Powers must therefore act when they have a duty to do so, express or implied by their role in the international system.

After placing NKR’s struggle in historical context, we review the value of diplomatic recognition and proceed to query whether international law and custom mandate such recognition if the MC criteria have been satisfied. Next, do the Great Powers have an enhanced responsibility to unilaterally engage with NKR, in spite of the OSCE-led negotiation effort or any concerted action through the United Nations? The paper concludes that custom mandates Great Power diplomatic engagement with NKR, though not necessarily recognition, with the expectation that such direct engagement will lead to a relatively quick resolution. Specifically, a referendum will likely indicate popular preference for annexation by Armenia. The ultimate decision whether to recognize NKR continues to rest within the decision-making ambit of each individual Great Power that chooses to actively engage with NKR.

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capital held by their leaders to sell a compromise solution to publics used to hard-line rhetoric; and the combined and determined support of regional and international players to support such a solution”).

<sup>16</sup> By analogy, the Palestinian Authority’s frustration with ongoing peace negotiations led to a unilateral declaration of statehood. See Virginia Tilley, *Bantustans and the Unilateral Declaration of Statehood*, THE ELECTRONIC INTIFADA (Nov. 19, 2009), <http://electronicintifada.net/content/bantustans-and-unilateral-declaration-statehood/8543> (arguing that a Palestinian state is a dead end that threatens to rob the Palestinian movement of its only remaining clout and will result in a Palestine state wholly dependent for its survival on Israel).

<sup>17</sup> Roozbeh (Rudy) B. Baker, *Customary International Law in the 21<sup>st</sup> Century: Old Challenges and New Debates*, 21 EUR. J. INT’L L. 173, 176-177 (2010).

<sup>18</sup> For example, the international community was required by the League of Nations to act to stop Italy’s encroachment on Abyssinia (modern-day Ethiopia); their failure to agree on action at that time in part led to the loss of millions of lives in the horrors of the Second World War. See League of Nations Covenant art. 10.

## II. NAGORNO-KARABKH: BACKGROUND OF THE REGION AND CONFLICT

A. *The Current Situation*

The history of NKR has been dictated, in part, by its location at the crossroads of Europe and Asia. This has facilitated invasions by the Arabs, Persians, Seljuk Turks, Mongol conquerors, and Turkish tribes.<sup>19</sup> Nonetheless, the region has been widely recognized as comprising primarily an ethnic Armenian populace,<sup>20</sup> speaking an Armenian dialect.<sup>21</sup> Although the effects of the Armenian Genocide<sup>22</sup> and other migrations have decreased the proportion of ethnic Armenians relative to the Azerbaijanis,<sup>23</sup> referenda in 1987 and 1991 indicated popular support for secession by the Nagorno-Karabakh Autonomous Oblast (the “NKAO”)<sup>24</sup> from the Republic of Azerbaijan and unification with Armenia, as well as for NKR independence.<sup>25</sup> Following the 1987 referendum, the NKAO’s Council of Peoples’ Deputies appealed to the Azerbaijan SSR to secede and unite with Armenia.<sup>26</sup> This request

<sup>19</sup> INSTITUTE OF POLITICAL RESEARCH, REPUBLIC OF NAGORNO-KARABAKH: PROCESS OF STATE BUILDING AT THE CROSSROAD OF CENTURIES 4-5 (2009).

<sup>20</sup> *Background Note: Azerbaijan*, U.S. DEPT OF STATE (Mar. 23, 2012), <http://www.state.gov/r/pa/ei/bgn/2909.htm>.

<sup>21</sup> Ruzan Hakobyan, *Nagorno-Karabakh: A Limbo with No End*, EURASIANET.ORG (Jan. 8, 2005, 8:00PM), <http://www.eurasianet.org/departments/insight/articles/pp010904.shtml>.

<sup>22</sup> Although the events of the Armenian Genocide occurred many years ago – during the first quarter of the twentieth century – they are alleged to have been perpetrated by the Ottoman Turks against the Armenians. *Armenian Genocide*, UNITED HUMAN RIGHTS COUNCIL, [http://www.unitedhumanrights.org/genocide/armenian\\_genocide.htm](http://www.unitedhumanrights.org/genocide/armenian_genocide.htm) (last visited Oct. 14, 2012). Similarly, Azerbaijan has historically been a part of the Ottoman Empire and shares the Islamic religion. *Background Note: Azerbaijan*, *supra* note 20.

<sup>23</sup> INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 9-10.

<sup>24</sup> During the Soviet era, the NKR was known as the Nagorno-Karabakh Autonomous Oblast. *Nagorno-Karabakh*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/401669/Nagorno-Karabakh> (last visited Sept. 11, 2012).

<sup>25</sup> The 1987 referendum indicated overwhelming support from 80,000 voters and led to the establishment of a Council to appeal for secession from Azerbaijan, unification with Armenia, and Soviet recognition of the transfer. INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 7, 10. The 1991 referendum was held under UN auspices, asking voters “whether they agree Nagorno-Karabakh to function as an independent state that freely determines all the forms of cooperation with other states and communities.” *Id.* at 10.

<sup>26</sup> *Id.* at 7-8. Among other towns, genocidal activity was reported in Sumgait, Baku, Kirovabad, Shamkhor, and Mingechaur. *Id.* The February 1988 victims

reportedly led to “sanctioned pogroms, mass killings and actions of genocidal character” in various cities throughout NKR and Azerbaijan.<sup>27</sup> In response, on January 12, 1989 the Presidium of the Supreme Council of the USSR acknowledged the utility of temporary NKR governance and preserving its status as an autonomous region within Azerbaijan SSR.<sup>28</sup> However, Soviet authority was delegated to Azerbaijan.<sup>29</sup> As a result, from April to October 1991, Azerbaijan launched further operations to force out ethnic Armenians from NKR; operation “Ring” removed ethnic Armenians from 24 NKR villages.<sup>30</sup> Thereafter, social unrest led to the outbreak of the Nagorno-Karabakh War, an effort by Armenia and Nagorno-Karabakh to protect NKR’s ethnic Armenians from alleged state persecution and by Azerbaijan to defend its territory.<sup>31</sup>

Traditional criteria for a valid unilateral secession (a people subject to historical and persistent State-sponsored human rights abuse with no viable alternative within existing channels) thereby appeared to be satisfied.<sup>32</sup> The 1987 and 1991 referenda, discussed *supra*, indicate that domestic relief was sought first.<sup>33</sup> These official efforts within the existing framework of the Azerbaijan SSR and the Soviet SSR to give voice to popular will and to effectuate a transfer from Azerbaijan to Armenia were ignored.<sup>34</sup> Azerbaijan’s government responded with alleged state-sponsored ethnic cleansing of its ethnic Armenian element.<sup>35</sup> As self-determination and the call for independence simply were not respected, Karabakhs had only one alternative, to secede.<sup>36</sup>

Over 30,000 people were killed in the fighting.<sup>37</sup> Ultimately, Armenian and Karabakh forces seized Shushi, the historical Azerbaijani

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were hundreds of Armenians from Shahumia. *Id.* Over 400,000 ethnic Armenians were also forced to flee Baku, northern NKR and rural areas in Azerbaijan. *Id.* In January 1990, the killing of 200 ethnic Armenians in Baku resulted in this city becoming Armenian-free. *Id.*

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Daniel Fierstein, Note, *Kosovo’s Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT’L L.J. 417, 441-42 (2008).

<sup>33</sup> See INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 7, 10.

<sup>34</sup> *Id.* at 7, 16-17.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Background Note: Azerbaijan*, *supra* note 20.



capital of NKR, and Lachin, which thereby linked NKR to Armenia.<sup>38</sup> Hundreds of thousands of Azerbaijani refugees fled as these troops advanced to control most of NKR and the adjoining areas.<sup>39</sup> The U.N. Security Council called for the immediate withdrawal of all occupying forces and adopted resolutions calling for the cessation of hostilities, unimpeded humanitarian relief efforts, and a peacekeeping force.<sup>40</sup> Armed conflict ended with a cease-fire brokered by Russia on May 5, 1994.<sup>41</sup>

Since then, NKR has existed relatively independently and has developed an executive, judicial, and legislative branches.<sup>42</sup> 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 the OSCE-led peace talks.<sup>43</sup> Thus, post-1994 NKR arguably already has the ability to engage more appreciably with the community of nations. 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.<sup>44</sup> Additionally, NKR's development of military and civil forces that withstood a war is a testament to their durability.

Thus, we presently have a state that functions independently, yet lacks formal recognition by most major nations.<sup>45</sup> In order to provide some closure, the OSCE Minsk Group was founded with co-chairs Russia, France, and the United States spearheading peace talks.<sup>46</sup> Russia recently confirmed that it intends to work exclusively through the Minsk Group toward a peaceful resolution of NKR's status.<sup>47</sup>

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<sup>38</sup> INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 11-12.

<sup>39</sup> *Id.* at 17.

<sup>40</sup> See S.C. Res. 822, U.N. Doc. S/RES/822 (Apr. 30, 1993); S.C. Res. 853, U.N. Doc. S/RES/853 (July 29, 1993); S.C. Res. 874, U.N. Doc. S/RES/874 (Oct. 14, 1993); S.C. Res. 884, U.N. Doc. S/RES/884 (Nov. 12, 1993).

<sup>41</sup> The parties signed the Bishkek Protocol, which formed the basis of a cease-fire agreement signed by Azerbaijan, Armenia, and the NKR on May 12, 1994. INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 15.

<sup>42</sup> *Id.* at 22.

<sup>43</sup> THE PUB. INT'L LAW & POLICY GRP. & THE NEW ENGLAND CTR. FOR INT'L LAW & POLICY, *supra* note 15, at 8-10 (referencing various OSCE Minsk Group documents that NKR signed as a separate entity).

<sup>44</sup> *Id.* at 23.

<sup>45</sup> Pursuant to the factors and declarative presumption of statehood as spelled out in the Montevideo Convention, discussed in Part III.A. See Montevideo Convention on Rights and Duties, *supra* note 9.

<sup>46</sup> *Background Note: Azerbaijan*, *supra* note 20.

<sup>47</sup> *Lavrov: Russia's position on Nagorno-Karabakh conflict remains*

Moreover, on the twentieth anniversary of the Minsk Group, the Foreign Ministers of the co-chair nations issued a joint statement reiterating their insistence that only a negotiated settlement can yield lasting peace; they went on to oppose the use of force, as “any delay in reaching a settlement will only prolong [the peoples’] hardships.”<sup>48</sup> To complicate matters, Azerbaijan appears to hold sway with the Great Powers due to its oil reserves; in fact, the State Oil Fund<sup>49</sup> (the “SOFAZ”)’s Executive Director reports directly to the President of Azerbaijan and the nation is considered one of the most important regions for oil exploration and development due to its access to the Caspian Basin.<sup>50</sup>

Further toward this principle of unimpeded peace, the Great Power nations have the ability to progressively enable nation-building by independently engaging with NKR’s government. To this end, the OSCE Minsk Group has unsuccessfully attempted to convince Armenia and Azerbaijan to agree on “Basic Principles,” including withdrawing the Armenian armed forces from the seven districts that they currently occupy around NKR, giving NKR a transitional status, ensuring direct communication between Armenia and NKR, finally settling NKR’s legal status, returning refugees and internally displaced persons to their homes, and ensuring international security guarantees and peacemaking operations in the region.<sup>51</sup> In spite of agreements to find a “political solution” in accordance with various existing protocols such as the U.N. Charter and the Helsinki Final Act’s prohibition on the use of

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*unchanged*, TREND, Apr. 6, 2012, <http://en.trend.az/news/karabakh/2011503.html>.

<sup>48</sup> Press Release, Org. for Sec. and Co-operation in Eur., Joint Statement by the Foreign Ministers of the OSCE Minsk Grp. Co-Chair Countries (Sept. 11, 2012).

<sup>49</sup> *Background Note: Azerbaijan*, *supra* note 20. As of the end of 2011, SOFAZ had assets of USD \$29.8 billion and is structured as a sovereign wealth fund that manages all state oil and natural gas revenue, and is responsible for preserving Azerbaijan’s economic stability, and helping to diversify its economy. *Id.* In fact, about three-fourths of the consolidated state budget is funded by SOFAZ transfers and taxes paid by oil companies. *Id.*

<sup>50</sup> *Id.* The Caspian Basin is shared with Russia, Kazakhstan, Turkmenistan and Iran. *Id.* The Baku-Tbilisi-Ceyhan pipeline has a capacity of 1 million barrels per day, and the Shah Deniz project investment will likely make it even more productive. *Id.*

<sup>51</sup> *Mediators working on six basic principles for Karabakh peace*, KARABAKH.ORG (Oct. 11, 2011) [hereinafter Basic Principles] <http://www.karabakh.org/news/mediators-working-on-six-basic-principles-for-karabakh-peace/>.

force,<sup>52</sup> there is no guarantee that the parties will actually accept the “Basic Principles” as they involve the removal of armed forces prior to a final resolution.<sup>53</sup> Once an army has secured difficult gains on the battlefield, it has scant motivation to leave until and unless a final resolution on all outstanding issues is reached. Moreover, in an age of media scrutiny, such a nation faces the conundrum of explaining to its war veterans and populace why it is ceding gains without receiving anything concrete in exchange. Pursuant to the “Basic Principles,” for example, Armenia’s incentive to remove its troops is that further talks – after twenty years of talking – might produce a lasting peace.<sup>54</sup> This hope is simply too uncertain and illusory to be acceptable although it would be consistent with Liberal Realists’ views that principles – and not only armies – play a major role in international relations.<sup>55</sup> Although the OSCE Minsk Group co-chairs have affirmatively stated that the current situation is an “unacceptable status quo,” they await an agreement by Armenia and Azerbaijan to move forward by accepting the principles; only then will they “assist in the drafting of the peace agreement, and then to support its implementation with our international partners.”<sup>56</sup> In effect, the process is stuck.

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<sup>52</sup> See Org. for Sec. and Co-operation in Eur., *supra* note 48.

<sup>53</sup> By analogy, the Kashmir dispute has not progressed since the United Nations Security Council issued its recommendation in 1948 that Pakistan and India substantially de-militarize the region to enable a United Nations-supervised plebiscite. See S.C. Res. 47, U.N. Doc. S/RES/726 (Apr. 21, 1948). Although India was willing to accept this, there was simply little concrete motivation for Pakistan to cede its territorial gains, especially in the face of Indian claims to all of Kashmir. See Wajahat Ahmad, *Kashmir and The United Nations*, COUNTERCURRENTS.ORG (Aug. 27, 2008) <http://www.countercurrents.org/ahmad270808.htm>. Similarly, Israel has been reluctant to withdraw its troops from Palestinian settlements – “legal” or otherwise - until it has some assurance of peace. In fact, one could argue that it is the perception that peace will never be possible – perhaps due to Israel’s occupation of foreign lands – that can be blamed for the occupation of such hinterlands and delays in demolishing West Bank “outposts.” See Ramzy Baroud, *Illegal Settlements Bonanza: Israel Plots an Endgame*, FOREIGN POL’Y J. (May 3, 2012) <http://www.foreignpolicyjournal.com/2012/05/03/illegal-settlements-bonanza-israel-plots-an-endgame/>.

<sup>54</sup> See Basic Principles, *supra* note 51.

<sup>55</sup> Robert O. Keohane & Joseph S. Nye, *Realism and Complex Interdependence*, PEARSON, 21 (Jan. 15, 2011), [http://www.pearsonhighered.com/assets/hip/us/hip\\_us\\_pearsonhighered/samplechapter/0205082912.pdf](http://www.pearsonhighered.com/assets/hip/us/hip_us_pearsonhighered/samplechapter/0205082912.pdf) (“[M]ilitary force is not used by governments toward other governments within the region, or on the issues. . .”).

<sup>56</sup> *Joint Statement on the Nagorno-Karabakh Conflict by Dmitry Medvedev, President of the Russian Federation, Barack Obama, President of the United*

As we have concluded that the “Basic Principles” are unlikely to be accepted by the parties and that unilateral means are needed to propel the peace process, we need to examine the responsibility of the Great Powers to act. Before we do so, though, we will examine why NKR needs to obtain *de jure* recognition in the first place, in light of its current *de facto* independence. What does NKR gain from such diplomatic recognition?

*B. The Value of Diplomatic Recognition*

Out of concern for the stability of international law, at some point the international community should ideally be able to conclude whether a given state should or should not be recognized.<sup>57</sup> However, there is no bright-line rule on the amount of time that the state needs to exist independently before we can agree that it is committed to the world community’s principles. Nonetheless, the present situation in NKR clearly does not engender regional stability; instead, it seems to threaten to go down the Kashmir non-resolution path.

Although the Montevideo Convention is clear that “[t]he political existence of the state is independent of recognition by the other states,” international recognition is nonetheless deemed valuable.<sup>58</sup> For one thing, recognition has been viewed as expanding a state’s national interests although it does not dictate the threshold question of the state’s existence.<sup>59</sup>

Recognition may also be legally relevant because it creates estoppel, which prevents the recognizing party from later contesting or denying the legal personality of the new state.<sup>60</sup> On the other hand, the acts of a non-recognized state can be imputed to their recognized successors.<sup>61</sup> In

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*States of America, and Nicolas Sarkozy, President of the French Republic at the Deauville Summit of the Eight*, WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (MAY 26, 2011) <http://www.whitehouse.gov/the-press-office/2011/05/26/joint-st>.

<sup>57</sup> See Cohen, *supra* note 10; see also G.A. Res. 273 (III), *supra* note 5 (referring to UN recognition of Israel even before its government had full control of its existing territory).

<sup>58</sup> Montevideo Convention on Rights and Duties, *supra* note 9, at art. 3

<sup>59</sup> See Lloyd Sheng-Pao Fan, *My Land, Your Land, But Never China’s: An Analysis of Taiwan’s Sovereignty and Its Claim to Statehood*, 3 TAIWAN INT’L STUD. Q. 141, 171 (2007).

<sup>60</sup> Josef L. Kunz, *The International Law of Recognition*, 65 HARV. L. REV. 713, 714 (1952).

<sup>61</sup> See, e.g., *Tinoco Concessions* (Gr. Br. v. Costa Rica) 1 R.I.A.A. 369 (1923) (holding that the United Kingdom’s lack of recognition for the Tinoco regime in Costa Rica did not estop it from later asserting claims against a successor regime based on contracts entered into by the Tinoco government).

other words, a non-recognized state can incur responsibilities without necessarily obtaining benefits that are incidental to widespread recognition. This presents a potential disincentive to recognize a state as its contracts might in any case be respected under international law.

The credibility of a state on the world stage can often be a function of its recognition status. The case of Taiwan, the classic unrecognized state, teaches us that a nation's standing can be limited by the absence of major power recognition.<sup>62</sup> In spite of having the world's seventeenth largest economy, the Taiwanese delegation has been embarrassed by not even being allowed to display its own national flag or sing its own national anthem at the Olympics.<sup>63</sup> Moreover, in light of the People's Republic of China ("PRC")'s "one China" stance on diplomatic relations, most nations do not accept a Taiwanese diplomatic delegation under the ROC title, opting instead for "Taipei Economic and Cultural Office," "Taipei Representative Office," or "Chung Hwa Travel Service."<sup>64</sup>

Moreover, when a state ultimately provides recognition to another state, this usually means that it will allow the recognized state to enjoy customary privileges and immunities within its borders; thus, the decision is usually a political one rather than legal.<sup>65</sup> To that end, large communities of expatriate citizens tend to exert pressure on foreign governments to recognize their home states.<sup>66</sup> To them, recognition is certainly meaningful.

In the instant case, the sizeable presence of an Armenian diaspora in Uruguay could make that nation the first non-regional state to recognize NKR.<sup>67</sup> As the only nations that currently recognize NKR are not Great

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<sup>62</sup> See Sterio, *supra* note 11.

<sup>63</sup> Pursuant to an International Olympic Committee determination called the "Nagoya Resolution" which recognized the Olympic Committee in Beijing as the "Chinese Olympic Committee" while simultaneously designating Taiwan's delegation as the "Chinese Taipei Olympic Committee." Whereas the Chinese Olympic Committee was allowed to use the PRC's anthem and flag, Taiwan was ordered to change its anthem and flag. Ying Wushanley, *Waltzing on Ice: Lake Placid, the Carter Doctrine, and China's Return to the Olympics*, in *PATHWAYS: CRITIQUES AND DISCOURSE IN OLYMPIC RESEARCH* 132, 133 (Robert K. Barney et al. eds. 2008).

<sup>64</sup> Hsieh, *supra* note 5, at 766-67.

<sup>65</sup> NURULLAH YAMALI, GEN. DIRECTORATE OF INT'L LAWS & FOREIGN AFFAIRS, MINISTRY OF JUSTICE, TURKEY, WHAT IS MEANT BY STATE RECOGNITION IN INTERNATIONAL LAW? 5, available at <http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf>.

<sup>66</sup> See Christopher Waters, *Law in Places that Don't Exist*, 34 *DENV. J. INT'L L. & POL'Y* 401, 406 (2006).

<sup>67</sup> Uruguay accepted many Armenian refugees, especially after the Armenian Genocide. Perhaps due to the influence of this Armenian diaspora community,

Powers – specifically, South Ossetia, Transnistria, and Abkhazia – such a designation by Uruguay might convince the rest of the world to adopt a similar stance.<sup>68</sup> The fact that Uruguay has not officially gone forward with such recognition, however, underscores the importance of the traditional leadership exercised by the Great Powers in this regard.

### C. Traditional Recognition Theories

The fact of statehood does not necessarily dictate a state's freedom of action.<sup>69</sup> Rather, sovereignty is “an ‘essentially relative question’ – dependent on whatever law there is to curtail it.”<sup>70</sup> Disagreement over the appropriate theory of recognition, declaratory, constitutive or hybrid, accounts for this perceived relativity.<sup>71</sup>

Once *de facto* statehood under the MC has been achieved, the failure of the Great Powers to recognize a new state appears to impinge upon the new state's rights granted by the MC.<sup>72</sup> Article 3 of the MC specifically provides that:

Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts . . . . The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.<sup>73</sup>

Inherent within this “right to defend its integrity and independence” is arguably the state's right to require other states to recognize its existence and its right to so defend. The MC attempts to reconcile this

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Uruguay's Minister of Foreign Affairs stated that “I am sure that Nagorn[o]-Karabakh must be independent and eventually reunited with Armenia. This is the only way to solve the problem.” *Uruguay Recognizes the Nagorno-Karabakh*, BAKUTODAY.NET (Sept. 10, 2011) <http://www.bakutoday.net/uruguay-recognizes-the-nagorno-karabakh.html>.

<sup>68</sup> See *Uruguay May Recognize Nagorno-Karabakh Republic*, ASBAREZ NEWSPAPER (Sept. 9, 2011), <http://asbarez.com/98016/uruguay-may-recognize-nagorno-karabakh-republic/>.

<sup>69</sup> Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 408 (1991).

<sup>70</sup> *Id.* (quoting Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24).

<sup>71</sup> See generally J. D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9 (1991).

<sup>72</sup> See Sterio, *supra* note 11.

<sup>73</sup> Montevideo Convention on Rights and Duties, *supra* note 9, at art. 3.

inconsistency by affirming the equality of states and affirmatively stating that the “rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.”<sup>74</sup> If this is so, how can we explain why some states appear to have more sway in the international arena?

The MC endorses a declaratory theory of recognition that “the political existence of the state is independent of recognition by the other states.”<sup>75</sup> In other words, no affirmative recognition by other states is necessary. However, the effect of any such affirmative recognition would be to “merely signif[y] that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law.”<sup>76</sup>

By contrast, the constitutive theory of recognition requires affirmative approval by the community of nations.<sup>77</sup> This reflects the Realist concern inherent within the concept of recognition that a new state must be respected by other states in order for its declaration of sovereignty to have practical effect.<sup>78</sup> By virtue of the structure of the international arena, some posit that “the formal reception by others” is necessary for a state to be assured of its “place and rank.”<sup>79</sup>

Another explanation for this inconsistency is found in Lauterpacht’s view, which has not been generally accepted, that existing states have an affirmative duty to recognize states that meet the four MC statehood factors.<sup>80</sup> The acceptance of this proposition would bring the constitutive school in line with declaratory principles.

Ultimately, one of the primary considerations for a state in deciding whether to recognize a new government is whether it has *de facto* control. Sometimes this test is insufficient, and states have taken other

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<sup>74</sup> *Id.* at art. 4

<sup>75</sup> *Id.* at art. 3.

<sup>76</sup> *Id.* at art. 6.

<sup>77</sup> See Lauterpacht, *supra* note 2, at 420.

<sup>78</sup> Such respect comes in the form of military independence. KENNETH N. WALTZ, *Anarchic Orders and Balances of Power*, in *NEOREALISM AND ITS CRITICS* 98, 98 (Robert O. Keohane ed., 1986) (“Because some states may at any time use force, all states must be prepared to do so - or live at the mercy of their militarily more vigorous neighbor.”).

<sup>79</sup> Clarence A. Berdahl, *The Power of Recognition*, 14 AM. J. INT’L L. 519, 519 (1920).

<sup>80</sup> See Sterio, *supra* note 11, at 151 n.74 (citing Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”?: Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 382 (2005) (citing LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 13–15 (1995))).

factors into account, including whether the new government is ready to honor the international obligations of its predecessor, whether it is democratic, whether it has come to power through aggression, and its political nature.<sup>81</sup>

### III. INTERNATIONAL LAW, CUSTOM, AND POLITICS OF STATE RECOGNITION

As the right to self-determination has been enshrined within the International Bill of Human Rights, international law has traditionally focused efforts on domestic reforms.<sup>82</sup> However, this concept has also been used to support secessionist struggles, like external self-determination, where domestic avenues of representation are alleged to be effectively unavailable, futile and/or have been exhausted.<sup>83</sup> Moreover, the U.N. Declaration on Friendly Relations<sup>84</sup> provides all people with the right to determine their own political status: “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”<sup>85</sup> Thus, an

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<sup>81</sup> *Lecture Notes: Subjects of International Law – States*, AMERICAN UNIVERSITY IN BULGARIA, <http://home.aubg.bg/faculty/nbentz/International%20Law%20and%20Organization/Lecture%20notes/Subjects%20of%20International%20Law%20-%20States.doc> (last visited Nov. 21, 2012).

<sup>82</sup> This includes the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (and its optional protocols), and the International Covenant on Economic, Social and Cultural Rights. OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*. Article 1 in both covenants provides for the universal right of self-determination in the form of representative democracy, and calls upon states to promote the realization of that right and to respect it. International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>83</sup> See, e.g., Sterio, *supra* note 11. For a discussion of circumstances where a claim to independence was denied, see, for example, *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.), which held that Quebec was not entitled to secede because Canada represents its people equally, without discrimination and thus was entitled to deference to its own right to territorial integrity. In spite of the hope for secessionist movements that the Quebec decision provides under appropriate facts, customary international law has not consistently held a right of secession.

<sup>84</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

<sup>85</sup> *Id.* ¶ 1.



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."<sup>86</sup> 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."<sup>87</sup>

Hence, 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. As discussed in Part II.A, *supra*, ethnic Armenian efforts at representation within Azerbaijan have been thoroughly exhausted, frustrated, and have effectively laid the seed for the present struggle. Under these circumstances, NKR claim to a right to external self-determination appears to be legitimate. One wrinkle exists: NKR is no longer subject to persecution by Azerbaijan as it is now *de facto* independent.<sup>88</sup> However, in the absence of Great Power assistance, a military build-up by oil-rich Azerbaijan could again threaten NKR Armenians' basic rights to human dignity and self-determination.

Ultimately, to the extent that the MC criteria have been relied upon to yield a successful recognition effort, the winning ingredient appears to be the support for recognition by the world community and, in particular, by leadership by the Great Powers.<sup>89</sup> However, their whim is not the only relevant factor.

#### A. Montevideo Convention - Predictable Patterns and "Trump Cards"

Are there predictable recognition patterns based on satisfying the MC criteria? The universe of historical self-determination struggles is admittedly limited.<sup>90</sup> Nonetheless, within this portfolio, clear patterns emerge from which it is possible to extrapolate lessons about the fact scenarios that we can predictably expect to generate favorable international reception. In this regard, Dajena Kumbaro presents two examples representing post-colonial scenarios in which some of the MC criteria are present: (1) the post-colonial context where the local

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<sup>86</sup> *Id.*

<sup>87</sup> Sterio, *supra* note 11, at 143 (quoting *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7/21/68/106, at 28 (1921)).

<sup>88</sup> INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 22.

<sup>89</sup> See Sterio, *supra* note 11, at 140.

<sup>90</sup> *Id.* at 137.

populace is widely understood to have been denied adequate representation by a foreign power, and (2) the non-post-colonial context in which one or more groups claim their concerns are not being, and cannot be, represented internally and that only secession can address this.<sup>91</sup>

First, self-determination had not been properly measured in Eritrea – no referendum – as part of the U.N. determination of its status after the British trusteeship ended in 1952.<sup>92</sup> In addition to Eritrean control over its own territory, an MC factor, a strong case could thus be made for recognition of the instant movement. Second, Portugal withdrew from its colonial mandate in East Timor after a civil war broke out between East Timor freedom-fighters and Indonesian unionists that favored annexing the region.<sup>93</sup> Although Indonesia invaded the region and forcibly annexed it, the U.N. ignored its territorial claim as the popular will had not been consulted.<sup>94</sup> Thus, the results of a subsequent U.N.-administered referendum organized by an international organization – the United Nations Administration Mission in East Timor (the “UNAMET”) – were acknowledged as representing the true will of the people.<sup>95</sup> The lesson appears to be that, at least in the post-colonial context, the international community is willing to allow a degree of flexibility in determining whether to recognize a struggle for independence. Perhaps this represents an acknowledgement of the wrongfulness of colonialism itself, or Great Power guilt?

By contrast, this flexibility is all but absent in the non-colonial context. The forcible annexation by the Soviet Union of the Baltic states of Lithuania, Latvia, and Estonia<sup>96</sup> presented the international community with an opportunity to disregard the Soviet annexation.<sup>97</sup> Although most of the MC criteria were present in each case, the international community did not recognize those states as independent.

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<sup>91</sup> DAJENA KUMBARO, NORTH ATLANTIC TREATY ORGANISATION, FINAL REPORT: THE KOSOVO CRISIS IN AN INTERNATIONAL LAW PERSPECTIVE: SELF-DETERMINATION, TERRITORIAL INTEGRITY AND THE NATO INTERVENTION 30 (2001).

<sup>92</sup> *See id.* at 31.

<sup>93</sup> *See id.* at 32.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Soviet Deportations from Estonia in 1940s*, Estonia.eu, <http://estonia.eu/about-estonia/history/soviet-deportations-from-estonia-in-1940s.html> (last visited Oct. 14, 2012).

<sup>97</sup> This decision was presumably based upon the UN principle: “all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” U.N. Charter art. 2, para. 3.

As Kumbaro points out, however, that decision was accompanied by the inability on the part of the secessionist movements to regain control over their own territory – also an MC criterion – as well as their relative independence within the Soviet Union, the *de facto* reality of Soviet hegemony at the time, and a lack of protest against the decision not to recognize.<sup>98</sup> The lesson appears to be that the four MC criteria are essential before a state can claim entitlement to international recognition. Moreover, international politics likely played a role: opposition by the Soviet Union meant that no other Great Power was so interested in the plight of the Baltics as to risk a confrontation.<sup>99</sup>

As an exception to this rule, Kumbaro further notes that, in the case of the former Yugoslavia, although the international community initially rejected secessionist claims in favor of Yugoslavian territorial integrity, it quickly recognized the former constituent states even while armed struggle continued.<sup>100</sup> This is apparently the result of the U.N. Security Council Resolution's characterization of the struggle's continuation as an imminent threat to international peace and security.<sup>101</sup> 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, there was no Great Power interest that opposed such an interpretation.<sup>102</sup>

The lesson from all this appears to be that, in the post-colonial scenario, the international community seems to have a bias in favor of recognition due to the historical lack of ascertainment of the popular will. In the non-post-colonial plain vanilla scenario, the presence of all four MC criteria is largely necessary though 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 that may not obviously exhibit all four MC criteria might nonetheless be granted recognition out of greater concern for international, rather than regional, peace. By contrast, if an additional “negative trump card” is present – as in the case of Taiwan – struggles that do exhibit all four MC criteria might nonetheless be denied international recognition.

In the case of NKR, strong oil interests disfavor Armenia's position as

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<sup>98</sup> Kumbaro, *supra* note 91, at 34

<sup>99</sup> By contrast, when Russia intervened in Abkhazia and South Ossetia, the international community favored Georgia out of concern for Russian expansionism.

<sup>100</sup> See Kumbaro, *supra* note 91, at 35.

<sup>101</sup> See S.C. Res. 713, pmb., U.N. Doc. S/RES/713 (Sept. 25, 1991).

<sup>102</sup> See Kumbaro, *supra* note 91, at 35-39.

much of the industrialized world sees Azerbaijani oil as an alternative source for their energy needs.<sup>103</sup> Thus, it might be politically expedient to not answer the call for self-determination. Moreover, tensions on the battlefield have been in large part subdued such that only minor border clashes continue.<sup>104</sup> Thus, there is now little concern that the dispute will pose a threat to international peace and security that might serve as the basis for a call to concerted U.N. Security Council economic or military intervention. Other factors, however, might serve as an appropriate legal basis for NKR's recognition.

### *B. Regional Custom of State Recognition*

Another source of international law is custom, which can be a universal custom, a regional custom, or a course of conduct between two or more particular states. The hallmark of custom is obligation. The *Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union* ("Guidelines") are instructive for determining whether a custom of diplomatic engagement or recognition exists in NKR, for instance in concluding whether a regional custom governs. The Guidelines provide, in part, that:

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighboring (sic.) States. The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.<sup>105</sup>

Moreover, the Guidelines include several values intrinsic to recognizing new states, including "guarantees for the rights of ethnic and national groups and minorities."<sup>106</sup> Applicants for recognition must

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<sup>103</sup> See *Background Note: Azerbaijan*, *supra* note 20.

<sup>104</sup> See INSTITUTE OF POLITICAL RESEARCH, *supra* note 19, at 16.

<sup>105</sup> European Community, Declaration on Yugoslavia and on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, Dec. 16, 1992, 31 I.L.M. 1485, 1487 (hereinafter the "Guidelines").

<sup>106</sup> *Id.* Additional stated values include: "respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights; . . . respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement; acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; and commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes." *Id.*

commit “to adopt constitutional and political guarantees ensuring that [they] ha[ve] no territorial claims towards a neighbouring Community State and that [they] will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.”<sup>107</sup>

This language tends to imply that, as long as a state does not attempt to impinge upon the territorial claims of its neighbors and provides for its subjects’ human rights, it has a strong argument in favor of recognition. The presence of all MC criteria would further this finding. Moreover, the Guidelines, the Badinter Commission’s Opinion No. 3,<sup>108</sup> and the lessons of Yugoslavia indicate respect for the principle of *uti possidetis*: the former boundaries should become international borders so as to affect inter-state relations as little as possible.<sup>109</sup> By contrast, the Badinter Commission’s findings on self-determination<sup>110</sup> also favor characterization of a “minority group” as a “people” within the definition of the U.N. Charter, so as to support their ability to determine their own nationality.<sup>111</sup> These appear to be the customary regional principles of recognition.

These principles bring mixed news for NKR movement for secession. Although NKR certainly meets all four MC criteria, inevitably the heart of its claim conflicts with *uti possidetis* as the pre-conflict borders placed NKR within Azerbaijan in spite of the historical evidence showing the region’s autonomy and common heritage with Armenia.<sup>112</sup> Under similar facts, Kosovo was denied international recognition early in its independence movement, in spite of the presence of the MC factors, due to Serbia’s conflicting territorial claim that Kosovo was contained within

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<sup>107</sup> *Id.* at 1486.

<sup>108</sup> The Badinter Commission was established to resolve issues arising out of the dissolution of Yugoslavia. Conference on Yugoslavia Arbitration Commission Opinion No. 1, 31 I.L.M. 1494, 1494. The Commission’s Opinion No. 3 related to borders and reinforced the principle of *uti possidetis*. Conference on Yugoslavia Arbitration Commission Opinion No. 3, 31 I.L.M. 1494, 1499.

<sup>109</sup> *Uti Possidetis*, BLACK’S LAW DICTIONARY 1686 (9th ed. 2009).

<sup>110</sup> Badinter Commission Opinion No. 2 provides that the Serbian people in Yugoslavia are entitled to nationality selection. Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1494, 1497. It states, in relevant part, “that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality.” *Id.* at 1499.

<sup>111</sup> See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, 179 (1992).

<sup>112</sup> See *Background Note: Azerbaijan*, *supra* note 20.

its borders.<sup>113</sup> As in the NKR scenario, Kosovo's movement for secession arose out of ethnic tension.<sup>114</sup> There was a predominance of ethnic Serbs in northern Kosovo and of ethnic Albanians elsewhere in the region.<sup>115</sup> After years of unsuccessful negotiations with Serbia and a NATO bombing campaign, Kosovo was brought under UN administration.<sup>116</sup> Subsequently, a Republic of Kosovo was declared, which has been recognized by sixty-nine UN members and the ROC.<sup>117</sup>

The regional custom thus appears to favor self-determination efforts under the Guidelines' principles of respect for the rule of law, democracy and human rights.<sup>118</sup> However, historical borders are also respected. As to NKR conflict, although the parties are still negotiating under the OSCE's Minsk Group,<sup>119</sup> there is little hope of resolution as the "Basic Principles" envision tangible, immediate concessions without tangible, immediate returns. Specifically, they require Armenia's demilitarization of the border provinces and the presence of U.N. peacekeeping forces, which ultimately might potentially undermine Azerbaijan's territorial claims. Moreover, the co-chairs continue to base their conceptions of the future on an unwillingness to accept the present context: the fact that Armenians and Azers will not happily co-exist and thus neither party is likely to accept the "Basic Principles."<sup>120</sup>

Certainly, Azerbaijan is not a superpower that can exert the pressures that China was able to with respect to Taiwan's sovereignty claims. However, Azerbaijan has been able to successfully exercise influence over the Great Powers due to its strategic access to oil.<sup>121</sup> Thus, NKR potentially has a "negative trump card." Moreover, there is not currently a Yugoslavia-type scenario of civil war that can

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<sup>113</sup> See Kumbaro, *supra* note 91, at 39.

<sup>114</sup> *Id.* at 42-47.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.*

<sup>117</sup> Mike Corder, *Kosovo Independence Declaration is Legal, UN Court Rules*, HUFFINGTON POST (July 22, 2010, 2:32 PM), [http://www.huffingtonpost.com/2010/07/22/kosovo-independence-decla\\_n\\_655816.html](http://www.huffingtonpost.com/2010/07/22/kosovo-independence-decla_n_655816.html) (discussing a recent the International Court of Justice advisory opinion that found Kosovo's declaration of independence did not violate international law).

<sup>118</sup> See Guidelines, *supra* note 105, at 1486-87.

<sup>119</sup> See discussion *supra* Part II.A.

<sup>120</sup> See Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66 (1993) (arguing that the failure of European Community leaders to accept the contemporary fact that Yugoslavia was a defunct state, rather than constantly working to bring its constituencies back together, has postponed the resolution of competing recognition claims).

<sup>121</sup> See *supra* notes 49-50; discussion *supra* Part II.A.

imminently threaten international peace and security, wreak havoc upon millions, align the world powers and potentially lead to world war. Thus, there is no “positive trump card” that can force the U.N. Security Council to intervene on the ground without the express invitation of both parties. On the other hand, the history of state persecution of NKR ethnic Armenians by the Azerbaijani authorities<sup>122</sup> provides a powerful “positive trump card.” Therefore, we have a stalemate now as we have had it for the past twenty years. To make matters worse, religious differences – ethnic Armenians are mainly Christian, ethnic Azers are predominantly Muslim – make the struggle for NKR, just as in Kashmir and Kosovo, a symbolic one tinged with ideology.<sup>123</sup>

As a way forward, it is helpful to extrapolate from the Badinter Commission’s findings with respect to Yugoslav Serbs.<sup>124</sup> The lesson is that, in the event of Yugoslavia-like conditions in NKR, we might expect concerted action to intervene to restore peace and impose a referendum. In reality, the NKR situation differs notably from Yugoslavia as there is no large-scale general war that threatens international, as opposed to regional or national, security. However, an argument can be made that a general war should not be required to give effect to fundamental human rights, such as the right to determine one’s nationality. To be clear, the Badinter Commission’s findings would likely support ethnic Armenian nationhood, either in the form of NKR state recognition or annexation by Armenia.

By contrast, an argument can be made that only the specific ethnic hostilities within Yugoslavia actually necessitated widespread state recognition. By extension, anything short of this might not implicate gross human rights violations. Moreover, widespread conflict may have diminished the importance of a competing claim for territorial integrity, especially as it seemed that there was no Yugoslavia remaining to assert such a claim.

In light of these competing claims, who can be the responsible tie-breaker?

#### IV. THE TIE-BREAKER: CUSTOM OF ENHANCED SUPERPOWER RESPONSIBILITY

##### A. *Traditional Views on Superpower Responsibility for Recognition*

Traditionally, Superpowers have intervened where doing so is in their

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<sup>122</sup> See INSTITUTE OF POLITICAL RESEARCH, *supra* note 19.

<sup>123</sup> *Id.*

<sup>124</sup> See Opinion No. 2, *supra* note 110.

own interest.<sup>125</sup> This was perhaps more transparent before the founding of the United Nations and is consistent with the traditional dominance of classical Realism in international relations.<sup>126</sup> Ian Brownlie echoes the Realist position in stating that “[r]ecognition . . . is an optional and political act and there is no duty in this regard.”<sup>127</sup>

This position, however, is opposed by the presumptive international obligation of Great Powers “to [not] serve exclusively the interests of their national policy and convenience regardless of the principles of international law.”<sup>128</sup> This finding is consistent with Liberal Realist thinking that advances the influence of principles agreed upon by a “community of nations” over military capability alone.<sup>129</sup> Additionally, certain morality-based arguments support the idea that action should be based on truth.<sup>130</sup> As an example, Mahatma Gandhi’s Satyagraha movement enlisted Western media to assist in India’s freedom struggle from British sovereignty.<sup>131</sup> By demonstrating to the world the injustice of British rule over India, the message was that world opinion should be based on the reality of unjust British policies and immoral British treatment of Indians.<sup>132</sup> By this analysis, the economic interests of the British East India Company were rendered irrelevant. This worldview would similarly render Western oil interests in Azerbaijan meaningless, human rights being of paramount concern. For example, the rights of NKR’s population would guide world opinion to censure the OSCE co-chairs to apply pressure.<sup>133</sup>

In any case, the Great Powers’ actions set precedents that have

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<sup>125</sup> See Sterio, *supra* note 11.

<sup>126</sup> Classic Realism considered moral theorizing around international responsibilities as futile. See Allen Buchanan & David Golove, *Philosophy of International Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 868 (Jules Coleman & Scott Shapiro eds., 2002) (arguing *inter alia* that the Realist perspective may imply alternatively (i) that moral “oughts” do not apply in international relations, i.e., there are no true or justified statements about what anyone ought morally to do; (ii) that no actor behaves or will behave morally in international relations; or (iii) that moral behavior in international relations is fundamentally irrational and therefore infrequent).

<sup>127</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 89-90 (7th. ed. 2008).

<sup>128</sup> Lauterpacht, *supra* note 2.

<sup>129</sup> See Keohane & Nye, *supra* note 55.

<sup>130</sup> See, e.g., M. K. GANDHI, AN AUTOBIOGRAPHY OR THE STORY OF MY EXPERIMENTS WITH TRUTH (Mahadev Desai trans., 1927).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See discussion *infra*.



formed a variety of international customs.<sup>134</sup> Moreover, the existence of some customs by certain Great Powers can have the effect of making such customs binding upon others.<sup>135</sup> This might be because a “subglobal group of nations” possesses the appropriate mix of characteristics to develop a particular custom;<sup>136</sup> some such nations have played a leading role in the development of international law. The Great Powers are on this list, as is India, guiding nations seeking independence through the influence of Gandhi’s Satyagraha movement.

Through this lens, the OSCE co-chairs – the Great Powers here – have the responsibility to do more than continue to wait for a miracle. As the United States, France, and Russia already agree that one of the six “Basic Principles” involves the legal resolution of NKR’s status, they can incentivize Armenia and Azerbaijan to resolve their remaining issues by declaring recognition of NKR’s transitional status and at least by engaging with its government. Ultimately, this may ripen into full recognition, or de-recognition, but in the interim it will have served its purpose of pressuring the parties to produce a final resolution. This is especially important where it is clear that requiring de-militarization without any concrete gain in exchange is futile and can potentially complicate the peace process further. Moreover, the lack of a large-scale, Yugoslavia-type conflict removes any other pressure that might otherwise have assisted in bringing the conflict to a prompt conclusion.

Such an act would not necessarily be interpreted as frustrating the purpose of the Minsk Group and indeed can facilitate the “lasting peace” at the outset by helping to resolve one of the key outstanding issues. In fact, diplomatic engagement by major states is the only feasible means for more universal engagement and recognition.

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<sup>134</sup> The American case *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which found chargeable acts of kidnapping and torture by the Paraguayan police with respect to Joelito Filartiga, is instructive in this regard. The Second Circuit used the Alien Tort Statute of 1789 to establish its jurisdiction over the case, and proceeded to find that torture is prohibited under international law on the basis of various charters and treaties. This finding ultimately evolved to become a *jus cogens* norm that is still cited in charging humanitarian violations by nations against their own citizens. Moreover, as a non-derogable norm of international law torture is chargeable even though the charged nation might not have signed the Convention Against Torture or similar treaty.

<sup>135</sup> Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 902-03 (2006).

<sup>136</sup> *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102(2) (1987).

*B. Responsibility by Omission: Failure to Recognize*

In addition to the traditional four factors considered by the MC as necessary to establishing a state, an additional requirement appears to be the moral backing by the community of nations.<sup>137</sup> Therefore, when states have failed to garner such support the world community has acted by failing to recognize them. Especially when there is some humanitarian concern, or where territory was acquired through the use of force, a strong tradition of non-recognition appears in numerous treaties and has risen to the level of ICL.<sup>138</sup> ICL can arise where a substantial number of states ratify relevant treaties or engage in conduct reflecting their assent.<sup>139</sup> Moreover, it can bind parties that are non-signatories or did not engage in such practice.<sup>140</sup> However, states do have the ability to argue that certain customs do not bind them by demonstrating that they have consistently adopted a contrasting position as a “persistent objector.”<sup>141</sup> By contrast, certain customs are non-derogable when they have reached the level of *jus cogens*; these ordinarily prescribe such a basic level of responsibility that states cannot opt out of them under international law.<sup>142</sup>

For example, territorial acquisition through the use of force has a long history of international non-recognition and has been enshrined as a basic tenet of the U.N. Charter as well as in several treaties:

(1) Even before the Second World War, the moral responsibility to not recognize such acts was a central tenet of the Kellogg-Briand Pact, which effectively outlawed war among its signatories in 1928, ultimately 62 nations, though it was never enforced.<sup>143</sup>

(2) Following the Second World War, the U.N. Charter provides that the United Nations “is based on the principle of the sovereign equality of all its Members.”<sup>144</sup> Additionally, “all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not

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<sup>137</sup> See Vyver, *supra* note 71, at 9.

<sup>138</sup> *Id.*

<sup>139</sup> JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 155 (8th ed. 2012)

<sup>140</sup> MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW CASES AND COMMENTARY* 111 note 3 (2d ed. 2001).

<sup>141</sup> CRAWFORD, *supra* note 139, at 28.

<sup>142</sup> *Id.* at 594.

<sup>143</sup> Office of the Historian, *Kellogg-Briand Pact, 1928*, U.S. DEP’T OF STATE, <http://history.state.gov/milestones/1921-1936/Kellogg> (last visited Oct. 14, 2012).

<sup>144</sup> U.N. Charter art. 2, para. 1.

endangered.”<sup>145</sup> Territorial acquisition through force would patently fly in the face of this principle. One hundred and ninety-three parties have signed on to the U.N. Charter, and have thereby accepted this principle, including fifty-one original signatories, and 144 acceding parties.<sup>146</sup>

(3) The Bogotá Charter of the Organization of American States provides that “no territorial acquisition or special advantage obtained either by force or by other means of coercion should be recognised (sic).”<sup>147</sup> It was signed in 1948 and ultimately included thirty-five states.<sup>148</sup>

(4) Several provisions adopted by the U.N. General Assembly articulated the prevailing sentiment on territorial expansion.<sup>149</sup> For example, the 1946 *Draft Declaration on the Rights and Duties of States* provides that “every State has the duty to refrain from recognizing any territorial acquisition by another State” which is violating the territorial integrity of a third state.<sup>150</sup> The 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* proclaimed that “no territorial acquisition resulting from the threat or use of force shall

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<sup>145</sup> *Id.* at art. 2, para. 3.

<sup>146</sup> *United Nations Member States*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Nov. 20, 2012). Additionally, the United Nations endorsed the Nuremberg Charter to govern World War II-related acts and included “crimes against peace” within its prosecutorial ambit. These included (i) planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; and (ii) participation in a common plan or conspiracy for the accomplishment of any such acts. Rep. of the Int’l Law Comm’n, 2nd sess, June 5-July 25, 1950, at 11, Principle VI(a), U.N. Doc. A/1316 ; GAOR, 5th Sess., Supp. No. 12 (1950).

<sup>147</sup> Charter of the Organization of American States, art. 21, Apr. 30, 1948, 119 U.N.T.S. 48.

<sup>148</sup> *Member States*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/about/member\\_states.asp](http://www.oas.org/en/about/member_states.asp) (last visited Oct. 14, 2012).

<sup>149</sup> Similarly, the Definition of Aggression Resolution adopted by the United Nations General Assembly on December 14, 1974, provides in Article 5(3) that “no territorial acquisition or special advantage resulting from aggression is or shall be recognised (sic.) as lawful.” G.A. Res. 3314 (XXIX), annex art. 5, para. 3, U.N. Doc. A/9890 (Dec. 14, 1974).

<sup>150</sup> Draft Declaration on Rights and Duties of States, G.A. Res. 375 (IV), annex art. 3, U.N. Doc A/1196 (Dec. 6, 1949).

be recognized as legal.”<sup>151</sup>

Based on this general historical consensus, we can conclude that a universal custom prohibiting the recognition of territorial expansion has been established and binds the community of nations under ICL.

In spite of this custom of non-recognition for acts of aggression that impinge upon a subject state’s territorial integrity, other factors might play a supervening role. In the case of NKR, the facts do not necessarily indicate Armenia’s territorial expansion, but rather a long-standing self-determination effort among ethnic Armenians within NKR. As discussed *supra* in Part II.A, although one referendum indicated approval of annexation by Armenia, another indicated preference for NKR independence. These details would indicate that there would not be much strength in a moral argument opposing recognition of NKR independence.

Additionally, where there is some humanitarian concern for a targeted population’s suffering, there is a strong moral tradition of withholding state recognition.<sup>152</sup> As discussed *supra*, Rhodesia and the South Africa-created Bantustan governments fit this category.<sup>153</sup> Similarly, during the 1976 Montreal Olympics, eighteen African countries and five Arab neighbors boycotted Canada due to the International Olympic Committee’s refusal to ban New Zealand as New Zealand had sent a rugby team to apartheid South Africa which had been banned from Olympic competition since 1968.<sup>154</sup>

In the case of NKR, the widespread humanitarian violations discussed above would disfavor international recognition of an Azerbaijani claim to NKR’s territory on moral grounds, as well as accord the principles of the Badinter Commission and the Guidelines.<sup>155</sup>

### C. *Responsibility by Positive Act*

Humanitarian crises have engendered a strong tradition of Great Power affirmative involvement and engagement with emerging states in their recognition efforts. As NKR independence follows a history of persecution, this is especially relevant in determining whether we can

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<sup>151</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), annex, U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>152</sup> This is commonly associated with the fourth tranche of the MC criteria – the capacity to enter into foreign relations with other states. *See* discussion *supra* note 9.

<sup>153</sup> *Id.*

<sup>154</sup> *Game Playing in Montreal*, TIME, July 26, 1976, at 38, 39.

<sup>155</sup> *See* Guidelines, *supra* note 105.

expect any Great Power involvement outside of the OSCE talks. Principles of self-determination underlie any Great Power responsibility to take affirmative action.<sup>156</sup>

In addition to international law's support for self-determination efforts, as discussed in III above, there is also a custom in favor of humanitarian efforts in the face of mass atrocities.<sup>157</sup> This concept is often referred to as a responsibility to protect and can be divided into three commitments: to prevent, to react and to re-build.<sup>158</sup> The U.N. General Assembly approved of this concept and related it to the U.N. Security Council's Chapter 7 "threat to peace" concept in providing that:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity . . . . The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>159</sup>

On this subject, Richard Haass aptly summarizes the instances justifying foreign intervention: where states commit or fail to prevent genocide or crimes against humanity in their territory; where countries

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<sup>156</sup> See sources cited *supra*, note 15, (discussing NKR's right to self-determination).

<sup>157</sup> See generally discussion *supra* Part III.A; see also *supra* note 9.

<sup>158</sup> Adèle Brown, *Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect*, House of Commons Library Research Paper 08/55, at 3 (2008) (arguing that the international community has such a responsibility where there is a "manifest failure" of a particular state to discharge its responsibilities to its citizens; that military intervention to stop atrocities would be the most controversial aspect; and that the legality of unilateral action – without Security Council authorization – is questionable).

<sup>159</sup> 2005 World Summit Outcome, G.A. Res. 60/1, para. 138-139, U.N. Doc. A/60/L (Sept. 20, 2005).

find it necessary to take action to protect their nationals against other states that harbor international terrorists; and where states pursue weapons of mass destruction.<sup>160</sup> As Sterio points out, this responsibility to protect was acted upon by a UN-sanctioned coalition that launched an offensive in northern Iraq on behalf of the Kurds who were alleged to be persecuted by the Iraqi government.<sup>161</sup> Additionally, NATO intervened in Kosovo due to Serbia's publicized persecution of ethnic Albanian Muslims.<sup>162</sup> Moreover, an argument was made for intervention in Burma after authorities there obviously failed to respond adequately to cyclone Nargis; the intentional denial of humanitarian assistance was claimed to implicate a crime against humanity and to thereby trigger a responsibility to protect.<sup>163</sup> Similarly, the 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.<sup>164</sup> In each of these instances, a humanitarian crisis was a pre-requisite.

In the case of NKR, despite the history of the Armenian Genocide after the First World War, and substantial evidence of pogroms and targeted ethnic cleansing by Azerbaijan, there has been little international intervention.<sup>165</sup> 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 avoid the recurrence of a humanitarian crisis. This follows from the commitment to re-build, which in turn is inherent in the responsibility to protect.

Although such an act might be viewed as unnecessary because no large-scale human rights violation currently exists, the Great Powers have in the past exercised their responsibility to lead the world in dealing with novel situations. For example, in following the Guidelines

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<sup>160</sup> Richard N. Haass, *Byliner: Richard Haass on the Changing Nature of Sovereignty*, THE INFORMATION WARFARE SITE (Jan. 15, 2003), <http://www.iwar.org.uk/news-archive/2003/01-15.htm>.

<sup>161</sup> *Id.* at 156.

<sup>162</sup> *Id.* at 156-57.

<sup>163</sup> As Brown points out, the legal basis to prosecute a crime against humanity was ostensibly Article 8(2)(b)(xv) of the Statute of the International Criminal Court on war crimes: "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully (sic.) impeding relief supplies as provided for under the Geneva Conventions." See Brown, *supra* note 158, at 51 n.148.

<sup>164</sup> Linda Malone, *The Responsibility to Protect Haiti*, in 14 AM. SOC'Y INT'L L. INSIGHTS, (Mar. 10, 2010) (pointing out Security Council intervention in the face of gross human rights violations).

<sup>165</sup> See generally INSTITUTE OF POLITICAL RESEARCH, *supra* note 19.

with respect to Macedonia, the Great Powers – in this case, the EU – insisted on expanding the criteria for recognition beyond those required by the Badinter Commission.<sup>166</sup> Because the term “Macedonia” historically also included areas in Greece, which felt such a moniker threatened its own territory, the new republic would be required to use a name that excluded this term.<sup>167</sup> Moreover, that the Great Powers intervene unilaterally on the ground is not suggested, only that they engage diplomatically with the NKR government and guide it to a final resolution.<sup>168</sup>

## V. CONCLUSION

This article concludes that there is a custom mandating state recognition, though not exactly as it was envisioned by the MC criteria. First, this custom is localized to the region of the former Soviet Union pursuant to the Guidelines, as discussed above. Second, there is no mandate that the Great Powers take any action to actually recognize; rather, they need only engage with NKR. Ultimately, their own fact-finding, as well as domestic politics and actions of other nations will determine whether they recognize or decide to not recognize. At that point, and on the basis of their own findings, these nations will be under a self-imposed obligation to act.

The heart of this claim is that 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 by acting without regard to the outcome of the OSCE-led negotiations or concerted action through the United Nations. Additionally, these powers cannot arbitrarily make this determination on the basis of self-interest. Rather, their duty is to act objectively. With great power comes great responsibility.

This might include welcoming NKR as an independent state in the community of nations and recognizing its government. This conclusion is reinforced by the fact that NKR’s self-determination efforts have been widely received as substantially consistent with conventional thinking on international humanitarian law and the appropriate use of force as a means to obtain independence. Additionally, international custom favors a responsibility to protect people that have suffered humanitarian crisis. Although the situation has largely been stabilized on the ground, the commitment to re-build still exists and continues to

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<sup>166</sup> See Sterio, *supra* note 11, at 152-53.

<sup>167</sup> *Id.*

<sup>168</sup> As Brown points out, the legality of doing so would be met with uncertainty. See Brown, *supra* note 158, at 32-35.

implicate Great Power engagement with NKR.

The form that recognition takes may include producing a written declaration, entering diplomatic or treaty negotiations with the new state, and sending and receiving agents.<sup>169</sup> Regardless of the outcome of the OSCE effort, therefore, the leading powers of the world community now appear to have a ripened duty to effectively engage with NKR. Their actions would be persuasive upon the European Community and the Minsk Group members. We can only hope for widespread acceptance of an independent Nagorno-Karabakh as the dream of a long-suffering people if there is concerted initiative of one Great Power at a time.

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<sup>169</sup> Berdahl, *supra* note 79, at 520.