APPENDICES - ARTSAKH

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The Territorial Integrity Norm: International Boundaries and the Use of Force

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Cursed be he that removeth his neighbor's landmark.
—Deuteronomy 27:17
Good fences make good neighbors.
—Robert Frost, Mending Wall
In the late twentieth century many international relations scholars and observers have commented on the declining importance of interstate territorial boundaries for a variety of national and transnational activities.1 Concurrently, something very signi cant has been happening in international relations that raises questions concerning judgments of the decreasing importance of boundaries: the growing respect for the proscription that force should not be used to alter interstate boundaries—what is referred to here as the territorial integrity norm.2 The development of a norm concerning respect for states' territoriality is particularly important because scholars have established that territorial disputes have been the major
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1. See Ohmae 1990 and 1995; Rosecrance 1986 and 1996; Ruggie 1993; Rosenau 1990; Elkins 1994;

and Hirst and Thompson 1996.
2. A norm is generally de ned as “a standard of appropriate behavior for actors of a given identity” (Finnemore and Sikkink 1999, 251) and an international regulatory norm is strong when it is respected and viewed as legally binding by the great majority of states.
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cause of enduring interstate rivalries, the frequency of war, and the intensity of war.3 After reviewing studies on interstate wars, John Vasquez wrote that “Of all the issues over which wars could logically be fought, territorial issues seem to be the ones most often associated with wars. Few interstate wars are fought without any territorial issue being involved in one way or another.”4

In this article I trace the dramatic change in attitudes and practices of states in the Westphalian international order concerning the use of force to alter interstate boundaries. I also explore the factors that have shaped this historical change. Of course, theWestern state system did not expand to most of Asia and Africa until the twentieth century, and even the Latin American states were marginal to the system in the nineteenth century. In the rst section I brie y outline the attitudes and practices of states regarding territorial boundaries from the seventeenth century until World War II. In the second section I focus on the remarkable changes in beliefs and practices from World War II until the present. In the third section I explore the roots of the territorial integrity norm. States’ motivations for accepting the territorial integrity norm have been both instrumental and ideational, and the importance of different motivations has varied among groups of states. Also, the coincidence of a number of conditions has been crucial for the growing strength of the norm.

International Boundaries from the Seventeenth to the Early Twentieth Century

Political life has not always disclosed a clearly de ned system of international boundaries. The medieval world did not have international boundaries as we understand them today;5 authority over territorial spaces was overlapping and shifting. The political change from the medieval to the modern world involved the construction of the delimited territorial state with exclusive authority over its domain. Even at that, precisely surveyed national borders only came into clear view in the eighteenth century.6 In the words of Hedley Bull, the practice of establishing international boundaries emerged in the eighteenth century as “a basic rule of co-existence.”7

The birth of the modern interstate system is often dated at the 1648 Peace of Westphalia, although key features of the system emerged gradually and uctuated in strength before and after 1648. Initially, the legitimacy of interstate borders was de ned in dynastic terms: state territory was the exclusive property of ruling

families, and they had an absolute right to rule their territories. But this international order did not re ect any absolute right to particular territory that could legitimately
3. See Holsti 1991; Goertz and Diehl 1992; Vasquez 1993, 123–52; Huth 1996; Hensel 1999; and Vasquez and Henehan 2001.
4. Vasquez 1993, 151.
5. Clark 1961, chap. 10.
6. Clark 1972, 144.
7. Bull 1977, 34–37.
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change hands by inheritance, marriage, war, compensation, and purchase.8 In these early centuries of the Westphalian order territory was the main factor that determined the security and wealth of states, and thus the protection and acquisition of territory were prime motivations of foreign policy.Most wars, in fact, concerned the acquisition of territory, and most of these wars led to exchanges of territory; this practice continued until the middle of the twentieth century (see Table 1). These practices were re ected in the legal norm concerning the legitimacy of conquest. To quote the eminent international legal scholar Lassa Oppenheim writing in 1905, "As long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory."9
In the early centuries of the Westphalian system the populations of the early modern states were often culturally diverse and politically disorganized. Many people were not collectively identi ed by state borders that moved back and forth without much regard for them.10 The practice of drawing boundaries in disregard of the people living in the territories was extended from Europe to the rest of the world during the age of Western colonialism from the sixteenth through the nineteenth centuries. This was often carried out with little attention to the cultural and ethnic character of the indigenous peoples of the non-European world. Yet it was the borders that were initially drawn and imposed by Western imperialists that later became the acceptable reference for articulating anticolonial demands for selfdetermination and independent statehood.11
The nineteenth century was, of course, the age of nationalism, which was spurred by the French Revolution and Napoleon's support for popular sovereignty and national self-determination. These intellectual currents began to alter peoples' views concerning the legitimacy of territorial conquests. "From the middle of the nineteenth century the current of opinion, in uenced by the growing belief in national self-determination, was moving against the legitimacy of annexation outside the colonial sphere, when effected without the consent of the inhabitants."12 Sharon Korman referred to this change in attitudes as the beginning of an "important change in the moral climate of international relations."13 This moral climate, with its clear

democratic thrust, however, had con icting implications for the stability of boundaries. On the one hand, nationalism supported the precept that a territory belonged to a national grouping and it was wrong to take the land from a nation. On the other hand, nationalism provided grounds for a national grouping in one state trying to secede to form an independent state or to unite with its ethnic compatriots living in other states. In fact, nationalism had a more disruptive than pacifying effect on international relations in the late nineteenth and early twentieth centuries, as was
8. Holsti 1991.
9. Quoted in Korman 1996, 7. Juxtapose this with the statement of Professor Lauterpacht in the 1955 edition of Oppenheim's International Law in Korman 1996, 179.
10. Clark 1972, 143.
11. See Jackson and Rosberg 1982; and Korman 1996, 41–66.
12. Korman 1996, 93.
13. Ibid., 39 (italics added). Malcolm Anderson has spoken of "the sacralization of homelands" as a result of the growth of nationalism. Anderson 1996, 3.
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witnessed in the wars surrounding the uni cation of the German and Italian peoples and in the division of the Hapsburg, Hohenzollern, and Ottoman empires into numerous national states.14
14. See Cobban 1969; and Mayall 1990.
TABLE 1. Interstate territorial wars, 1648–2000
a. Wars by historical era

Period	Territorial con icts	Con icts resulting in redistribution of territory	Con icts in which territory was redistributed	Territorial redistributions per year
1648–1712	19	15	79%	0.23
1713–1814	30	24	80%	0.24
1815–1917	25	20	80%	0.19
1918–1945	18	16	88%	0.59
1946–2000	40	12	30%	0.22

b. Wars by half century
Period
Territorial
con icts
Con icts resulting
in redistribution
of territory
Con icts in which
territory was
redistributed
Territorial
redistributions
per year
1651–1700 14 11 79% 0.22
1701–1750 16 14 88% 0.28
1751–1800 12 8 67% 0.16
1801–1850 13 11 85% 0.22
1851–1900 14 10 71% 0.20
1901–1950 26 23 89% 0.46
1951–2000 37 10 27% 0.20
Sources: Data used to identify territorial wars between 1648 and 1945 is from Holsti 1991. Holsti classi es wars according to twenty-two issues. Six of these are clearly concerned with control over territory: territory, strategic territory, colonial competition, empire creation, maintaining integrity of empire, and national uni cation. Additional information on these con icts was derived from a number of secondary sources, including Goertz and Diehl 1992; Goldstein 1992; McKay and Scott 1983; and Taylor 1954. Wars are classi ed by their beginning date.
Information on territorial wars between 1946 and 2000 was also obtained from a large number of secondary sources, including Bercovitch and Jackson 1997; Goertz and Diehl 1992; Kacowicz 1994; Huth 1996; and Wallensteen and Sollenberg 1998. Goertz and Diehl focus on territorial con icts where there were exchanges of territory; Kacowicz examines cases of peaceful territorial change; and
Huth includes territorial disputes that involved and did not involve international violence. The Correlates
of War list of con icts was also consulted. It includes territorial wars with over one thousand deaths. Singer and Small 1982. There were ve con icts between 1946 and 2000 that led to minor border alterations and are not included under “Con icts resulting in redistribution of territory.” For descriptions of the territorial aggressions between 1946 and 2000, see Table 2.
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Three interrelated territorial issues during and at the end of World War I were

whether the victorious states should be able to take territory from the defeated, whether states should commit themselves to respect the territorial integrity of other states, and whether national self-determination should take precedence over respect for existing state boundaries in shaping the territorial order. On the rst issue, in the early years of World War I the major states still supported the right of victorious states to realize territorial gains, and this was re ected in their secret treaties concerning territorial exchanges at the end of the war. This perspective was altered signi cantly following the United States' entry into the war, the Russian revolution in 1917, and popular pressure against territorial annexation in some countries.15 In the 1919 Versailles settlement the victorious states only obtained small territorial concessions in Europe, although they realized some signi cant gains by dividing up the colonies of the defeated powers. Still, these colonies were declared League Mandates, and the new colonial powers were implicitly obligated to prepare the colonial peoples for self-governance—especially in the case of the former Turkish territories.16 As Korman has noted, while "It cannot be concluded . . . that the distinguishing feature of the territorial settlement of 1919 was the abandonment of the legal doctrine of the right of a victor to dispose of the territory of the vanquished by right of conquest . . . from the perspective of the evolution of attitudes towards the right of states to acquire territory by conquest or military victory, the First World War undoubtedly marked a moral turning point."17

On the second issue, the obligation to uphold the territorial integrity of all states, President Woodrow Wilson was the strongest protagonist. His famous "Fourteenth Point" spoke of "speci c covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."18 Such a revolutionary proposal took the form of Article 10 of the League of Nations Covenant, whose approval really constituted the beginning of states' formal support for the territorial integrity norm. It read: "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

On the third question of the weight that should be given to the right of national self-determination in redrawing international boundaries, there was clearly tension within democratic governments between protagonists of national self-determination and respect for existing boundaries; and the former generally lost. Even President Wilson, who was viewed as the leader of the national self-determination cause, came out fundamentally on the side of respect for territorial integrity. National self-determination for ethnic nations was not mentioned in the covenant, and at the Versailles conference self-determination for ethnic nations was only applied to some of the territories of the defeated states in World War I.19 Overall, recognition of the

15. Korman 1996, 132–36.

16. See Article 22 of the League Covenant; Claude 1964, 322–28; and Korman 1996, 141–42.
17. Korman 1996, 161, 132–78.
18. See Zimmern 1939, 199; Egerton 1978; and Knock 1992.
19. Franck 1990, 154– 62.
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territorial boundaries of juridical states gained signi cant support in post–World War I settlements.
Following the World War I peace settlements, the territorial integrity norm was supported in several multilateral declarations and treaties. The 1928 General Treaty for the Renunciation of War (better known as the Kellogg-Briand Pact) certainly included support for the prohibition against territorial aggressions, although it did not explicitly focus on territorial aggrandizement.20 The norm was then directly supported by the League's backing for the Stimson Doctrine in 1931, which denied the legitimacy of territorial changes obtained by force.21
Despite broad backing for the norm in these multilateral declarations, the supportive political conditions for maintaining the territorial status quo during the interwar decades were not as strong as many leaders hoped. First of all, there was the problem of inconsistency and inequity in some of the 1919 settlements that evoked dissatisfaction in a number of countries. For example, for entering the war on the side of the allies the Italians were given a piece of formerly Austro-Hungarian territory where few Italians lived. This was an obvious throwback to a past era when territories were exchanged with little attention to the local populations. Far more signi cant was the division of the German nation, leaving millions of Germans residing in the new or reborn states of Czechoslovakia and Poland.22 Second, by the 1930s the great powers were divided in their commitment to the territorial integrity norm, and the supporters lacked the commitment to use force to uphold states' territorial boundaries. In particular, Britain, France, and the United States stood by and tolerated the territorial expansionism of Japan, Germany, and Italy before they nally met these aggressive powers with military force.
At the end of World War II the Western Allied Powers exhibited very strong support for the integrity of interstate boundaries. With one exception they did not request or obtain sovereignty over any territories that belonged to the defeated powers, although they did obtain some UN Trust Territories that were formerly colonies of Japan and Italy and that they were obliged to bring to independence.The exception was the right of the United States to maintain control over some of the Paci c islands that formerly belonged to Japan.23 The same approach toward territorial gains, however, was not true for the Soviet Union, which continued to operate with a classical view of boundaries, namely, that the victors in wars could claim territorial spoils. The Baltic states were integrated into the Soviet Union by

Stalin against the wishes of their populations and without the recognition of major Western powers. The Soviet Union also absorbed parts of Poland, Germany, Finland, Rumania, the southern half of Japan's Sakhalin Island, and Japan's Kurile Islands. In addition, the territory of postwar Germany was realigned and reduced. These changes were clearly reminiscent of the outcomes of wars in earlier centuries, but they were the last major diplomatic developments in Europe that blatantly de ed
20. Korman 1996, 192–99.
21. Stimson and Bundy 1948, 227–60.
22. Franck 1990, 154–59.
23. See Korman 1996, 176; and Claude 1964, 339– 40.
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the consent principle in the determination of international boundaries.24 Finally, despite most countries' accession to the territorial gains of the Soviet Union, all countries at the 1945 San Francisco conference acceded to the obligation to respect existing boundaries in the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."25

The Evolution of the Territorial Integrity Norm Since 1945

General Legal and Declaratory Developments

The UN Charter of 1945, as noted, af rmed states' obligation not to use force to alter states' boundaries. This same respect for the borders of juridical entities in uenced the UN's approach to de-colonization. The colonial territory, which was often arti cial in terms of delimiting ethnic nations, became the frame of reference for making and responding to claims for self-determination and political independence. 26 The 1960 UN Declaration on Granting Independence to Colonial Countries and Peoples made clear that it was existing colonies, and not ethnic groups, that were eligible for independence. Concerning "dependent peoples," it stated that "the integrity of their national territory shall be respected." It then proclaimed that "any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatiblewith the purposes and principles of the Charter of the United Nations."27 In 1970 the UN General Assembly approved a comparable normative statement in the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States.28 There is clearly no ambiguity as to whether these major UN declarations supported respect for the territorial integrity of juridical states and existing colonies. To quote Michael Barnett and Martha Finnemore, "The UN encouraged the acceptance of the norm of sovereignty-as-territorial-integrity through resolutions, monitoring devices, commissions, and one famous peacekeeping episode in the Congo in the 1960s."29

Apart from reviewing UN normative statements, it is important to look at

developments relating to respect for international boundaries in several regional organizations. The charters of the Arab League and Organization of American States, which were approved in 1945 and 1948, respectively, contained provisions supportive of the territorial integrity of member states, but the issue was not
24. Korman 1996, 161–78. The new German-Polish border subsequently acquired legitimacy. The need to recognize this border was made abundantly clear to Chancellor Helmut Kohl by Germany's Western allies in 1990 when he voiced a desire to relocate the border. Fritsch-Bournazel 1992, 102–11.
25. Article 2 (4). On debates over whether the UN prohibition allows any exceptions, see Korman 1996, 199–229.
26. Jackson 1993.
27. Declaration on Granting of Independence to Colonial Countries and Peoples, UNGA res. 1514, 1960.
28. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, UNGA res. 2625, 1970.
29. Barnett and Finnemore 1999, 713 (italics in original).
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highlighted by the founding member states.30 Several decades afterwards, however, the Organization of African Unity (OAU) and the Conference on Security and Cooperation in Europe (CSCE) adopted strong and well-publicized stands in favor of the sanctity of existing state boundaries. The 1963 OAU Charter contains a strong article in support of territorial integrity (Article 3), but a much more speci c statement was adopted by the Assembly of Heads of State and Government in 1964 after both Morocco and Somalia had launched wars of territorial revisionismagainst neighboring states. All member states except Morocco and Somalia approved a resolution calling on members "to respect the borders existing on the achievement of national independence."31
In 1975 the CSCE reiterated the same principle in the Helsinki Final Act: "Frontiers can be changed, in accordance with international law, by peaceful means and by agreement." Separate bilateral treaties between West Germany and its major Communist neighbors (East Germany, Poland, and the Soviet Union) that preceded and anticipated the Helsinki agreements committed the parties to "respect without restriction the territorial integrity" of each state and "reaf rm the inviolability of existing boundaries."32 At the end of the ColdWar the 1990 Charter of Paris for a New Europe reiterated exactly the same principle, as have all subsequent conferences concerning international boundaries, including the 1995 Dayton peace treaty that settled the wars in Croatia and Bosnia-Herzegovina.33
One other development should be noted with regard to attitudes and practices within Europe and the Western community more generally. In the 1990s both the

European Union (EU) and NATO proclaimed that all new members must have accords with contiguous states as to their borders. This has necessitated that the East European countries aspiring to membership sign boundary treaties with their neighboring states—sometimes at the cost of sacri cing long-held dreams of absorbing parts of these neighboring countries.34 In 1999 EU leaders agreed that all candidates should submit outstanding territorial disputes to the International Court of Justice "in a reasonable period of time" and that the leaders would review outstanding disputes by 2004 at the latest.35 Overall, these policies have added to the stability and legitimacy of the European territorial order.

The fteen successor states of the Soviet Union have also followed the Western countries in supporting their existing boundaries. The Commonwealth of Independent States (CIS) has supported the principle of territorial integrity in their main constitutional documents. In part their support for the territorial integrity norm is attributable to pressure from the Western countries, especially through the Organization for Security and Cooperation in Europe (OSCE), but the great majority of

30. Zacher 1979, 189, 165.
31. Ibid., 129.
32. Maresca 1985, 86–87.
33. See Ullman 1996; and Holbrooke 1998. The Dayton Agreement can be found at 7 http://www1.umn.edu/humanrts/icty/dayton8 . See particularly Articles 1 and 10.
34. DonaldM. Blinken and Alfred H. Moses, Hungary-Romania Pact: Historic but Ignored, The Daily Yomuri (Tokyo), 21 September 1996, 11.
35. Financial Times (London), 15 December 1999, 3.

these countries have recognized that respect for inherited boundaries (the principle of uti possidetis) is in their mutual interest.36

Territorial Aggressions Since 1946: International Responses and Outcomes

Prior to discussing the patterns of territorial wars in the post-1945 period I review some data on territorial wars since the seventeenth century because they highlight the marked changes in international practices in the late twentieth century. Table 1 contains data on international territorial wars for ve historical eras in international relations over the past three and a half centuries and seven half-century periods. The ve historical eras are frequently used in historical analyses of the interstate system. They are also employed by Kalevi Holsti from whose book this article has drawn the list of wars for the period 1648–1945. The wars listed by Holsti are major military con icts in "the European and global states system."37 He includes some civil wars, but they are excluded from the con icts examined here. Of the 119 interstate wars between 1648 and 1945, 93 were judged to be territorial wars in that Holsti classi ed

them as being concerned with six issues that clearly involve state control over territory.38 The list is not exhaustive of all territorial aggressions or wars, but it is extensive enough to reveal important patterns.
The list of forty territorial aggressions for the period 1946–2000 is drawn from extensive research in secondary materials. The de nition of territorial aggressions or wars for this period encompasses a larger group of con icts because the management and outcomes of small as well as large military encounters reveal a great deal about the development of the territorial integrity norm. Territorial aggressions or wars include interstate armed con icts where a clear purpose of the military attack was the change of boundaries of a state or its colonies; the invading state sought to capture some territory from the attached state—not merely to punish it (China's 1979 invasion of Vietnam, for example); attacking states were widely recognized as sovereign states; and the invasion or occupation lasted at least a week. Using this de nition clearly reduces the value of comparisons with the pre-1946 territorial wars, but the value of using a larger group of territorial aggressions for the recent period greatly assists our understanding of recent changes.39
Several key patterns emerge from the data in Table 1. First, and most importantly, while approximately 80 percent of territorial wars led to re-distributions of territory for all periods prior to 1945, this gure dropped to 30 percent after 1945. Second, the number of territorial redistributions per year (given our list of wars) has varied by time period. It was about 0.24 from 1648 to 1814; it dropped to 0.19 between
36. See MacFarlane 1999, 4; and Webber 1997.
37. Holsti 1991, 20.
38. See note to Table 1.
39. The term "aggression" is more accurate than "war" for some of the con icts since in a few cases the attacked state did not resist militarily and in some cases the number of deaths was small. However,
such territorial occupations are often referred to as "wars" and therefore the terms "war" and "aggression"
are used interchangeably.

1815 and 1917; it rose dramatically to 0.59 between 1918 and 1945; and then it dropped back to 0.22 in the post-1945 period.
In looking at the average territorial redistributions per year, it is valuable to take into consideration that a larger population of territorial con icts is included in the 1946–2000 period than in other periods and, more importantly, that the number of states has increased dramatically over recent centuries—especially since 1945. A recent study provides data on the number of states (with certain characteristics) between 1816 and 1998, and it allows us to control for the number of states in the

international system by calculating the number of territorial redistributions per country-year for particular periods of time. The gure for 1816–50 is 0.0032; for 1851–1900, 0.0035; for 1901–50, 0.0073; and 1951–98, 0.0015.40 These gures indicate, of course, that the number of territorial redistributions per country-year was more than twice as high in the nineteenth century than it was in the last half of the twentieth century. Also, it was almost ve times higher in the rst half of the twentieth century than in the second half. These gures have to be interpreted in light of the fact that the criteria for the inclusion of wars differs for the pre- and post-1945 years, and there is no claim of statistical signi cance.

The preceding gures do point to important changes in some patterns of territorial armed con ict. However, it is also crucial to look at post-1945 territorial wars (summarized in Table 2) in some detail since the development and management of these con icts reveal a great deal about the strengthening of the norm. This section starts with territorial wars in Europe and then moves to the Americas, Africa, the Middle East, and Asia.

Europe. It is tting to consider territorial aggressions in Europe rst, not only because the modern territorial order rst developed there, but also because that continent has witnessed some of the most destructive territorial con icts in modern history. In the late 1940s Europeans were certainly not con dent that the era of violent territorial revisionism was at an end. However, only four interstate territorial wars have occurred in Europe since 1945; only one of them (Turkey-Cyprus) led to a territorial change, and it could be reversed.

Regarding the three wars among the states that emerged from the dissolution of Yugoslavia in 1991 and 1992, the European states and the United States supported the territorial boundaries that Slovenia, Croatia, and Bosnia possessed when they declared their independence in 1991 and 1992, and all the warring parties accepted them at the 1995 Dayton peace conference. Finally, in 1996 Yugoslavia, under considerable U.S. and European pressure, signed bilateral accords with Croatia and

40. Gleditsch and Ward 1999. The authors include states that meet the following criteria: (1) they possessed autonomous administration over some territory; (2) they were regarded as distinct entities by
local actors; and (3) they had a population over 250,000. The average number of states per year between
1816 and 1850 was 53.05; between 1851 and 1900, 56.70; between 1901 and 1950, 63.42; and between 1951 and 1998, 134.58. The total number of territorial redistributions for these four periods was 6, 10, 23, and 10, respectively. To determine the number of territorial redistributions per country-year for a particular period it is necessary to multiply the total number of years by the average number of countries
per year and to divide this sum into the total number of redistributions for the period.

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TABLE 2. Interstate territorial aggressions, 1946–2000

States involved	Issue	Outcome	Change
Europe			
Turkey-Cyprus, 1974–present	Turkey invaded Cyprus to protect the Turkish Cypriot community. It gathered all Turkish Cypriots into the northern 40 percent of the island. In 1983 Turkey supported the creation of the Turkish Republic of Northern Cyprus (TRNC). Turkish troops remain in the TRNC.	The UN and NATO opposed the invasion and recognition of the TRNC. Western and UN attempts to negotiate a settlement based on a federation of the two sections of the island have failed. Only Turkey recognizes the TRNC.	Major change
Yugoslavia-Slovenia, 1991	Yugoslavia's armed forces attacked to try to reverse Slovenia's departure from the federation after Slovenia declared independence on 25 June 1991.	Yugoslavia ceased its attack after eight days of fighting and withdrew from Slovenia.	No change
Yugoslavia-Croatia, 1991–95	Croatia declared independence in 1991. Yugoslavia (Serbia-Montenegro) sent troops to assist Serbs in Croatia (12		

percent of pop.) who wanted to attach their areas to Yugoslavia. Most Serb troops defending Serb enclaves came from Croatia, but some came from Yugoslavia.
UN called for withdrawal of foreign troops and a cease- re. Fighting killed 15,000. Main Serb force was defeated in 1995. Dayton accord in 1995 recognized former boundary. Yugoslavia and Croatia recognized boundary in bilateral treaty in August 1996.
No change
Yugoslavia-Bosnia, 1992–95
Bosnia declared independence in 1992. Serb population of Bosnia (assisted by Yugoslav military) fought against an alliance of Bosnian Muslims and Bosnian Croats. The Serb forces wanted to unite parts of Bosnia with Yugoslavia. The Croatian army intervened at times, and in a few instances it fought Muslim forces. UN called for withdrawal of non-Bosnian troops and cease- re. The ghting killed 200,000. The 1995 Dayton accord created a multiethnic government and recognized the original boundaries of Bosnia-Herzegovina. Yugoslavia and Bosnia recognized boundary in bilateral treaty in October 1996.
No change
The Americas

Nicaragua-Honduras, 1957	Nicaragua occupied a part of Honduras. Nicaragua withdrew and accepted ICJ arbitration because of OAS pressure. ICJ awarded territory to Honduras in 1959.	No change
Argentina-Britain, 1982	Argentina occupied Malvinas/Falkland islands.	UN called for Argentina's withdrawal. Britain reoccupied islands.	No change
Ecuador-Peru, 1995	Ecuador sent troops into an area it lost in peace treaty at end of 1942 war.	Four guarantor powers of 1942 treaty promoted withdrawal. The two states signed a border treaty in 1998.	No change
Africa			
Egypt-Sudan, 1958	Egypt occupied a small area of Sudanese territory.	Arab League pressured Egypt to withdraw.	No change
Ghana–Upper Volta, 1963–65	Ghana occupied a small border area of Upper Volta in 1963.	In 1965 OAU supported original boundary. Ghana withdrew.	No change

Algeria-Morocco,
1963
Morocco occupied a part of Algeria. Arab League and OAU called for withdrawal. OAU established
mediators. Morocco withdrew.
No change
Somalia-Ethiopia
and Kenya,
1964
Somalia provided troops to Somali rebels
in eastern Ethiopia and northern Kenya
seeking union with Somalia.
OAU supported original
boundaries and established
mediator. Somalia withdrew.
No change
Libya-Chad,
1973–87
In 1973 Libya secretly occupied a border
area of Chad called the Aouzou Strip.
OAU tried to secure Libyan
withdrawal in 1980s. Libya was
driven out by Chad in 1987. ICJ
arbitration was accepted in 1990.
ICJ ruled in Chad's favor in
1994.
No change
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TABLE 2. continued
States involved Issue Outcome Change
Mali–Burkina
Faso, 1975
Mali claimed a small area of Burkina
Faso in 1960. Mali occupied the area in
1975.
OAU mediated a cease- re and
withdrawal by Mali.
No change
Somalia-Ethiopia,

1976–80	Somalia occupied most of the Ogaden region of Ethiopia. Ethiopia received military forces from Cuba. An OAU committee called for respect for former boundary. Somalia withdrew all forces by 1980.
No change	
Uganda-Tanzania, 1978	Uganda occupied a small part of Tanzania. Within several weeks of Tanzanian military action, Uganda withdrew.
No change	
Morocco–Spanish Sahara, 1975–2000	Morocco claimed Spanish Sahara prior to independence and sent in military contingents in 1975. Under pressure Spain agreed to cede the colony. Since 1976 Morocco and the independence movement Polisario have conducted a continuous war. The OAU and the UN have called for Moroccan withdrawal and a referendum. The UN tried to organize a referendum during the 1990s. (Mauritania occupied part of Spanish Sahara from 1976 to 1978.)
Major change	
Libya-Chad, 1981–82	Libya pressured Chad to accept a political union in exchange for military

assistance in its civil war.
OAU opposed union and provided some troops. Chad ended political union and Libya withdrew troops.
No change
Mali–Burkina Faso, 1985
Dispute over a small strip existed from time of independence and led to violence again.
In 1985 they accepted ICJ arbitration as a result of OAU mediation. In 1986 ICJ divided the area equally between the two states.
Minor change
Eritrea-Ethiopia, 1998–2000
Eritrea and Ethiopia dispute sovereignty over several small border regions.
Eritrea occupied some areas in 1998. In 1999 and 2000 Ethiopia regained control of all areas.
The OAU and the Western powers promoted a cease- re, a withdrawal to the pre-1998 boundary, and arbitration based on colonial treaties. These were accepted in June 2000.
No change
Middle East
Arab states–Israel, 1948
Britain accepted a UN recommendation to divide Palestine into Israeli and Arab states. Neighboring Arab states attacked Israel at time of independence in May 1948 to support Palestinian Arabs'

claim to entire area.
Israel gained territory in each stage of the war. At end of 1948 both sides accepted armistice lines. Arab Palestinians retained control of the West Bank and Gaza Strip (administered by Jordan and Egypt).
Major change
Israel–Arab states, 1967
Israel occupied the West Bank, Gaza Strip, Sinai, and Golan Heights. It later annexed East Jerusalem and applied Israeli law to Golan Heights.
UN Security Council in November 1967 called for withdrawal of Israel to 1948 armistice lines in exchange for recognition by Arab states of Israel. In 1978 Israel agreed to return the Sinai; in 1993 Israel accepted staged implementation of self-rule for West Bank and Gaza.
Major change
Egypt and Syria–Israel, 1973
Egypt and Syria sought to recapture the Sinai and Golan Heights.
UN Security Council called for cease- re. Fighting ended after two weeks. Egypt was allowed to keep a small enclave in the Sinai.
Minor change
Iraq-Kuwait, 1990–91
Iraq invaded Kuwait and annexed it. Most UN members called for Iraq's withdrawal. Iraq was

expelled by a UN-sanctioned force.
No change
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TABLE 2.
States involved Issue Outcome Change
Asia
Pakistan-India, 1947–48
British India was partitioned and India and Pakistan became independent in 1947. Pakistan army joined Muslim rebels in Kashmir who were seeking union of Kashmir with Pakistan. Pakistan secured control over a sparsely populated third of Kashmir by end of war. UN Security Council supported plebiscite during war, but India did not accept it. Post-1948 border is the Line of Control.
Major change
North Korea–South Korea, 1950–53
North Korea attempted to absorb South Korea. Armistice line re ects very minor changes in former boundary.
Minor change
China-Burma, 1956
China moved into a small border area of Burma. The two states negotiated a new border that gave China a part of the area it occupied.
Minor change
Afghanistan-

Pakistan, 1961	Afghanistan sent irregular Afghan forces into the Pathanistan region of Pakistan to support local forces favoring union with Afghanistan. Afghan incursions were defeated by Pakistan.	No change
India-Portugal, 1961	India invaded and absorbed the Portuguese-controlled colony of Goa. Most states accepted the legitimacy of India's action.	Major change
Indonesia-Netherlands, 1961–62	Indonesia claimed West New Guinea (West Irian) over which the Netherlands had colonial control. Indonesia invaded in 1961. In 1962 Indonesia and the Netherlands agreed to a plebiscite after one year of UN administration. The plebiscite favored integration with Indonesia.	Major change
China-India, 1962	China occupied Aksai Chin and part of Northeast Frontier Agency that it claimed.	China still occupies the areas. Major change
North Vietnam–South Vietnam, 1962–75	France administered the northern and southern parts of Vietnam separately prior to 1954. After independence in	

1954 South Vietnam did not allow a referendum on uni cation as provided in the Paris peace accord. By 1962 North Vietnamese forces were ghting with the Viet Cong to promote uni cation.

In 1975 North Vietnamese and Viet Cong forces defeated the South Vietnamese army, and the two areas were reuni ed.

Major change

Indonesia-Malaysia, 1963–65

Indonesia claimed the Malaysian territory of North Borneo, and it introduced military contingents to expel Malaysian authorities.

Britain and Australia sent troops to help Malaysia. Indonesia was unsuccessful.

No change

Pakistan-India, April 1965

Pakistan sent a force into the Rann of Kutch.

Britain negotiated a cease- re and the parties agreed to an arbitration that awarded 10 percent of the area to Pakistan in 1968.

Minor change

Pakistan-India, August 1965

Pakistan attacked India to secure control of the Indian-controlled part of Kashmir.

Pakistan was defeated. USSR and Western powers backed the

1948 Line of Control.		
No change		
India-Pakistan (creation of Bangladesh), 1971		
The Bengali population in East Pakistan sought to secede from Pakistan. Indian troops intervened in the civil war to secure the creation of Bangladesh.		
The UN General Assembly called for Indian withdrawal; India did not withdraw, and it facilitated the creation of Bangladesh.		
Major change		
Iran–United Arab Emirates, 1971		
Upon Britain's granting of independence to the UAE Iran occupied some of the islands in the Straits of Hormuz that belonged to the UAE.		
Iran maintains control of the islands.		
Major change		
(continued)		

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Bosnia accepting those boundaries. The basic position of most of the Western powers was enunciated in a statement by U.S. Secretary of State James Baker in a meeting with President Milosevic in 1991: "The United States and the rest of the international community will reject any Serbian claims to territory beyond its borders."41 Subsequently, the chief U.S. negotiator at Dayton, Ambassador Richard Holbrooke, substantiated Baker's judgment: "There was a moral issue: the United States and its European allies could not be party to . . . legitimizing the Serb aggression."42

The one territorial aggression in Europe that has succeeded is Turkey's invasion of Cyprus in 1974 following a coup d'etat in Cyprus that brought to power a government committed to amalgamating Cyprus with Greece. After its invasion, Turkey brought together the Turkish Cypriots in the northern part of Cyprus, expelled the Greek Cypriots from the area, and maintained a military presence in

this northern region. In 1983 the Turkish Cypriots, with Turkey's backing, created an independent Turkish Republic of Northern Cyprus that de facto constituted a change of state boundaries by the use of force. Both the Western countries and the UN have steadfastly refused to recognize the Turkish Republic of Northern Cyprus.
41. See Baker 1995, 481; and Ullman 1996.
42. Holbrooke 1998, 363.
TABLE 2. continued

States involved	Issue	Outcome	Change
China–South Vietnam, 1974	China expelled South Vietnam from the western Paracel Islands that it claimed.	China maintains control of the islands.	Major change
Indonesia-Portugal (East Timor), 1975–99	Indonesia invaded East Timor several months before it was to achieve independence from Portugal. It made it a province of Indonesia.	UN demanded Indonesian withdrawal and selfdetermination through 1982. In 1999 Indonesia relented to international pressure and allowed a referendum that led to independence.	No change
Cambodia-Vietnam, 1977–78	Cambodia attacked Vietnam to establish control over a small border region.	Cambodian forces were defeated.	War was the result mainly of political con icts.

No change
Iraq-Iran,
1980–88
Iraq invaded Iran to seize control of the Shatt al-Arab waterway and some other areas.
UN Security Council backed acceptance of former boundary in 1987. The two states accepted a cease- re in 1988 and the former boundary in 1990.
No change
Note: Of the forty interstate territorial con icts listed here, twelve involved major redistributions of territory, and ve involved minor alterations of borders. A “minor change” refers to small border adjustments.
Any change apart from a minor border alteration is regarded as a “major change.” The con ict over the Spratly Islands, which involves China, Taiwan, Vietnam, Philippines, Malaysia, and Brunei, is not included because there has never been any local or international consensus on jurisdictions.
See Haller-Trost 1990; and Lo 1989.
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In fact, only Turkey has recognized the secessionist state. The eventual outcome of the international opposition to the creation of the secessionist state could be a reuni cation of the Turkish and Greek parts of the island and hence a nulli cation of a coercive territorial change.43
The Americas. In Latin America the principle of uti possidetis, or the obligation of states to respect the boundaries inherited from the previous governing power, originated in the 1820s following the Latin American states' achievement of independence from Spain and Portugal. While the principle was not respected by all countries in the region throughout the nineteenth century, it had some impact in promoting greater order in the region.44 After World War II the members of the Organization of American States (OAS) declared their opposition to coercive territorial revisionism,45 and very few military challenges to territorial boundaries have been made by states in the Western Hemisphere. Also, all attempts to alter boundaries by force have failed.
In 1957 Nicaragua sought to absorb a region of Honduras; the OAS pressured Nicaragua to withdraw and persuaded the two states to submit their dispute to the International Court of Justice, which rejected the Nicaraguan claim.46 In 1995 a small war broke out between Ecuador and Peru over Ecuador's claim to a border

region that was awarded to Peru in the 1942 Protocol of Rio de Janeiro. The four guarantor powers of the 1942 protocol (Argentina, Brazil, Chile, and the United States) secured a restoration of the status quo ante.47 Finally, there was the Malvinas/Falklands war between Argentina and Britain in 1982 that eventuated in Britain's reoccupation of the islands.48Most UN member states called for Argentina to withdraw; most Latin American states, however, supported Argentina because they regarded the Malvinas as a British colony that should be ceded to Argentina.49 Overall the Latin American countries have been strong opponents of coercive territorial aggrandizement, and the United States, of course, has exerted a strong in uence in favor of the territorial integrity norm in the region.

Africa. Most African states are composed of a variety of ethnic groups, and often these groups straddle boundaries with neighboring states. Consequently, there are sociological pressures for territorial revisionism in many parts of the continent. This condition as well as the military weakness of the African states are key reasons why they have supported the principle of uti possidetis.

43. See McDonald 1989; and Necatigil 1989.

44. Parkinson 1993, 140– 46.

45. Shaw 1986, 180.

46. Zacher 1979, 232.

47. See Day 1987, 424–25; and Fighting on Peru-Ecuador Border, Keesing's Contemporary Archives 41 (January 1995), 40356.

48. See Kacowicz 1994, 150–51; and Korman 1996, 275–80.

49. During the late 1970s and the early 1980s there was also the possibility of a territorial war between
Chile and Argentina over islands in the Beagle Channel. In 1984, the dispute was settled by arbitration
by the Vatican. Day 1987, 385.

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We now turn to unsuccessful wars of territorial aggrandizement. One war occurred before the founding of the OAU in 1963: Egypt's occupation of a small area in the Sudan in 1958. The Arab League was responsible for pressuring Egypt to withdraw.50 The rst challenge to the territorial integrity norm in Africa after the creation of the OAU was Morocco's occupation of a part of Algeria in October 1963. Within several months Morocco was pressured to withdraw by the OAU and the Arab League.51 A similar development occurred in 1964 when Somalia sent troops into areas of Ethiopia and Kenya inhabited by ethnic Somalis. Somalia was subsequently pressured by the OAU to withdraw. On each occasion the OAU insisted that the con ict be settled in keeping with the OAU principle of state territorial integrity, and the super powers backed con ict resolution by the OAU.52

In 1965 the OAU also successfully pressured Ghana to withdraw from a small area of neighboring Upper Volta.53 Within its rst three years (1963–65), the OAU was remarkably successful in upholding the territorial integrity norm, or what James Mayall has called the OAU's "unnegotiable acceptance of the status quo."54 Since 1973 the norm has been tested by eight territorial aggressions, and most OAU members have consistently upheld it; in one case, however, the aggression has not been reversed.55 One of these wars involved large-scale ghting over four years and was politically very important. From 1976 to 1980 Somalia unsuccessfully tried to absorb the Ogaden region of Ethiopia, and the OAU, the former Soviet Union, and the Western powers all opposed the Somali military action. The African and Western opposition to the Somali action is quite signi cant since the Ethiopian government was Marxist and relied on Cuban troops.56

The one successful violation of the territorial integrity norm in Africa is Morocco's absorption of the former Spanish Sahara (Western Sahara) in 1975. It is included as a case of territorial aggression because Morocco pressured Spain into ceding the area prior to its scheduled independence in 1976 by sending in military contingents and mobilizing its troops and its civilian population at the border. Morocco's absorption of the area was supported by France and the United States because they preferred that pro-Western Morocco, and not the radical Polisario independence movement, control the region. The majority of OAU and UN members have periodically called for a referendum for the inhabitants of the former Spanish Sahara. During the 1990s a UN mission sought regularly, though unsuccessfully, to organize a referendum in the Western Sahara.57

50. Zacher 1979, 199–200, 233.
51. See Goldstein 1992, 173–74; and Wild 1966.
52. See Wild 1966; Touval 1972; and Day 1987, 129–31.
53. Zacher 1979, 246– 47.
54. Mayall 1990, 56.
55. Libya-Chad, 1973–87; Mali–Burkina Faso, 1975; Somalia-Ethiopia, 1976–80;Morocco–Spanish Sahara, 1975–present; Uganda-Tanzania, 1979; Libya-Chad, 1981–82; Mali–Burkina Faso, 1985; and Eritrea-Ethiopia, 1998–2000. The only con ict the OAU did not get involved in was Uganda-Tanzania because it ended very quickly. The agreement of June 2000 ending the Eritrea-Ethiopia war is available at < www.bbc.co.uk/hi/world/africa> .
56. Day 1987, 129–31.
57. See Layachi 1994; and Von Hippel 1995, 72–79.

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In nine of the eleven African territorial wars since 1963, the OAU has been a major in uence in securing troop withdrawals, and it could succeed eventually in the

Morocco–Western Sahara con ict. When the OAU was founded in 1963, few thought that the society of African states would be such an important force in securing the stability of African boundaries. The OAU members have exerted signi cant diplomatic pressure on aggressing states, and they have in uenced outside powers to back OAU positions against territorial aggressions.
The Middle East. Table 2 lists four territorial wars in theMiddle East, excluding Arab North Africa. Two wars between North African Arab states are listed under "Africa." In these two North African con icts the Arab League opposed Egypt's occupation of a small region of Sudan in 1958 and Morocco's occupation of an area of Algeria in 1963. Among the four territorial wars in the Arabian Peninsula only one was between Arab states—namely, the Iraqi invasion of Kuwait in 1990–91. In that war only three of the more than two dozen members of the Arab League failed to oppose Iraq's military absorption of Kuwait within the context of the UN deliberations.58
Within the Arabian Peninsula, three major territorial wars have concerned Israel and its Arab neighbors. The 1948 and 1967 wars led to signi cant redistributions of territory in favor of Israel, and the 1973 war saw the return of a small piece of territory from Israel to Egypt. In May 1948 the armies of the neighboring Arab states, which rejected the UN partition plan to create separate Jewish and Arab states in Palestine, attacked Israel. These Arab armies subsequently lost ground during each phase of ghting during 1948, and at the end of the hostilities the Arab armies controlled only the West Bank and the Gaza Strip where most of the Arab Palestinians had gathered. No international attempts were made to reverse the Israeli expansion since both super powers favored Israel, the Arab states had initiated the ghting, and the prohibition against coercive territorial revisionism was certainly not as strong as it later became.59
In the Six Day War in June 1967, Israel occupied the West Bank, Gaza, the Sinai Desert, and the Golan Heights following bellicose statements and actions by the Arab states. A very important development in the wake of this war was the Security Council's passage of Resolution 242 in November 1967. It stated, in essence, that Israel should return the Arab lands that it occupied in exchange for diplomatic recognition from the Arab states. In 1980 the UN Security Council opposed Israel's making East Jerusalem part of the capital of Israel and extending Israeli law to the
58. In 1990 Yemen, Libya, and Jordan parted company with the other Arab states by supporting Iraq. See Friedman and Karsh 1993; and Johnstone 1994. Note that in 1961 Iraq threatened to invade Kuwait,
and all of the Arab League countries opposed it. In fact, most sent troops to defend Kuwait. Zacher 1979,
199, 341.

59. See Hurewitz 1950; and Day 1987, 204–207. In 1949 King Abdullah of Transjordan (now Jordan) indicated Transjordan's intention to absorb the West Bank, which was occupied by the Transjordanian
army, but after strong protestations by other Arab states he agreed that Transjordanian administration
would last only until the Palestinians were able to establish a united Palestinian state.
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Golan Heights.60 The Western powers have, for the most part, strongly supported the return of the occupied territories. In 1978, the United States mediated the Camp David agreement between Israel and Egypt that restored the Sinai Desert to Egypt, and in 1993 the Western powers were active in promoting the Oslo accord, which anticipates eventual Israeli withdrawal from the West Bank and Gaza. In December 1999, Israeli-Syrian negotiations concerning the return of the Golan Heights nally commenced. The territorial integrity norm continues to have an important impact on the con ict, since withdrawal from the occupied areas (or most of the areas) is a standard that the Western powers feel obligated to support and that the con icting states will probably accept as a tolerable outcome.61 The 1948 armistice lines have taken on a legitimate status for many states, and it is likely that future Arab-Israeli accords will make only modest alterations in these borders.
Asia. Asia has witnessed twice as many territorial redistributions as all other regions combined, although Asia is the one region without the outbreak of a new territorial war since 1976. Most wars originated with states' dissatisfaction with boundaries that were inherited from the colonial era, and increasingly these territorial disputes have been resolved. Of the seventeen territorial wars in Asia, six wars did not lead to any exchange of territory; three led to minor border alterations; and eight eventuated in major territorial changes.
In six Asian wars that led to a restoration of the status quo ante, the attacked states were often supported by a great power ally, and most had local military superiority to defeat the invasion.62 In two of these wars the UN passed resolutions calling for withdrawals, which were eventually accepted. In the Iraq-Iran war of 1980– 88, outside powers were generally noncommittal on the merits of the con ict for most of the war. In the nal stage of the war in 1987 the UN Security Council passed a resolution calling on the parties to accept the prewar boundary, and they eventually did.63 In the case of Indonesia's invasion of East Timor in 1975, the UN General Assembly regularly called for Indonesia's withdrawal and the holding of a referendum between 1975 and 1982, but Indonesia did not relent because it had the de facto backing of the United States and some other Western powers who feared that an East Timor government controlled by the pro-independence party, Fretilin, would establish close ties with communist China after independence. With the end of the

Cold War, foreign public opinion and some governments began to push for a referendum concerning East Timorese independence.This pressure eventually led to a decision by Indonesia to allow a referendum on independence in 1999 after having
60. Korman 1996, 250–60.
61. See Kacowicz 1994, 129; Makovsky 1996, 205–10; Newman 1999; and Whetten 1974.
62. Afghanistan-Pakistan, 1961; Indonesia-Malaysia, 1963–65; Pakistan-India, April 1965; Indonesia-Portugal (East Timor), 1975–99; Kampuchea-Vietnam, 1977; Iraq-Iran, 1980– 88.
63. See MacDonald 1990, 214–215, 218; and Dramatic Acceptance by Iraq of Peace Offer, Keesing's Contemporary Archives 36 (August 1990), 37667.
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controlled East Timor for twenty-four years. This important development strengthened the territorial integrity norm.64
Among the three Asian wars where minor territorial changes occurred, in only one (the Korean War, 1950–53) did the UN take a stand against the aggressor. Signi cantly, the armistice line is very close to the pre-1950 boundary. In the other two (China-Burma, 1956; and Pakistan-India, April 1965) diplomacy soon brought about accords to implement minor border adjustments.
When one looks at the eight cases of successful territorial revisionism in Asia, it becomes clear that there has not been as much territorial turbulence as the number of cases implies.65 China absorbed remote and sparsely populated areas of two neighboring states—namely, India's Aksai China and Northwest Frontier Agency in 196266 and South Vietnam's Paracell Islands in 1974.67 In the 1990s China has actually been very active in signing legal accords to stabilize its boundaries—speci cally, agreements with Russia, Kazakhstan, Uzbekistan, and Vietnam.68 India absorbed the small Portuguese colonial enclave of Goa in 196169 and assisted a popular secessionist movement in East Pakistan to create the state of Bangladesh.70 Pakistan in 1948 established control over a third of the area of the Indian state of Jammu and Kashmir whose accession to India was certainly challenged by many observers.71 Indonesia in 1962 absorbed the sparsely populated Dutch colony of West Irian that it had long claimed.72 In 1971 Iran occupied some small but strategic islands belonging to the United Arab Emirates soon after the latter's independence.73 Finally, North Vietnam united the two parts of Vietnam by force, but uni cation would probably have resulted from an election in the mid-1950s if South Vietnam had permitted it.74 In evaluating the history of territorial aggrandizement in Asia it is noteworthy that there have been no new territorial wars in Asia since 1976.
64. See Carey and Bentley 1995; Day 1987, 332–33; Korman 1996, 181–92; and 7 http://www.nautilus.org/napsnet/sr/East_Timor/index.html8 .
65. Pakistan-India, 1948; India-Portugal, 1961; Indonesia-Netherlands, 1961–62; North Vietnam–South Vietnam, 1962–75; China-India, 1962; Iran–United Arab Emirates, 1971; India-Pakistan, 1971;

and China–South Vietnam, 1974. On Asian territorial wars, see Anderson 1996, 93–104.
66. See Liu 1994; and Foot 1996.
67. Lo 1989.
68. Wang 2000.
69. Korman 1996, 267–75. Most developing states supported India, and the West did not exert strong pressure to promote its withdrawal.
70. Sisson and Rose 1990. Most states voted for Indian withdrawal in the UN since they did not want to set a precedent of approving foreign military assistance to a secessionist group; but there was broad
public support for India's assistance to the Bengalis.
71. See Brecher 1953; and Korbel 1966. The Hindu princely ruler acceded to India while the majority Muslim population strongly supported union with Pakistan. The UN Security Council called for a referendum, but India rejected it.
72. Van der Veur 1964. The developing countries overwhelmingly supported the Indonesian claim.
73. Day 1987, 242–44. The failure of the United States and the United Kingdom to exert strong pressure against Iran to secure its withdrawal evidently stemmed from Iran's strong pro-Western stance
at that time.
74. Turley 1986. South Vietnam rejected the provisions of the 1954 Paris agreements calling for a referendum.
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It is clear that there have been very few cases of coercive boundary change in the last half century during which UN membership has grown from 50 to 190. No longer is territorial aggrandizement the dominant motif of interstate politics; whereas in the three centuries leading up to 1946, about 80 percent of all interstate territorial wars led to territorial redistributions, for the period 1946–2000, the gure is 30 percent (twelve out of forty) (Table 1a). Given the huge increase in the number of states in the international system in the past half century and our de nition of territorial wars for the period, the absolute numbers of forty territorial wars and twelve cases of major boundary change are not very large by historical standards. Two of the successful uses of force involved turbulent decolonization processes in 1947 and 1948 in the Indian subcontinent and former British Palestine, and the other ten occurred between 1961 and 1975. Of these ten wars, the UN passed resolutions calling for withdrawal in four of them (Israel-Arab states in 1967, India-Pakistan in 1971, Turkey-Cyprus in 1974, andMorocco-Spanish Sahara in 1975). Another three of the ten (India-Portugal in 1961, Indonesia-Netherlands in 1961–62, and North Vietnam-South Vietnam from 1962 to 1975) were viewed by many countries as stages of the decolonization process. The remaining two involved China's occupation of remote areas—parts of northern India in 1962 and South Vietnam's Paracel

Islands in 1974.
An interesting characteristic of territorial wars concerns the role of international organizations in bringing them to an end, since multilateral responses often re ect broad international backing for the norm. In the four territorial wars in Europe (except for the quick war between Yugoslavia and Slovenia in 1991) the NATO states and the UN were active in promoting respect for boundaries. In the Western Hemisphere the OAS or an important group of OAS members was active in promoting a withdrawal of forces in two con icts, and the UN backed withdrawal in the other. In Africa the OAU was very active in ten of the twelve territorial wars (one being prior to the OAU's creation), and the UN played a role in several con icts as well. In the Middle East the UN played a signi cant role in promoting a return to the status quo ante in three territorial wars (not the Arab-Israeli war of 1948). In Asia international organizations have not been active in most of the seventeen territorial wars. However, the UN had a major long-term role in promoting Indonesia's recent withdrawal from East Timor.
The Boundaries of Successor States
In discussing the post-1945 stabilization of boundaries another pattern of international behavior should be noted, since it is closely related to support for the prohibition of the use of force to alter boundaries. During the postwar period, all of the successor states that emerged from the nine breakups of existing states have kept their former internal administrative boundaries as their new international bound-
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aries.75 In fact, in cases where some doubt existed as to whether the successor states would accept these boundaries, outside countries pressured the successor states to adopt their former administrative boundaries as their new interstate borders. This indicates that states generally desire predictability regarding the international territorial order. They do not like secessions, but if they are going to occur, they do not want the successor states ghting over what their boundaries should be.
Some of the best examples of international policy on this issue concern the breakups of the former Yugoslavia and the former Soviet Union. The United States and the European powers went to tremendous lengths to preserve the former internal administrative boundaries of Croatia and Bosnia as their new international boundaries. These boundaries were legitimated in the Western countries' recognition of these states in 1992, the 1995 Dayton accord, and the 1996 accords between Yugoslavia (Serbia), on the one hand, and Croatia and Bosnia, on the other.76 The Western countries have also been active in promoting respect among the Soviet successor states for the boundaries they originally possessed as Soviet republics. Concerning why the former internal boundaries have been maintained as interstate

borders, Neil MacFarlane has remarked:
Most signi cant . . . are the norms of sovereignty and non-intervention and the principle of territorial integrity. The 15 republics of the former Soviet space exist in the territorial boundaries de ned under Soviet rule, whether or not they make sense in ethno-geographical terms, or correspond to the aspirations of the people living within them. They do so in part because Western states and international organizations . . . have self-consciously promoted these norms. . . . For better or worse, the West is committed to the attempt to address problems relating to minority rights within the context of acceptance of the sovereignty and territorial integrity of the new states.77
Western efforts at promoting the territorial integrity of the successor states (often through the OSCE) have focused on keeping Nagorno-Karabakh (an Armenian enclave) within Azerbaijan and keeping Abkahzia and Ossetia within Georgia, but Western policy has had a broader impact as well in strengthening the international territorial order among the Soviet successor states.78
75. Syria's secession from the UAR in 1961, Singapore's secession from Malaysia in 1965, Bangladesh's secession from Pakistan in 1971, Gambia's secession from Senegambia in 1989, Namibia's
secession from South Africa in 1990, Eritrea's secession from Ethiopia in 1993, the breakup of the former
Soviet Union into fteen states in 1991, Yugoslavia's breakup into ve states in 1991–92, and Slovakia's secession from Czechoslovakia in 1992. In the case of Eritrea-Ethiopia, they maintained the former internal administrative boundary from 1993 to 1998. In 1998 Eritrea occupied several small border areas,
and in 1999 and 2000 Ethiopia regained the lost territories. In 2000 the OAU backed withdrawal of all forces behind the pre-1998 boundary and the establishment of an arbitral body to settle the dispute.
76. See Weller 1992, 587, 602; and Ullman 1996.
77. MacFarlane 1999, 4, 16.
78. See Baranovsky 1966, 267–78; Webber 1997; MacFarlane and Minnear 1997; and Menon 1998. Armenia's support for the Armenian population in Azerbaijan is not regarded as an interstate territorial
war because Armenia (some of whose army fought for Nagorno-Karabakh) has not explicitly backed secession by Nagorno-Karabakh.
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It is impossible to declare that the acceptance of internal administrative boundaries as interstate boundaries for secessionist states is now an authoritative rule of international practice. Quite possibly, however, this norm will become entrenched as a part of the new territorial order that ows from states' concern for reducing the incidence of destructive wars and wars' impact on commercial relations. States and

international commercial interests increasingly abhor violence and uncertainty over what political entities have jurisdiction over particular geographical spaces.

Overview of Stages in the Development of the Norm

In concluding the discussion of the evolution of normative declarations and state practices concerning coercive territorial revisionism, it is valuable to look at past developments as falling into a number of stages. Two scholars have identi ed three stages of norm development as emergence, acceptance, and institutionalization.79 The emergence stage is marked by a growing advocacy of the new norm by important countries and nongovernmental groups and some multilateral declarations. The acceptance stage is characterized by growing support for the norm and its integration into treaties to that point where it is viewed as legally binding by most countries. The institutionalization stage includes the integration of the norm in additional international accords and more effective multilateral efforts to promote state compliance.

Before moving to an analysis of the three stages of norm development during the twentieth century, I offer some observations about the nineteenth century. The magnitude of international violence declined from 1815 to 1913 as a result of regular consultations within the framework of the Concert of Europe, but the great powers were involved periodically in territorial aggrandizement within the Western state system as well as in colonial expansion in the Southern Hemisphere. In fact, territorial adjustments in Europe and in the colonial world were central to maintaining a balance of power.

The emergence stage of norm development started with the end of World War I and more particularly Article 10 of the League Covenant, and it lasted through the end of World War II. The major proponents of the norm were the Western democratic states. During this period major multilateral treaties and declarations for the rst time upheld the territorial integrity norm—particularly the 1919 League Covenant, the 1928 Kellogg-Briand Pact, and the League's approval of the Stimson Doctrine in 1931. At the same time the great powers tolerated a number of territorial aggressions, and Germany, Italy, and Japan became increasingly committed to territorial expansion in the 1930s. The emergence stage was very bloody, but it was states' experience with this era of destructive territorial aggrandizement that increased support for the norm after World War II.

The acceptance stage of norm development began with the adoption of Article 2(4) in the UN Charter in June 1945, and it lasted until the mid-1970s. It was not

79. Finnemore and Sikkink 1999, 254– 61.

until the 1960s and early 1970s that broad and strong backing for the norm became palpable. The key post-1945 multilateral accords were the 1960 UN declaration that

uphold the territorial integrity of states and pronounced that existing colonies (not ethnic groups) were eligible for self-determination; the OAU's 1963 charter provision and 1964 resolution supporting respect for inherited boundaries; and the 1975 CSCE's Helsinki Final Act with its proscription that boundaries could only be altered by consent. In 1975 the last case of signi cant territorial revisionism occurred—Morocco's absorption of the Spanish Sahara.

The institutionalization (strengthening) stage of norm development encompassed the period from 1976 to the present; no major cases of successful territorial aggrandizement have occurred during this period. The key events that strengthened the norm were states' responses to individual con icts. Particularly noteworthy cases were Somalia's war against Ethiopia, 1976– 80; Iraq's occupation of Kuwait, 1990–91; and Yugoslavia's attempts to absorb parts of Croatia and Bosnia, 1992–95. Also important was the decision by Indonesia in 1999 to allow a referendum in East Timor. Another noteworthy development during this period was the International Court of Justice's adjudication of several territorial con icts; the court based its decisions on the principle of uti possidetis, which means that states have rights to those territories that were legally ceded to them by prior governing states and, of course, that other states do not have the right to take these territories by force.80

Roots of the New Territorial Order

International practices regarding the use of force to alter boundaries have changed markedly in recent years, and in this section I analyze the reason for this transformation in the international order. At the heart of this analysis are several general assertions. First, states have backed the norm for both instrumental and ideational reasons, though the former have dominated. Instrumental reasons are rooted in perceptions of how a norm and congruent practices bene t the self-interests of countries. Ideational reasons are rooted in changing views of ethical behavior toward other peoples and states. A number of scholars have recognized that both instrumental and ideational factors in uence the evolution of norms and that applying an "either/or" approach concerning their in uence is wrong.81

Second, the reasons for such a change in beliefs and practices have varied among countries, and no single factor explains the support for the norm among a particular grouping of states.82 These factors include the perceived relationship between territorial aggrandizement and major international wars, the power relations be-

80. Prescott 1998, 241–52.

81. See Nadelmann 1990; Finnemore 1996; Finnemore and Sikkink 1999; Jackson 1993; and Ruggie 1999.

82. The Soviet bloc is not speci cally discussed in this section. It was generally supportive of existing boundaries because it wanted to legitimize the Eastern European boundaries that were established

in
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tween possible territorial aggressors and the major powers supporting the norm, the costs and bene ts of territorial aggrandizement, and moral predispositions concerning territorial aggression. Although we can speculate about the relative importance of speci c factors, providing de nitive conclusions about the weight of each is dif cult when the factors have generally pressured states in the same direction. It appears that the coincidence of several factors has been crucial for both the Western and the developing states' backing of the norm.
Among the Western industrialized states, the association of territorial revisionism with major wars was the central driving force that led these states after World Wars I and II to advocate a prohibition of coercive territorial revisionism. The key international af rmations of the norm were after the world wars in 1919 and 1945 and at the 1975 Helsinki conference whose central purpose was the prevention of a major war between the Western and Soviet alliances. Territorial aggrandizement was not the central motivation of the key antagonists in World War I, but it played a part in states' participation and the postwar settlements. Also, attempts to promote national self-determination and hence border changes exacerbated feelings of international hostility after World War I, and this made many states wary of this justi cation for territorial revisionism. To quote Michael Howard, "The Mazzinian doctrine, that peace could result only from national self-determination, had left its followers in disarray. It had caused chaos at the Paris peace conference, and it was increasingly clear that this mode of thought lent itself far more readily to right-wing authoritarianism . . . than it did to any form of parliamentary democracy."83
The fear of territorial aggrandizement as a cause of major war was exacerbated by World War II because the origins of the war lay signi cantly in German and Japanese territorial ambitions. The Western states came to fear the right of national self-determination, and particularly the right to unite national compatriots in different states, since it encouraged territorial irredentism and xenophobic nationalism. 84 Then, after World War II the introduction of nuclear weapons increased their fear of major war and enhanced support for the norm. Western nations' concern was instrumental at its heart, since states were concerned rst and foremost with preventing the destruction of their own societies, though governments did share a certain moral concern for other societies as well.85
Because Western countries' support for democratic political institutions grew during the development of the norm,86 it is important to ask whether their liberal democratic ethos in uenced their acceptance of the territorial integrity norm. This
1945. Like theWestern powers it occasionally supported territorial revisionism for Cold War reasons, for

example, Afghanistan-Pakistan, 1961; and Indonesia-Malaysia, 1963–65.
83. Howard 1978, 95.
84. See Cobban 1969; Mayall 1990; and Franck 1990, 155–74. The destructiveness of past territorial wars also encouraged Latin American states to oppose territorial revisionism. Holsti 1996, 150–84.
85. In part the movement to abolish territorial revisionism was an aspect of the movement to abolish war in the industrialized world. See Mueller 1989; and Luttwak 1996.
86. Michael Doyle has noted that the number of liberal states grew from three in 1800; to eight in 1850; thirteen in 1900; twenty-nine in 1945; and forty-nine in 1980. Doyle 1996, 56. With recent changes
in Eastern Europe, Latin America, and Asia the number is now considerably higher.
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question involves considering the reasons why democratic states might eschew wars of territorial aggrandizement, the views of democratic leaders, and democratic and nondemocratic states' patterns of territorial aggrandizement. The key factor that has probably in uenced democratic states' opposition to territorial aggrandizement is touched on in John Owen's study concerning the democratic peace in which he notes that "liberalism as a system of thought" is particularly attached to "self-legislation or self-government" and "self-determination."87 It is these values that have shaped the policies of democratic leaders toward coercive territorial revisionism.
In the late stages of World War I President Wilson commented that "no right exists anywhere to hand peoples about from sovereignty to sovereignty without their consent,"88 and Prime Minister David Lloyd remarked that any territorial changes had to be based on "the consent of the governed."89 If the citizens of liberal states adhered to this principle of not imposing a new government on people by force, they would de nitely be opposed to using force to change interstate boundaries—unless possibly a liberal state sought to assist the secession of a national minority in a foreign country. However, the dangers of supporting national secessionist groups have been clearly recognized by liberal democratic states. While self-determination for ethnic groups is at times viewed sympathetically by liberals, it is "trumped" by their recognition that the logical outcome of allowing self-determination for every national group would be continual warfare. Self-determination has had to be compromised in the pursuit of physical security, which is itself necessary for individuals' realization of liberty. Hence, democratic states' fear of major war and their respect for self-determination by juridical states are inextricably interrelated in their support for the territorial integrity norm.90 This perspective was recognized by most of the statesmen involved in the peace settlements at the end of the two world wars, including President Wilson.91 Inis Claude has remarked that President Wilson "created his League to make the world safe by democracy,"92 and absolutely central

to his conception of democracy was a commitment to prevent the imposition of rule by one juridical state on another juridical state or a part of that state.
The proclivity of democratic states to eschew territorial aggrandizement is re ected in their evolving practices regarding territorial annexations at the end of the world wars and in their colonial policies. At the end of World War I, the Triple Entente states and their democratic allies gained little territory. Britain and the United States, whose President Wilson led the ght for "no annexations," did not
87. Owen 1997, 32. Malcom Anderson has identi ed another in uence on liberal democrats' support for the sanctity of boundaries—namely, that established boundaries are "essential for ordered constitutional
politics." Anderson 1996, 8. For a discussion of institutional and cultural factors that have in uenced the democratic zone of peace, see Russett et al. 1993.
88. Korman 1996, 136.
89. Lloyd George 1936, 1524–26.
90. Related to this argument, the international protection of minority rights during the twentieth century has been concerned primarily with promoting international peace or order. Preece 1998.
91. See Mayall 1990; and Knock 1992.
92. Claude 1964, 47.
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establish sovereignty over any new territories, and France only reestablished sovereignty over Alsace-Lorraine. Among the smaller allies, Belgium obtained a small border area from Germany; Denmark secured two-thirds of Scheswig-Holstein from Germany as a result of a referendum; and Italy and Greece obtained small, but strategic, territories from Austria and Bulgaria. The Italian and Greek gains might be explained by the relatively new and unstable character of their democratic regimes, which collapsed in the interwar period.93 France, Britain, Australia, and New Zealand (as well as Japan and South Africa) secured League mandates that previously belonged to the defeated powers, and while there was no obligation to bring them to independence, there was an implicit responsibility to move in this direction for the A mandates and to a lesser extent the B mandates as well.94 Some signs of a new normative orientation on territorial issues were present in the policies of the victorious democratic states at the end of World War I, but the old order that sanctioned annexations and colonialism still had a signi cant in uence.
As happened with the expansion of the voting franchise in the Western states, progress in promoting liberal democratic values about territorial revisionism occurred in stages.
In the case of the settlements at the end of World War II, no Western power achieved territorial control over new areas (except UN trusteeships that they were to prepare for independence),95 whereas the authoritarian Soviet Union obtained

sovereign control over signi cant areas in eastern Europe as well as some of Japan's northern islands. The democratic Western European states still clung to the legitimacy of colonial empires through the immediate post–World War II years, but by the 1950s they had all committed themselves to decolonization. However, the authoritarian regimes in Portugal and Spain resisted granting independence to their colonies until their democratic transformations in 1974. Granting the right of self-determination to colonies owed from the very same ideational source as did opposition to violent territorial revisionism—namely, a liberal democratic belief that it is wrong to impose rule on the people of another juridical state or a part thereof. Decolonization resulted signi cantly because the Western colonial powers "lost con dence in their normative right to rule."96 Of course, in the Cold War era the Western states fashioned themselves into an alliance that self-consciously identi ed itself as an upholder of democratic values,97 and hence it would have been very dif cult to absorb foreign territories against the wishes of their citizens and governments.

The reluctance of democratic states to engage in territorial aggrandizement is also seen in their infrequent territorial aggressions sinceWorld War I. Between 1919 and 1945 there were twenty territorial wars; the only democratic state to achieve

93. Gleditsch and Ward 2000.

94. See Howard 1978, 83–84; and Lyons 2000, 302–12. One clearly authoritarian ally of the Triple Entente was Romania, and it gained considerable territory.

95. Claude 1964, 285–302.

96. See Russett et al. 1993, 35; and Jackson 1993.

97. Risse-Kappen 1995.

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territorial gains was Poland in 1922, and its democratic government did not have deep social roots, as the 1926 coup d'etat indicated.98 Since 1945 the only territorial wars that have been initiated by democratic states have been India's absorption of the Portuguese colony of Goa in 1961, Israel's invasion of three Arab neighbors in 1967 following Arab sabre rattling, and Ecuador's invasion of Peru in 1995.99 The other thirty-seven territorial aggressions have been by nondemocratic states.

In dwelling on whether the association of territorial revisionism and major war or a liberal respect for other states is the crucial factor that shaped Western states' support for the territorial integrity norm, it is interesting to ask what might have happened if the other factor had not been present. First, if democracy had not grown steadily in theWestern world during the twentieth century, would the Western states have opted for the sanctity of states' borders because of the linking of territorial revisionism and major war? They might have adopted this strategy after the carnage of the two world wars, but it is problematic whether the policy would have endured

without a moral belief that other juridical states deserved their respect. After all, the Western states did not support the territorial integrity norm following major wars prior to the twentieth century (for example, the Thirty Years' War and the Napoleonic Wars). Second, if territorial revisionism had not been a very important cause of major wars, would the democratic states have come down strongly for a prohibition against coercive territorial revisionism? Again, it is doubtful (probably more doubtful) because without a fear that territorial revisionism could lead to regional or world wars, they probably would have opted for the right of selfdetermination for all ethnic or national groups. Liberal states were clearly in uenced to support the right of self-determination for juridical states, and hence the territorial integrity norm, because warfare was so horri c in the twentieth century. Indicative of this perspective is a provision in President Wilson's rst draft of the League Covenant: "The parties accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary."100 A fear of a major war and a liberal democratic respect for other juridical states clearly have a symbiotic relationship that has motivated these countries to support the territorial integrity norm, and it is highly problematic whether the norm would have achieved the strength it has if both factors had not been present.

In considering the support for the territorial integrity norm by non-Western or developing states, we must rst recognize that most of them have not experienced very destructive territorial wars in recent centuries and have not had liberal democratic governments in the postwar era. Their backing of the norm generally

98. See Table 1a; and Holsti 1991, 213–42. On the war proneness of new and unstable democratic states, see Gleditsch and Ward 2000.

99. Huth found that of forty-one territorial disputes occurring between 1950 and 1990, the only one where a state with fteen years of democratic rule was the challenger was the Indian invasion of Goa. Huth 1996, 136–37. Mitchell and Prins found that of the ninety-seven territorial "militarized disputes" occurring between 1815 and 1992, only two were between well-established democracies; and these two occurred between 1945 and 1992. Mitchell and Prins 1999.

100. Miller 1928, 23 (Art. 3).

stems from the existence of ethnic groups that overlap borders and can provoke territorial irredentism, the military weakness of many developing states vis-a`-vis their neighbors, and their weakness vis-a`-vis Western supporters of the norm. However, changing economic costs and bene ts of territorial aggrandizement have undoubtedly had an in uence in recent decades.

Among developing states, many (especially in Africa) have feared territorial

aggressions because of the likelihood of irredentist claims resulting from ethnic groups' overlapping borders and their own military weakness.101 These developing states made sure that the 1960 UN Declaration on Granting Independence to Colonial Territories and Countries established that the peoples of existing colonial territories, not ethnic groups, are eligible for self-determination and that the territorial integrity of all states should be respected.102 Through regional organizations and the UN, the African, Middle Eastern, and Latin American states have also been very active in opposing territorial aggrandizement and secessionist movements (for example, Biafra) and in securing great power backing through concerted diplomatic advocacy.

Another concern that has been (and still is) very important in promoting support of the territorial integrity norm among developing states is their recognition that they will probably meet strong Western opposition if they embark on territorial aggression. In the Cold War the Western states provided assistance to their many allies in the developing world if they were subject to territorial revisionist threats or attacks. Good examples are South Korea in 1950, Kuwait in 1961 (a threat of invasion from Iraq), and Malaysia in 1963. In addition, the Western states generally opposed their allies when they pursued territorial expansionism.103 In some areas the Western powers sought to promote military balances between states where territorial revisionist wars could occur.104 In a few cases, such as South Korea in 1950 and Kuwait in 1990, the Western powers actually sent signi cant military forces to repel invasions. And in Eastern Europe the NATO countries bombed Serb forces as part of their attempt to promote respect for the boundaries of Bosnia and Croatia. If it had not been for the Western democratic powers' (and especially the United States') willingness to employ their military and economic leverage in many territorial wars over the entire post-1945 era, the norm against coercive territorial revisionism would not have been sustained.However, the Western powers could not have enforced the norm in the developing world without the backing of the great majority of non-Western states. A crucial factor in the strength of the territorial integrity norm in the developingworld is the coincidence of most developing states'

101. See Jackson 1990; and Touval 1972.

102. Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA res. 1514, 1960.

103. In a few cases the Western powers backed territorial revisionism for strategic reasons related to the Cold War. They favored the absorption of the Spanish Sahara by Morocco and Mauritania and East

Timor by Indonesia in 1975 prior to their independence because of the political orientation of their independence movements during the Cold War.

104. Holsti 1996, 162–63.

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opposition to coercive territorial revisionism and the willingness of the Western states to use their power to reverse territorial aggressions.
In addition to the aforementioned international conditions and beliefs sustaining the prohibition against coercive territorial change, scholars have observed that a number of economic trends reduce the bene ts and increase the costs of coercive territorial revisionism. These trends have undoubtedly had an important impact on strengthening support for the norm in recent decades, but it is doubtful whether they could be regarded as important factors in securing its diplomatic acceptance between World War I and the 1960s. These economic trends in uence why states are less motivated to pursue territorial aggrandizement themselves, not why they would oppose such actions by other states.
First, the declining value of land as a factor of production in modern economies means that the conquest of foreign territory no longer brings the same bene ts that it did in the pre-industrial era. Robert Gilpin has observed that a state can now gain more "through specialization and international trade" than it can "through territorial expansion and conquests."105 This is clearly true, but land has been viewed by some countries in the twentieth century as quite valuable. It was certainly viewed as valuable by Germany and Japan in the 1930s and 1940s—a time when the territorial integrity norm was beginning to attract strong support. Today the accomplishments of countries such as South Korea and Singapore are leading to a recognition that economic development depends rst and foremost on human skills and not on control of territory; but this recognition has not been strong enough, and it did not come soon enough in this century, to be seen as a crucial factor in driving broad acceptance of the territorial integrity norm.
Second, some scholars argue that the occupation of foreign territory is more dif cult and costly in an era of national consciousness, and therefore states are less prone toward territorial expansionism.106 This view is true in many circumstances, but as Peter Lieberman's study has pointed out, the occupation of foreign territories can be bene cial as long as the occupying states do not meet large-scale military resistance and are willing to use considerable force to suppress local populations.107 In World War II foreign occupiers were certainly willing to adopt such policies of suppression. We should also recognize that quite a few cases of potential territorial revisionism today concern a desire to unite ethnic brethren in different countries, and in this case the problem of needing to suppress local populations would not exist.
Finally, some political observers adopt a traditional liberal stance that war generally, and territorial wars in particular, are increasingly being rejected in this century because they disrupt valuable economic interdependencies.108 This hypothesis

is true to a degree. However, such interdependencies were not adequate to deter major wars throughout most of this century. In fact, such interdependencies were
105. See Gilpin 1981, 125, 132; and Kaysen 1990, 54.
106. See Deutsch 1953; Kaysen 1990, 53; and Lieberman 1996.
107. Lieberman 1996.
108. See Rosecrance 1986 and 1996; and Zacher and Matthew 1995, 124–26.
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quite strong in 1914.109 Their impacts are certainly stronger at the end of the twentieth century as a result of the recent growth of international economic transactions, but they are unlikely to assure a rejection of coercive territorial revisionism by the majority of countries. For one thing, many states are highly interdependent with a relatively small number of other states (often not including contiguous states), and wars with most countries would not have major impacts on their commercial interactions.
Another way to re ect on the roots of the territorial integrity norm is to look at what has happened to the major incentives for territorial aggrandizement: the search for economic gains, the search for strategic gains, and the protection of national brethren. In the case of a striving for economic gain, the bene ts of territorial aggression are much lower now since land alone does not provide the resources it once provided when agricultural production was a central source of wealth. Also, the economic costs of occupying land inhabited by a different ethnic group can be very high.
The use of territorial aggrandizement to achieve strategic gain, or an improvement in a state's relative power, has concerned the occupation of territories well situated for launching military operations, the exploitation of captured land as a source of national wealth, and the uni cation of ethnic brethren in other countries so as to increase the state's population base. Having strategically located territory is less important now than it once was because of the mobility of planes, missiles, and ships—in our technologically advanced era, land provides less power potential than it once did. Finally, increasing the population base of loyal nationals still gives a state more power, but in this case an expansionist state would have to meet the costs of international opposition.
The nal motivation for territorial aggrandizement, protecting fellow nationals, has concerned the protection of ethnic compatriots who are beingmistreated in other states and the uni cation of nationals in a single state. This motivation cannot be squelched, but it is much more dif cult now for states to embark on attempts to protect and absorb fellow nationals in foreign states when their civil rights are respected. A central reason why the Western states have been so active in promoting minority rights (particularly through the OSCE) is that they want to remove any

justi cation for foreign intervention and territorial aggrandizement.
Conclusion
The decline of successful wars of territorial aggrandizement during the last half century is palpable. In fact, there has not been a case of successful territorial aggrandizement since 1976. Furthermore, there have been important multilateral
109. Thompson and Krasner 1989. Ethan Nadelmann has made an interesting comment about the demise of piracy and privateering in the seventeenth century that is relevant to the gradual strengthening
of the territorial integrity norm: “The advantage to be derived from stealing from one another was giving
way to the greater advantage of stable commercial relations.” Nadelmann 1990, 487.
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accords in support of the norm and frequent interventions by international organizations to force states to withdraw from foreign countries.
Clearly, a central source of the norm has been the industrialized world’s fear that territorial revisionism could ignite a major war that would cause great human suffering. Several scholars have observed that this revulsion against the imposition of physical pain has been central to the strengthening of a variety of security and human rights regimes.110 The experiences of the two world wars, a general understanding of territorial revisionism’s encouragement of major wars, and a fear of nuclear weapons drove the development of the territorial integrity norm at key points in its multilateral legitimization. But one cannot dismiss the ideational element of democratic values among Western, and an increasing number of non-Western, countries. The Western democratic states were the driving force behind the norm in 1919, 1945, and 1975. A recent study on the CSCE highlights the impacts of democratic values on respect for interstate borders. According to Gregory Flynn and Henry Farrell, these values orient states to the peaceful settlement of disputes and respect for the territory and institutions of other countries. 111 They also stress that democratic countries place respect for states’ territorial integrity before self-determination for ethnic communities because this strategy best realizes their two values of self-governance and freedom from violence—or liberty and order. They note that “the norm of self-determination was not only subordinated to the norm of inviolability of borders; it was also effectively removed as an independent principle of international relations in Europe separable from the norm of democracy.”112 In other words, for most Western liberals, self-determination means self-governance for the peoples of juridical territorial states.
Wars of territorial aggrandizement since 1945 have, for the most part, concerned developing states’ dissatisfaction with the boundaries they inherited from the colonial powers; but these quarrels are largely coming to an end. On the whole, what

is remarkable is the degree of support for the territorial order by developing countries. At the heart of their support have been their fear of territorial aggrandizement based on con icting treaties, overlapping ethnic groups, and their military weakness; but the leverage of the Western states has also had a major impact in assuring respect for the norm. If the Western states had not backed the territorial status quo in the developing world, a good number of territorial aggressions would have succeeded, and the commitment of the developing states to the territorial integrity norm would have probably declined markedly.

One should not discount the contribution of economic trends in the strengthening of the territorial integrity norm, especially in recent decades. Of great import is the signi cance of a stable territorial order to the operation of the increasingly interdependent international economy: "The globalizing economy requires the backing

110. Finnemore and Sikkink 1999, 267–68.

111. Flynn and Farrell 1999.

112. Flynn and Farrell 1999, 527 and passim. On the change in Western international practices that ow from the application of liberal democratic values, see also Adler 1998.

of territorially based state power to enforce its rules."113 At the same time there is no indication that economic discourses and economic motivations sustained the emergence of the norm—especially in the wake of the two world wars. In fact, while these economic trends have reduced states' perceptions of bene ts and increased states' perceptions of costs of territorial aggrandizement, they do not account for why states are so strongly opposed to territorial aggressions by other states.

There is not a simple answer to why the territorial integrity norm has emerged as a central pillar of the international order. Different reasons were key for two major groupings of states, and the coincidence of several factors seems to have been crucial to their backing. These key factors have wrought a major change in the international territorial order. Boundaries have not been frozen, but states have been effectively proscribed from altering them by force. The multistate political and security order is clearly stronger than many political observers think in that the society of states has largely eliminated what scholars have identi ed as the major source of enduring rivalries and the frequency and intensity of warfare.114

It is valuable at this point to address brie y the meaning of the emergence of a strong territorial integrity norm for the international order. On the one hand, the ndings presented here support Stephen Krasner's judgment that the archetypal features of the Westphalian system, such as effective internal control and respect for state territoriality, have varied considerably over recent centuries.115 On the other hand, certain changes have taken place in the twentieth century that demarcate our

present era from past eras, and they should not be viewed as mere stages of a cycle. In particular, a change in the normative status of state territoriality constitutes a basic transformation in the global political order. As Vasquez has remarked, "Territorial issues are so fundamental that the behavior associated with their settlement literally constructs a world order."116 It is likely that the world is "witnessing emerging fragments of international security communities alongside the traditional war system that continues elsewhere."117 Contrary to what one might initially think, the underlying premise of the territorial integrity norm is not a commitment to separateness but a commitment to a global political order in which people have excised a major source of international violence. In this sense mutually recognized and respected boundaries are not what separate peoples but what binds them together.

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113. Cox 1996, 278.

114. See Holsti 1991; Goertz and Diehl 1992; Vasquez 1993; Huth 1996; and Hensel 1999.

115. Krasner 1999.

116. Vasquez 1993, 151.

117. Ruggie 1993, 174.

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**THE CASE FOR CANADA'S RECOGNITION OF
THE REPUBLIC OF ARTSAKH (NAGORNO-KARABAKH)
AS A MEASURE OF THE RESPONSIBILITY TO PROTECT**

anccanada.org/wp-content/uploads/2020/12/The-Case-for-Canadas-Recognition-of-Artsakh-

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2

I. Introduction

1. At the end of June 2020, 170 of the 193 member states of the United Nations ("UN") endorsed the UN Secretary-General's appeal for a global

ceasefire due to the threat of the novel coronavirus pandemic ("COVID-19").
Armenia was among the signatories; Azerbaijan, notably, was not.1
2. On 27 September 2020, Azerbaijan, backed by Turkey, initiated a large-scale, unprovoked war against the Republic of Nagorno-Karabakh (also known as, and hereinafter interchangeably, "Artsakh"),2 an independent breakaway State predominantly inhabited by ethnic Armenians since the 5th century BC, yet still internationally recognized as part of Azerbaijan despite repeated assertions by the Armenians of Artsakh of their legal right to selfdetermination for more than 30 years.3
3. Over the course of the next 44 days, Azerbaijan unrelentingly and intentionally targeted and attacked civilians and civilian objects in Armenia and Artsakh, including cultural and religious sites, with drones, as well as illegal cluster munitions and other weapons banned by international humanitarian law, including chemical weapons.4 Turkey supported

1 United Nations, "170 signatories endorse UN ceasefire appeal during COVID crisis", 24 June 2020, retrieved from https://news.un.org/en/story/2020/06/1066982.

2 Political Geography Now, "All About Nagorno-Karabakh's 2017 Name Change", 30 January 2018, retrieved from https://www.polgeonow.com/2018/01/artsakh-name-change-nagornokarabakh.html. A constitutional referendum was held in the Republic of Nagorno-Karabakh on 20 February 2017, pursuant to which the name of the Republic was officially changed to the Republic of Artsakh.

3 For more on the history of the Armenians of Artsakh's struggle for independence, see infra Section IV(A): Artsakh has always been independent of Azerbaijan. See also, inter alia, Shahen Avakian, Nagorno Karabakh: Legal Aspects, 5th ed. (Moscow: MIA Publishers, 2015), pp. 16-25.

4 See, e.g., The Human Rights Ombudsman of the Republic of Artsakh ("HRORA"), "Interim Report on the Azerbaijani Atrocities against Artsakh Population in September 2020", 1 October 2020, retrieved from https://artsakhombuds.am/sites/default/files/2020-10/Artsakh-Ombudsman-report-on-Azerbaijan-attrocities-01.10.2020_4.pdf; The Human Rights Defender of the Republic of Armenia ("HRDRA"), "Ad Hoc Report on Fact-Finding Activities in Villages of Gegharkunik Province of Armenia Damaged by Azerbaijani Military Attacks", 30 September – 1 October 2020, retrieved from https://www.ombuds.am/images/files/dc1b379419a1a9aaeec5191128277502.pdf; HRDRA, "Ad Hoc Public Report on Azerbaijani Drones' Targeted Attacks against Peaceful Population of Armenia and Artsakh in Grave Breach of International Law", October 2020, retrieved from https://www.ombuds.am/images/files/de3634c257bb698735db318a33f280bf.pdf; HRORA, "Updated Edition of the Second Interim Report on the Azerbaijani Atrocities against the Artsakh Population in September-October 2020", 18 October 2020, retrieved from

https://artsakhombuds.am/sites/default/files/2020-10/new-Artsakh-Ombudsman-updatedsecond-interim-report-on-the-Azerbaijani-atrocities-in-September-October-2020-18.10.2020_3.pdf; HRORA, "Ad Hoc Public Report on the Azerbaijani Targeted Attacks against the St. Holy Savior Ghazanchetsots Cathedral of Shushi, Artsakh (Nagorno Karabakh) as a War Crime and Crime against Humanity", 20 October 2020, retrieved from https://artsakhombuds.am/sites/default/files/2020-10/Report_Ghazanchetsots_Cathedral_-3

Azerbaijan's attacks by supplying state-of-the-art weapons and drones (some of which contained Canadian technology, as set out in Section III below) and directly participating in the hostilities,5 as well as hiring and sending jihadist mercenaries from Syria to fight against Armenians,6 which is also prohibited under international law.7 Artsakh, by contrast, had only Armenia to count on

20.10.2020.pdf; HRDRA, "Ad Hoc Report on Azerbaijani Military Attacks against Davit Bek and Agarak Villages of Syunik Province", 30 October – 3 November 2020, retrieved from https://www.ombuds.am/images/files/86cfd80eb354d0f2a600831371bb32c3.pdf; HRDRA and HRORA, "Joint Ad Hoc Public Report on the Use of Incendiary Ammunition of Mass Destruction (Incendiary Weapon) Against Civilian Objects of Artsakh (Nagorno-Karabakh) by the Azerbaijani Armed Forces", November 2020, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Report-On-White-Phosphorus.pdf; HRORA, "Ad Hoc Report on the Children's Rights Affected by the Azerbaijani Attacks against the Republic of Artsakh (Nagorno-Karabakh)", 9 November 2020, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020_0.pdf. The HRDRA and HRORA jointly issued their "Forth Ad Hoc Report on Torture and Inhuman Treatment of Members of Artsakh Defence Army and Captured Armenians by Azerbaijani Armed Forces (from November 4-18, 2020)" confidentially ("Fourth Report on POWs"). This report can be made available on request by contacting the Human Rights Defenders of Armenia or Arstakh directly. For more details on the extent of the war crimes and other atrocities committed against the population of Artsakh, see infra Section IV(B)(ii): Azerbaijan commits atrocious crimes against Armenians.

5 See, inter alia, Dorian Jones, "Turkey Vows Support for Azerbaijan in Escalating Nagorno-Karabakh Conflict", Voice of America, 28 September 2020, retrieved from https://www.voanews.com/south-central-asia/turkey-vows-support-azerbaijan-escalatingnagorno-karabakh-conflict; Steven Chase, "Canadian-made targeting gear used in air strikes against Armenians, evidence shows", The Globe and Mail, 30 October 2020, retrieved from https://www.theglobeandmail.com/politics/article-canadian-made-targeting-gear-used-in-airstrikes-against-armenians/; Andrew E. Kramer, "Armenia and Azerbaijan: The Conflict

Explained", The New York Times, 15 November 2020, retrieved from https://www.nytimes.com/article/armenian-azerbaijan-conflict.html.
6 In this respect, UN human rights experts have confirmed: "here were widespread reports that the Government of Azerbaijan, with Turkey's assistance, relied on Syrian fighters to shore-up and sustain its military operations in the Nagorno-Karabakh conflict zone, including on the frontline. The fighters appeared to be motivated primarily by private gain, given the dire economic situation in the Syrian Arab Republic . In case of death, their relatives were reportedly promised financial compensation and Turkish nationality. Turkey engaged in large-scale recruitment and transfer of Syrian men to Azerbaijan through armed factions, some of which are affiliated with the Syrian National Army." See UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, "Mercenaries in and around the Nagorno-Karabakh conflict zone must be withdrawn", 11 November 2020, retrieved from https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26494&LangID=E&fbclid=IwAR0_JnkNB7eo-EgeedExyVrl0wruHYff4BwhgLJDEQPSFAFDS9Ax3DBQxvo. See also, inter alia, Syrian Observatory for Human Rights, "Nagorno-Karabakh battles | Over 2,000 mercenaries sent to Azerbaijan, nearly 135 killed so far", 18 October 2020, retrieved from https://www.syriahr.com/en/188669/.
7 See International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, which entered into force on 20 October 2001. Azerbaijan acceded to this Convention on 4 December 1997, and Armenia ratified it on 27 October 2020.

to come to its aid, as its calls to the rest of the international community were consistently ignored.8

4. On 7 October 2020, the Global Center for the Responsibility to Protect issued an "Atrocity Alert" noting the indiscriminate shelling of civilians and civilian infrastructure, the use of hired foreign mercenaries and the resulting important displacement of populations in and around Artsakh.9 On 22 October 2020, a group of 80 genocide scholars issued a joint statement on the imminent genocidal threat deriving from Azerbaijan and Turkey against the Armenians of Artsakh, declaring that "already a case can be made that there is conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide".10 The UN Secretary-General also noted that COVID-19 had doubled in Armenia and increased 80% in Azerbaijan since the beginning of hostilities.11 Meanwhile, the death toll rapidly rose to the thousands,12 and more than 85% of Artsakh's indigenous Armenian population of 150,000 was forcibly displaced from their ancestral lands.13

5. Needless to say, the combined forces of Armenia and Artsakh alone could prove no match for those of Azerbaijan and Turkey.14 Azerbaijan's use

8 Artsakh's Human Rights Ombudsman, Artak Beklaryan, who lost his sight from a landmine explosion when he was a child during the 1988-1994 Nagorno-Karabakh war, created a campaign under the hashtag "#DontBeBlind" calling on the international community to focus attention on, and take action against, war crimes committed by Azerbaijan against the population of Artsakh. See https://twitter.com/Artak_Beglaryan.

9 Global Center for the Responsibility to Protect, "Atrocity Alert No. 223: Nagorno-Karabakh, Central African Republic and Sudan", 7 October 2020, retrieved from https://www.globalr2p.org/publications/atrocity-alert-no-223-nagorno-karabakh-centralafrican-republic-and-sudan/.

10 See Open letter by members of the International Association of Genocide Scholars (IAGS), 22 October 2020, retrieved from https://www.voltairenet.org/article211404.html. See also Ewelina U. Ochab, "Shortly Before Ceasefire, Experts Issue A Genocide Warning For The Situation In Nagorno-Karabakh", Forbes, 11 November 2020, retrieved from https://www.forbes.com/sites/ewelinaochab/2020/11/11/shortly-before-ceasefire-experts-issuea-genocide-warning-for-the-situation-in-nagorno-karabakh/?sh=440086e4d005.

11 The Independent, "'The only winner is the pandemic': United Nations chief calls for ceasefires in major global conflicts to focus on pandemic", 22 October 2020, retrieved from https://www.independent.co.uk/news/un-ceasefire-coronavirus-yemen-afghanistan-armeniaazerbaijan-pandemic-covid-19-b1235074.html.

12 See, e.g., BBC News, "Nagorno-Karabakh: Nearly 5,000 dead in conflict, Putin says", 22 October 2020, retrieved from https://www.bbc.com/news/world-europe-54652704.

13 See, e.g., United Nations Children's Fund, "UNICEF statement on one month of fighting in and beyond Nagorno-Karabakh", 28 October 2020, retrieved from https://www.unicef.org/press-releases/unicef-statement-one-month-fighting-and-beyondnagorno-karabakh.

14 For a side-by-side comparison of the defence budgets and military capabilities of Armenia and Azerbaijan, see Al Jazeera, "Infographic: Military arsenals of Armenia and Azerbaijan", 1 October 2020, retrieved from https://www.aljazeera.com/news/2020/10/1/infographicmilitary-arsenals-of-armenia-and-azerbaijan. Between 2009 and 2018, Azerbaijan's military spending totaled almost USD$24 billion, according to updated data from the Stockholm

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of force against Artsakh was therefore not only illegal on the basis of its unprovoked aggression, but also grossly disproportionate and unjust in its means and conduct. Facing impossible odds and total extermination, on 9

November 2020, Armenia (on behalf of Artsakh) was left no other choice but to sign a highly prejudicial ceasefire statement brokered by Russia ("Ceasefire Statement") that, inter alia, allows Azerbaijan to hold on to areas of Artsakh that it took during the conflict and requires Armenia to withdraw from several other adjacent areas (see map in Annex).15 With nine bullet points, the Ceasefire Statement constitutes more than a mere ceasefire, but much less than an actual peace agreement, and does not resolve issues at the core of the conflict. Crucially, there is no mention of the status of Artsakh itself as a subject of ongoing dialogue, an omission given extra weight by President Aliyev of Azerbaijan saying there will be no such discussion as long as he is president.16

6. The third and fifth bullet points of the Ceasefire Statement provide for the deployment of Russian peacekeepers for a minimum of five years and that of " peacekeeping center to monitor the ceasefire". Despite Canada having urged Turkey to "remain outside the conflict" after the Ceasefire Statement was signed,17 Russia agreed to allow Turkey to

International and Peace Research Institute ("SIPRI"). Armenia spent slightly more than USD$4 billion in the same period. See SIPRI Military Expenditure Database, retrieved from https://www.sipri.org/databases/milex. Turkey's military expenditure was USD$20.4 billion just in 2019 alone, ranking it the 16th highest military spender in the world. See Nan Tian et al., "Trends in World Military Expenditure, 2019", SIPRI Fact Sheet, April 2020, retrieved from https://www.sipri.org/sites/default/files/2020-04/fs_2020_04_milex_0_0.pdf. It is also worth noting that, with a GDP of USD$40.7 billion in 2017, Azerbaijan's economy is almost four times as large as Armenia's economy at USD$11.5 billion, and Azerbaijan's population of ca. 9.8 million is more than three times the size of Armenia's population of ca. 3 million. No recent verified statistical information exists on Nagorno-Karabakh, but the de facto authorities state a reported population of ca. 146,000 and a reported GDP of ca. USD$480 million for 2016, although experts consider these figures to likely be inflated. See David Saha et al., "The economic effect of a resolution of the Nagorno-Karabakh conflict on Armenia and Azerbaijan", Berlin Economics, 15 June 2018, pp. 10-11, retrieved from https://berlineconomics.com/wp-content/uploads/The_Economic_Effect_Of_A_Resolution_Of_The_Nagorno-Karabakh_Conflict.pdf.

15 See The Prime Minister of the Republic of Armenia, "Statement by the Prime Minister of the Republic of Armenia, the President of the Republic of Azerbaijan and the President of the Russian Federation", 10 November 2020, retrieved from https://www.primeminister.am/en/press-release/item/2020/11/10/Announcement/. See also President of Russia, "Statement by the President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation", 10 November 2020, retrieved from http://en.kremlin.ru/events/president/news/64384.

16 Laurence Broers, "Russia's Peace Imposed on Armenia-Azerbaijan Bloodshed", Chatham House, 11 November 2020, retrieved from https://www.chathamhouse.org/2020/11/russiaspeace-imposed-armenia-azerbaijan-bloodshed. See also infra, fn. 23.
17 Statement by François-Philippe Champagne, Minister of Foreign Affairs of Canada, Twitter, 11 November 2020, retrieved from https://twitter.com/FP_Champagne/status/1326690424237543425.
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participate in the establishment of the "peacekeeping center" and monitoring process.18 Turkey's involvement is in no way envisaged by the terms of Ceasefire Statement, and, considering the direct role it played in the conflict, can in no way be perceived as neutral or reasonable in the eyes of the international community, let alone acceptable to Armenia or Artsakh.
7. As such, the Ceasefire Statement does not change the dangerously fragile situation of the Armenians of Artsakh, who remain extremely vulnerable in light of the current humanitarian crisis and the lack of final status for Artsakh.19 Moreover, the conditions under which Armenia had to accept the terms of the Ceasefire Statement bring into question their very validity.20 Politicians and analysts have criticized the terms of the Ceasefire Statement as being "unfair", "tragic", even "disastrous" for Armenia and Artsakh, recognizing the need for Western intervention to achieve a balanced and lasting settlement that preserves Artsakh's right to self-determination.21
18 See Reuters, "Erdogan says Turkey, Russia to monitor Karabakh ceasefire", 11 November 2020, retrieved from https://ca.reuters.com/article/idUSKBN27R1CP; Siranush Ghazanchyan, "Russia, Turkey to jointly monitor the Nagorno Karabakh ceasefire", Public Radio of Armenia, 12 November 2020, retrieved from https://en.armradio.am/2020/11/12/russia-turkey-to-jointly-monitor-the-ceasefire-in-nagornokarabakh/;
Al Jazeera, "Turkey seeks approval to deploy peacekeepers in Azerbaijan", 16 November 2020, retrieved from https://www.aljazeera.com/news/2020/11/16/turkey-seeksapproval-to-deploy-peacekeepers-in-azerbaijan.
19 International Crisis Group has warned that "the safety of thousands of ethnic Armenians remaining in the region is a serious concern". See International Crisis Group, "Getting from Ceasefire to Peace in Nagorno-Karabakh", 10 November 2020, retrieved from https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/gettingceasefire-peace-nagorno-karabakh.
20 Special agreements such as ceasefires and peace agreements are usually concluded in the context of armed conflict, where, almost inevitably, force is used. Article 52 of the 1969

Vienna Convention on the Law of Treaties stipulates that a treaty is void "if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations". How does this rule relate to special agreements? According to one view, " treaty is only procured by coercion if the use or threat of force is directly intended to bring about the treaty or if the treaty is aimed at maintaining a situation which was created by an illegal use of force". Another view is that "a treaty is only invalid if the victim of the coercion did not have any other choice but to conclude the treaty", thus very narrowly construing the rule. It can be anticipated that ambiguity in the validity of an agreement in the light of this rule will most likely arise in relation to ceasefire agreements. See International Committee of the Red Cross, "Commentary on the Second Geneva Convention" (Cambridge: Cambridge University Press, 2017), Article 6: Special Agreements, paras. 988, 1014-1015, retrieved from https://ihldatabases.icrc.org/ihl/full/GCII-commentary.

21 See, e.g., Statement by Jean-Yves Le Drian, Minister for Europe and Foreign Affairs, 10 November 2020, retrieved from https://www.diplomatie.gouv.fr/en/countryfiles/azerbaijan/news/article/nagorno-karabakh-statement-by-jean-yves-le-drian-minister-foreurope-and; Statement by Brad Sherman, United States Congressman, Twitter, 11 November 2020, retrieved from https://twitter.com/BradSherman/status/1326748284191465472; Philippe Raffi Kalfayan, "A Closer Look at the Trilateral Agreement to End War", The Armenian Mirror-Spectator, 16

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Armenia considers the matter of Artsakh's status and independence to remain a live issue of fundamental importance,22 whereas Azerbaijan has clearly demonstrated that it is not ready to accept or even discuss the status or independence of Artsakh in the long run,23 and this is what makes the conflict so dangerous. Therefore, help from the international community is crucial to maintain peace in the region and to resolve the conflict.

8. Several parts of Artsakh have fallen under the control of Azerbaijan, including the city of Shushi (of great religious and cultural importance to Armenians), thus forcing Armenians to flee their homes and creating a real risk of cultural genocide for the hundreds of Armenian churches and heritage sites left behind.24 Notable scholars, including Noam Chomsky and Cornel West, have warned that the wholesale human and cultural destruction in November 2020, retrieved from https://mirrorspectator.com/2020/11/16/a-closer-look-at-thetrilateral-agreement-to-end-war/. See also Statement by François-Philippe Champagne, Minister of Foreign Affairs of Canada, Twitter, 11 November 2020, retrieved from https://twitter.com/FP_Champagne/status/1326690424237543425 (expressing "support the Armenian people during this most difficult time").

22 See Statement by Nikol Pashinyan, Prime Minister of the Republic of Armenia, 12 November 2020, retrieved from https://www.primeminister.am/en/statements-andmessages/item/2020/11/12/Nikol-Pashinyan-Speech/ ("The final settlement of the Karabakh issue and the status of Artsakh is of fundamental importance. In this regard, our task has not changed: the international recognition of the Artsakh Republic is becoming an absolute priority, and in fact, there are now more weighty arguments for the international recognition of Artsakh."). See also Ministry of Foreign Affairs of the Republic of Armenia, "Foreign Minister Zohrab Mnatsakanyan held phone conversations with the representatives of the OSCE Minsk Group Co-Chair countries", 12 November 2020, retrieved from https://www.mfa.am/en/press-releases/2020/11/12/fm_phone_calls/10642.
23 See Statement by Ilham Aliyev, President of the Republic of Azerbaijan, 10 November 2020, retrieved from https://www.news.az/news/president-ilham-aliyev-this-statementcontains-not-single-word-about-status-of-nagorno-karabakh ("You probably noticed that this statement contains not a single word about the status of Nagorno-Karabakh! Where are the demands of the Armenian side that Nagorno-Karabakh should be granted independence? Not a word, Pashinyan! What happened? What is it, Pashinyan? This will probably remain the talk of the town for many years. What happened, Pashinyan? You were going to pave a road to Jabrayil. You danced. But where is the status? The status went to hell, it failed, it was scattered to smithereens, it is not and will not be there. As long as I am President, there will be no status"). See also Katerina Medvedeva, "Aliyev: the possibility of a special status for Nagorno-Karabakh is excluded", Gazeta.Ru, 17 November 2020, retrieved from https://www.gazeta.ru/politics/news/2020/11/17/n_15239629.shtml (in Russian).
24 The Azerbaijani government has, over the past 30 years, been engaging in a systematic erasure of the country's historic Armenian heritage, as exemplified by its destruction in recent years of 89 medieval churches, 5,840 intricate cross-stones, and 22,000 tombstones. See, e.g., Simon Maghakyan and Sarah Pickman, "A Regime Conceals Its Erasure of Indigenous Armenian Culture", Hyperallergic, 18 February 2019, retrieved from https://hyperallergic.com/482353/a-regime-conceals-its-erasure-of-indigenous-armenianculture/;
Dale Berning Sawa, "Monumental loss: Azerbaijan and 'the worst cultural genocide of the 21st century'", The Guardian, 1 March 2019, retrieved from https://www.theguardian.com/artanddesign/2019/mar/01/monumental-loss-azerbaijancultural-genocide-khachkars.
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Artsakh is "part of the expansive and violent territorial policy of President Recep Tayyip Erdoğan of Turkey to re-establish a version of Ottoman power in the region".25 Since the Ceasefire Statement took effect on 10 November 2020, incoming Russian peacekeepers have begun to document the aftermath of the conflict,26 and reports are increasing of gruesome atrocities including

murder, torture, mutilation, and other cruel treatment being committed by Azerbaijani forces against Armenian prisoners of war who remain in their captivity, as well of against Armenians civilians who choose to remain in, or return to, their homes in Artsakh.27

9. It is the position of this Paper that Canada's moral and legal obligations to prevent further atrocities against the Armenians of Artsakh have been triggered, both generally as a result of the doctrine of the Responsibility to Protect ("R2P"), and also specifically by virtue of its authorization of the sale of drone technology to Turkey which was used to

25 Gayatri Chakravorty Spivak et al., "A Call for Lasting Peace in Nagorno-Karabakh", Los Angeles Review of Books, 16 October 2020, retrieved from https://lareviewofbooks.org/shorttakes/lasting-peace-nagorno-karabakh/.

26 Radio Free Europe Radio Liberty, "Vision Of Hell: The Aftermath Of Fighting Around Key Nagorno-Karabakh City", 13 November 2020, retrieved from https://www.rferl.org/a/masscasualties-of-nagorno-karabakh-conflict-around-shushi/30947028.html.

27 See, e.g., Footage of four Armenian civilians kidnapped by Azerbaijani forces on 11 November 2020 and being forced to chant pro-Azerbaijani slogans, retrieved from https://www.instagram.com/p/CHoiSiTHQiD/?igshid=1cc360u2lx03c; Footage of Azerbaijani soldiers cutting the ears off of an Armenian who refuses to leave his home, retrieved from https://twitter.com/ASBMilitary/status/1327827599121375233; Footage of elderly ethnic Armenian man without shoes being beaten and publicly humiliated while in custody of Azerbaijani forces, retrieved from https://www.ombuds.am/en_us/site/ViewNews/1385; Statement of Artak Beglaryan, Human Rights Defender of Artsakh, on 21 November 2020, retrieved from https://twitter.com/Artak_Beglaryan/status/1330243372372594697 ("#Urgent! As a result of body exchange in #Shushi, 3 #Artsakh/#Karabakh killed civilians were found with signs of brutal mutilations by #Azerbaijan: cut off ears, taken off eye, partially beheaded body. Systematic #WarCrimes continue against #Armenian civilians & combatants"). See also Statement by Baroness Caroline Cox, Member of the U.K. House of Lords, 10 November 2020, retrieved from https://www.politicshome.com/thehouse/article/theuk-government-must-change-tack-and-urgently-bring-to-justice-those-responsible-for-warcrimes-against-the-armenian-people ("After 45 days of intense conflict, a ceasefire brokered by Russia has finally been agreed. Serious concerns nevertheless remain, with reports emerging of brutality inflicted on military and civilian prisoners, including torture and beheadings, with claims that equivalent brutalities have been perpetrated by jihadists who receive payment for every Armenian beheaded. There is an urgent need for the British Government and all relevant international authorities to bring to justice those responsible for such war crimes, and to take effective measures to prevent Azerbaijan from abusing and killing these prisoners, whom they have already captured or may capture during the

ceasefire evacuation."). In a televised interview on 13 November 2020, General Hüseynov Camal of the Azerbaijani forces menacingly declared (speaking Armenian) that, after Karabakh, they would be coming after every last Armenian (repeatedly calling them "dogs") in Armenia until Yerevan, referring to it as "West Azerbaijan". See Bilsəydilər erməni dilini bilirəm dərimi soyardılar - Hüseynov Camal, YouTube, 13 November 2020, retrieved from https://www.youtube.com/watch?v=YworvlLKGyQ.

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commit atrocity crimes against Armenians. It is submitted that, as an immediate remedial measure, Canada must recognize the independence of Artsakh and call on all other States to do the same. Failing to act means letting Azerbaijan and Turkey end the Armenian presence in Artsakh, sentencing the Armenians to ethnic cleansing, and, through them, condemning democracy.28

10. Although it is certainly not the only measure that could or should be implemented, for the reasons developed below, remedial recognition is imperative in light of the fundamental right of the people of Artsakh to selfdetermination and secession, particularly after having been subjected to systemic discrimination, repression and atrocity crimes. It is also an appropriate remedy to the harm caused by Canada permitting the sale of weapons technology to Turkey despite a ban in place since October 2019, as well as the most effective diplomatic measure to ensure a definitive and sustainable resolution to the conflict and prevention of further atrocities including ethnic cleansing and the risk of genocide.

II. Responsibility to Protect (R2P) and Obligation to Prevent

11. Informed by the foundational 2001 report of the Canadian-sponsored International Commission on Intervention and State Sovereignty,29 R2P is a global commitment to prevent and halt genocide, ethnic cleansing, other crimes against humanity and major war crimes. In the 15 years since its unanimous adoption by all UN member states at the 2005 World Summit,30

28 See Open letter from Belgian deputies, academics and civil society representatives, "La région du Caucase en proie à la violence: les Arméniens du Nagorno-Karabagh ont droit à la vie, leur autodétermination est légitime", Le Soir, 28 October 2020, retrieved from https://plus.lesoir.be/334453/article/2020-10-28/la-region-du-caucase-en-proie-la-violence-lesarmeniens-
du-nagorno-karabagh-ont.

29 Gareth J. Evans and Mohamed Sahnoun, The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, 2001).

30 See UN General Assembly Resolution 60/1, "2005 World Summit Outcome Document"

A/RES/60/1, 16 September 2005, paras. 138 ("Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability"), 139 ("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 to 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 are manifestly failing to

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near-universal agreement has been forged around the principle that all governments have a responsibility to protect populations from mass atrocity crimes, both within and beyond their borders.

12. R2P contains three pillars: (1) state responsibility to protect its own population; (2) the international community's duty to assist states in fulfilling their duty to prevent and protect; and (3) the international community's responsibility to take timely and decisive action through peaceful means, failing which it may use more forceful means, in a manner consistent with international law.31 As such, R2P stipulates that if a country is unable or unwilling to protect its civilians from mass atrocities, then the international community must act swiftly to fill the protection void.

13. As the UN Secretary-General underscored, R2P is "firmly anchored in well-established principles of international law. Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes, and crimes against humanity."32 By way of example, Articles 40 and 41(1) of the International Law Commission's Articles of State Responsibility provide that certain breaches of international law may be so grave as to trigger not only a right but also an obligation (i.e. a positive duty) of cooperation among states to foster compliance with the law.

14. UN member states also have obligations to take steps to ensure that they do not contribute to mass atrocities outside of their borders and, at minimum, refrain from exacerbating atrocity crimes of other states.33 Common Article 1 of the Geneva Conventions of 12 August 1949 stipulates that it is the duty of States to respect and ensure respect for the Convention

in all circumstances and, consequently, to prevent war crimes. The duty to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. 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.")
31 UN General Assembly, "Implementing the Responsibility to Protect – Report of the Secretary-General", A/63/677, 12 January 2009.
32 Ibid., para. 3. See also UN General Assembly, "Prevention of Genocide – Report of the Secretary-General", A/HRC/41/24, 8 October 2019, para. 4 ("The duty to prevent genocide, crimes against humanity and war crimes is well established both under several treaties and under rules of customary international law binding on all States"), fn. 2 ("Even though there is no international treaty specifically addressing State responsibility for crimes against humanity, the duty to prevent crimes against humanity derives from the obligation to prevent those human rights violations, such as torture, that, when committed as part of a widespread or systematic attack directed against any civilian population, would constitute crimes against humanity.")
33 See Sheri P. Rosenberg, "Responsibility to Protect: A Framework for Prevention", Global Responsibility to Protect 1 (2009), pp. 449-450.
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prevent genocide is also codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").34
15. As the International Court of Justice explained in the case of Bosnia v. Serbia,35 a State may be held responsible if it had the means and influence to actually prevent genocide in another State but manifestly refrained from using them.36 A State must employ all means reasonably available to it to prevent genocide so far as possible.37 The obligation to prevent and the corresponding duty to act arises "the instant that the State learns of, or should normally have learned of the existence of a serious risk that genocide will be committed."38 The obligation to prevent does not require the State to
34 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948. Article I of the Genocide Convention provides that genocide is a crime under international law that all contracting states undertake to prevent and punish, and Article IX provides the jurisdictional basis for bringing contracting states before the International Court of Justice.
35 International Court of Justice, Case Concerning the Application of the Convention on the

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 27 February 2007 ("Bosnia v. Serbia Judgment"). The Court begins by explicitly affirming that the obligation to prevent and the obligation to punish are related, yet, autonomous legal obligations. See Bosnia v. Serbia Judgment, para. 427.
36 Bosnia v. Serbia Judgment, paras. 430 ("Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. t is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce."), 438 ("As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.")
37 Bosnia v. Serbia Judgment, para. 430 ("t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.")
38 Bosnia v. Serbia Judgment, paras. 431 ("From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring special intent , it is under a duty to make such use of those means as the circumstances permit."), 432 (" State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed").
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know that genocide is occurring or is about to be perpetrated; it is sufficient for the relevant State to be aware at a "high level of certainty" of the grave risk of genocide.39
16. As the prevention of the crime of genocide is intrinsically connected to

the prevention of crimes against humanity and war crimes, the same legal standards directly bear on extraterritorial state responsibility with respect to other atrocity crimes.40 Irrespective of content-specific issues, it is clear that one thing is never sufficient to comply with the duty to prevent atrocity crimes whenever there exists a serious risk thereof: doing nothing. States must always overcome the threshold of passiveness, as inaction would contravene the object and purpose of the R2P doctrine and the general principles of international law on which it is based. This means that, as a minimum obligation, States must do at least something to prevent atrocity crimes.41

III. Canada's Implication and Duty to Act

17. Mere months before Turkey and Azerbaijan's military campaign against the Armenians of Artsakh, Canada allowed for exemptions to a ban which was in place since October 2019 (as part of an arms embargo alongside Germany, France, and the United Kingdom in response to Turkey's unilateral invasion of Syria) and, through a special exemption, issued permits in the spring of 2020 for the export of the Canadian-made WESCAM weapons technology to Turkey.42 These Canadian components would later be identified in Artsakh in October 2020, fully embedded in the Turkish-made Bayraktar drones.43 Canada is thus, however unwittingly, implicated in the present

39 Bosnia v. Serbia Judgment, para. 210.

40 See Sheri P. Rosenberg, "Responsibility to Protect: A Framework for Prevention", Global Responsibility to Protect 1 (2009), p. 461. See also UN General Assembly, "Prevention of Genocide – Report of the Secretary-General", A/HRC/41/24, 8 October 2019, para. 3 ("The prevention of the crime of genocide is intrinsically connected to the prevention of crimes against humanity and war crimes. I have been referring to these crimes as 'atrocity crimes' as they reveal extreme forms of human rights violations of a deeply violent and cruel nature that typically – but not always – occur on a massive scale. These crimes also tend to occur concurrently in the same situation rather than as isolated events, as has been demonstrated by their prosecution in both international and national jurisdictions.")

41 See Bjorn Schiffbauer, "The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention", Genocide Studies and Prevention: An International Journal, Vol. 12 Iss. 3 (2018), p. 86.

42 Kelsey Gallagher, "Killer Optics: Exports of WESCAM Sensors to Turkey – A Litmus Test of Canada's Compliance with the Arms Trade Treaty", Ploughshares Special Report, September 2020, p. 11, retrieved from https://ploughshares.ca/wpcontent/uploads/2020/09/TurkeyWESCAMReportSept.2020.pdf.

43 Steven Chase, "Canadian-made targeting gear used in air strikes against Armenians, evidence shows", The Globe and Mail, 30 October 2020, retrieved from

https://www.theglobeandmail.com/politics/article-canadian-made-targeting-gear-used-in-airstrikes-
against-armenians/.
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crisis in Armenia and Artsakh through its decision to allow the export of arms to Turkey.
18. The circumstances surrounding Canada's alarming issuance of these permits in the spring of 2020 remain unexplained. Such a decision by the Minister of Foreign Affairs is contrary to the Export and Import Permits Act ("EIPA"),44 as well as Canada's obligations under the Arms Trade Treaty,45 as the Minister could not issue a permit upon determining that there is a substantial risk that the export of the goods or technology could be used to commit or facilitate, inter alia, a serious violation of international humanitarian law or international human rights law, or an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party.
19. As Turkey's use of the WESCAM technology to foster instability and commit acts contrary to international humanitarian law in Syria and Libya were already well known and documented prior to the start of the Turkish-Azerbaijani offensive on 27 September 2020,46 it is unlikely that the Minister could not have determined that a "substantial risk" existed for Turkey to use, or facilitate the use of, the technology for illicit purposes. Considering the very nature of the technology in question and the use that was demonstrably made of it, it is also rather evident that the Minister could not – and did not – stipulate any effective mitigating measures to counter the risk. The Minister thus seems, prima facie, to have acted ultra vires, bypassing one of the rare provisions in the EIPA that limit his admittedly broad discretionary powers on substantive, rather than procedural, grounds.47
20. From 27 September 2020 until at least 10 November 2020, Azerbaijan used WESCAM technology in its offensive, which included carrying out planned, targeted and deliberate attacks on civilians in densely populated residential areas, resulting in over 2,500 casualties including the killing of at least one Canadian citizen,48 hundreds of civilian deaths and injuries
44 See Subsections 7.3 and 7.4 of the Export and Import Permits Act (R.S.C., 1985, c. E-19).
45 See Article 7 of the United Nations Arms Trade Treaty, which entered into force on 24 December 2014, and to which Canada became a State Party on 17 September 2019.
46 See, generally, Kelsey Gallagher, "Killer Optics: Exports of WESCAM Sensors to Turkey – A Litmus Test of Canada's Compliance with the Arms Trade Treaty", Ploughshares Special Report, September 2020, retrieved from https://ploughshares.ca/wpcontent/

uploads/2020/09/TurkeyWESCAMReportSept.2020.pdf.
47 In Turp v. Minister of Foreign Affairs, 2018 FCA 133, the Federal Court of Appeal explained the breadth of these discretionary powers. This decision, however, predates the adoption of s. 7.4 of the EIPA, and the Court confirmed its authority to review a decision by the Minister that "was made arbitrarily or in bad faith, cannot be supported on the evidence, or the Minister failed to consider the appropriate factors" (see para. 61). In amending the EIPA following its adherence to the Arms Trade Treaty, Canada incorporated an obligation to refuse the issuance of a permit when there is a substantial risk of grave violations.
48 See Associated Press, "Armenia raises Nagorno-Karabakh conflict troop toll to 2,425", 18 November 2020, retrieved from https://apnews.com/article/nikol-pashinian-azerbaijan14 including to children, as well as the destruction of thousands of civilian objects and infrastructure with no military objectives whatsoever and located nowhere near any military targets in Artsakh and Armenia.49 On 5 October 2020, the Minister announced that he had become aware of "Canadian technology being used in the military conflict in Nagorno-Karabakh resulting in shelling of communities and civilian casualties", and accordingly "suspended the relevant export permits to Turkey".50 However, by then the measure had obviously come too little, too late.
21. Since then, Canada has done little more than issue statements calling on both sides to negotiate peacefully and for Turkey to stay out of the conflict, all of which have obviously fallen on deaf ears with three consecutive ceasefire violations by Azerbaijan during active hostilities and Turkey's nowapparent participation in the implementation of the Ceasefire Statement, which will involve the continued use of drones in Artsakh.51 It is inappropriate for Canada to limit itself to issuing more such evidently futile statements, which effectively amounts to doing nothing, particularly in the context of a crisis to which Canada has contributed, and in which its duty to protect the population of Artsakh from further atrocities under the third pillar of R2P is unquestionably triggered. It is therefore imperative that Canada take more robust action and implement meaningful remedial measures to ensure accountability for Turkey and Azerbaijan's gross transgressions, and a fair, balanced and definitive resolution to the conflict that preserves Artsakh's right to self-determination, which can only be achieved through remedial recognition of its independence.
armenia-yerevan-e05ea4d7d43e0111cd142861dec105ec; CBC Radio-Canada, "Armenian community mourns Canadian killed in fighting in Nagorno-Karabakh", 8 October 2020, retrieved from https://www.cbc.ca/news/politics/nagorno-karabakh-armenia-azerbaijan-1.5755538.
49 See supra, fn. 4, for references to all ad hoc and interim reports issued by the Human

Rights Defenders of Artsakh and Armenia, especially HRDRA, "Ad Hoc Public Report on Azerbaijani Drones' Targeted Attacks against Peaceful Population of Armenia and Artsakh in Grave Breach of International Law", October 2020, retrieved from https://www.ombuds.am/images/files/de3634c257bb698735db318a33f280bf.pdf. See also infra, Section IV(B)(ii): Azerbaijan commits atrocious crimes against Armenians, for more details on the extent of the war crimes and other atrocities committed against the population of Artsakh.
50 Global Affairs Canada, "Statement from Minister Champagne on suspension of export permits to Turkey", 5 October 2020, retrieved from https://www.canada.ca/en/globalaffairs/news/2020/10/statement-from-minister-champagne-on-suspension-of-export-permitsto-turkey.html.
51 President of Russia, "Replies to media questions on developments in Nagorno-Karabakh", 17 November 2020, retrieved from http://en.kremlin.ru/events/president/news/64431 ("we have agreed to set up a joint centre, which will make use of unmanned aerial vehicles, drones, to jointly monitor the situation along the contact line").
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IV. Remedial Secession/Recognition of Artsakh
22. Although Canada has openly condemned the violence in Artsakh and temporarily suspended the sale of weapons technology to Turkey, these actions were entirely insufficient to prevent the beheadings, use of mercenaries, executions, mutilations, destruction of cultural and religious property, and attacks against civilians in Artsakh, as well as the risks of ethnic cleansing and continued atrocities against the Armenians of Artsakh.
23. The third pillar of R2P elaborates the full range of options for timely and decisive response. Non-military tools designed to prevent the escalation of atrocity crimes include mediation, monitoring and observer missions, factfinding missions and commissions of inquiry and public advocacy by international officials. Acting under Chapter VII of the UN Charter, the international community has also employed more robust tools, including sanctions designed to discourage the targeting of civilians, the establishment of peacekeeping missions and the authorization of military action with the express purpose of protecting civilians.52
24. However, every situation is different and calls for case-specific action. In the case of Artsakh, the tool of remedial secession/recognition is imperative in light of the fundamental right of the people of Artsakh to selfdetermination after a long history of being subjected to systemic discrimination and oppression, and in light of the current significant risk of ethnic cleansing.
25. In this respect, the above-mentioned group of 80 eminent genocide

scholars have declared that "history, from the Armenian genocide to the last three decades of conflict, as well as current political statements, economic policies, sentiments of the societies and military actions by the Azerbaijani and Turkish leadership should warn us that genocide of the Armenians in Nagorno-Karabakh, and perhaps even Armenia, is a very real possibility. All of this proves that Armenians can face slaughter if any Armenian territory is occupied, consequently recognizing the independence of the Republic of Artsakh is the way to save Armenians of Artsakh from extermination now or in the near future."53 Russian President Vladimir Putin also recently stated

52 See especially UN General Assembly, "Responsibility to protect: timely and decisive response – Report of the Secretary-General", A/66/874, 25 July 2012. See also United Nations Office on Genocide Prevention and the Responsibility to Protect, "Compendium of Practice: Implementation of the Responsibility to Protect, 2005-2016", retrieved from www.un.org/en/genocideprevention/documents/RtoP%20Compendium%20of%20Practice%20(Provisional%20Pre-Publication%20Version)%20FINAL%2020%20March%202017.pdf.

53 See Open letter by members of the International Association of Genocide Scholars (IAGS), 22 October 2020, retrieved from https://www.voltairenet.org/article211404.html

that the failure to recognize Artsakh has been a significant factor in the current crisis.54

26. The term "remedial recognition" is used throughout this Paper as it is the position herein, for reasons that are demonstrated below, that Artsakh has always been independent of Azerbaijan (Section A), and that, in any event, Artsakh's remedial secession/recognition of independence from Azerbaijan is fully warranted (Section B). Delegations from France, Belgium and Germany55 have already visited Artsakh to investigate and report back on the situation and are calling for their countries to recognize Artsakh's statehood.56 In fact, a number of cities57 and provinces58 have already recognized the independence of Artsakh. It is only a matter of time before UN member states begin to follow suit. Canada, as a pioneer in the development

54 President of Russia, "Replies to media questions on developments in Nagorno-Karabakh", 17 November 2020, retrieved from http://en.kremlin.ru/events/president/news/64431.

55 The Belgian Parliamentary delegation included Els Van Hoof, Georges Dallemagne, David Clarinval, Paul Delva, Zoé Genot and Serge de Patoul. Fifteen Members of Parliament from France visited Artsakh to gain knowledge of Azerbaijan's aggression. See Asbarez, "Artsakh's Foreign Minister Meets with French Lawmakers", 26 October 2020, retrieved from https://asbarez.com/197985/artsakhs-foreign-minister-meets-with-french-lawmakers/. Germany's Bundestag members from the "Alternative Germany Party" held a press conference in Stepanakert on 18 October 2020. See Asbarez, "In Artsakh, German

Lawmakers Call for Sanctions Against Ankara and Baku", 19 October 2020, retrieved from https://asbarez.com/197729/in-artsakh-german-lawmakers-call-for-sanctions-against-ankaraand-baku/.
56 See, e.g., Resolution No. 3436 "on the recognition of the Republic of Artsakh" submitted to the French National Assembly, 16 October 2020, retrieved from http://www.assembleenationale.fr/dyn/15/textes/l15b3436_proposition-resolution#tocUniqueId0; Resolution No. 145 "on the necessity of recognizing the Republic of Nagorno-Karabakh" submitted to the French Senate on 18 November 2020, retrieved from https://www.senat.fr/leg/ppr20-145.html, and adopted by the French Senate on 25 November 2020, retrieved from https://www.senat.fr/espace_presse/actualites/201011/necessite_de_reconnaitre_la_republique_du_haut_karabagh.html. See also Resolution adopted by Dutch Parliament calling on the European Union to impose sanctions on President Aliyev for war crimes committed in Artsakh, 17 November 2020, retrieved from https://www.europanu.nl/id/vlduoz1zjrzu/nieuws/kamer_wil_sancties_tegen_president.
57 Laval (Canada); Fowler, Fort Lee, Fresno, Glendale, Highland, Los Angeles, Clark County, Englewood Cliffs, Denver (United States); Geneva (Switzerland); Alfortville, Vienne (calling on French government to recognize Artsakh), Limonest (France); Milan, Palermo, Asolo, Cerchiara di Calabria, Aprilia (Italy); Amposta, Berga (Spain); Montevideo (Uruguay); Willoughby (Australia); Derby (United Kingdom); Sayaxché (Guatemala). On 17 November 2020, the mayors of 15 French municipalities issued a declaration recognizing the independence of Artsakh and urging France and the international community to follow suit. See France Bleu, "Valence : le maire lance un appel pour la reconnaissance internationale de la République du Haut-Karabagh", 14 November 2020, retrieved from https://www.francebleu.fr/infos/politique/valence-le-maire-lance-un-appel-pour-lareconnaissance-internationale-de-la-republique-du-haut-1605374366.
58 New South Wales (Australia); Massachusetts, Rhode Island, Maine, Louisiana, California, Georgia, Minnesota, Colorado, Hawaii, Michigan (United States); Catalonia (Spain); Lombardy (Italy).
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of the law on unilateral secession and right to self-determination, and as an instrumental actor in the championing of R2P, has the opportunity to take a leadership role in this respect by officially recognizing Artsakh, and thereby upholding fundamental principles of international law.
A. Artsakh has always been independent of Azerbaijan
i. The League of Nations never recognized Azerbaijan
27. The international borders between Armenia, Artsakh and Azerbaijan were not established under international law at the beginning of the 20th Century.59 On 22 August 1919, Artsakh and Azerbaijan signed an agreement

stipulating that their boundaries would be settled at the 1919 Paris Peace Conference.60 At the Paris Peace Conference, the Commission "on the boundaries of a new independent State of Armenia" considered it advisable to await the results of an agreement between Armenia, Georgia and Azerbaijan, failing which the League of Nations would appoint an inter-allied Commission to arbitrate the dispute and determine borders based on "the principle of ethnographic data".61

28. At the time, Artsakh's population comprised over 90% Armenians and was self-governed.62 The Congress of Artsakh Armenians had elected their own government (the National Council and Peoples government) and

59 In February 1918, the Georgian, Armenian, and Azerbaijani authorities founded the "Transcaucasian Democratic Federative Republic", which was quickly dissolved in May 1918 when Georgia, Azerbaijan and Armenia each declared their respective independences. See Arman Sarvarian, "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" (2008) Melb J Int Law 9(1) ("Savarian"), p. 193; Armen Tamzarian, "Nagorno-Karabakh's Right to Political Independence under International Law: An Application of the Principle of Self-Determination" (1994) 50 SUL Rev 183 ("Tamzarian"), p. 187; Arsène Saparov, "Why Autonomy? The Making of Nagorno-Karabakh Autonomous Region 1918-1925" (2012) 64:2 Eur Asia Studies 281 ("Saparov"), p. 286-287.

60 Richard G. Hovanissian, Provisional Accord between the VII Armenian Council of Karabakh with the Government of Azerbaijan, Vol. 1., 1918-1919, (Berkeley, University of California Press, The Republic of Armenia, 1971), p. 186.

61 Ara Papian, Hayrenatirutyun. Reclaiming the Homeland, Legal Bases for the Armenian Claims and Related Issues, (Yerevan, 2014) pp. 260-261 quoting Documents on British Foreign Policy, Document #34, expressing the joint view of Britain, France, Italy and Japan: "As regards the boundary between the State of Armenia and Georgia and Azerbaijan, the Commission considers that, it is advisable for the present to await the results of the agreement, provided for in the treaties existing between the three Republics, in regard to the delimitation of their respective frontiers by the States themselves. In the event of these Republics not arriving at an agreement respecting their frontiers, resort must be had to arbitration by the League of Nations, which would appoint an interallied Commission to settle on the spot the frontiers referred to above, taking into account, in principle, ethnographical data." See also Article 92 of the 1920 Treaty of Sèvres.

62 Thomas De Waal, Black Garden: Armenia and Azerbaijan Through Peace and War, (New York, New York University Press, 2013) ("De Waal"), p. 140.

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proclaimed their independence in a series of Congress meetings between July 1918 and April 1920.63

29. On 1 December 1920, the League of Nations rejected Azerbaijan's

request for statehood, finding that, given the border disputes, it was impossible to determine the exact limits of the territory in which Azerbaijan exercised authority.64 The border issue was still unresolved when the Soviet Union established its reign over the region.

ii. The USSR illegally annexed Artsakh to the Azerbaijan SSR

30. On 30 November 1920, the Azerbaijan Soviet Socialist Republic ("SSR") recognized Nagorno-Karabakh, Zanghezour and Nakhichevan as integral parts of the Armenian SSR.65 Artsakh was nevertheless forcibly annexed to the Azerbaijan SSR in July 1921 under Stalin's direct pressure.66 Such annexation was illegal even under Soviet law.67 Two years later, the Union of Soviet Socialist Republics ("USSR") re-administered Artsakh as the Nagorno-Karabakh Autonomous Oblast ("NKAO"), giving it wide autonomy.68 The population of Nagorno-Karabakh (94% Armenian) was denied "even the most minimal possibility of participation" in this decision-making process.69 Artsakh's repeated requests for the USSR to reconsider its internal

63 See Saparov, p. 293 and G. A. Hovhannisian, Sovetakan ishkhanutian hastatume Lernayin Gharabaghum (Erevan, Izdatel'stvo Erevansgogo Universiteta, 1971), p. 167.

64 League of Nations: Journal N17 of the First Assembly, Geneva 1920, p. 139.

65See, e.g., Shahen Avakian, Nagorno Karabakh: Legal Aspects, 5th ed. (Moscow: MIA Publishers, 2015), p. 13, referring to The Declaration of the Revolutionary Committee of the Azerbaijan SSR on Recognition of Nagorno Karabagh, Zanghezour and Nakhichevan as an Integral Part of the Armenian SSR, 30 November 1920, published in Newspaper "Communist", 7 December 1920, Yerevan.

66 Otto Luchterhandt, Nagorny Karabakh's Right to State Independence According to International Law, (Boston, Baikar Association Inc., 1993) ("Luchterhandt"), p. 32.

67 See Haig E. Asenbauer, On the Right of Self-Determination of the Armenian People of Nagorno-Karabakh, (Wilhelm Braumuller, Unversitats-Verlagsbuchhandlung, 1993, English translation: New York. Armenian Prelacy, 1996) ("Asenbauer"), pp. 120 and 123 ("the USSR was a member of the United Nations and had ratified the two U.N. Human Rights Conventions (ratifications which applied to all Union republics- article 14 (a) of the 1936 Constitution). This forced annexation also went against the USSR's own norms "Decree on Peace" from October 26, 1917 in which it had declared: "If any nation whatsoever is forcibly retained within the borders of a given state, if, in spite of its expressed desire — no matter whether expressed in the press, at public meetings, in the decisions of parties, or in protests and uprisings against national oppression — is not accorded the right to decide the forms of its state existence by a free vote, taken after the complete evacuation of the troops of the incorporating or, generally, of the stronger nation and without the least pressure being brought to bear, such incorporation is annexation, i.e., seizure and violence.")

68 Saparov, p. 321; Tamzarian, p. 188-189. The NKAO was divided into five administrative

divisions – Mardakert District, Martuni District, Shusha District, Askeran District and Hadrut District – and shared no borders with the Armenian SSR.
69 Luchterhandt, p. 35.
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jurisdictional divisions for unification with the Armenian SSR fell on deaf ears.70
31. USSR authorities would eventually admit, in 1977, that Artsakh had been artificially annexed to the Azerbaijan SSR, without taking into consideration, notably, the "will of its people".71 On 20 February 1988, the NKAO once again passed a resolution requesting a transfer to the Armenian SSR's jurisdiction.72 One week later, mobs of ethnic Azerbaijanis formed into groups and attacked and killed Armenians for three days in the Azerbaijan SSR town of Sumgait, in the streets and in their apartments ("Sumgait Pogrom").73 Intellectuals and political leaders who called for the unification of Artsakh to the Armenian SSR were imprisoned or assassinated.74 On 15 June 1988, the Supreme Soviet of the Armenian SSR voted unanimously for unification with the NKAO; two days later the Supreme Soviet of the Azerbaijan SSR, equally unanimously, rejected the decision.75
32. On 7 July 1988, the European Parliament condemned the Sumgait Pogrom as well as anti-Armenian violence in Baku, recognized the arbitrary inclusion of the NKAO within the Azerbaijan SSR, and supported the demand of the Armenians of Nagorno-Karabakh for reunification with the Armenian SSR.76 On 12 July 1988, the NKAO passed a resolution to
70 V.A. Ponomarev "On the genocide of the Armenian people in Turkey and Transcaucasia in XIX-XX centuries", General scientific periodical "Tomsk State University Reporter" No 320 March 2009, p. 120.
71 See Avakian, p. 67, referring to Session of the Presidium of the USSR Council of Ministers ("As a result of a number of historic circumstances, Nagorno Karabakh was artificially annexed to Azerbaijan several decades ago. In this process, the historic past of the oblast , its ethnic composition, the will of its people and economic interests were not taken into consideration Nagorno Karabakh (Armenian name Artsakh) should be made part of the Armenian Soviet Socialist Republic. In this case everything will take its legal place.")
72 On 20 February 1988, the extraordinary session of the Council of People's Deputies 20th convocation of NKAO passed a decision to appeal to the Supreme Councils of the Azerbaijan SSR and the Armenian SSR to "demonstrate a sense of deep understanding of the aspirations of the Armenian population of Nagorno Karabakh and resolve the question of transferring NKAO from the Azerbaijan SSR to the Armenian SSR, at the same time to intercede with the Supreme Council of the USSR to reach a positive resolution on the issue of transferring the region from the Azerbaijan SSR to the Armenian SSR." See

http://www.nkr.am/en/karabakh-national-liberation-movement.
73 See infra Section IV(B)(ii)(a): History of persecution and pogroms.
74 “Eyewitness account of events in Mountainous Karabagh 1924-1936” in Gerard J. Libaridian (ed.), The Karabagh File: Documents and Facts on the Region of Mountainous Karabagh, 1918-1988, (Cambridge, MA: The Zoryan Institute, 1988) (“The Karabagh File”), p. 41.
75 Cornell, Svante E. “Turkey and the Conflict in Nagorno Karabakh: A Delicate Balance.” Middle Eastern Studies, vol. 34, no. 1, 1998, pp. 51–72.
76 See Resolution 4(d) of 7 July 1988 on the situation in Soviet Armenia, European Parliament, published in the Official Journal of the European Communities, C234, Volume 31, 12 September 1988, p. 106 (“The European Parliament, having regard to the historic status of the autonomous region of Nagorno-Karabakh (80% of whose present population is 20
withdraw from the Azerbaijan SSR and to become an independent republic named “the Artsakh Armenian Autonomous Region”.77
33. In an attempt to right a historic wrong, in January 1989 the USSR placed the NKAO under a special administration committee directly accountable to the supreme state organs of the USSR; this committee however, was dissolved later that year, leaving Artsakh with no political representation.78 On 11 August 1989, Artsakh formed the “Congress of the Authorized Representatives of the Population of the Autonomous Territory of Nagorno-Karabakh” and elected a national council with authority over Nagorno-Karabakh.79
iii. Artsakh legally seceded from the USSR
34. At the collapse of the Soviet Union, Artsakh legally seceded from the USSR in conformity with the USSR’s law and procedure promulgated in 1990 governing the secession of one of its constituent parts (“USSR Law on Secession”), according to which an autonomous region, such as the NKAO, could secede from the USSR or from a Union Republic by referendum.80 Although the USSR Constitution already provided a right of secession to Union Republics,81 the USSR Law on Secession extended the right to autonomous republics and autonomous regions. The USSR constitution also enshrined the right of a nation to self-determination.82
35. However, considering that the USSR Law on Secession was only promulgated in 1990, it was virtually impossible to apply the mechanisms provided for into strict practice given the USSR’s rapid dissolution as a whole. Union Republics accordingly proclaimed their unilateral independence one after another in the days and weeks following the failed August 1991 coup d’état in Moscow.83 Artsakh followed the same approach used by other

Armenian) as part of Armenia, to the arbitrary inclusion of this area within Azerbaijan in 1923 and to the massacre of Armenians in the Azerbaijani town of Sumgait in February 1988, upports the demand of the Armenian minority for reunification with the Socialist Republic of Armenia."), retrieved from https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:JOC_1988_235_R_0080_01&from=EN.
77 De Waal, p. 61.
78 Luchterhandt, p. 26.
79 Luchterhandt, p. 27.
80 See Articles 3 and 6-9 of the Law on Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR. 3 April 1990, retrieved from http://soviethistory.msu.edu/1991-2/shevarnadze-resigns/shevarnadze-resigns-texts/law-onsecession-from-the-ussr/.
81 See Articles 72 and 78 of the Constitution of the USSR of 1977 ("USSR Constitution"), retrieved from http://www.departments.bucknell.edu/russian/const/77cons03.html. ,
82 See Articles 29 and 70 of the USSR Constitution. See also Asenbauer, p. 125, according to whom the right to self-determination even had "priority over the claim of a state to territorial integrity".
83 The USSR officially dissolved on 26 December 1991.
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seceding Union Republics: declaring independence and then conducting a referendum to determine the population's will to secede.84
36. On 2 September 1991, the NKAO proclaimed its independence from the USSR and on 10 December 1991, 82.2% of the total number of the registered voters took part in a referendum, 99.89% of whom voted "yes" to the question: "Do you agree that the proclaimed Nagorno Karabakh republic be an independent state acting on its own authority to decide forms of cooperation with other states and communities?"85 The referendum was monitored by over 20 external observers including deputies from the USSR, the Russian Soviet Federative Socialist Republic, the city council of Moscow as well as human rights advocates, all of whom reported that the vote was conducted without any procedural violations and represented the free will of the voters.86
37. Azerbaijan similarly declared its independence on 30 August 1991, and then held its referendum on 29 December 1991, nineteen days after Artsakh.87 The European Parliament has since recognized that Artsakh "declared its independence following similar declarations by former Soviet Socialist Republics after the collapse of the USSR in September 1991".88 Accordingly, the secession of Artsakh from the USSR and the Azerbaijan SSR

was implemented before Azerbaijan obtained its own independence. As such, when the independent Republic of Azerbaijan was pronounced, Artsakh was no longer a part of it.
84 All Soviet republics seceded without following the specific procedure set out in the USSR Law on Secession. See Alexander Salenko, "Legal Aspects of the Dissolution of the Soviet Union in 1991 and Its Implications for the Reunification of Crimea with Russia in 2014", ZaöRV 75 (2015), p. 156.
85 See Act on Referendum Conducted in the Nagorno-Karabakh Republic on December 10, 1991, retrieved from http://www.nkrusa.org/nk_conflict/declaration_independence.shtml; Ministry of Foreign Affairs, Republic of Artsakh, "The Referendum on Independence of the Nagorno Karabakh Republic", retrieved from http://www.nkr.am/en/independencereferendum-in-karabakh. The referendum question was consistent with a question that would be considered "clear" under section 1 of An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000 c.26. See also Luchterhandt, p. 28 ("in this manner the Armenians of Nagorno-Karabakh have expressed their will for self-determination in a form and a procedure, namely that of a referendum, which international law usually requires today for the effective exercise of the right of self-determination").
86 See Yuri Barsegov (ed.), Nagornyi Karabakh in International Law and World Politics, Documents and Commentary, Vol. 1, (Moscow, Krug Publishers, 2008, Doc. no 749, p. 713.
87 Savarian, p. 197; Tamzarian, p. 5; RadioFreeEurope/RadioLiberty, "Azerbaijan Marks 20th Anniversary Of Independence", 18 October 2011, retrieved from https://www.rferl.org/a/azerbaijan_marks_20th_anniversary_of_independence/24363665.html
88 European Parliament "Resolution on support for the peace process in the Caucasus", Official Journal, C.175, 21 June 1999, p. 0251, retrieved from https://op.europa.eu/en/publication-detail/-/publication/1c8edb49-c670-426d-bc4f-267f0d5509a4.
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38. Azerbaijan's own declaration of independence and constitution, as well as its application for membership to the United Nations,89 stated that it had been illegally annexed into the USSR, and that it revoked the existence of the Azerbaijan SSR, viewing itself as a continuation of the pre-Soviet Azerbaijan state.90 Yet, as noted above, during the pre-Soviet period, Artsakh never formed part of Azerbaijan, and the latter's application for membership to the League of Nations was rejected primarily on the ground that the borders of Azerbaijan were not precisely determinable.91 Therefore, by declaring the newly-established Azerbaijan Republic as the successor of the 1918-1920 Azerbaijan Republic, any claim toward Nagorno-Karabakh was consequently relinquished.

iv. Artsakh is an independent State under international law

39. The objective criteria that must be fulfilled in order for an entity to be recognized as a State are formulated in the 1933 Montevideo Convention on the Rights and Duties of States ("Montevideo Convention"), Article 1 of which sets out that the State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. These four criteria are the ones most commonly referred to when addressing the question of what constitutes a State. The Montevideo Convention is today considered part of customary international law, and is the major foundation for the declaratory theory concerning the effect of State recognition.

40. Artsakh fulfills all four criteria as follows:

(a) First, Artsakh has a permanent population of 150,000 people, 95% of whom are Armenian.92 The indigenous Armenian group's presence in Nagorno-Karabakh dates back over two millennia.93 The population shares a common language (Armenian), religion (Orthodox Christian) and culture. The region is host to ancient Armenian ruins, and hundreds of Armenian

89 Application of the Republic of Azerbaijan for admission to membership in the United Nations (February 7, 1992), Annex II: "Proclaiming in accordance with the will of the Azerbaijan people the restoration of the independence, which had been liquidated in April 1920".

90 On 18 October 1991, Azerbaijan adopted the Constitutional Act "On recovery of the state independence of the Azerbaijan Republic." This Constitutional Act, which today forms a part of the constitutional framework of Azerbaijan, considered the establishment of Soviet power in Azerbaijan as "annexation by Soviet Russia", which "overthrew Azerbaijan's legal government." In so doing, the Republic of Azerbaijan declared the establishment of Soviet power in Baku illegal, and rejected the whole Soviet political and legal heritage. As a result, the Azerbaijan effectively nullified the above-mentioned July 1921 decision to forcibly and illegally annex Artsakh to the Azerbaijan SSR, thus revoking its sole claim, however thin, to Nagorno Karabakh. This Constitutional Act also provided that Azerbaijan is the successor of the Azerbaijan Republic which existed from 28 May 1918 until 28 April 1920.

91 See supra Section IV(A)(i): The League of Nations never recognized Azerbaijan.

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churches and cemeteries, carrying countless famous Armenian cross-stones ("Khachkars" in Armenian), classified by UNESCO as a part of the Intangible Cultural Heritage of Humanity.94

(b) Second, the territory of Artsakh is defined in its proclamation of independence on 2 September 1991, namely that the Republic of Nagorno-Karabakh is within the boundaries of the NKAO region and the adjacent

Shahumian district.95
(c) Third, Artsakh has its own government, which holds elections under a democratic constitutional framework. The government is composed of a National Assembly made up of 33 members,96 and a judiciary (its Supreme Court is composed of a chairperson and six female judges).97 The government is currently led by the head of state, President Arayik Harutyunyan.98
(d) Fourth, Artsakh has full capacity to enter into relations with other States, through its Council of Ministers, particularly the Minister of Foreign Affairs, whose responsibilities include diplomatic relations.99 However, until other States recognize the independence of Artsakh, it is prevented from entering into formal diplomatic relations with them, despite being otherwise willing and capable of doing so. Artsakh has nevertheless established representative offices in Armenia, France, Germany, Russia, Australia, Lebanon (accredited to all Middle Eastern countries) and the United States
92 De Waal, p. 140.
93 Tamzarian, p. 185.
94 See United Nations Educational, Scientific and Cultural Organization, "Armenian crossstones art – Symbolism and craftsmanship of Khachkars, Inscribed in 2010 (5.COM) on the Representative List of the Intangible Cultural Heritage of Humanity", retrieved from https://ich.unesco.org/en/RL/armenian-cross-stones-art-symbolism-and-craftsmanship-ofkhachkars-
00434.
95 See the Proclamation of the Nagorno Karabakh Republic at http://www.nkrusa.org/nk_conflict/declaration_independence.shtml. See also map in Annex.
96 See National Assembly of the Republic of Artsakh (Nagorno-Karabakh) at http://www.nankr.am/en.
97 See Government of the Republic of Artsakh Republic at http://gov.nkr.am/en/.
98 Artsakh previously operated under a semi-presidential system, with the establishment in 1992 of the position of Prime Minister, appointed by the head of state—the President. In a constitutional referendum held in 2017, citizens voted in favour of transforming Artsakh into a presidential system and the office of Prime Minister was abolished. The President accordingly became both the head of state and the head of government.
99 See Ministry of Foreign Affairs of the Republic of Artsakh at http://www.nkr.am/.
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(also accredited to Canada),100 as well as a number of friendship groups and circles around the world, including with Canada.101
41. It is important to note that the Montevideo Convention does not list recognition by other States as one of the criteria for statehood. In fact, Article 3 of the Montevideo Convention confirms that "he political existence of the

state is independent of recognition by the other states. 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. Thus, the Montevideo Convention rests on the supposition that statehood is an objective concept and above all a question of fact, independent of the consent by other States.102

42. As such, the fact that other States have not yet officially recognized the independence of Artsakh does not in any way detract from the legality and objectivity of its existence and independent status. Nevertheless, the recognition of Artsakh by other States would allow it to consolidate its

100 See Ministry of Foreign Affairs of the Republic of Artsakh, "Permanent Representations", at http://www.nkr.am/karabakh-permanent-representations and Office of the Nagorno Karabakh Republic, "Representations of the Nagorno Karabakh Republic", at http://www.nkrusa.org/foreign_policy/representations.shtml.

101 The following friendship groups and circles have been formed: "Artsakh Republic - European Parliament" friendship group; "Artsakh Republic - Flemish Parliament of the Kingdom of Belgium" friendship group; "Artsakh - Canada" friendship group; "Artsakh Republic - Lithuania Republic" friendship group; "Artsakh - France" friendship circle; "Artsakh Republic - French-speaking legislators, representatives of scientific and public spheres of Belgium" friendship circle; "Artsakh - Australia" friendship circle; "Artsakh - Cyprus" friendship circle; Interparliamentary Commission on Cooperation between the Republic of Artsakh National Assembly and the National Assembly of the Republic of Armenia. See National Assembly of the Republic of Artsakh (Nagorno-Karabakh), "About Parliament", at http://www.nankr.am/en/32. See also National Assembly of the Republic of Artsakh (Nagorno-Karabakh), "Statement On the Creation of the Friendship Group 'Artsakh-Canada'", 27 March 2019, at http://www.nankr.am/en/3198.

102 "The emergence of a new State is fundamentally a question of fact because it is above all a matter of establishing the existence of a human community grouped on a specific territory, endowed with a stable political organization, capable of ensuring order within its borders and preserving its political independence vis-à-vis other foreign governments. This is therefore an objective and observable fact that no legal principle can deny and that no discourse can prevent: the State first arises in fact before offering that others recognize its existence and, as such, its birth relates to history and political sociology. In this area, facts take precedence over law since the phenomenon of the accession of peoples to independence and state sovereignty sometimes finds its basis and legitimacy even outside established law". J.-Maurice Arbour and Geneviève Parent, Droit international public, 7th ed.,

Cowansville, Yvon Blais, 2017 ("Arbour and Parent"), pp. 307-308.
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political existence.103 For instance, Canada's recognition of the Republic of Artsakh would give the Republic of Armenia, and other states, the backing they need to be able to follow suit.104 Such recognition has also now become necessary as a result of, and only viable remedial solution to, renewed and persistent Azerbaijani and Turkish atrocities, including the imminent threat of genocide, against Artsakh's indigenous Armenian population.

B. Artsakh's remedial secession/recognition is warranted

i. Azerbaijan's claims to Artsakh are not valid

a. Azerbaijan can no longer invoke territorial integrity

43. Azerbaijan regularly invokes the principle of uti possidetis juris and, by extension, territorial integrity, as grounds for claiming the illegality of the independence of Artsakh. However, the principle of territorial integrity of States does not contain an implicit prohibition on secession, and there is no prohibition on secession in international law.105 The territorial integrity of a State is not absolute, and is limited by self-determination of its peoples if the State does not conduct itself in compliance with the latter.

44. A people's right to self-determination is a general principle of international law enshrined in a number of fundamental international instruments, including, inter alia, the UN Charter, the International

103 Arbour and Parent, pp. 296-304. For example, the legitimacy of Palestine is recognized by most states but it does not have de facto control over all its territory. We also note that, according to the Constitutive theorists, recognition is an additional criterion to the formation of the state which allows it to have an international legal personality. According to the declarative theory, recognition is not necessary for a state to have legal existence. According to Arbour and Parent the latter theory better accounts for the phenomenon of the appearance of new states and previously unrecognized states, such as East Germany for example. See Arbour and Parent, p. 313.

104 The Republic of Armenia has not yet recognized the independence of Artsakh in hopes of resolving this problem through negotiations and peace talks, which have unfortunately not led to any sustainable solutions. The recognition of an independent Artsakh from the Republic of Armenia would have meant a refusal to negotiate around the issue, which was not in line with the government's policy. See Tass Russian News Agency, "Armenia will recognize Karabakh if it is clear that Azerbaijan dodges dialogue – president", 18 October 2020, retrieved from https://tass.com/world/1213533.

105 The International Court of Justice has confirmed that State practice during the eighteenth, nineteenth and early twentieth centuries "points clearly to the conclusion that international law contained no prohibition of declarations of independence". In particular,

the Court concluded that "the scope of the principle of territorial integrity is confined to the sphere of relations between States". It also determined that no general prohibition of declarations of independence could be deduced from Security Council resolutions condemning other declarations of independence, because those declarations of independence had been made in the context of an unlawful use of force or a violation of a jus cogens norm. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010 ("Kosovo Advisory Opinion"), paras. 79-81.
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Covenant on Civil and Political Rights, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.106 The International Court of Justice has recognized the erga omnes character of the right to self-determination, which it qualified as "one of the essential principles of contemporary international law".107 The Supreme Court of Canada has also recognized that "the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law".108
45. The possession of a State, or sovereignty, is not a human right, but rather – as articulated by the R2P doctrine – is dependent on respect for human rights. As the UN Human Rights Committee has indicated, selfgovernment of a people is an "essential condition" for the exercise and observance of other rights.109 The breakdown of State legitimacy occurs at the point where it fails to protect and promote the rights of its inhabitants. As such, territorial integrity is not assured where States do not comply with the principles of equal rights and self-determination. When a country violates a peoples' right to self-determination or freedom from systemic abuses and discrimination, the latter may have recourse to secession from that State.
46. The jurisprudence of the International Court of Justice indicates that the international community has taken the steps to endorse secession when a State commits atrocity crimes against a territorially concentrated minority.110 In particular, Judges in the Kosovo case affirmed the principal
106 Charter of the United Nations (Can T.S. 1945 No 7), Article 1, par. 2 and article 55; International Covenant on Civil and Political Rights (999 U.N.T.S., 171), article 1; International Covenant on Economic, Social and Cultural Rights, article 1 (993 U.N.T.S., 3); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV), 24 October 1970, ("Declaration on Friendly Relations"); Vienna Declaration and Program of Action, A/CONF.157/24, 25 June 1993 ("Vienna Declaration"); Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, A/RES/50/6, 9

November 1995, ("Declaration on the Fiftieth"); Final Act of the Conference on Security and Co-operation in Europe, part 8 and art. IV (14 I.L.M. 1292) (1975); European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (31 I.L.M. 1486) (1992) (Brussels, December 16, 1991).
107 See Case Concerning East Timor (Portugal v. Australia), Judgment of 30 June 1995 ("East Timor Judgment"), para. 29. See also Kosovo Advisory Opinion, para. 80 (recognizing that the principle of self-determination, as expressed in the Declaration on Friendly Relations, reflects customary international law).
108 Reference re Secession of Quebec, 2 SCR 217, para. 114.
109 UN Human Rights Committee General Comment No. 12: Article 1 (Right to Selfdetermination) The Right to Self-determination of Peoples, para. 1.
110 See Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion of 21 June 1971 (treating self-determination as an enforceable, tangible right, setting the stage for understanding self-determination as a way of giving selfgovernance to people violently denied it); Western Sahara, Advisory Opinion of 16 October 1975 (indicating that there is a strong legal claim for the principle of self-determination as
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that remedial secession is justified in cases where a group is subjected to systemic discrimination, repression and crimes against humanity.111
Moreover, written and oral statements of States participating in the Kosovo case proceedings reflect opinio juris towards the external right to selfdetermination in cases where the parent state has engaged in severe, longlasting refusal of internal self-determination and/or systemic, severe, and massive human rights violations.112
functionalized in the free and genuine expression of the will of the peoples of a territory); Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment of 22 December 1986 (defining peoples entitled to self-determination as those who possess a reasonably defined area of land and implying that a self-determining people have an intrinsic right to govern their heritage land); East Timor Judgment (reaffirming that the right to territorially based self-determination is a right erga omnes); Kosovo Advisory Opinion (confirming that declarations of independence are not, per se, contrary to international law).
111 See especially Kosovo Advisory Opinion, Separate Opinion of Judge Yusuf, para. 11 ("nternational law a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of selfdetermination
(as described earlier) but also subjects them to discrimination, persecution, and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate

statehood provided it meets the conditions prescribed by international law") and Separate Opinion of Judge Trindade, paras. 175 ("The principle of self-determination has survived decolonization, only to face nowadays new and violent manifestations of systematic oppression of peoples. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny"), 176 ("No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized. The basic lesson is clear: no State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not vice-versa"), 184 ("In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation"), 206 ("Under contemporary jus gentium, no State can revoke the constitutionally guaranteed autonomy of a "people" or a "population" to start then discriminating, torturing and killing innocent persons, or expelling them from their homes and practicing ethnic cleansing — without bearing the consequences of its criminal actions or omissions. No State can, after perpetrating such heinous crimes, then invoke or pretend to avail itself of territorial integrity; the fact is that any State that acts this way ceases to behave like a State vis-à-vis the victimized population.")
112 See Written Statement of Germany, p. 35; Written Statement of Estonia, § 2.1.1., p. 69; Written Statement of Denmark, § 2.7, p. 12; Written Statement of Finland, § 10, 12, p. 5, 7; Written Statement of Albania, § 75, 79, 8692, p. 40, 42, 4448; Written Statement of Ireland § 32, p. 10, § 33 iii, p 11; Written Statement of the Netherlands, § 3.93.13, p. 911; Written Statement of Switzerland, § 8186, p. 2123; Written Statement of Poland, § 6.5, 6.10 6.12
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47. In its landmark judgment regarding the legality of unilateral secession under domestic and international law, the Supreme Court of Canada similarly affirmed that a State is entitled to the protection of its territorial integrity as long as its government represents the whole of the people within its territory in its own internal arrangements on a basis of equality and without discrimination.113 The right of secession (or external selfdetermination) accordingly arises when it is not possible for a people to exercise their right of self-determination within the framework of an existing state (internal self-determination), in the following exceptional

circumstances: (1) former colonies; (2) where a people is oppressed (for example, under foreign military occupation); or (3) where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.114 The Supreme Court of Canada asserted that "n all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."115

48. Internationally recognized secession, therefore, operates akin to the R2P doctrine, where sovereignty and territorial integrity are dependent upon upholding the rights of citizens. Canada has promoted the right to remedial secession through its support for an independent State of Palestine,116 as well as its vote in favor of recognizing the independence of the State of Kosovo

p. 2527; Written Statement of Maldives, p. 1; Written Statement of Slovenia p. 2/3; Croatia, see CR 2009/29 of 7 December 2009, § 13, p. 53, §43, p. 58, § 5661, p. 6162; the Hashemite Kingdom of Jordan, see CR 2009/31 of 9 December 2009, § 10, p. 29, § 24, p. 33, 38, p. 37; Written Statement of Romania, § 134, p. 39; Belarus, see CR 2009/27 of 3 December 2009; Written Statement of the Russian Federation, § 88, p. 31 32.

113 Reference re Secession of Quebec, 2 SCR 217, paras. 126-130. In this respect, the Declaration on Friendly Relations, the Vienna Declaration, and the Declaration on the Fiftieth have equally affirmed that "the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of selfdetermination

shall not be construed as authorizing or encouraging any action that

would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction" (emphasis added). Accordingly, a State which does not conduct itself "in compliance with the principles of equal rights and self-determination of peoples" and instead maintains a government based on discriminatory practices may not avail itself of the protection of the principle of territorial integrity to limit the exercise of the external right to self-determination.

114 Reference re Secession of Quebec, 2 SCR 217, paras. 131-138, 150, 154.

115 Reference re Secession of Quebec, 2 SCR 217, para. 138 (emphasis added).

116 See UN General Assembly Third Committee, "Concluding Session, Third Committee Approves Draft Resolution "The Right of the Palestinian People to Self-determination", GA/SHC/4285, 19 November 2019, during which the representative of Canada voted in favor of GA draft resolution A/C.3/74/L.58 reaffirming "the right of the Palestinian people to selfdetermination,

including the right to their independent State of Palestine".

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after the latter's unilateral declaration of independence.117 As seen in situations such as that of East Timor, Kosovo and South Sudan, secession became the option of last resort for the international community once it became clear that Indonesia, Serbia and Sudan had committed serious crimes. As detailed below, the Armenians of Azerbaijan and Artsakh have suffered such systematic persecution, atrocities and gross human rights violations as to make any option for their internal self-determination or participation in Azerbaijan impossible.118 Artsakh's circumstances thus fall squarely in line with such situations justifying its remedial secession or recognition of independence from Azerbaijan.

b. Azerbaijan's reliance on the 1993 UN Resolutions is inapposite

49. Azerbaijan often cites four UN Security Council resolutions adopted in 1993 ("Resolutions") to support its territorial claim to Artsakh.119 According to Azerbaijan, the Resolutions establish that: the occupied regions including Nagorno-Karabakh are part of Azerbaijan; Armenia is the aggressor; and Armenia was in continual violation of the Resolutions by not withdrawing its forces from occupied Azerbaijani territory. Azerbaijan also relies on the Resolutions, stating that it is merely implementing them, to justify its use of force against the Armenians of Artsakh.120

50. The UN Security Council has no authority whatsoever to make any decisions as to statehood or territorial limits through its resolutions or otherwise. The only principal UN organ vested with such powers is the

117 Canada recognized the sovereignty of Kosovo in 2008, two years prior to the International Court of Justice's Kosovo Advisory Opinion. Arguably, Canada even recognized a right of remedial secession in its 14 February 1972 full diplomatic recognition of Bangla Desh (as it was then known) contrary to the express wishes of (West) Pakistan and prior to United Nations recognition. Such recognition was premised on the understanding that only by recognizing Bangla Desh could Canada provide the aid necessary to prevent a major humanitarian catastrophe. As Secretary of State for External Affairs Mitchell Sharp stated, diplomatic representation allowed Canada to carry out its plan to deliver aid to Bangla Desh.

118 For more details on the extent of the atrocities committed against the Armenians of Azerbaijan and Artsakh, see infra Section IV(B)(ii): Azerbaijan commits atrocious crimes against Armenians.

119 UN Security Council Resolution 822, S/RES/822, 30 April 1993, retrieved from http://unscr.com/en/resolutions/doc/822; UN Security Council Resolution 853, S/RES/853, 29 July 1993, retrieved from http://unscr.com/en/resolutions/doc/853; UN Security Council Resolution 874, S/RES/874, 14 October 1993, retrieved from http://unscr.com/en/resolutions/doc/874; UN Security Council Resolution 884, S/RES/884, 12

November 1993, retrieved from http://unscr.com/en/resolutions/doc/884.
120 See, e.g., MENAFN-AzerNews, "Azerbaijan itself implementing UN Security Council resolutions", 21 October 2020, retrieved from https://menafn.com/1100994787/Azerbaijanitself-implementing-UN-Security-Council-resolutions ("President Ilham Aliyev has always stressed that in case the conflict is not resolved by peaceful negotiations, Azerbaijan reserves the right to free its territory from military occupation. Today, Azerbaijan uses this right, it itself has begun to implement the resolutions of the UN Security Council and therefore no one has the right or arguments to reproach it for anything.")
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International Court of Justice. The Resolutions may therefore not be used to claim ownership of territory. Furthermore, none of the Resolutions ever direct any other UN member states to refuse the recognition of Artsakh, in contrast to directions the Security Council has given regarding certain illegitimate regimes or declarations of independence in the past.121
51. The primary responsibility of the UN Security Council is to maintain international peace and security, and the Resolutions therefore must be read through the lens of this objective. The Resolutions were adopted in the context of the active hostilities in 1993 – two years after Artsakh's declaration of independence, and only when territories adjacent to Artsakh's 1991 borders fell under its control in 1993 – with the specific aim to end those hostilities. The Resolutions also reaffirm the respect for sovereignty and territorial integrity "of all States in the region". All references to territories made in these Resolutions must thus be interpreted in the context of an ongoing war over a secession that had already taken place.122
52. The Resolutions also reiterate the UN Security Council's support for the OSCE Minsk Group as the appropriate framework to negotiate a final settlement. The Resolutions are directly addressed to Nagorno-Karabakh and Azerbaijan, and address Armenia only indirectly, calling upon it to use its influence to achieve compliance by Nagorno-Karabakh of the Resolutions – which Armenia has repeatedly done through active participation in the peace process under the auspices of the OSCE Minsk Group. Beyond this and an expressed concern at the deterioration of relations between Armenia and Azerbaijan, the Resolutions make no further reference to Armenia, and in no way do they ever assert or imply that Armenia is an aggressor.
53. The Resolutions, which primarily demanded the "immediate cessation of hostilities and hostile acts with a view to establishing a durable cease-fire", led to the 1994 and 1995 ceasefire agreements. With the execution of these ceasefire agreements, the Resolutions achieved the rightful purpose for which they were adopted, and accordingly have questionable continued relevance.123

Despite this, Azerbaijan has repeatedly violated the Security Council's demand by breaching the ceasefire regime and recommencing hostilities, most notably in April 2016 and September 2020.
54. The UN Security Council did not adopt any of the Resolutions under Chapter VII of the UN Charter, which is the only avenue to mandate the use of force, and the sole prerogative of which lies with the UN Security Council.
121 See Arbour and Parent, p. 309, referring to Rhodesia, Namibia, the former Bantustans of South Africa and the Turkish Republic of Northern Cyprus.
122 See Vladimir Kazimirov,"Azerbaijan and the UN Security Council's Resolutions" in Peace to Karabakh: Russia's Mediation in the Settlement of the Nagorno-Karabakh Conflict, (Moscow: VES MIR Publishers, 2014), pp. 347-363, retrieved from http://www.vn.kazimirov.ru/mir2014.files/Peace_to_Karabakh_book.pdf.
123 Ibid.
31
Accordingly, any use of force by Azerbaijan against Artsakh and its people is wholly inconsistent with the UN Charter and a violation of international law as an act of aggression.124 It is also inconsistent with the Resolutions, every one of which reaffirms the "inadmissibility of the use of force for the acquisition of territory". Azerbaijan's pretense of implementing the Resolutions to justify its use of force against Artsakh is therefore not only invalid and perverse, but also completely illegal.125
ii. Azerbaijan commits atrocious crimes against Armenians
a. History of persecution and pogroms
55. The advent of Sovietization did not quell anti-Armenian sentiments in Azerbaijan, which has always had a consistent, clear policy to "de-Armenianize" Artsakh and force Armenians to leave, whether it was through campaigns of violence and intimidation, orchestrated by local Azerbaijani authorities, or through economic underdevelopment and cultural repression.126 For instance, the Azerbaijan SSR authorities neglected Artsakh Armenian schools and cultural institutions,127 and willfully neglected and destroyed Armenian cultural landmarks, notably in the region of Nakhichevan.128 Armenian authors could not publish their works in Artsakh,129 and the import of Armenian literature or learning materials from the Armenian SSR was forbidden.130 As part of its bid to impoverish the area, the Azerbaijan SSR transferred Artsakh's industrial sector to other regions of Azerbaijan.131 Industrial production and investments per capita were thus three times lower in Artsakh than in the Azerbaijan SSR.132 This pattern of oppression, which finally erupted in outbreaks of ethnic violence against Armenians of Azerbaijan, provided ample reason for Artsakh's consistent

pleas, throughout the entire Soviet period, for independence from any Azerbaijani administrative authority or, alternatively, for unification with the Armenian SSR.133

56. In 1988, days after Artsakh requested to unite with the Armenian SSR, the violence against Armenians in the Azerbaijan SSR escalated leading to several anti-Armenian massacres, including the Sumgait Pogrom in February 1988, the Kirovabad pogrom in November 1988, and the Baku

124 See UN General Assembly Resolution 3314 (1974), defining aggression and including within it the non-mandated use of force against unrecognized and non-UN member states as well. The Eritrea-Ethiopia Claims Commission has also confirmed that self-defense cannot be invoked to settle territorial disputes, even in situations when the party resorting to the use of force has a valid claim over the territory in question, including when the land in question is unlawfully occupied. See Eritrea-Ethiopia Claims Commission, Partial Award, Jus ad Bellum: Ethiopia's Claims 1-8 (19 Dec. 2005), 45 I.L.M. p. 430 (2006), para. 10.

125 See, e.g., Statement of President Ilham Aliyev, Twitter, 26 October 2020, retrieved from https://twitter.com/presidentaz/status/1320763657329004544 ("We are implementing the UN Security Council resolutions single-handedly. Although it is the duty of the UN Security Council. We have created a new reality. Now everyone must reckon with the new reality.")

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pogrom in January 1990.134 Azerbaijani authorities took no measures whatsoever to stop the atrocities, and local police, comprised almost entirely of ethnic Azerbaijanis,135 took no action.136 Almost all 14,000 Armenians in Sumgait fled the city after the pogrom.137 In the spring of 1991, Armenians of the villages of Getashen, Martunashen and other villages in Artsakh were violently assaulted, raped, killed and deported out of their homes as part of what was called "Operation Ring".138 As a result, full-blown war erupted in early 1992, during which inter-ethnic strife reached its peak, resulting in over 30,000 deaths and the displacement of over one million people.139

b. Armenophobia and hate speech

57. Violence against Armenians is further fueled by Azerbaijan's Armenophobic state policy that has disturbingly continued – and even gained in fervor – since the 1994 ceasefire.140 In fact, hate speech against Armenians

126 "Eyewitness account of 1920s in Karabagh", in The Karabagh File, p. 40.

127 "Zori Balayan on patriotism and Karabagh", in The Karabagh File, p. 71.

128 "Memorandum by Suren Ayvazian to General Secretary Gorbachev on Karabagh and Nakhichevan", in The Karabagh File, p. 81.

129 Luchterhandt, pp. 62-63.

130 Luchterhandt, p. 63.

131 "Petition of Karabagh Armenians to Nikita Khrushchev on re-incorporation of

Mountainous Karabagh in the Armenian S.S.R.", in The Karabagh File, pp. 42-46.
132 Luchterhandt, p. 60.
133 See The Karabagh File, pp. 40, 42-46, 47, 50, 51.
134 De Waal, p. 91. In June 1990, over 100 leading intellectuals including Jacques Derrida, Isaiah Berlin and Alain Finkelkraut penned "An Open Letter on Anti-Armenian Pogroms in the Soviet Union" in which they were "compelled to recognize that crimes against the Armenian minority have become consistent practice—if not official policy—in Soviet Azerbaijan. According to the late Andrei Sakharov (New York Times, November 26, 1988), these pogroms constitute "a real threat of extermination" to the indigenous Armenian community in Azerbaijan and in the autonomous region of Mountainous Karabakh, whose inhabitants are 80 percent Armenian. See Jacques Derrida et al., "An Open Letter on Anti-Armenian Pogroms in the Soviet Union" The New York Review, 27 September 1990, retrieved from https://www.nybooks.com/articles/1990/09/27/an-open-letter-on-antiarmenian-pogroms-in-the-sov/.
135 Ibid., p. 33.
136 Svante E. Cornell, "The Armenian-Azerbaijani Conflict and European Security", in The International Politics of the Armenian-Azerbaijani Conflict, Ed. Svante E. Cornell, New York, Palgrave MacMillan, 2017, p. 7.
137 De Waal, p. 40.
138 Caroline Cox and John Eibner, "Ethnic Cleansing in Progress. War in Nagorno Karabakh", Institute for Religious Minorities in the Islamic World, Zurich, 1993, p. 45.
139 See, e.g., United Nations High Commissioner for Refugees, "UNHCR publication for CIS Conference (Displacement in the CIS) – Conflicts in the Caucasus", 1 May 1996, retrieved from https://www.unhcr.org/publications/refugeemag/3b5583fd4/unhcr-publication-cisconference-displacement-cis-conflicts-caucasus.html
140 In a letter dated 11 November 2020, the Republic of Armenia condemned the Republic of Azerbaijan's actions and policies adopted during the last decades as being in gross violation of the 1965 International Convention on the Elimination of All Forms of Racial
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is omnipresent in political discourse, educational institutions and in the media in Azerbaijan.141 The European Commission against Racism and Intolerance ("ECRI") has consistently decried that an entire generation of Azerbaijanis has thus now grown up listening to this hateful rhetoric. The ECRI found that this widespread instrumentalization of hate speech towards Armenians results in Armenians experiencing discrimination daily.142 It also denounced the fact that Armenians remaining in Azerbaijan are denied formal citizenship and thus access to social rights,143 and have to hide their ethnic origin when applying for employment,144 or simply to avoid

persecution. Political opponents are, in fact, regularly accused of having Armenian roots or of receiving funds from Armenian sources.145
58. The ECRI further noted with deep concern that even the "fault" of describing someone as an Armenian is perceived as an insult that justifies initiating judicial proceedings against the persons making such statements.146 Human rights activists and intellectuals perceived as pro-Armenian or critical of the Azerbaijani government have also been targeted, even sentenced to heavy prison terms on controversial accusations.147 For example, long-imprisoned Azerbaijani investigative journalist, Khadija Ismayilova, was targeted for her work exposing President Aliyev's corruption
Discrimination. See Ministry of Foreign Affairs of the Republic of Armenia "The Republic of Armenia formally calls on the Republic of Azerbaijan to comply with its international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination", 13 November, 2020, retrieved from: https://www.mfa.am/en/interviewsarticles-and-comments/2020/11/13/cerd_/10647.
141 See generally The Office of Ombudsman of the Republic of Artsakh, "Armenophobia in Azerbaijan: Organized Hate Speech and Animosity Towards Armenians", December 2019, retrieved from https://artsakhombuds.am/sites/default/files/2019-12/Armenophobia-in-Azerbaijan-1.00-Interactive-25.09.2018.pdf ("Armenophobia in Azerbaijan").
142 See European Commission Against Racism and Intolerance, "ECRI Report on Azerbaijan (Fourth Monitoring Cycle)", 31 May 2011 ("Fourth ECRI Report"), p. 18, retrieved from https://rm.coe.int/third-report-on-azerbaijan/16808b557e.
143 Fourth ECRI Report, p. 29 ("attempts to have the courts overturn administrative decisions refusing to issue these persons with identity documents have proved unsuccessful").
144 Fourth ECRI Report, p. 34.
145 "ECRI Report on Azerbaijan (Fifth Monitoring Cycle)", 7 June 2016 ("Fifth ECRI Report"), pp. 9, 10, 15, retrieved from https://rm.coe.int/fourth-report-on-azerbaijan/16808b5581. See also a post from Nurlan Ibrahimov, head of PR and media manager of the Qarabag football club of Azerbaijan, dated October 31, 2020 which read: "We must kill all Armenians - children, women, the elderly. need to kill without distinction. No regrets, no compassion." On November 4, 2020, the Union of European Football Association ("UEFA") provisionally banned Ibrahimov from exercising any footballrelated activity, effective immediately, until the UEFA's Control, Ethics and Disciplinary Body decides the merits of the case, retrieved from http://www.insideworldfootball.com/2020/11/04/uefa-bans-qarabags-ibrahimov-call-killarmenians.
146 Fourth ECRI Report, p. 29.
147 Fifth ECRI Report, p. 9.

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when local pro-government press published an article entitled “Khadija’s Armenian Mother Should Die”, containing details of the Baku district where her mother lived.148 In addition, when famed 81-year old author Akram Aylisli, published a book perceived as sympathetic to Armenians, he was censored, stripped of his pension and honorary title, has been subject to an officially-sanctioned harassment campaign, and is currently under house arrest awaiting trial.149
59. Anti-Armenian hateful rhetoric is also included in Azerbaijani school curricula,150 with stories and sayings portraying Armenians as treacherous, dishonest, untrustworthy, hypocrites, dangerous, and evil.151 The singling out of the Armenian ethnic group as less than human echoes the stigmatization and dehumanization that Armenians suffered at the hands of the Ottoman Empire culminating in the Armenian Genocide of 1915-1923.
60. Top-ranking Azerbaijani officials have particularly disturbing anti-Armenian rhetoric that consistently dehumanize Armenians in their public addresses and openly admit their intent to completely cleanse the region of Armenians.152 In 2005, at a meeting with a German delegation, the Mayor of Baku, Hajibala Abutalybov, declared: ‘‘Our goal is the complete elimination of Armenians. You, Nazis, already eliminated the Jews in the 1930s and 40s, right? You should be able to understand us.”153 Allahşükür Paşazadə, religious leader of the Caucasus Muslims has also stated that “alsehood and betrayal are in the Armenian blood.”154
61. In November 2012, President Aliyev described Armenia as a country of “no value”, a “colony, an outpost run from abroad, a territory artificially created on ancient Azerbaijani lands.”155 In January 2015, he stated that
148 See Amnesty International, “Azerbaijan: The Repression Games. The voices you won't hear at the first European games”, June 2015, p. 6 (“The allegation that Khadija Ismayilova’s relatives were Armenian tapped into widespread hostility towards Armenians following the conflict in Nagorno-Karabakh in the early 1990s”), retrieved from https://www.amnesty.org/download/Documents/EUR5517322015ENGLISH.PDF.
149 See PEN America, “Akram Aylisli: Azerbaijan – Status: On Trial”, retrieved from https://pen.org/advocacy-case/akram-aylisli/; Trend, “Azerbaijani President signs orders to deprive Akram Aylisli of presidential pension and honorary title”, 2013, https://web.archive.org/web/20140327182556/http://en.trend.az/news/politics/2116873.html.
150 See Armenophobia in Azerbaijan, p. 30.
151 See, e.g., Proverbs and sayings on Armenia and the Armenians, retrieved from http://azerichild.info/en/proverbs-azerbaijan-childhood-6.html.
152 The examples are too numerous to cover exhaustively in this paper. For more examples,

see Armenophobia in Azerbaijan, pp. 7 et seq.
153 Stated in 2005 at a meeting with a municipal delegation from Bavaria, Germany. See "The Caucasus: Frozen Conflicts and Closed Borders", United States Government Printing Office, 18 June 18, 2008, at p. 50, retrieved from https://www.govinfo.gov/content/pkg/CHRG-110hhrg43066/pdf/CHRG-110hhrg43066.pdf.
154 See Armenophobia in Azerbaijan, p. 15.
155 Statement by President Ilham Aliyev, Twitter, 20 November 2012, retrieved from https://twitter.com/presidentaz/status/270827003521929216?s=19 and
35
Armenia is "not even a colony, it is not even worthy of being a servant."156 A few months later, Azerbaijani MP Elman Mammadov stated that "Turkey and Azerbaijan could together wipe Armenia off the face of the Earth at a blow, and the Armenians should beware of that thought."157 More recently, on 17 October 2020, President Aliyev declared that if Armenians "do not leave our lands of their own free will, we will chase them away like dogs and we are doing that."158 In a televised interview on 13 November 2020, General Hüseynov Camal of the Azerbaijani armed forces menacingly declared that, after Karabakh, they would be coming after every last Armenian (repeatedly calling them "dogs") in Armenia until Yerevan, referring to it as "West Azerbaijan".159
62. The Azerbaijani government has gone so far as hailing a convicted murderer as a national hero for killing an Armenian in his sleep with an ax. Ramil Safarov, a member of the Azerbaijani Army, was convicted in Hungary of murdering Armenian Army Lieutenant Gurgen Margaryan with an ax in his sleep, during a NATO-sponsored training seminar in Budapest. Following his extradition to Azerbaijan, Safarov was immediately pardoned by President Aliyev, promoted to the rank of major by the Minister of Defence, and gifted an apartment with over eight years of back pay. The Azerbaijani Ombudsman praised Safarov as "an exemplary model of patriotism for the Azerbaijani youth." Agshin Mehdiyev, the Permanent Representative of Azerbaijan to the Council of Europe published the following message: "Armenians should better not sleep peacefully as long as the Karabakh conflict is unsettled, the possibility of incidents similar to the one in Budapest cannot be ruled out." In May 2020, the European Court of Human Rights found that the actions taken by the Azerbaijani authorities, who pardoned and then glorified convicted murderer Ramil Safarov, contravened Article 14 of the European Convention on Human Rights (prohibition of discrimination) and constituted racial discrimination against Armenians.160
c. Present war crimes and atrocities

63. Starting on 27 September 2020, Azerbaijan's armed forces, backed by Turkish forces and hired jihadist mercenaries, launched a large-scale attack
http://www.twitlonger.com/show/k2p4ba
156 Statement by President Ilham Aliyev, Twitter, 29 January 2015, retrieved from https://twitter.com/presidentaz/status/560718307515318272
157 See Armenophobia in Azerbaijan, p. 12.
158 President of the Republic of Azerbaijan, "Ilham Aliyev addressed the nation", 17 October 2020, retrieved from https://en.president.az/articles/43334.
159 See Bilsəydilər erməni dilini bilirəm dərimi soyardılar - Hüseynov Camal, YouTube, 13 November 2020, retrieved from https://www.youtube.com/watch?v=YworvlLKGyQ. "West Azerbaijan" is an irredentist political concept that is used in the Republic of Azerbaijan mostly to refer to the territory of the Republic of Armenia.
160 See European Court of Human Rights, Case of Makuchyan and Minasyan v. Azerbaijan and Hungary (Application No. 17247/13), Judgment, 26 May 2020, paras. 25, 215-221, 237.
36
with aerial, artillery, rocket and tank fire strikes on over 120 civilian towns and villages in Artsakh,161 many 90-100 km away from the line of contact and containing no military objects.162 Azerbaijan's war was clearly "the next phase in a campaign to expel and ethnically cleanse Armenians from their indigenous lands."163 Azerbaijan deliberately attacked civilians, civilian infrastructures and committed countless war crimes.
64. Amidst the regular shelling of Artsakh's population centers, 85% of the civilian population of Artsakh (approximately 130,000 people)164 were forced to flee, including 40,000 children who took refuge in neighbouring Armenia,165 many showing signs of anxiety, depression and sleeplessness.166 The attacks killed at least 49 Armenian civilians and over 158 were seriously wounded,167 a number which would have been incomparably higher had 85% of the population not fled. Amongst those attacked was 9-year-old Victoria Gevorgyan who was killed from shelling on 27 September 2020 in her backyard, in the Martuni region of Artsakh.168 Her mother and her two-year old brother also received shrapnel wounds when trying to flee.169 The same day, pregnant Anna Galstyan was wounded from shelling in the Mataghis
161 These included densely populated communities such as Artsakh's capital Stepanakert and the towns of Shushi, Hadrut, Martuni, Martakert, Askeran, Karvajar, Berdzor, villages of Taghaser, Vardashat, Spitakshen, Maghavus, Nerkin Horatagh, Alashan and Mataghis. See: HRORA, Second Interim Report on the Azerbaijani Atrocities against the Artsakh population in September-October 2020, Updated Edition, 13 October 2020, p. 4, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf
162 HRORA, Ad Hoc Report on the Children Rights Affected By the Azerbaijani Attacks

Against the Republic of Artsakh (Nagorno-Karabakh), 9 November 2020, p. 3, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020.pdf,
163 David L. Phillips and Salpi S. Kevorkian, "The Failure to Protect Civilians in Artsakh", Columbia University Institute for the Study of Human Rights, 17 November 2020, retrieved from http://www.humanrightscolumbia.org/news/failure-protect-civilians-artsakh
164 Unicef, "Unicef Statement on one month of fighting in and beyond Nagorno Karabakh", 28 October 2020, retrieved from https://www.unicef.org/armenia/en/press-releases/unicefstatement-one-month-fighting-and-beyond-nagorno-karabakh
165 Ad Hoc Report on Children's Rights, p. 19, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020.pdf
166 The United Nations Office for the Coordination of Humanitarian Affairs, "Nagorno-Karabakh fighting leaves children who fled the conflict in distress", 22 October 2020, retrieved from https://reliefweb.int/report/azerbaijan/nagorno-karabakh-fighting-leaveschildren-who-fled-conflict-distress
167 Ad Hoc Report on Children's Rights, p. 3, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020.pdf
168 Ad Hoc Report on Children's Rights, p. 4, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020.pdf
169 Ibid.
37
village and delivered her baby prematurely.170 Also heavily wounded were 13- and 15-year-old cousins, Robert and Narek Gevorgyan, hit by Azerbaijani shelling while fleeing their home.171 On or around 10 October 2020, at least four civilians were executed by Azerbaijani soldiers in the town of Hadrut.172 Azerbaijani attacks also reached Armenia, killing and injuring civilians, damaging houses, schools and property in the villages of Shatvan, Mets Markis and Sotk.173 On 15 October 2020, a 14-year-old Armenian boy was severely wounded on his way to a field for harvest in Sotk village, Armenia.174
65. The damage caused by Azerbaijani forces to civilian infrastructures in Artsakh is devastating. Azerbaijan intentionally destroyed more than 19,000 buildings and property,175 over 25 crucial energy and electricity stations,176 and several key communication stations and networks.177 More than one third of all schools in Artsakh were shelled (71 schools and 14

kindergartens).178 On 28 October 2020, Artsakh's Maternity and Child Health Center in Stepanakert was bombed,179 in clear violation of international
170 Ibid., p. 5.
171 Ibid., p. 6.
172 Second Interim Report on he Azerbaijani Atrocities, p. 9, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf; See also BBC News, "Nagorno-Karabakh conflict: 'Execution' video prompts war crime probe", 24 October 2020, retrieved from https://www.bbc.com/news/world-europe-54645254
173 HRDRA, Ad Hoc Public Report On Azerbaijani Drones' Targeted Attacks Against Peaceful Population of Armenia and Artsakh in Grave Breach of International Law, Yerevan, 2020, p. 1, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/ra_hr/1.pdf ; See also: HRDRA, Ad Hoc Report On Fact Finding Activities in Villages of Gegharkunik Province of Armenia damaged by Azerbaijani Military Attacks 30 September-1 October, Yerevan, 2020, p.1-2, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/ra_hr/2_s.pdf
174 "UNICEF Statement on the Nagorno Karabakh conflict", 15 October 2020, retrieved from https://www.unicef.org/armenia/en/press-releases/unicef-statement-nagorno-karabakhconflict-1
175 HRDRA and HRORA, Ad Hoc Public Report on the Use of Incendiary Ammunition of Mass Destruction (Incendiary Weapon) Against Civilian Objects of Artsakh (Nagorno-Karabakh) by the Azerbaijani Armed Forces, November 2020, p. 4, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Report-On-White-Phosphorus.pdf
176 Second Interim Report on he Azerbaijani Atrocities, p. 19, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf
177 Ibid., p. 21.
178 Ad Hoc Report on Children's Rights, p. 10, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020.pdf; See also: Unicef, "Unicef Statement on one month of fighting in and beyond Nagorno Karabakh", 28 October 2020, retrieved from https://www.unicef.org/armenia/en/press-releases/unicef-statement-one-month-fighting-andbeyond-
nagorno-karabakh
179 Ad Hoc Report on Children Rights, p. 15, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-onchildren-rights-09.11.2020.pdf. See also video footages published 28 October 2020 by the Artsakh Ombudsperson, the Armenian Ministry of Defense and the Armenian Unified Info
38
law.180 Patients (including children) had already sought refuge in the hospital's basement at the time. The Azerbaijani forces also intentionally attacked the 19th Century Holy Savior Ghazanchetsots Cathedral at the

center of the city of Shushi181 with the use of drones.182 Civilians had taken refuge in the church basement at the time. The attack injured three journalists183 and killed 28-year-old resident Grisha Narinyan who was accompanying the journalists that day.184 After the Azerbaijani forces captured the town of Shushi, they caused additional damages and vandalism to the Cathedral.185

66. Azerbaijan even released incendiary ammunition of mass destruction containing chemical elements, including white phosphorus, in the primary forests of Artsakh, committing wide scale ecocide.186 White phosphorus

Center retrieved from https://www.facebook.com/artak.beglaryan/videos/3668331173205093 ; https://twitter.com/ShStepanyan/status/1321730287710121984 ; https://www.facebook.com/ArmenianUnifiedInfoCenter/videos/636827646985319/

180 See article 18 of the Geneva Convention IV, "Geneva Convention Relative to the Protection of Civilian Persons in Times of War", 12 August 1949, 75 U.N.T.S. 287: "Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict."

181 A violation of the UN Educational, Scientific and Cultural Organization (UNESCO) Convention for Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, retrieved from https://www.refworld.org/docid/40422c914.html.

182 HRORA, Ad Hoc Public Report on the Azerbaijani Targeted Attacks Against the Saint Holy Savior Ghazanchetsots Cathedral of Shusho, Artsakh (Nagorno-Karabakh) as A War Crime and Crime Against Humanity, 20 October 2020, retrieved from https://artsakhombuds.am/sites/default/files/2020-10/Report_Ghazanchetsots_Cathedral_-20.10.2020.pdf

183 Le Monde reporter Allan Kaval, who was severely wounded, described the attacks as a "bombing of the town" "in a rain of fire and metal."See Allan Kaval, "Ça a frappé fort. Mais je suis là.", 8 October 2020, retrieved from https://www.facebook.com/allan.kaval/posts/10158545812272226.

184 Ibid. A number of other journalists were also targeted and injured during the war. On October 1 2020, 4 journalists (two French and two Armenian) were targeted by shelling in the town of Martuni. A local resident accompanying them was killed. On the same day the Azerbaijani armed forces targeted a car transporting journalists of the Agence France-Presse international news agency. On October 2, Azerbaijan again targeted a minibus with Armenian and foreign journalists in the town of Martakert. See: Second Interim Report on Azerbaijani Atrocities, p. 16, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf

185 Ministry of Education, Science, Culture and Sports of the Republic of Armenia, "The RA ESCS Ministry appeals to the relevant international bodies to immediately prevent cultural

vandalism", retrieved from https://escs.am/en/news/7428; See also: Public Radio of Armenia, "Armenian Ghazanchetsots Church in Shushi vandalized", 14 November 2020, retrieved from https://en.armradio.am/2020/11/14/armenian-ghazanchetsots-church-in-shushi-vandalized/
186 Ad Hoc Report on the Use of Incendiary Ammunition, p. 6 and following, retrieved from https://artsakhombuds.am/sites/default/files/2020-11/Report-On-White-Phosphorus.pdf. See also: Sara Daniel "Au Karabakh, des crimes de guerre au phosphore?" 13 November 2020,
39
causes long-term dangerous consequences for the life and health of humans, natural ecosystems, biodiversity and critical species habitats.187 Azerbaijani forces destroyed and damaged ancient forests, ecosystems and protected areas of Artsakh near the communities of Shushi, Martakert and Askeran.188 It is estimated that a total of 1,815 hectares of Artsakh's forests have burned as a result of Azerbaijan's use of white phosphorus,189 causing widespread environmental damage190 including the contamination of rivers and groundwater, and indiscriminate harm to civilians burned by these chemicals and fires, many of whom lived close to these forests or had taken refuge in them during the war.191 The use of white phosphorus weapons violates numerous international law conventions.192
retrieved from: https://www.nouvelobs.com/monde/20201113.OBS36046/au-karabakh-descrimes-de-guerre-au-phosphore.html.
187 See Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, "White Phosphorus", retrieved from https://www.cdc.gov/niosh/ershdb/emergencyresponsecard_29750025.html. See also: Agency for Toxic Substances and Disease Registry, "Toxicological Profile for White Phosphorus" U.S. Department of Health and Human Services, Public Health Service, September 1997; Marianne E. Walsh, Michael R. Walsh, Charles M. Collins, Charles H. Racine "White Phosphorus Contamination of an Active Army Training Range" Water Air and Soil Pollution, June 2014.
188 Armenia Tree Project, "Joint Statement on Azerbaijan's Use of Prohibited Weapons to Destroy Ancient Forests of Artsakh", 3 November 2020, retrieved from https://www.armeniatree.org/en/news/85.
189 Zartonk Media, "To Date, Azeris Have Burned Over 1,815 Hectares Of Artsakh's Forests Using White Phosphorus Munitions", 2 November 2020, retrieved from https://zartonkmedia.com/2020/11/02/to-date-azeris-have-burned-over-1815-hectares-ofartsakhs-
forests-using-white-phosphorus-munitions/
190 The Armenian Weekly, "Armenian Environmental Organizations Raise Alarm about Use of White Phosphorus in Artsakh's Forested Regions", 4 November 2020, retrieved from https://armenianweekly.com/2020/11/04/armenian-environmental-organizations-raise-alarmabou

t-
use-of-white-phosphorus-in-artsakhs-forested-regions/; Artsakh is recognized as one of the world's biodiversity hotspots. The region is known for its high rate of endemism and for being home to 6,000 plant species, 153 species of mammals, 400 species of birds and other living organisms. Hundreds of plant and animal species are found in Artsakh which are listed in the local Red Book and the IUCN Red List of Threatened Species, and have a protection status at a global level. Notable is the critically endangered and rare Caucasian Leopards, of which only 1,000 exist in the wild. Other protected species in Artsakh include the brown bear, Bezoar Goat, Armenian Mouflons, Eurasian Lynx, vultures, and eagles.
191 Notably, the Azerbaijani government has also granted Anglo Asian Mining, an Azerbaijani mining company, the right to exploit parts of Artsakh for gold mining. The company's mining activities will take a further toll on the environment and health of species. On 28 October 2020, Anglo Asian Mining PLC announced an update on the company's Venjaly contract in the Zangilan district. The 115 square miles deposit contains 6.5 tonnes of C1 and C2 gold and 2.3 tonnes of P1 gold. See: Seeking Alpha, "The Nagorno-Karabakh Conflict Unlocks Value For Anglo Asian Mining", retrieved from https://seekingalpha.com/article/4385896-nagorno-karabakh-conflict-unlocks-value-for-angloasian-
mining ; See also: Mining Technology, "Anglo Asian Mining accused of "exploiting" border dispute for financial gain", 9 November 2020, retrieved from https://www.mining40
67. After six weeks of attacks, more than 2,500 Armenian soldiers (most between the ages of 18-25) were killed. This number is shockingly high compared to the number of casualties in the Nagorno-Karabakh war of 1988-1994, which resulted in 30,000 deaths from all sides. The fate of Armenian prisoners of war currently in Azerbaijani custody is extremely concerning.193 At the time of writing (25 November 2020), not a single Armenian prisoner of war has been returned alive. There is also increasing evidence of numerous atrocities committed by the Azerbaijani armed forces against captured Armenians and corpses pursuant to the latest report by the Human Rights Defenders of Armenia and Artsakh.194 Videos of Azerbaijani soldiers humiliating, torturing, skinning and beheading Armenian prisoners of war have surfaced on social media accompanied by violent hate speech towards Armenians.195
technology.com/news/anglo-asian-mining-accused-of-exploiting-border-dispute-for-financialgain/
192 See 1977 Protocol I to the 1949 Geneva Conventions, Can. T.S. 1991 No 2, articles 35, 55, retrieved from https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf; Environmental Modification Convention (ENMOD), formerly Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December

1976, 31 U.S.T. 333, 1108 U.N.T.S. 152, retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-1&chapter=26&lang=en; Rio Declaration, principle 24, A/CONF.151/26 (Vol. I), 12 August 1992, retrieved from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf; Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 (amended in 2010), article 8(2)(b)(iv), retrieved from https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf; Protocol III of the Convention on Certain Conventional Weapons, 10 October 1980, retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en; See also "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Int'l L.J. 1.; M.C. Power, "La protection de l'environnement en droit international humanitaire: Le cas du Kosovo" (2001-2) 33 Ottawa L. Rev 225.

193 In the April 2016 war, 90% of Armenian soldiers who fell under the custody of Azerbaijani forces were tortured, executed or mutilated. See HRORA, "Artsakh Ombudsman's Second Report on Atrocities Committed By Azerbaijan During the April 2016 War. Public Edition", Shushi, 2016, p. 4, retrieved from https://artsakhombuds.am/sites/default/files/2019-12/Report_PUBLIC.pdf

194 Panorama.am, "Fourth report on Azerbaijani atrocities against captured ethnic Armenians complete, Ombudsman says", 21 November 2020, retrieved from https://www.panorama.am/en/news/2020/11/21/Ombudsman-says/2406147. See also Fourth Report on POWs (available upon request).

195 See inter alia Second Interim Report on Azerbaijani Atrocities, p. 27, retrieved from https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf; See also Public Radio of Armenia, "Azerbaijani military forces beheaded an Armenian soldier -Human Rights Defender", 19 October 2020, retrieved from https://en.armradio.am/2020/10/19/azerbaijanimilitary-forces-beheaded-an-armenian-soldier-human-rights-defender/; Fourth Report on POWs (available on request).

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68. In light of Azerbaijan's widespread and state-sponsored dehumanization and hate speech towards Armenians, thousands of Armenians living in the portions of Artsakh which have fallen under Azerbaijani control have fled their homes and lands in an exodus towards Armenia (some even unearthing the remains of their loved ones to bring along with them).196 There are already reports of torture and killings of captured civilians who have returned or stayed behind.197

69. The transfer of parts of Artsakh to Azerbaijan risks the fate of the

millennia-old cultural and religious heritage of outstanding value to humanity and creates a real threat of cultural genocide for over 4,000 Armenian heritage sites.198 The head of the Armenian Apostolic Church recently spoke out about the hundreds of historical churches, monasteries, monuments and cultural museums in Artsakh at risk of becoming the "silent victims of conquest" by Azerbaijan.199 The concerns of cultural genocide in Artsakh are very real given the distinct historical precedent of Nakhichevan, a historically and demographically Armenian territory that once included thousands of examples of Armenian Christian cultural heritage. Azerbaijan, upon taking control of Nakhichevan, demolished or claimed 89 Armenian churches and cathedrals, 5,840 tombstones, crosstones (or "khachkars") and ornate headstones, and 22,000 estimated flat tombstones of Armenian origin.200 Among the erased Armenian heritage sites were the medieval global trade networks launched by Djulfa merchants, the medieval Djulfa

196 OBS and Agence France Press, "Haut-Karabakh: des Arméniens déterrent leurs morts avant l'exode", 17 November 2020, retrieved from https://www.nouvelobs.com/monde/20201117.OBS36191/haut-karabakh-des-armeniensdeterrent-leurs-morts-avant-l-exode.html

197 See e.g. HRDRA, "The Azerbaijani soldiers forces humiliate an elderly man, an ethnic Armenian: The Human Rights Defender", 18 November 2020, retrieved from https://www.ombuds.am/en_us/site/ViewNews/1385 and supra, fn. 27.

198 Milana Nikolova, "Concerns grow for the fate of Nagorno-Karabakh's cultural heritage" Emerging Europe, 21 November 2020, retrieved from: https://emerging-europe.com/afterhours/concerns-grow-for-the-fate-of-nagorno-karabakhs-cultural-heritage/; M. Chiara Biagioni, "Nagorno-Karabakh. Ferrari (Ca' Foscari): 'A genocide of Armenian cultural heritage in the territories transferred to Azerbaijan must not be permitted'", Servizio Informazione Religiosa Agenzia d'informazione, 20 November 2020, retrieved from https://www.agensir.it/europa/2020/11/20/nagorno-karabakh-ferrari-ca-foscari-a-genocide-ofarmenian-cultural-heritage-in-the-territories-transferred-to-azerbaijan-must-not-bepermitted/; Samvel Karapetyan, Armenian Cultural Monuments in the Region of Karabakh, Yerevan, 2001, retrieved from http://www.raa-am.com/BOOK_3/3girqE_poqr.pdf

199 See Catholicos Karekin II, "A Plea to Save Artsakh's Armenian Heritage", Christianity Today, 17 November 2020, retrieved from https://www.christianitytoday.com/ct/2020/november-web-only/karekin-save-artsakharmenian-churches-nagorno-karabakh.html.

200 Simon Maghakyan and Sarah Pickman, "A Regime Conceals Its Erasure of Indigenous Armenian Culture" Hyperallergic, 18 February 2019, retrieved from https://hyperallergic.com/482353/a-regime-conceals-its-erasure-of-indigenous-armenianculture/

cemetery, Surb Hakob and the three adjacent churches of Shorot (founded in the 12th century), and Surb Karapet (Holy Precursor Church) in Abrakunis. Since Azerbaijan banned international fact-finders from visiting Nakhichevan, the world only knows what has happened to these cultural monuments, historical sites and traces of Armenian origin from satellite imagery.201

70. Although the 10 November 2020 Ceasefire Statement has entailed a cessation of hostilities and the deployment of Russian peacekeepers in Artsakh, the population's living conditions and geopolitical situation remain extremely precarious. Artsakh's cities and towns are heavily contaminated by explosive remnants of war, including rockets, missiles, artillery projectiles, and cluster munitions202 and are "pitted with bomb craters, burnt out cars and shelled buildings.203 Children are particularly vulnerable to injury or death in that "cluster munitions bear a cruel resemblance to toys."204

71. Also, even though Canada has called on Turkey to stay out of the conflict,205 Russia and Turkey have announced their intent to create a joint monitoring centre of the cease-fire in Azerbaijan (a condition which was not in the Ceasefire Statement).206 It is also unclear whether jihadist mercenaries still remain in the area,207 as thousands of them had been sent by Turkey to Azerbaijan to kill Armenians,208 the whole in violation of

201 Ibid.

202 Joint Bipartisan letter by US Representatives to USAID Acting Administrator John Barsa, 3 November 2020, retrieved from https://www.halotrust.org/media/7295/demining_uxo_letter-11320.pdf

203 Halo Trust NGO, "From the Frontline: Nagorno Karabakh", 2 November 2020, retrieved from https://www.halotrust.org/latest/halo-updates/stories/from-the-frontline-nagornokarabakh/

204 Ibid.

205 Minister François-Philippe Champagne, "Statement on the ongoing situation in Nagorno-Karabakh", 11 November 2020, retrieved from https://twitter.com/FP_Champagne/status/1326690424237543425

206 Euronews, "Russia and Turkey to jointly monitor Nagorno-Karabakh ceasefire", 12 November 2020, retrieved from https://www.euronews.com/2020/11/12/russia-and-turkey-tojointly-monitor-nagorno-karabakh-ceasefire

207 UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, "Mercenaries in and around the Nagorno-Karabakh conflict zone must be withdrawn", 11 November 2020, retrieved from

https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26494&LangID=E&fbclid=IwAR0_JnkNB7eo-EgeedExyVrl0wruHYff4BwhgLJDEQPSFAFDS9Ax3DBQxvo.
208 Syrian Observatory for Human Rights, "Azerbaijan-Armenia conflict. As more fighters return to Syria, Turkey sends new batch to Azerbaijan", 3 November 2020, retrieved from https://www.syriahr.com/en/190938/; See also Radio France Internationale, "France's Macron says Syrian jihadists active in Armenia-Azerbaijan conflict", 1 October 2020, retrieved from https://www.rfi.fr/en/international/20201001-macron-claims-syrian-jihadists-active-inconflict-between-armenia-and-azerbaijan-nagorno-karabakh ; CTV News, "2,000 Mideast militants fight in Nagorno-Karabakh: Russia FM", 3 November 2020, retrieved from
43
international humanitarian law.209 These mercenaries have designated the conflict to be a "part of the Jihad; a holy war of Muslims against Christians"210, and were promised $100 per beheaded Armenian.211

72. Azerbaijan, in deliberately targeting civilian populations, achieved in a six-week war what it sought to do in the past 100 years, since Sovietization: remove Armenians from their indigenous lands in Artsakh and make it too dangerous for them to return. A "peaceful coexistence" under Azerbaijani rule, where Armenians rights would be protected, is naive and completely unrealistic, particularly given the Azerbaijani government's denial of the value of the existence of Armenians as a people.

73. This hypothesis also ignores the very nature of Azerbaijan's authoritarian regime. The government, run by the Aliyev family since 1993,212 is repeatedly criticized by international organizations for its human rights abuses even on its own citizens: unlawfully arresting opposition activists213 and journalists,214 censoring the media and internet215 (with one of the world's worst press freedom scores, ranking 168th out of 180

https://www.ctvnews.ca/world/2-000-mideast-militants-fight-in-nagorno-karabakh-russia-fm-1.5172931

209 See International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, United Nations, Treaty Series , vol. 2163, p. 75 .

210 Asia News, "Turkey sends 4,000 Syrian ISIS mercenaries to fight against the Armenians", 28 September 2020, retrieved from http://asianews.it/news-en/Turkey-sends-4,000-Syrian-ISIS-mercenaries-to-fight-against-the-Armenians-(VIDEO)-51151.html

211 ArmenPress, "$100 dollars for each beheaded infidel: Shocking testimony of detained Syrian mercenary in Artsakh", 1 November 2020, retrieved from https://armenpress.am/eng/news/1033500/$100-dollars-for-each-beheaded-infidel-shockingtestimony-of-detained-syrian-mercenary-in-artsakh.html

212 "Azerbaijan is one of only three countries—along with North Korea and Syria—that declares itself a "constitutional republic," but transfers power by inheritance within a ruling family. Ilham Aliyev has effectively elected himself president four times since 2003 and appointed his wife as First Vice President, just to be extra secure." See The National Interest, "Recognizing Artsakh's Independence Will Stop Turkey and Azerbaijan's War on Armenians", 2 November 2020, retrieved from https://nationalinterest.org/blog/buzz/recognizing-artsakh%E2%80%99s-independence-willstop-turkey-and-azerbaijan%E2%80%99s-war-armenians-171824
213 Human Rights Watch, "Azerbaijan: Crackdown on Critics Amid Pandemic", 16 April 2020, retrieved from https://www.hrw.org/news/2020/04/16/azerbaijan-crackdown-critics-amidpandemic; Human Rights Watch, "Azerbaijan: Relentless Crackdown on Opposition", 19 April 2020, retrieved from https://www.hrw.org/news/2020/08/19/azerbaijan-relentlesscrackdown-opposition
214 Parliamentary Assembly of the Council of Europe, "Stop jailing journalists: Turkey and Azerbaijan must uphold Council of Europe standards", 22 May 2020, retrieved from https://pace.coe.int/en/news/7899/stop-jailing-journalists-turkey-and-azerbaijan-must-upholdcouncil-of-europe-standards-
215 Freedom House, "Freedom on the Net 2020. Azerbaijan", retrieved from https://freedomhouse.org/country/azerbaijan/freedom-net/2020
44
countries),216 known for its endemic corruption217 and heavily suppressing its citizens' political rights and civil liberties.218
74. Even under the current cease-fire, the status quo cannot ensure future safety or peace in the region. Azerbaijan has made no secret of its intent to seize control of Artsakh, representing a real risk of a repeated ethnic cleansing campaign of Armenians.219 This risk is heightened in light of the fact that, pursuant to the Ceasefire Statement, Azerbaijan now retains control over portions of Artsakh, as well as the strategic city of Shushi, which overlooks Artsakh's capital, Stepanakert. In light of the above, it is illusory to state that, absent recognition of its independence, the safety of the Armenian population of Artsakh can be guaranteed.
V. Conclusion
75. The indigenous Armenians of Artsakh remain extremely vulnerable due to the current humanitarian crisis and the lack of final status for Artsakh. Since the full-scale and unprovoked offensive by Azerbaijan against the people of Artsakh began on 27 September 2020, thousands of Armenian

men, women, children, and elderly persons have been killed or seriously injured, and more than 130,000 have been displaced from their homes. Cities and their residential areas have been deliberately bombarded, destroying hospitals, schools, homes, and critical civilian infrastructure. Azerbaijan and its Turkish sponsors have deployed jihadist militants from Syria as a mercenary fighting force. Azerbaijan, emboldened by the international community's silence at the height of a global pandemic, continued its belligerence against the people of Artsakh for 44 days.

76. The Ceasefire Statement of 10 November 2020 does not change the dangerously fragile situation of the Armenians of Artsakh. Rather, the Ceasefire Statement omits the final status of Artsakh as a subject of ongoing dialogue and grants Turkey, a central player of Azerbaijan's war of aggression, a large role of "monitoring" the ceasefire. What is more, even in historically Armenian towns and villages that have passed under Azerbaijani control, in compliance with the terms of the Ceasefire Agreement, all

216 Reporters Without Borders, "Azerbaijan. Hope quickly dashed", retrieved from https://rsf.org/en/azerbaijan

217 Transparency International, "Azerbaijan. Corruption Perceptions Index", retrieved from https://www.transparency.org/en/countries/azerbaijan

218 Azerbaijan scores 10/100 by the organization Freedom House, which qualifies the country as "Not Free" See Freedom House, "Freedom in the World 2020. Azerbaijan", retrieved from https://freedomhouse.org/country/azerbaijan/freedom-world/2020

219 President Aliyev took to Twitter to proclaim, with regards to the Ceasefire Statement, that "There is no issue of Nagorno-Karabakh's status in this statement" and that "The phrase "Karabakh is Azerbaijan!" is a Symbol of our Victory!", 9 November 2020, retrieved from https://twitter.com/presidentaz/status/1325961471445127169 and https://twitter.com/presidentaz/status/1325961739888975872

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remaining ethnic Armenians were simply expected to evacuate, as their gruesome fate under Azerbaijani rule was deemed by all parties as a foregone conclusion. The Azerbaijani government thus flippantly admitted what Armenians had long viewed as an obvious truth: no Armenians are expected to live in any part of Artsakh under Azerbaijani authority.

77. Throughout history, the people of Artsakh have continuously, democratically and unequivocally expressed their will for self-determination and independence. Azerbaijan, in turn, has repeatedly failed to recognize any such right and consistently resorted to murderous violence to quell dissent and fuel Armenophobia. President Aliyev's most recent declarations show that Azerbaijan has no plans of accepting any independent status for Artsakh

in the future. Coupled with its history of persecution towards Armenians and other minorities, and state-sponsored Armenophobia, Azerbaijan's dangerous and aggressive state policy put the very existence of the ethnic Armenians of Artsakh at grave risk. Azerbaijan, in short, has set its sights on the territory of Artsakh, devoid of its inhabitants. In these circumstances, Artsakh's right to remedial secession/recognition is not only clearly justified; it is also essential to its survival.

78. There is now a greater need than ever for Western intervention to achieve a balanced and lasting resolution that preserves the people of Artsakh's right to self-determination and prevents further bloodshed in the region. To be clear, the Armenian presence in Artsakh is today more vulnerable, and its fate more endangered, than at any other time in the last hundred years. Considering that all other avenues of negotiation have been exhausted, the OSCE Minsk Process having led to no lasting peaceful outcome, it is now Canada's duty, along with the rest of the international community, to intervene and address this injustice. There cannot be neutrality when international law is being violated and peace and security are being destabilized.

79. Canada, renowned for its historic and deep attachment to human rights, and as a pioneer in the development of the law on unilateral secession and right to self-determination, is in a unique position to take a leadership role and contribute to resolving the issues at the core of the conflict. Under the R2P doctrine, Canada's moral and legal obligations to prevent atrocities against the Armenians of Artsakh have been triggered. Further, by virtue of Canada's provision of permits for the export of drone technology to Turkey, which was used by Azerbaijan to commit atrocity crimes against Armenians, Canada has an added obligation to act.

80. As an immediate remedial measure, Canada must recognize the independence of Artsakh and call on all other States to do the same. Remedial recognition is the most effective diplomatic measure to ensure a definitive and sustainable resolution to the conflict and prevent further atrocities including the risk of genocide.

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81. For all foregoing reasons, it is submitted that Canada must:

1. recognize the independence of the Republic of Artsakh and call on all other States to follow suit;
2. condemn the joint Azerbaijani-Turkish aggression and atrocity crimes against the people of Artsakh;
3. request the UN Security Council to refer Azerbaijan and Turkey to the

International Criminal Court, and/or call on the UN Secretary-General and High Commissioner for Human Rights to establish a commission of inquiry, fact finding mission, or other appropriate investigative mechanism to ascertain the truth of, and promote justice and accountability for, the crimes committed since 27 September 2020;
4. permanently uphold the suspension of arms exports to Turkey in light of the irrefutable evidence that is now publicly available, and impose further sanctions on persons responsible in Azerbaijan and Turkey for the violence, atrocity crimes, and use of jihadist mercenaries in Artsakh, especially against President Ilham Aliyev, his family members, and other key figures in the Azerbaijani offensive; and
5. provide immediate and robust humanitarian aid to the civilian population of Artsakh.
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ANNEX
Map of Artsakh post-Ceasefire Statement220
220 Retrieved from https://www.rferl.org/a/macron-france-ready-lasting-solution-karabakhconflict/30946318.html

INTERNATIONAL LAW AND THE CRITERIA FOR STATEHOOD

<arno.uvt.nl/show.cgi?fid=121942>.
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Abbreviations

AU African Union
CSRC Crisis States Research Centre
DDR Deutsche Demokratische Republik
EC European Community
EPC European Political Co-operation
EU European Union
FSI Failed State Index

FFP Fund for Peace
GA General Assembly
ICJ International Court of Justice
ILC International Law Commission
NGO Non-Governmental Organization
PCA Permanent Court of Arbitration
PCIJ Permanent Court of International Justice
TFG Transitional Federal Government
UN United Nations
US United States
USSR Union of Soviet Socialist Republics

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Introduction

When looking at the map of the world it appears as if almost the whole world is neatly divided into separate parts, with each part representing a defined territorial entity, known as a State. But under this neatly divided surface, a closer examination reveals that the concept of „statehood is shrouded in many ambiguities. For example, what makes a State, a State?

For over a century there has been a great debate between the „declarative and „constitutive schools of thought on statehood.1 According to the „declaratory theory a State should possess the following qualifications: (a) a defined territory; (b) a permanent population and (c) a government. These criteria are provided by art. 1 of the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention). Art. 3 of the Montevideo Convention declares that statehood is independent of recognition by other states. The declaratory theory prescribes that recognition of a State by existing States is nothing more than expressing the willingness to enter into relations with that State: in other words, accepting the existing conditions of statehood. The declaratory theory appears to be consistent with the current practice of

1 Talmon, 2004, p. 101.

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recognition, which is primarily used as a political tool by States.2

In contrast, according to the „constitutive theory, a State only becomes a State by virtue of recognition by the other States. Once the three factual criteria of the declaratory theory have been met, this „factuality must then be confirmed by the existing States. This doctrine has proved untenable in practice, as there is no international body with the authority to acknowledge the existence of States on behalf of the entire community of States. Therefore, each State may individually decide whether a new State has come into being (and recognize it). If the constitutive theory would serve as the basis for statehood, it would lead to the strange consequence that an entity would be considered a State by some States (those that have recognized it) and not a State by other States (those that have not recognized it).34 Consequently, the question arises what the status of such a territorial entity is under international law, and – by extension - how it should be treated by

the other members of the international community: is such an entity entitled to any form of sovereignty for example? In addition, there is no international obligation for States to recognize a territorial entity as a State once it fulfills the factual criteria for statehood: recognition often relies on many other considerations besides legal ones.
Apart from recognition, there are other issues relating to the factual criteria for statehood. As mentioned above, a government is an essential (factual) requirement for statehood. This government must be capable of exercising effective authority over the territory and its population.5 However, as it currently stands under international law,
2 The DDR for example, was established in 1949, but it would take until the 1970s before it was recognized by Western States. This does not mean however that the DDR lacked the properties for statehood before it was recognised. It would otherwise not be possible for a non-recognized State to violate any international obligations towards the non-recognizing States. However, state practice demonstrates that an unrecognised State is also bound by international law: for example most Arab States do not recognize Israel, but they regularly blame Israel for non-compliance with its international obligations. Another example is when the US ship, the Pueblo, was attacked by North Korea in 1968, the United States claimed that North Korea was liable, without recognizing it. For more information, see: Kooijmans 2002, p. 24-25.
3 Koojimans 2002, p. 2.
4 Also, in practice, States rely on many other considerations than mere factual ones when it comes to State recognition.
5 Crawford 1977, p. 116-119.
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once a State has been formed, there are very few rules governing its end (short of dissolution, or merger with another State).6 Even if internal unrest or civil war leads to lasting anarchy and the de facto collapse of a State - arguably as in the case of Somalia or Sierra Leone - State practice has not resulted in the „denial or the „de-recognition of statehood.7
Somalia for example, was ranked number one for a third consecutive year by the Failed State Index (FSI):8 scoring 114.3 points out of a total of 120 points.9 Somalias officially recognized government, the Transitional Federal Government (TFG), which is backed by the United Nations (UN), the United States (US) and the African Union (AU) controls only a relatively small percentage of Somalia. Within Somalia several de facto independent territories can be found, with the most notable being Somaliland, located in the north of Somalia.
Based on the criteria for statehood, Somaliland may be regarded as a State: there is a territory (albeit with disputed borders), with a population and a government exercising effective control over its territory. Whether or not Somaliland is recognized by any other State is irrelevant: an entity's statehood is independent of its recognition by other States, according to the declaratory theory of statehood. A State - in this case Somaliland - must therefore first exist before other States may decide to establish ties with it. As
6 Hobach, Lefeber & Ribbelink 2007, p. 161.

7 Kooijmans 2002, p. 21.
8 The Failed State Index (FSI) is an annual index published since 2005 by the United States think-tank Fund for Peace and the magazine Foreign Policy. The FSI only includes recognized sovereign States determined by membership in the United Nations (UN). Consequently, a number of territories whose status is not final are excluded until their political status and UN membership is ratified. These include Taiwan, the Palestinian Territories, Northern Cyprus, Kosovo, and Western Sahara (even though some territories may be recognized as sovereign States by existing States). Excluded are also some States for which there is insufficient data. The ranking of the States is based on the total scores of the 12 indicators. For each indicator, the ratings are placed on a scale of 0 to 10, with 0 being the lowest intensity (most stable) and 10 being the highest intensity (least stable). The total score is the sum of the 12 indicators and is on a scale of 0-120. For more information – such as the methodology used to calculate the scores– can be found on the Fund for Peace website: http://www.fundforpeace.org/global/?q=fsi-faq
9 The Fund for Peace, 'Failed States Index', The Fund For Peace 2010. <http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=99&Itemid=140>
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mentioned earlier however, there is no obligation under international law for States to recognize an entity as a State, once it meets the factual criteria for statehood. At the same time however, it seems that a State cannot exercise its full legal rights under international law without recognition by other States. An example of this is membership of the UN. Art. 4 of the United Nations Charter (UN Charter) prescribes:
1. Membership in the United Nations is open to all (...) States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.
Yet, it is Somalia that is a member of the UN and not Somaliland. In addition, Somaliland may not become a member of the United Nations while it is unrecognized by other States. In contrast, Somalia remains to be recognized as a sovereign State by the international community of States, despite failing to meet the factual requirement of effective control: it exists de jure as it were.
This raises questions about the nature of statehood and how it is achieved. Some authors have contended that the violation of fundamental norms of international law, such as the annexation of existing States, or the creation of States by military force, might prevent the creation of a State.10 Or that the right to territorial integrity of an existing State might have priority over the right to external self-determination of peoples (possibly after the period of decolonization).11 Assuming that these norms are applicable within the context of statehood, the above arguments reach beyond the generally accepted criteria of the declaratory and constitutive theories. In addition, they only address the situation of the „new State and not that of the parent State Somalia, which remains de

facto collapsed. Rather than meeting the factual criteria for statehood, Somalia's continued existence seems to depend on its recognition by other States.
Although the case of Somalia and Somaliland is merely one example among many,12
10 Dugard 1987, p. 135.
11 Kooijmans 2002, p. 20-24.
12 Other examples include Kosovo (Serbia), Northern – Cyprus (Cyprus), South – Abkhazia (Georgia),
5
the above suggests that the generally accepted criteria for statehood are an incomplete system of law, as neither the declaratory, nor constitutive theory of recognition seems to satisfactorily explain the objective legal situation of States in international law.
Research Goal
I want to examine the criteria for statehood according the declaratory and constitutive theories of statehood, because I want to find out to what extent these theories are sustainable as the method for determining whether a territorial entity has become a State under international law, in order to determine whether these theories satisfactorily explain the objective legal situation of States in international law. The scientific and social relevance of the research will be discussed in the last paragraph.
Central Research Question
To what extent are the declaratory and constitutive theories of statehood sustainable as the method for determining whether a territorial entity has reached statehood under international law?
Sub-questions
- What are the generally accepted criteria for statehood according to the constitutive and declaratory theories?
- What issues arise when these criteria are applied in practice?
- How do the constitutive and declaratory theories attempt to address these issues?
- Based on the above, do the declaratory, or constitutive theories of statehood satisfactorily explain the objective legal situation of States in international law?

In order to answer the main research question, the research will be divided into four Sections. The first Section is a general introduction to the concept of „statehood and is
Taiwan (China), Moldova (Transnistria), Katanga (Congo), Biafra (Nigeria), Anjouan (Comors) and numerous others. For more information see: Caspersen & Stansfield 2011.
6
meant to provide background information on issues that are necessary for a thorough understanding of the thesis. The main purpose will be to describe the general legal framework and underlying theoretical premises regarding statehood. This Section addresses the historical development of the State, the distinction between State and government and the way in which international law regards the relationship between the State on the one hand and its territory and its population on the other hand. The three traditional elements of the State, as generally accepted in contemporary international law (territory, population and government) will be discussed in the second Section,

whereby special attention will be given to the requirement of effective authority, also known as the „principle of effectiveness. The third Section addresses the notion of State recognition and how it relates to statehood, according to the declaratory and constitutive theories. The fourth and final Section examines the issues that arise when the theory of statehood is applied in practice and how the criteria for statehood attempt to address these issues. In this part the relationship between the factual criteria for statehood and recognition will be examined closely. A comparison will be made between „de facto States (territorial entities that fulfill the factual criteria for statehood, but remain unrecognized by other States) and „de jure States (territorial entities that are recognized as States by the international community, but who do not fulfill the criteria for statehood). Special emphasis will be given to the factual requirement of effective control and the interplay between recognition and statehood. This Section will also evaluate whether the declaratory and constitutive theories can satisfactorily explain the objective legal situation of States in international law.

Theoretical Framework

The theoretical framework for the research consists of several „layers. The primary focus will be on positive law (for example, cases dealt with by the International Court of Justice) and legal doctrine. This will be essential during every part of the research. The positive law will be particularly important when dealing with established law and the interpretation of legal concepts, while the legal doctrine can help provide the necessary definitions and legal framework. In addition, by analyzing the arguments of scholars and international courts, the contemporary status of the debate on the criteria

for statehood can be determined.

General principles of law and legal theory will be most valuable as a guideline when dealing with issues that are not well worked out, or normative issues, such as the evaluation of legal concepts related to the criteria for statehood.

Theories from other academic disciplines might be used in limited quantity, namely in relation to international relations, due to the inherent interplay between international law (particularly statehood) and politics.

Methods of Research

This thesis will be based on doctrinal research, whereby the following research methods will be used:

Literature review is used throughout the research.

Theoretical research is used to analyze, extrapolate, (re)construct, and compare the information gathered from the literature review.

(Limited) empirical research methods (from secondary sources) are used to help clarify the factual circumstances surrounding (putative) States and other territorial entities.

Scientific and Social Relevance of the Research Topic

Although the notion of statehood occupies a central place in international law, it is in many regards shrouded in ambiguities. At the same time, it is likely that the subject of statehood will gain increasing importance under the influence of globalization and the changing nature of threats (the

so called "new threats" such as terrorism, and its associated factors). What is for example the status of these unrecognized territorial entities and do they interact with the international system of sovereign States? Ambiguities in the theory of statehood can be exploited to deny States their rights or serve as justifications for intervention. Where States are involved, no member of the international community is guaranteed to remain „untouched (be it for better, or for worse).
From a scientific perspective this thesis is relevant because the research focuses on a
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legal concept that poses many outstanding questions. Research can shed some light on many of these unanswered questions and add knowledge to the body of legal doctrine. This in turn can be used by lawyers and scholars who have to deal with this subject.
9
1. The Notion of Statehood in International Law
1.1 General Observations
Some writers have suggested that the concept of statehood does not have a separate place in international law, or have even come close to denying the existence of statehood as a legal concept altogether. While these views might contribute to view the State in non-absolutist terms, they are difficult to match with the extensive reliance on the concept in international „constitutional documents such as the United Nations Charter (UN Charter), or State practice.13 The separate position of the State is further underscored by the recognition of the existence of certain fundamental rights and obligations of States in international law. Werner notes that many of these fundamental rights and duties may be summarized in three principles closely related to the principles of liberty, equality and fraternity as those developed in the domestic sphere: the independence of States, the (sovereign) equality of States and the obligation of States to peacefully coexist.14 The independence and equality of States includes for example, the right of States to choose their own constitution, to exercise (exclusive) jurisdiction over their territory and if necessary, to defend the State against an armed attack. The obligation of peaceful coexistence implies, among other things, that States have the duty to refrain from intervention in the (internal or external) affairs of other States, from using their territory (or allowing it to be used) for activities that violate the rights of other States, or form a threat to international peace and security, and to comply with obligations imposed on them by international law in accordance with the principle of good faith. The last requirement implies, for example, that States are obliged to respect human rights on their territory.15 Similarly, Crawford observes that States possess certain exclusive and general legal characteristics, which he divides into five principles that „onstitute in legal terms the hard core of the concept of statehood, the essence of the special position in customary international law of States.16
13 Crawford 1977, p. 94-95.
14 Hobach, Lefeber & Ribbelink 2007, p. 160.
15 Hobach, Lefeber & Ribbelink 2007, p. 160.
16 Crawford 1977, p. 108 - 109.
10

1. In principle States have full competence to perform acts in the international sphere, such as entering into treaties. This is one meaning of the term „sovereign as applied to states, which will be discussed in more detail in the next paragraph.
2. In principle States are exclusively competent with regard to their internal affairs: a principle that is underscored by art. 2, paragraph 7 of the UN Charter. While this does mean that States have the authority or legal capacity to act in all matters, in international law, regarding those affairs, it does mean that their jurisdiction is prima facie both complete and not subject to the control of other States.
3. In principle States cannot be compelled to take part in international processes, settlements, or jurisdiction unless they consent to such exercise (either in general cases or specifically).
4. States are considered „equal in international law. A principle also recognized by art. 2 paragraph 1 of the UN Charter. This is to some extent a confirmation of the above-mentioned principles, but it may have certain other consequences. Crawford states that „t is a formal, not a moral or political, principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations, merely that, in any international organization not based on equality, the consent of all the members to the derogation from equality is required.
5. Finally, it is only possible to derogate from these principles if it has been clearly established. In case of doubt or disagreement an international tribunal or court will have to resolve disputes relating to the (external or internal) freedom of action of States, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality.
1.2 The Emergence of the State as a Defined Territorial Entity
One of the defining characteristics of the contemporary (sovereign) State is its territoriality. The State is the highest authority within a given territory: outside that territory the State, is obliged to respect the principle of non-intervention in its relations
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with other States.17 The concept of the State as a territorially bounded unit finds her origins in the 16th and 17th centuries18 when in Western-Europe, it replaced the dominant form of political organization of the Medieval order, known as the „Respublica Christiana'. The Respublica Christiana was the central notion of unity and universality: all members of the (Christian) community were united under the authority of the Emperor and Pope. Simultaneously, on the local level, there existed a complex feudal system wherein the rights and obligations between lord and vassal occupied a central place. The universalism of the Respublica Christiana and the diversity of feudalism were gradually replaced by a system of territorially defined entities, with a relatively high degree of internal centralized authority.19 The term sovereign originates from the Latin „suprema potestas, which translates into „highest authority or „highest power indicating that the State is the highest body of authority, not inferring its powers from other earthly bodies such as, for example the Pope or Emperor, as had been the case during the Respublica Christiana.20
The transition from the Respublica Christiana to the contemporary system of States was a gradual process, but in general, 1648 is regarded as the year that the transition to the modern State system

was formalized.21 In that year delegations from the main political powers in Europe gathered in the cities of Münster and Osnabrück to sign a series of peace treaties that would finalize the Peace of Westphalia. The treaties concluded in Münster and Osnabrück put an end to the religious wars that had swept through Europe since the Reformation and initiated a new system of political order in central Europe, based upon the concept of a sovereign State governed by a sovereign: a system which would later be referred to as „Westphalian sovereignty. The Peace of Westphalia formalized a number of important principles that currently underlie the basis of modern international relations and international law. In addition to the principle of the sovereignty, these include the principle of (legal) equality between States and the principle of non-intervention in the internal affairs of another State.22
17 Hobach, Lefeber & Ribbelink 2007, p. 161.
18 Koojimans 2002, p. 2.
19 Hobach, Lefeber & Ribbelink 2007, p. 161.
20 Koojimans 2002, p. 2.
21 Koojimans 2002, p. 2.
22 Birdsall, 2009, p. 40-41.
12
The importance of territoriality further increased with the invention of cartography in the late 17th century.23 With the aid of cartography States were able to establish the borders of the different territories with much greater precision. Within these borders the power of the State steadily increased. This led to, among other things, an increase in bureaucracy, an improved ability to register and monitor the population, and a rise in the number of tasks performed by the State.24 One of the most striking examples of the increased power of the State is the extent to which it succeeded in centralizing the use of force. This is an important reason why many historians and sociologists have attempted to define the State in terms of centralization of (legitimate) violence.25 This centralization manifested itself internally, through the creation of national police forces and a drastic increase in the number of prisons during the late 18th and early 19th centuries. Externally, it manifested itself through the definition of war as being an exclusive affair of the State, in which a (three-way) separation was made between a government which is regarded to set out the policy of the State, armies that are supposed to fight in the interest of the State and a civilian population which is expected to be spared from the horrors of war.26 War became an „institution of international law and an accepted and routine method of conducting everyday international business between States.27 Vattel observed for instance in his book „Le droit des gens (1758),28 that going to war was the prerogative of rulers who act on behalf of their States and that individuals are obliged not to interfere in the wars of States.29 Similarly, Neff states that „ar was forthrightly seen as an instrument for the advancement of rival national interests.30
It would be wrong however to view the State merely in terms of a centralized
23 Hobach, Lefeber & Ribbelink 2007, p. 162.
24 Hobach, Lefeber & Ribbelink 2007, p. 162.

25 Hobach, Lefeber & Ribbelink 2007, p. 162.
26 Hobach, Lefeber & Ribbelink 2007, p. 162.
27 Neff 2005, p. 85
28 Emer de Vattel, Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains (Londres, 1758). 2 vols.
< http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1858&Itemid=27 >
29 Hobach, Lefeber & Ribbelink 2007, p. 162.
30 Neff 2005, p. 85
13
authority, exercised within a defined territory.31 As will be explained, there is another element to territoriality. Characteristic of the modern State is not only its territoriality, but also the fact that it is itself regarded as an abstract person or order.32 This person or order cannot be equated with either the rulers (for example the monarch or government) or the subjects or citizens of the State. The State is an abstract order which includes both the rulers and those who are ruled, but it cannot be equated with either group.33 The idea of the State as an independent abstract individual or order was developed by the political philosophy of Thomas Hobbes (1588-1679). Hobbes, identified the State as an „artificial man, which should be distinguished from the government (who is expected to speak on behalf of the state) and the people (who may expect protection from the State and in turn, owe obedience to it).34
The notion of the State as an abstract person also serves as the basis for the distinction between the concepts „State and „government in international law. A single State can experience changes in its constitution or government. Even an unconstitutional or violent change of government, does not - in principle - affect the legal personality and the continuity of the State.35 Examples include Chile which underwent a bloody coup by Pinochet in 1973 and the survival of Romania after the forceful expulsion of Ceausescu regime in 1989. Even revolutions, such as the Russian revolution of 1917 or the Iranian revolution of 1979, which gave rise to in an entirely different system of government and a renaming of the name of the State, left the personality of the States intact. The State as an abstract (legal) person continues to endure even if the central government has completely collapsed due to internal unrest, such as a civil war. After the fall of Barres regime in 1991, Somalia underwent an internal armed conflict between warring clans, which resulted to the complete collapse of Somalias central government. Nevertheless, the international legal personality of Somalia as a State remained intact. Likewise, Lebanon underwent a civil war that ravaged the country between 1975 and 1990, without having its statehood affected.36
31 Hobach, Lefeber & Ribbelink 2007, p. 162.
32 Hobach, Lefeber & Ribbelink 2007, p. 162.
33 Hobach, Lefeber & Ribbelink 2007, p. 162.
34 Hobach, Lefeber & Ribbelink 2007, p. 162.
35 Hobach, Lefeber & Ribbelink 2007, p. 163.
36 Hobach, Lefeber & Ribbelink 2007, p. 163.

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The development of the notion of the State as an abstract person or order is also reflected by the different attempts that have been made over time to express the relationship between the State and its territory.37
The oldest approach, also known as the „Eigenthumstheorie „, „or property theory considered the territory to be an object of the States property.38 According to this theory, the State quite literally, possesses a territory. In other words, the property theory makes no distinction between the notions of „property and „governance (or politics): a distinction which is necessary to better understand the contemporary view on statehood.39 Partly under the influence of nationalism a second approach was developed, also known as the „Eigenschaftsstheorie, or „attribute theory. According to this theory, the territory is an attribute of the State.40 In other words, the State does not possess a territory, but it is its territory.41 Any damage to the territory of the State would constitute a violation of the person of the State itself. As such, the transfer of any part of the States territory would amount to an amputation. Given the number of (often bloody) struggles that take place between States over - what often appears to be useless - fragments of territory offers the impression that at least some individuals (implicitly) still believe in the validity of the attribute theory.42
Contemporary international law approaches the relationship between the State and its elements (territory, people and government) differently however. Unlike the attribute theory, the contemporary approach makes a distinction between the State as an abstract order on the one hand and its elements on the other.43 This - currently dominant - theory, also referred to as the „Kompetenz theory, or „competence theory, was developed by the „Viennese School of Legal Theory, of which Hans Kelsen (1881-1973) is considered the most prominent representative. According to the Viennese School, the State should be thought of as a normative (legal) order, constrained by a territory and a
37 Hobach, Lefeber & Ribbelink 2007, p. 163-164.
38 Milano 2006, p. 67.
39 Hobach, Lefeber & Ribbelink 2007, p. 163.
40 Milano 2006, p. 67.
41 Hobach, Lefeber & Ribbelink 2007, p. 163.
42 Hobach, Lefeber & Ribbelink 2007, p. 163-164.
43 Hobach, Lefeber & Ribbelink 2007, p. 163.
15
population.44 The territorial borders indicate the territory over which the States legal order extends and thus defining the (legitimate) territorial scope of the State (excluding the possibility of extraterritorial jurisdiction as recognized in international law).45 Similarly the population of the State represents the (legitimate) „personal scope of the States legal order. Kelsen observed that the population of the State is nothing other than the group of people over which the States legal order extends (with the exception of the option to exercise jurisdiction over non-nationals).46
In addition to a personal and territorial scope, the State also contains a „temporal scope: States arise

(such as the numerous new States that were formed out of the decolonization process), States exist and States may cease to exist (as in the case of the United Arab Republic and Social Federal Republic of Yugoslavia).47 Werner notes, that the temporal component of the State is essential, because the criteria used to assess the emergence of States may differ to some extent from the criteria used to determine whether a State has ceased to exist. The requirement of effective and independent authority – which will be discussed in the next Section - typically occupies an essential role in answering the question whether a new State has come into existence.48 Nevertheless, the loss of effective and independent control in an existing State does not necessarily imply that the State has ceased to exist. The above examples of Lebanon and Somalia appear to indicate that a State without effective control is capable of maintaining its international legal personality. This is why Werner observes, that it is of great importance to separate questions relating to the creation of States from questions relating to the survival and the demise of States. 49 It must be added however, that the creation of States – at least in contemporary international law – is almost always is inextricably linked to the survival, or the demise of other States. Typically, the emergence of a new State is not possible without affecting the personality of an already existing State in some way.
44 Hobach, Lefeber & Ribbelink 2007, p. 163-164.
45 Hobach, Lefeber & Ribbelink 2007, p. 163-164.
46 Also referred to as the „nationality principle. For more information, see: Hobach, Lefeber & Ribbelink 2007p. 163-164.
47 Hobach, Lefeber & Ribbelink 2007, p. 164.
48 Whether, and to the extent to which, this is true will be examined in the following Sections.
49 Hobach, Lefeber & Ribbelink 2007, p. 163-164.
16
Based on the above it is clear that the concept of statehood has a clear and separate place in international law. Moreover, this concept has undergone numerous significant developments since its (formal) conception in 1648. These developments have ultimately given shape to the concept of statehood in international law as it is known today. The following Sections will examine the contemporary notion of statehood, its requirements, and what its (legal) implications are for the creation and continued existence of States.
17
2. International Law and the Criteria for Statehood
2.1 Definition
Given the States central role in international law and international relations, it would seem evident that a clear and codified definition of a State exists in international law, so to determine which entity may be considered a State. Since 1945, several attempts have been made to agree on such a definition. During the negotiations over the draft text on the Declaration on the Rights and Duties of States (1949), the Vienna Convention on the Law of Treaties (1956 and 1966) and the articles on Succession of States in respect of Treaties (1974), attempts were made to describe the concept of the State. None of these efforts succeeded however, as a codification of a definition of the State

turned out to be too politically sensitive.50 Despite the lack of a clear definition of what constitutes a State, international law does provide some guidelines on how to approach the issue of statehood. For example, the existence of effective control – which will be examined in more detail in the next Section - is widely regarded as an important, perhaps even crucial, consideration in assessing the emergence of new States.51 The so-called „principle of effectiveness, came to replace the commonly accepted „policy of recognition of the 19th century, which allowed existing States to authoritatively determine whether a (new) political community possessed sufficient „legitimacy and „civilization to join the existing community of sovereign (and self-proclaimed civilized) States. This subjective policy of recognition was replaced with a more objective, factual criterion: the existence of effective control over a given territory (also known as the „principle of effectiveness).52
The importance of effective control was underscored as early as 1929 by the arbitrator in the case of the Deutsche Continental Gas-Gesellschaft.53 The arbitrator stated that „ State does not exist unless it fulfills the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over
50 Hobach, Lefeber & Ribbelink 2007, p. 164.
51 Hobach, Lefeber & Ribbelink 2007, p. 165.
52 Hobach, Lefeber & Ribbelink 2007, p. 165.
53 Deutsche Continental Gas-Gesellschaft v. Polish State (1929), Annual Digest, 5 (1929-30) No. 5, at p. 14-15. Grant 1999, p. 36.
18
the people and the territory.54
Likewise, the importance of the principle of effectiveness has long been recognized in legal doctrine. A brief summary of the importance of effective control for identifying a State is given by Shaw, who observes that „ he ultimate control and territory is the essence of a State.55 Similar formulations are found in older literature, among which special attention should be given to Jellinek's „Drei Elementen Lehre, which affirms that a State consist of three essential elements: a government, a territory and a population. A codification of Jellineks doctrine of the three elements can be found in the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention). Art. l of the Montevideo Convention provides a description of the State as a subject of international law:
„The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter info relations with the other States.
The Montevideo Convention is a relatively old, inter-American convention, with few ratifications. Its description of the State however, is almost without exception considered the starting point for any discussion about the State as a subject of international possessing legal personality. Art. 1 of the Montevideo Convention, is by many regarded as „the most widely accepted formulation of the criteria of Statehood in international law.56 Grant notes that citing from the Montevideo Convention in discussions about the position of the State in international law has almost become a reflex.57

This Section is no exception in this regard. However, before the criteria for statehood are discussed in more detail, a number of points should be raised. First, the elements of the Montevideo Convention were primarily intended as criteria for assessing the creation of States and not as criteria for assessing the continuation of States.58 As
54 Hobach, Lefeber & Ribbelink 2007, p. 165.
55 Hobach, Lefeber & Ribbelink 2007, p. 166.
56 Hobach, Lefeber & Ribbelink 2007, p. 166.
57 Shaw, 2003, p. 178.
58 Hobach, Lefeber & Ribbelink 2007, p. 166.
19
already mentioned in the previous Section, a State can continue to exist even if the criterion of the Montevideo Convention, the existence of an effective government, is (temporarily) lost. Secondly, it should be noted that the fourth criterion, the ability to enter into relations with other States, is generally not considered a prerequisite for the existence of a State. It is instead the other way around: if an entity meets the first three criteria (a territory, a population and a government) it can be considered a State and therefore has the ability to enter into relations with other States. In other words, the ability to enter into relations with other States, is seen as a consequence and not a prerequisite of being a State:59 a State cannot enter into a relations with other States if it does not exist.60

2.2 The Montevideo Criteria

2.2.1 Defined Territory

As discussed in the previous Section, the development of the State is closely linked to the ability to exercise effective control over a defined territory. This was already reflected by the principle of cuius region, euius religio and became more important with the increased technical capabilities of border demarcation, the increased centralization of power within the State and the rise of nationalism (which is referred to as the principle of cuius region, national euius).61 Given the strategic, economic and symbolic importance of territory, it is therefore not surprising that at the present time many territorial disputes and disputes over border demarcation still exist.

However, the existence of border disputes is not an obstacle to attaining statehood in international law. There is no rule stating that the boundaries of a State should be
59 Hobach, Lefeber & Ribbelink 2007, p. 166.
60 Whether the three generally accepted criteria of the Montevideo Convention can be regarded as sufficient and necessary conditions for statehood under all circumstances remains to be answered of course. As mentioned in the introduction, there are territorial entities that have not fully met the criteria for statehood and yet remain to be recognized as States by the international community, while entities that have met the three criteria remain unrecognized.
61 Hobach, Lefeber & Ribbelink 2007, p. 167 - 168.
20
undisputed or unambiguously established.62 Israel for example, was admitted to the United Nations

on 11 May 1949, despite its ongoing territorial disputes with the (predominantly) Arab States.63 When Jessup, the representative of the United States to the United Nations argued for Israels admission, he discussed the requirement of territory in the following manner:64
„One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers (…) The formulae in the classic treatises somewhat vary, (…) but both reason and history demonstrate that the concept of territory does not necessarily include precise delamination of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit (…) here must be some portion of the earths surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement (…)65
A German-Polish Mixed Arbitral Tribunal had previously confirmed the above rule in 1929 in the case of the Deutsche Continental Gas Gesellschaft:66
„Whatever may be the importance of the delamination of boundaries, one cannot go so far as to maintain that as long as this delamination has not been legally effected the State in question cannot be considered as having any territory whatever (…) In order to say that a State exists (…) it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delaminated, and that the State actually exercises independent public authority over that territory.67
More recently in the North Seas Continental Shelf cases, the International Court of Justice (ICJ) confirmed that international law does not require that the boundaries of a
62 Hobach, Lefeber & Ribbelink 2007, p. 167 - 168.
63 Hobach, Lefeber & Ribbelink 2007, p. 168.
64 Crawford 1977, p. 112.
65 Security Council, Official Records, 383rd Meeting, 2 December 1948, p. 41.
66 Crawford 1977, p. 113.
67 Deutsche Continental Gas-Gesellschaft v. Polish State (1929), Annual Digest, 5 (1929-30) No. 5, at p. 14-15.
21
State should be fully delaminated and defined:68
„The appurtenance of a given area, considered as an entity, in no way governs the precise delamination of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delaminated and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.69
Crawford notes that in addition to claims relating to the borders of a State, it is possible to have claims relating to the entire territory of a new State. Claims relating to the entire territory of a State have often been brought up in the context of admission to the United Nations. Examples include Israel, Mauritania and Kuwait. However, the proposition that a State exists despite claims to the

whole of its territory have not been challenged in these cases.70 Crawford further observes:
„In any event, customary international law prohibits the settlement of territorial disputes between States by the threat or use of force, and a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to or is claimed by another State.71
Subsequently, for a territorial entity to be protected by the above rule, it would first have to be a State, as the above rule only applies to the relations between States and not territorial entities in general.
With regard to the size of the territory it can be stated that no specific requirements exist: the international community of States consists of both „micro-States, such as Liechtenstein and San Marino and very large States such as Canada or Russia. This does not mean however that the existence of the so-called „micro-States is free from practical complications. An example of this is partially reflected in the United Nations, which is, in principle, open to all States capable of complying with the obligations
68 Hobach, Lefeber & Ribbelink 2007, p. 168.
69 ICJ, Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands (1969), ICJ Reports 3 (Feb 20), Para. 3, p. 32.
70 Crawford 1977, p. 113.
71 Crawford 1977, p. 113.
22
under the UN Charter. The proliferation of small States has led to a discussion about the status and powers of the so-called micro-States within the UN, where some for example have suggested, that the voting rights of small States in the General Assembly should be limited.72
2.2.2 Permanent Population
States are not only territorial entities, but they also consist of groups of individuals. Therefore, a permanent population is another necessary requirement for statehood. There are no criteria relating to the size of the population: Andorra with its 68,000 inhabitants is as much a State as India, which now has currently has well over one billion inhabitants. Neither does international law set any requirements about the nature of the population: the population may largely consist of nomads (such as in Somalia), it may be ethnically (relatively) homogeneous (such as in Iceland) or very diverse (such as in the former Soviet Union), it may be very poor (such as in Sierra Leone, where in 2000 nearly 70 percent of the population lived below the poverty line) or it may be very rich (as in many Western States).73
It should also be noted that the requirement of a permanent population does not relate to the nationality of a population: it merely requires that States have a permanent population. Neither does international law prescribe which person belongs to a State: States are free to determine to whom the nationality of the State is granted.74 In so far as relevant to this thesis, it is important to understand that nationality depends on statehood and not the reverse: that is, a State is able to give a certain nationality to a person, due to being a State.

2.2.3 Government
The existence of a permanent population on a given territory is in itself insufficient for
72 Hobach, Lefeber & Ribbelink 2007, p. 168.
73 Hobach, Lefeber & Ribbelink 2007, p. 168.
74 Hobach, Lefeber & Ribbelink 2007, p. 168.
23
statehood. The third - and according to many final75 – requirement for statehood, is the existence of a government capable of exercising independent and effective authority over the population and the territory. The importance that is attached to the criteria of independence and effectiveness is understandable considering the predominantly decentralized nature of international law. Since international law lacks a central executive body, with the power to enforce compliance with international obligations, compliance with international obligations must often be guaranteed by the States themselves.76 A State must therefore be able to the effectively and independently exercise its authority within its borders.
2.2.3.1. Effectiveness
Questions regarding the creation of a new State often revolve around the criterion of effective authority. Crawford notes that „he requirement that a putative State have an effective government might be regarded as central to its claim for statehood.77 The importance of effective authority is, among others evidenced by the Aaland Islands case.78 Finland had been an autonomous part of the Russian Empire from 1807. After the November Revolution of 1917 it declared its independence. During the first months after its declaration of independence, Finlands territory was subjected to a series of military actions and interventions. In the ensuing struggle between various domestic and foreign troops, it was unclear whether and by whom effective authority was being exercised in the newly declared State. It was not until after the defeat of Germany by the Triple Entente and the removal of Soviet troops from Finnish territory by Sweden that some degree of order was restored.79 The Commission of Jurists (the Commission), appointed by the Council of the League of Nations (the Council), was to report on certain aspects of the Aaland Islands dispute (the Aaland Islands were being claimed by both Finland and Sweden).80 In essence the Commission of Jurists was of the opinion
75 Koojimans 2002, p. 21.
76 Hobach, Lefeber & Ribbelink 2007, p. 169.
77 Crawford 1977, p. 116.
78 Hobach, Lefeber & Ribbelink 2007, p. 168.
79 Crawford 1977, p. 117-118.
80 The Aaland Islands Question (On Jurisdiction), Report of the International Committee of Jurists,
24
that the legal status of Finland was unclear until the new government was able to effectively exert its authority over the territory:81
„or a considerable time, the conditions required for the formation of a sovereign State did not exist.

In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves, civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and the Russian troops, and after a time Germans also, took part in the civil war (…) It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from the time onwards it was possible do re-establish order and normal political and social life, little by little.82

It should be noted that this position was later somewhat nuanced. After receiving the report of the Commission on the question of jurisdiction over the Islands, the Council appointed a second commission, known as the Commission of Rapporteurs (the Rapporteurs), to advise the League on the resolution of the dispute on the merits.83 The Rapporteurs disagreed with the Jurists on this point. Partially because of Soviet recognition of Finland, but more importantly, because of Finlands continuity of personality before and after 1917. Subsequently, the Rapporteurs applied rules relating to the restoration of law and order in Finlands territory, and to the legality of foreign support for that purpose, instead of the stricter rules relating to the creation of ab initio

League of Nations Official Journal, Special Supplement No. 3 (1920).

81 Crawford 1977, p. 117-118.

82 League of Nations Official Journal, Special Supplement No. 4 (1920), p. 8-9.

83 The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921) (excerpted and reprinted).

25

of a stable government in a new State.84

The importance of effective authority is further evidenced in the Island of Palmas case.85 The arbiter, Max Huber, noted that while international law does recognize that States have exclusive jurisdiction on their territory, it does not dictate that States are entirely free in their conduct on their territory. Huber notes that the recognition of the right to exercise authority also implies that States are held to respect and effectively protect the rights of other States on their territory. This obligation can only be met if a State is truly capable of exercising effective authority on its territory:86

„Territorial sovereignty (…) involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a

manner corresponding to the circumstances, the State cannot fulfill this duty.87
Despite the above, in State practice the application of the principle of effectiveness seems to be considerably less strict. For instance, Bosnia-Herzegovina was recognized by the international community as a State and was authorized to join the United Nations during a period that large parts of its territory were not under effective control of the government. At that time, even the president had admitted that Bosnia-Herzegovina independence was not enforceable without foreign support.88 Similarly, during the process of decolonization, numerous entities achieved statehood and were admitted to the UN, while their governments lacked effective authority over the territory. Some authors have argued that in these instances the principle of effectiveness was weighed against the right to self-determination of the colonized peoples and the widely held
84 Crawford 1977, p.118.
85 Permanent Court of Arbitration, Netherlands v. United States of America (Island of Palmas Case), RIAA II, 829.
86 Hobach, Lefeber & Ribbelink 2007, p. 169.
87 Permanent Court of Arbitration, Netherlands v. United States of America (Island of Palmas Case), RIAA II, 829 at 839.
88 Hobach, Lefeber & Ribbelink 2007, p. 169.
26
desire that former colonies could transform themselves into independent States.89 Congo for example, gained formal independence from Belgium during a period of severe internal armed conflicts. As a result of these conflicts, at one point in 1960, two separate groups were claiming to be the (official) representatives the new State in the General Assembly. Similarly, when Guinea-Bissau was admitted to the United Nations on 17 September 1974, the requirement of effective authority was not very strictly enforced. Guinea-Bissau was recognized as a State by a large portion of the international community, even though the new government lacked control over the majority of the population and the most important cities. A year earlier in 1973, the Dutch government had even spoken out against approval of Guinea-Bissau, as it had yet to fulfill the requirement of effective authority.90
2.2.3.2 Independence
In addition to the principle of effectiveness, the authority must be exercised independent of external interference. Independence is widely considered as one of the most important requirements for statehood. A number of authors regard independence in fact as the most important criterion for statehood.91
The landmark case on independence, is the Austro-German Customs Regime case, which involved the meaning of the term „independence as laid down in art. 88 of the Treaty of Saint-Germain.92 Art. 88 intended to guarantee the continuation of Austria and its separation from Germany. The Permanent Court of International Justice was asked to give its advisory opinion on whether a proposed customs union between Germany and Austria was consistent with obligations of Austria under the Treaty of Sain-Germain and the Protocol of Geneva. The following definition given by

Judge Anzelotti is often used
89 Hobach, Lefeber & Ribbelink 2007, p. 171.
90 Hobach, Lefeber & Ribbelink 2007, p. 171.
91 Crawford 2006, p. 62. It must also be noted that the requirement of independence of authority is not unanimously accepted as a necessary requirement for statehood. In this regard, Talmon notes: „here are, however, several arguments against factual independence as an additional criterion for statehood. One argument against factual independence as an additional criterion for Statehood for example is its vagueness. For more information see: Talmon 2004, p. 111-116.
92 Crawford 1977, p.120.
27
as the standard definition of independence as the criterion of statehood:93
„he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (suprema potestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law. (…)
It follows that the legal conception of independence has nothing to do with a States subordination to international law or with the numerous and constantly increasing states of de independence which characterize the relation of once country to other countries. It also follows that the restrictions upon a States liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.94
The importance of independence was also made explicit in the Island of Palmas case. Huber notes with regard to the importance of the independence in international law:95
„Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.96
93 Crawford 1977, p.122.
94 Crawford observes that while this passage is often cited as a definition of independence, it is should be assessed within its specific context. As a general definition of independence as the criterion of statehood it is much too absolute: Crawford 1977, p. 122. This is also one of the reasons why Talmon states that one of the argument against factual independence as an additional criterion for Statehood is its vagueness. For more information, see: Talmon 2004, p. 111-116.
95 Hobach, Lefeber & Ribbelink 2007, p. 170.

96 The Island of Palmas Case (or Miangas), United States of America v. The Netherlands, Permanent Court of Arbitration, 4 April, 1928, p.39.
28
Werner notes that the criterion of independence is primarily intended to indicate that States must possess so-called „constitutional independence: meaning that the State constitutes the highest legal order (excluding international law) and that it must also be able to protect this (formally independent) legal order.97 Alan James, defined constitutional independence as follows: „A territorial entity claiming sovereignty must (...) show that it is territorially defined, contains people, and governs them, and also that there is no other State which claims formal authority over it and is providing effective physical backing for that claim.98 This is also why parts of a federal State, such as California (United States) or North Rhine-Westphalia (Germany), are not considered to be States in international law. Even though they enjoy a territory, a population and effective authority, they lack constitutional independence. In contrast, the federal States to which they belong do possess independence and can therefore operate as a State under international law.
Moreover, independence must be both „formal and „functional. Formal independence exists in cases where the powers to govern a territory are vested in the separate authorities of the State. This authority may stem from internal legislation or can be the result of a concession by the former sovereign State.99 Functional independence exists when a certain minimum level of (real) power is exercised by the authorities of the State.100 The two aspects, formal and functional independence, are not unrelated, although the exact relationship between formal and functional independence may be complex.101 For the purpose of this thesis, it is sufficient to note that formal independence without functional independence is not sufficient to conclude that the entity is independent in its actions.
In specific cases, different legal consequences may be attached to the lack of independence. If there is a complete lack of independence, the affected entity might not be internationally considered a State, but may be regarded as an indistinguishable part
97 Hobach, Lefeber & Ribbelink 2007, p. 170.
98 Hobach, Lefeber & Ribbelink 2007, p. 170.
99 Crawford 2006, p. 76.
100 Crawford 2006, p. 78.
101 For more information on the relationship between formal and functional independence, see: Crawford 1977, p. 134-139.
29
of the dominant State. The granting of such „independence may under certain circumstances, be considered legally null and void, or even an act favoring the grantor, by way of so-called „puppet States:102 a term that is used to describe nominal sovereigns that are de facto under foreign control.103 An entity might also be independent in some basic form, but „act in a specific matter under the control of another State so that the relationship becomes one of agency, and the responsibility of the latter State is attracted for illegal acts of the former.104

Nevertheless, even an extensive lack of independence may coexist with statehood as demonstrated by the case of Iran under Allied occupation from 1941 to 1946. In August 1941, Iran was occupied by British and Soviet forces to prevent fears of looming German control. Both parties underscored that the occupation of the country would be temporary and that they had no plans on Iranian sovereignty or territorial integrity. The occupation was followed by a change of government, in which Reza Shah Phalevi succeeded his father. The former was not considered a puppet government, and the change in government was widely recognized. The United States viewed the British and Russian occupation as necessary and justified, even though it expressed fears regarding the future independence of Iran. At the Teheran Conference, the three Allies reiterated „their desire for the maintenance of the independence, sovereignty and territorial integrity of Iran. 105 Despite the inability of the Iranian government to actually control events in parts of its territory during the war, there was little justification for any view that Iran had in some way ceased to exist, under those circumstances.106 Crawford further notes that „the criterion of independence as the basic element of statehood in international law may operate differently in different qualifications for statehood, and as a criterion for its continued existence.107 For example, if a new State is formed through secession from an existing State, it will have to demonstrate considerable independence, both formal and functional, before it is considered to be

102 Crawford 1977, p.120.
103 Crawford 1977, p.130.
104 Crawford 1977, p.120.
105 Crawford 1977, p. 134.
106 For an extensive examination of situations that might derogate from actual or functional independence, see: Crawford 1977, p. 123-134.
107 Crawford 1977, p.120.

definitively created. In contrast, international law protects the independence of an existing State against illegal invasion and annexation, so that it may continue to exist as a legal entity despite the lack of effectiveness. But in case a new State is formed through devolution (through a grant of power from the previous sovereign), considerations of pre-existing rights are less relevant and the independence is dealt with as a mostly formal requirement.108

It must be emphasized that the requirement of independence does not mean that governments are obliged to act completely independent from of all forms of foreign influence. States largely rely for their decisions on the actions and decisions of other States and international organizations. This does not mean however, that the States sovereignty is in question.109 International law also permits States to freely handover a (considerable) portion of their formal powers to other States or international organizations (for example, the European Union). This was confirmed in the Wimbledon case110 in which the Permanent Court of International Justice declared that „he right of entering international engagements is an attribute of State sovereignty.111 Also, whether the authority is exercised independently or with the help of others is immaterial, provided that the formal authority is

exercised on behalf of the government.
In summary it may be said that the test of effective and independent authority is not always strictly applied and that the importance of effective authority seems to be sometimes weighed against other interests and values of the international community. Nevertheless, the absence of a coherent form of government in a given territory is to the detriment of that territory being a State: at least in the absence of other factors, such as the granting of independence to that territory by a former sovereign.112 Continuity of government in a territory is one factor determining the continuity of the affected State and prolonged absence of government will incline to the dissolution of the State.113
108 Crawford 1977, p.120.
109 Hobach, Lefeber & Ribbelink 2007, p. 170.
110 S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17)
111 Hobach, Lefeber & Ribbelink 2007, p. 170.
112 Crawford 1977, p.118.
113 Crawford 1977, p.118.
31
2.2.4 Democratically Legitimated Authority
Some authors have also contended that customary international law supports the position that the „public authority must be a „democratically legitimated. James Fawcett was the first who introduced the criterion of democratic legitimacy.114 In response to the unilateral declaration of independence by the white minority regime in Southern Rhodesia, he wrote in 1966:115
„But to the traditional criteria for the recognition of a regime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.116
Talmon notes that while Fawcett broadened the classic criterion of „public authority to include „democratically legitimated public authority, he did not provide any ground for the new criterion except from pointing to art. 21, paras. 1 and 3, of the Universal Declaration of Human Rights117 and to two United Nations General Assembly resolutions.118 Fawcett stated that this „principle was acknowledged in the case of Rhodesia by the almost unanimous condemnation of its unilateral declaration of independence by the international community and by the collective withholding of recognition of the new regime.119 In addition, he made reference to the „idea of self-determination, even though he himself regarded the notion to be „highly political.120
114 Talmon 2004, p. 121.
115 Talmon 2004, p. 121-122.
116 Talmon 2004, p. 121.
117 A/RES/217 (III) of 10 December 1948. Art. 21 provides: „(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives (3) The will of the people shall b the basis of the authority of government,: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or

equivalent free voting procedure.
118 A/RES/648 (VI) of 10 December 1952; A/RES/1514 (XV) of 14 December 1960. Talmon 2004, p. 121.
119 Talmon 2004, p. 121.
120 Talmon 2004, p. 121.
32
At least two arguments can be made against this new criterion for statehood. First, customary international law does not give each citizen the right to influence public authority by way of periodic, equal, and secret elections. This is evidenced by the continued existence of a large number of undemocratic States.121 Secondly, to establish such a criterion for statehood in customary international law there must be a constant and uniform practice coupled with the required opinio juris: also this is missing.122 Quite a considerable number of the new States that were created in the 1960s and 1970s during the process of decolonization often did not meet the criterion of having a democratically legitimated public authority. Nevertheless, their statehood was never called into question. In 1975, the International Court of Justice held in its advisory opinion in the Western Sahara case, that „no rule of international law requires the structure of the State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.123 It should be noted, that in both the literature and in State practice a trend towards giving greater weight to the democratic legitimization of public authority may be detected. But the question of how public authority is organized is still irrelevant to the issue of statehood, as international law currently stands. As such, it would go too far to explain Rhodesia's non-recognition in these terms.124
2.2.4 Capacity to Enter into Relations with Other States
The „capacity to enter into relations with States is not the exclusive entitlement of States: autonomous national authorities, liberation movements and insurgents are all capable of maintaining relations with States and other subjects of international law.125 While States do possess that capacity, it is not a requirement, but a consequence of statehood. A consequence which is moreover irregular and dependent on the status and situation of a particular State. It can be said that the capacity to enter into full range of
121 Talmon 2004, p. 121-122.
122 Talmon 2004, p. 122.
123 ICJ 1975 Rep 12, p. 43-44, para. 94.
124 Talmon 2004, p. 122.
125 Crawford 1977, p. 119.
33
international relations can be a valuable measure, but capacity or competence in this sense depends in part on the power of the government, without which as State cannot carry out its international obligations. The ability of the government to independently carry out its obligations and accept responsibility for them in turn greatly depends on the previously discussed requirements of effective government and independence.126 Moreover, a State cannot enter into relations with other

States if it is not recognized. Consequently, it cannot be recognized as a State.
126 Crawford 1977, p. 119
34
3. Statehood and Recognition: The Declaratory v. Constitutive Theory
The key question in the discussion about the legal effect of recognition is whether the formation (and continued existence) of a State is dependent or independent of recognition by the existing States: in other words, may a political entity be considered a State under international law, even if it is not recognized as such by the existing States?127 The so-called „constitutive theory of recognition answer this question negatively. According to the constitutive theory, an entity may only become a State by virtue of recognition.128 Once the three previously mentioned factual (classic) criteria of a territory, a population and a government are met, this „factuality must then be confirmed by the existing States, only then - after being „constituted- may it enjoy rights inherent in States under international law.129
This interpretation of recognition fits well within the 19th century positivist view of international law as a purely consensual system, where legal relations may only arise with the consent of those concerned.130 The positivist theory believed that the creation of a new State also created legal obligations for existing States. As such, the existing States either had to consent to the creation of the new State, or to its accession to
127 Hobach, Lefeber & Ribbelink 2007, p. 170.
128 The term 'recognition' can be used in at least two ways. First, a State may explicitly express its view with regard to the legal status of a certain political community. An example of such an explicit recognition is the recognition of Israel as a sovereign State by the United Kingdom. In April 1950 the government of the United Kingdom declared: "His Majesty's Government have (...) decided to accord de jure recognition to the State of Israel." Secondly, a State may indicate that it considers a community to be a State under international law, by entering into certain relations with that community (for example, by concluding a treaty with the State, by entering into diplomatic relationships, or by beginning a dispute settlement proceeding before the International Court of Justice). Such a form of recognition, is also called an implicit or tacit recognition. Whether entering into such relations may be considered the recognition of a particular political entity as a State under international law, must be inferred from the specific circumstances. Hobach, Lefeber & Ribbelink 2007, p. 177.
129 Hobach, Lefeber & Ribbelink 2007, p. 170.
130 Talmon 2004, p. 102.
35
international law (and the international community). This form of recognition gave important consideration to matters like „the degree of civilization (as measured by Western standards) and dynastic legitimacy.131
This approach of the State was gradually replaced by one which defined the State primarily as a „matter of fact rather than a „matter of law. The State became to be viewed as an independent and

defined unit of (centralized) authority, which exists independent of its recognition by other States.
The notion that „recognition does not bring into legal existence a State which did not exist before is known as the „declaratory theory of recognition.132
The declaratory theory prescribes that recognition of a State is nothing more than expressing the willingness to enter into relations with that State. In other words, an entity becomes a State for the reason that it meets all the international legal criteria for statehood and the recognizing State „merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State.133 Recognition is therefore retroactive and status-confirming. In contrast, the previously mentioned constitutive theory, views recognition as status-creating and non-recognition as status-preventing: without recognition, there can be no State.134
In general terms, the proponents of the declarative theory can be divided into two groups. The first, more extreme group, regards recognition by existing States as completely irrelevant. The creation of States is seen as a factual process which happens outside of international law. This approach suggest that international law should regard States purely as a matter of fact, but that it should not determine which entities may be considered States or not. 135 This position is for example held by James, who argues that:
„t is not a provision of international law which has to be satisfied for a state to be ascribed sovereign status (…). Thus the position of international law in relation to sovereignty is that it presupposes it. International law
131 Hobach, Lefeber & Ribbelink 2007, p. 170.
132 Meijknecht 2001, p. 43.
133 Talmon 2004, p. 105.
134 Talmon 2004, p. 101.
135 Hobach, Lefeber & Ribbelink 2007, p. 178.
36
makes only sense on the assumption that there are sovereign states to which it can be applied.136
The second group – which consists of most supporters of the declaratory theory - accepts however that international law (as formed by the existing States) does indeed contain criteria for the creation of States. They disagree, however, that recognition by other States belongs to these criteria. Recognition by existing States might be beneficial, but it is not required for the creation, or the continuation of a State.137
Over the course of the 20th century the declaratory theory on recognition became the predominant theory on statehood.138 It finds support in treaties, declarations of States and particularly jurisprudence.139 This factual approach of the State is confirmed by art. 1 of the Montevideo Convention, which describes the attributes of the State in terms of effective authority and independence, instead of civilization or dynastic legitimacy.140 Given the „factual description of the State in art. 1 of the Montevideo Convention it is not surprising that a statement against the constitutive theory of recognition can be found in art. 3 of the Montevideo Convention:141
„The political existence of the state is independent of recognition by the other states. Even before

recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and subsequently 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.
This view is shared by the Institute de Droit International, which declared in art. 1 of its Brussels Resolution Concerning the Recognition of New States and New Governments
136 James 1986, p. 40.
137 Hobach, Lefeber & Ribbelink 2007, p. 179.
138 Talmon 2004, p. 105.
139 Talmon 2004, p. 106.
140 Hobach, Lefeber & Ribbelink 2007, p. 177.
141 Hobach, Lefeber & Ribbelink 2007, p. 177.
37
of 23 April 1936:142
„Recognition has a declaratory effect; The existence of a new State with all the juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States.143
The declaratory position on recognition also finds support in the opinions of the Arbitration Commission of the Hague Conference on Yugoslavia (also known as the „Badinter Commission), which was set up with the backing of the European Political Co-operation (EPC) (currently superseded by the Common Foreign and Security Policy). The Commission was charged with the task of studying questions relating to the recognition of new States and State succession, which resulted from the dismemberment of the Socialist Federal Republic of Yugoslavia (SFRY). In its first Opinion on 29 November 1991, it expressed that:144
„the principles of public international law (…) serve to define the conditions on which an entity constitutes a State; that is in this respect, the existence (…) of the State is a question of fact; that the effect of recognition by other States are purely declaratory.145
The declaratory theory also finds support in contemporary State practice. The Deutsche Demokratische Republik (DDR) was established on the 7th of October 1949, but it would take until the 1970s before it would be formally recognized by Western States. This does not mean however that the DDR lacked the properties of statehood before its recognition by the existing States. This was reflected by the Dutch position on the DDR until the early seventies (before it formally recognized the DRR as a State). The Dutch government argued that recognition of States was a political decision, not necessarily based on international law criteria.146 This position is not surprising as it would otherwise not be possible for a non-recognizing State to hold a non-recognized State
142 Talmon 2004, p. 105-106.
143 American Journal of International Law, Suppl., 1936, p. 185ff.
144 Talmon 2004, p. 106-107.

145 Opinion No. I (1991) 92 ILR 162, p. 164-165. Affirmed in Opinion No. 8 (1992) ILR 199, p. 201.
146 Hobach, Lefeber & Ribbelink 2007, p. 179.
38
liable for violating any international obligations. Nonetheless, State practice demonstrates that an „unrecognized State is also bound by international law. In 1949 a British fighter jet was shot down over Egypt by the Israeli armed forces. While the United Kingdom did not officially recognize Israel at that time (as it still adhered to the constitutive interpretation of recognition), it did hold Israel responsible for the incident and called for redress. Similarly, many Arab States do not formally recognize Israel as a State, but they frequently condemn Israel for not complying with its international obligations. Another example is the United States which held North-Korea liable for an attack on its ship the „Pueblo in 1968, even though North-Korea was not recognized by the United States at the time.147
Despite the considerable support for the declaratory theory in international law, there is at least one issue that continues to reopen the debate between the declaratory and constitutive theories: international law does not have any mechanisms for authoritatively determining whether an entity fulfills the factual criteria for statehood.148 The absence of such a body is one of the main arguments used by proponents of the constitutive theory to argue for the importance attached to recognition by existing States. Kelsen - one of the prominent defenders of the constitutive theory - argues for instance, that international law provides existing States the freedom to determine in each case separately whether an entity meets the necessary criteria for statehood.149 Recognition is therefore necessary to close the gap between the general rules of international law and the specific facts on which these rules should be applied. Kelsen notes that recognition is a determination of facts: a determination of the existence of a sufficiently effective and independent authority (government) over a territory and a population.150 Without such an approval it would not be possible to speak of the existence of a State under international law.151 This view would mean however, that the existence of a States is „relative: an entity is considered a State by some States (those who have recognized it) and not a State by other States (those who have not recognized
147 Examples taken from Hobach, Lefeber & Ribbelink 2007, p. 178-179.
148 Hobach, Lefeber & Ribbelink 2007, p. 179.
149 Hobach, Lefeber & Ribbelink 2007, p. 179.
150 Hobach, Lefeber & Ribbelink 2007, p. 179.
151 Hobach, Lefeber & Ribbelink 2007, p. 179.
39
it).152 Subsequently, the question arises what the status of such a territorial entity is under international law, and – by extension – what rights it is entitled to and how it should be treated by other members of the international community. Is such an entity entitled to any form of sovereignty for example? The next Section will examine in more detail some of the ambiguities relating to the application of the declaratory and constitutive theories of recognition.
3.2 Recognition of Governments

Recognition of States must be distinguished from the recognition of governments, both of which are subject to their own set of rules. Questions regarding the recognition of governments normally only arise in relation to a (previously) recognized State (a State may have „competing governments, without having its (legal) continuity affected).153 While international law distinguishes States from their governments, it is normally only the government of a State that has the capacity to bind a State, such as by treaty. As such, the existence of a government in a territory is a requirement for the normal conduct of international relations.
States can be roughly divided into three categories based on their recognition policy: States that explicitly recognize governments such as the United Kingdom before 1980 (de jure recognition), States that generally do not explicitly recognize governments, but might do so out of political considerations, such as the United States and lastly States that formally recognize only States and not their governments such as the Netherlands and those that follow the „Estrada-doctrine (de facto recognition).154
152 The recognition of a State may depend on many other considerations than mere factual ones, such as political or economic considerations. Koojimans 2002, p. 2.
153 Hobach, Lefeber & Ribbelink 2007, p. 180-181.
154 The Estrada-doctrine is the name of Mexico's core foreign policy ideal from 1930 onwards (shortly discontinued between 2000 and 2006, during the Fox Administration). Its name derives from Genaro Estrada, Secretary of Foreign Affairs during the presidency of Pascual Ortiz Rubio (1930-1932), who pointed out that Mexico would refrain from the explicit recognizing governments „since that nation considers that such course is an insulting practice. At present, the majority of States adhere to the Estrada-doctrine and do not explicitly acknowledge governments. For more information, see: Hobach, Lefeber & Ribbelink 2007, p. 180-184.
40
The recognition of a government merely implies that a State acknowledges that one or more persons are competent to act as organs of the State and to represent it in its international relations.155 This may be important for example, in cases where there are competing governments within the same recognized State (such as Congo in 1960156), or in case of a possible secession. However, while it is generally accepted that statehood requires a government capable of exerting (effective and independent) authority over the territory and its people, it is not required that this government is recognized by the international community. The recognition of governments must therefore be considered separate from the criterion of effective authority.157
155 Hobach, Lefeber & Ribbelink 2007, p. 181-182.
156 Crawford 1977, p. 116.
157 Hobach, Lefeber & Ribbelink 2007, p. 181-185.
41
4. Ambiguities Relating to the Application of the Declaratory and Constitutive Theories
It is clear that the temporary disruption of the effectiveness of the authority (due to for example internal unrest, civil war or hostile military occupation) does not lead to the loss of existing

statehood. Depending on political opportunity, regional or global organizations, will attempt to restore some form of centralized authority and put an end to any serious fundamental human right violations.158 However, even if the internal unrest or civil war leads to lasting anarchy and the de facto collapse of a State, State practice has not resulted in the denial or the „de-recognition of a State. Similarly, numerous territorial entities have achieved statehood, without having an effective and independent authority, both during and after the process of decolonization (such as Congo and Bosnia-Herzegovina). Recognition of these entities by the international community of States appears to have played a crucial role in their ability to achieve statehood. This Section will therefore examine whether the creation and continuation of States can be (fully) explained in accordance with either the declarative or constitutive theories. For this purpose, the case of Somalia and Somaliland will be considered, as it will help to identify many of the ambiguities arising from the practical application of the declarative or constitutive theories.

4.1 The Case of Somalia and Somaliland159

Somalia is arguably the best-known example of a so-called „failed State. The notion of the failed State - sometimes also referred to as a 'collapsed State' or an „etat sans gouvernement - has no legal standing in international law. Neither does a clear (non-) legal universal definition of a failed State exist. In general, it may be defined as a way to

158 Kooijmans 2002, p. 22.

159 For a detailed discussion about the situation in Somalia and Somaliland, see M. Schoiswohl, Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes In International Law: The Case of 'Somaliland, Leiden/Boston: Martinus Nijhoff Publishers 2004.

describe a sovereign State that has failed at some of its fundamental responsibilities.160 Insofar as relevant to this thesis, this fundamental responsibility will relate to the absence of an effective governmental authority, which is a necessary condition for statehood. In this regard, the case of Somalia and Somaliland is of particular interest, due to its combination of legal and factual circumstances.

Somalias last functioning government was swept away during the outbreak of the Somali civil war in 1991. Since then, there has been no central government to control most of Somalia's territory. Large portions of Somalia, particularly in the south, remain under the influence of various clans opposing each other in their claim for authority. Somalia's official internationally recognized government, the Transitional Federal Government, which is backed by the United Nations, the United States and the African Union, has yet to establish effective governance on the ground, as it controls only the capital, Mogadishu, and some territory in the center of Somalia. Somalia has not only been unable to discharge its basic and primary functions, but it has de facto ceased to exist.161 It was ranked the most failed Stated by The Failed State Index for a third consecutive year, scoring 114.3 points out of a total of 120 points.162 The Economist, has described Somalia as „the worlds most utterly failed State.163 However, despite the

160 A well-known example of a definition of the failed State is given by the Crisis States Research

Centre (CSRC). The CSRC is a centre that does interdisciplinary research into processes of war, state collapse and reconstruction in fragile States. The CSRC uses a number of definitions to describe States in various stages of failure and it has defined a failed State as „a condition of "State collapse" – eg, a State that can no longer perform its basic security, and development functions and that has no effective control over its territory and borders. A failed State is one that can no longer reproduce the conditions for its own existence. This term is used in very contradictory ways in the policy community (for instance, there is a tendency to label a "poorly performing" State as "failed" – a tendency we reject). It continues to describe that „the opposite of a „failed State is an enduring State and the absolute dividing line between these two conditions is difficult to ascertain at the margins. Even in a failed State, some elements of the State, such as local State organisations, might continue to exist. For definitions of the terms „fragile, „crisis and „failed state, as used by CSRC, see: <http://www2.lse.ac.uk/internationalDevelopment/research/crisisStates/Research/research.aspx>
Another example is given by Schoiswohl 2004, p. 24-27.
161 Schoiswohl 2004, p. 131.
162 For more information about the Failed State Index and the methodology used for measuring State failure, see Introduction.
163 „Hope is four-legged and woolly, The Economist, October 15th-21st 2011, p.37.
43
collapse of Somalia as a unitary State,164 it continues to be formally recognized as a sovereign State by the international community of States: it continues to exist „de jure as it were.
Within Somalia exist several de facto independent territories, with the most notable being the self-declared, but unrecognized, „Republic of Somaliland (Somaliland), located in the the north-western part of Somalia. In contrast to Somalia, which remains embroiled in destructive internal conflicts, Somaliland appears to function on the basis of an effective and working constitution (National Charter).165 In accordance with the National Charter, Somalilands government consists of a parliament, an executive
164 „Hope is four-legged and woolly, The Economist, October 15th-21st 2011, p.37.
165 Schoiswohl 2004, p. 133.
44
branch, and a legislative branch.166 Security in Somaliland has been continuously improving and is generally regarded as high. Political opposition to the government is displayed through peaceful methods.167 This is demonstrated, among other things, by the large amount of international NGOs operating in Somaliland, and the return of many Somali refugees after years in exile.168 Somaliland has also demobilized the different clan forces and formed a national armed force, as well as a regular police force. Revenues are collected by the Somaliland authorities through exports taxes, fees for certain services and imports.169 In addition, Somaliland maintains foreign relations with several States and organizations.170
Based on the factual criteria for statehood, Somaliland may be regarded as a (sovereign) State: there exists a territory, a permanent population and an authority capable of exerting effective control over

the territory. Somaliland's (lack of) recognition by other States is according to the (predominant) declaratory theory irrelevant. An entity's statehood is independent of its recognition by other States. A State, in this case Somaliland, must first exist, before other States may enter into relations with it. There is however no obligation for States under international law, to recognize an entity as a State once it fulfils the factual criteria for statehood. Consequently, without any recognition by the international community, Somalilands existence may be described as „de facto: it meets all the necessary criteria for statehood, but remains unrecognized as a State by the international community.
This apparent difference raises several important question about the status of Somaliland in international law, and by extension the theories of statehood in general. Ideally a State exists as both de jure and de facto: once a territorial entity possesses all the necessary factual requirements for statehood it becomes a State and subsequently it is - without compulsion - recognized as such by the existing States. But the case of Somalia and Somaliland seems to indicate that it is possible for a State to exist, at some point, as either one, or the other. This is problematic, if only for the reason that it is not
166 Schoiswohl 2004, p. 134.
167 Schoiswohl 2004, p. 134.
168 Schoiswohl 2004, p. 134.
169 Schoiswohl 2004, p. 137.
170 More information regarding the foreign relations of Somaliland can be found on the website of the Somaliland Embassy at: http://www.somalilandembassy.se/.
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possible for two separate States to occupy the same territory, simultaneously: one as de jure and the other as de facto. However, based on the above, it can be argued that States can be divided into three categories.
The first category consists of States that exist as both de jure and de facto: these States could be described as „ideal-typical sovereign States: they fulfill the factual requirements for statehood and are recognized as States by the international community. Most States fall into this category and examples are numerous, such as The United States, Lichtenstein and the Netherlands. These States meet the requirements of both the declaratory and constitutive theories. They meet the factual criteria for statehood (as required by the declaratory theory) and they are granted recognition by the existing States (which is required by the constitutive theory for its status-creating effect). The existence of the ideal-typical States, is widely accepted by the international community and their statehood is (for all intents and purposes) unchallenged. This is not to imply that they are free from all issues relating to international law. Nonetheless, as full and original subjects of international law they are entitled to all rights that are inherent in statehood. Subsequently, they may address these issues within the full framework of international law.
The second category of States are those that exist as de jure, but not de facto: these are States that are formally recognized by the international community as sovereign States, despite failing to meet

the requirement of effective authority. These could be existing States such as Somalia, or States that have yet to be established, such as Congo during the decolonization period (Congo was granted recognition, despite lacking any resemblance of effective authority).171 However, neither the declaratory theory, nor the constitutive theory may accord statehood to these entities, as they do not meet the factual criteria for statehood. The question whether recognition is a requirement for statehood only becomes relevant once an entity meets the factual criteria for statehood (which is either status-confirming in accordance with the declaratory theory, or status-creating in accordance with the constitutive theory). While some (putative) States ultimately did meet the requirement of effective authority, such as Bosnia-Herzegovina, it was not until after they had achieved statehood. Other States such as Somalia, Chad and Congo remain (in varying degrees) ineffective until this day. In all these instances

171 See Section 2.2.3.1. on Effectiveness.

recognition by the international community appears to have played an essential role in the ability of these entities to achieve statehood.

The third and final category of States exist as de facto, but not de jure: these States fulfill the factual requirements for statehood, but they are not recognized as (sovereign) States by existing States, such as Somaliland. De facto States, may be considered States exclusively in accordance with the declaratory theory. They fulfill the factual criteria for statehood, but they are not granted (formal) recognition by existing States. Subsequently, they lack the status-creating effect of recognition, which is required by the constitutive theory. While the declaratory theory of recognition is considered to be the predominant theory of statehood in international law - it finds support in treaties, opinions and State practice - it is exactly the de facto States that are shrouded in most legal uncertainty.

For a State to be able to exercise its full legal rights under international law, it must first be recognized by other States. With regard to the these rights, Talmon points out the following:

„If a State's legal status is to be withheld from it, then the question arises as to what precisely that legal status is. States are „born subjects of international law. Their existence confers on them, the most comprehensive legal personality and capacity to act of all subjects of international law. Capacity or competence, however are not to be mistaken for rights: for example, a State has the capacity to conclude treaties with other States (treaty-making power) but, under customary international law, it does not have the right to demand that other States make treaties with it. Statehood merely bestows certain rudimentary rights. It is necessary to distinguish between the rights inherent in statehood, i.e. the rights a State can demand under general international law because it is a State, and the optional relations between States (and the resulting rights and privileges) that depend on the consent or co-operation of the other States.172

But even if there are only very few rights inherent in statehood, a State cannot be denied those rights.173 More importantly however, issues relating to inherent rights only arise

172 Talmon 2004, p. 148.

173 Talmon cites three main documents that deal with the rights and duties of States and offer guidance regarding the inherent rights of States: the Draft Declaration on Rights and Duties of States which was drawn up by the ILC in 1949, and which was subsequently noted but not adopted by the General
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once it is established that a State exists.
An example of such inherent rights may be membership of the United Nations. According to the art. 4 of the UN Charter:
„1. Membership in the United Nations is open to all (...) States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'
Somalia (as a de jure State) is a member of the United Nations, while Somaliland (a de facto State) is not. In addition, Somaliland cannot become a member of the United Nations while it remains unrecognized by existing States.
If it were to be argued however that membership of the United Nations cannot be considered a right inherent in statehood, it is undeniable that (de jure) States such as Somalia are (at least in principle) entitled to respect for their independence and territorial integrity, by virtue of their sovereignty. An important rule in this regard is the prohibition of the use of force between States, which is controlled by both customary international law and by treaty law. Art. 2, paragraph 4 of the UN Charter reads:
„All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.
Somaliland (as a de facto State) however is unlikely to be able to invoke any rights inherent in statehood, due to its lack of (formal) recognition by the international
Assembly, The Charter of Economic Rights and Duties which was adopted by the General Assembly on 12 December 1974 over the opposition of important industrial States, and the Montevideo convention of 1933. These documents are primarily concerned with duties rather that rights as can be seen in the Draft Declaration of 1949, which lists just four rights as opposed to ten duties. The declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United nations of 24 October 1974 ('Friendly Relations Declaration') also mentions certain 'rights' of States. P.
48
community. What legal consequences would arise for example if Somalia attempted to „reassert its control over Somaliland after two decades of de facto independence? How does this relate to third States? And what consequences does this have for State-liabilities? Somaliland may still be subject to certain duties under international law, such as those relating to State liabilities, as in the case of the DDR: „all pain, no gain.

While the above distinction is artificial - as there is no distinction in international law between different categories of States174 - it does reveal, that neither the declaratory, nor constitutive theory of recognition can satisfactorily explain the objective legal situation of States in international law. If Somaliland has achieved statehood, the continuity and territorial integrity of Somalia should be affected. Yet, Somalia's statehood and borders remain internationally uncontested by existing States. This causes the curious situation where Somaliland is a State according to the predominant declaratory theory, yet it is Somalia which continues to (formally) exist through recognition and subsequently enjoys all rights inherent in statehood. On the other hand, if Somaliland is not a State, the declaratory theory would be inadequate, as the classic criteria for statehood have been met for well over two decades.
Some legal scholars have attempted to explain these ambiguities by pointing out that the factual criteria for statehood as described in the Montevideo Convention might primarily have been intended as criteria for assessing the creation of States rather than criteria for assessing the continuation of States. But this explanation falls short, as both during and after the process of decolonization, territorials entities have managed to achieve and maintain statehood, despite lacking effectiveness. Perhaps more importantly, as Talmon notes „The legal status of “State” describes a state of affairs, not a one-off event; therefore, the criteria for statehood serve as a test for both the creation and the continued existence of the State.175
4.2 Possible Explanations
Given the above, it is therefore not surprising that an extensive debate exists in the legal
174 An entity cannot be „somewhat of a State (it is either a State, or it is not a State) and the (legal) relationship between States is founded on the principle of sovereign equality between States.
175 Talmon 2004, p. 124.
49
doctrine about whether the current criteria for statehood suffice, or whether they should be supplemented with additional norms.176 These norms are either regarded as additional criteria of legality regulating the creation of States, or as reasons for the nullity of the States creation.177 Although such norms go beyond the generally accepted criteria of the declaratory and constitutive theories, certain remarks may be made with regard to some of the issues that arise from using additional norms to explain the notion of statehood in international law.
In recent decades, an understanding has emerged, that certain fundamental principles of international law are of such great importance for the protection of the interests of the international community as a whole that no derogation from these norms is ever permitted.178 These norms are also known as „peremptory norms of international law, or „ius cogens. Legal scholars have identified such norms as the prohibition of the use of force, the right to self-determination of peoples (during and after the period of colonial rule), the prohibition of racial discrimination (such as apartheid), genocide, torture, slavery, colonialism and numerous others.179 Peremptory norms of international law create obligations towards the entire international community, also known as an „erga omnes obligations.180 According to art. 53 and 64 of the 1964 Vienna Convention on the Law of Treaties

(Vienna Convention), a treaty is null and void if it conflicts with a peremptory norm of general international law. Some authors have argued by analogy
176 Hobach, Lefeber & Ribbelink 2007, p. 172.
177 Talmon 2004, p. 143.
178 Kooijmans 2002, p. 18-19.
179 Talmon 2004, p. 143, Kooijmans 2002, p. 18-19.
180 With regard to the breach of such obligations, the ICJ stated „ an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.. Barcelona Traction case, ICJ Reports 1970, p. 32, para. 33.
50
with the Vienna Convention „that a new State created in violation of a norm having the character of ius cogens is illegal and therefore null and void.181
While it is clear that the legal development in this area is in progress and may reflect the understanding that the international community is more than a collection of separate States (with separate interests) caution must be exercised. Although some authors have argued that a clear general consensus seems to have emerged with regard to certain norms,182 others - such as Talmon - have noted that the existence of additional legal criteria for statehood cannot be proven.183 This is not to say that the existence of such norms is in itself controversial, but there is still considerable disagreement about which rules of international law may be considered to have a mandatory character for the creation and continued existence of States: that is, within the context of statehood. Insofar as these norms may be identifiable, establishing their exact content is not without difficulties. As such, determining whether – and to what degree - a violation of such norms has occurred would face many hurdles.
Other problems are more practical in nature. In the absence of an international central authority, States must themselves decide whether the violation of a certain norm is the concern of the international community as a whole and by what means they want to protect this norm (usually within the framework of the UN Charter). Without a broad consensus among States it will not be possible to determine a) if a violation of a norm of ius cogens has occurred, and b) whether the violation may serve a reason for the nullity of the States creation. However, if the past is an indication of the political hurdles that the international community faces when dealing with international crises, reaching such an agreement will not be an easy task.

While these issues are not exhaustive,184 they do demonstrate that the existence of additional norms of ius cogens and erga omnes obligations for statehood should not be adopted too easily, as they may be uncertain, changeable or even contradictory.
Furthermore, the use of additional norms to explain the objective legal situation of
181 Talmon 2004, p. 129.
182 Hobach, Lefeber & Ribbelink 2007, p. 171-174.
183 Talmon 2004, p. 143-144.
184 Think for example of the temporal scope of a norm of jus cogens. Violation of a norm of jus cogens cannot be applied to a State that already exists. But what would the implications be for Somalia and Somaliland if a norm of jus cogens is being violated by Somalia, but not Somaliland?
51
States in international law only applies to situations where a territorial entity meets the three factual criteria for statehood, but remains unrecognized by the international community. The existence of such norms does not address situations where a territorial entity has achieved (formal) statehood, without fulfilling the factual criteria for statehood. Subsequently, additional criteria for statehood would - under ideal circumstances - only provide a solution in situations where the requirements of the declaratory theory have been met. They would not provide an explanation for situations where a territorial entity has achieved (and maintains) statehood but fails to meet the requirement of effective authority, as required by both the declaratory and constitutive theories.
52
Conclusions
The notion of the modern State has undergone numerous significant changes since its formal conception at the Peace of Westphalia in 1648. During the last two centuries, the State has gone from primarily being regarded as a „matter of law, to being regarded as a „matter of fact. In contemporary international law, the concept of statehood revolves around two competing theories: the (predominant) declarative theory and the constitutive theory. The core of the discussion around these theories revolves around question whether the formation (and continued existence) of States is dependent or independent of recognition by the existing States. In other words, it is about the legal effect of recognition on statehood.
According to the declaratory theory a State must possess a territory, a permanent population and an effective (and independent) government. Recognition of a State is nothing more than expressing the willingness to enter into relations with that State. As such, an entity becomes a State for the reason that it meets all the international legal criteria for statehood. The recognizing State merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State. Recognition is therefore retroactive and status-confirming.
In contrast, according to the constitutive theory, a State only becomes a State by virtue of recognition by the existing States. Once the three factual criteria of the declaratory theory have been met, this „factuality must then be confirmed by the existing States. The constitutive theory views recognition therefore as status-creating and non-recognition as status-preventing: without

recognition, there can be no State.
Proponents of the declarative theory have argued that the constitutive theory is unsustainable in practice, as there is no international body with the authority to acknowledge the existence of States on behalf of the entire community of States. As such, each State may individualy decide whether a new State has come into being and (without any obligations) recognize it. This would have the consequence that an entity would be State relative to those States that have recognized it, and not to those States that have not recognized it. Subsequently, the question arises what the status of such a territorial entity is under international law, and – by extension – what rights it may invoke, and how it should be treated by other members of the international community.
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In turn, proponents of the constitutive theory have criticized the declarative theory for being unable to explain the legal status of the collectively non-recognized territorial entities that do fulfill the factual criteria for statehood.
Closer examination reveals however that these are not the only shortcoming related to the declarative and constitutive theories. The principle of effective authority is regarded as an essential criterion for statehood according to both theories. Nevertheless, State practice demonstrates that there have been many instances where territorial entities have achieved statehood, while lacking any resemblance of effective authority. This has occurred both during, and after the process of decolonization. Similarly, there are numerous States that continue to exist without effective authority. In this regard, the case of Somalia and Somaliland is of particular interest, due to its combination of legal and factual circumstances.
Somalia is an example of what may be described as a failed State. Since the Somali civil war in 1991, it has not only been unable to discharge its basic and primary functions, but it has de facto ceased to exist. Despite of this, it continues to be formally recognized as a sovereign State by the international community of States: its continued existence is de jure as it were. In contrast, Somaliland – a de facto independent territory within Somalia - may be regarded as a State according to the declaratory theory, as it meets the factual criteria for statehood (territory, people and government) and it has done so for well over two decades.
This combination of legal and factual circumstances raises several important questions about the status of Somaliland in international law, and by extension the theories of statehood in general, as it seems to indicate that it is possible to have three different categories of States in international law. Normally a State exists as both de jure and de facto. These States may be described as „ideal-typical sovereign States, as they meet the factual requirements for statehood and are recognized as States by the international community. The ideal-typical States are States in accordance with both the declaratory and constitutive theories: they meet the factual criteria for statehood (which is required by the declaratory theory) and they are granted recognition by the existing States (as required by the constitutive theory for its status-creating effect).
However, the situation of Somalia demonstrates, that it is also possible for States to
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exist as de jure (but not de facto). These are States that are formally recognized by the international community as sovereign States, despite failing to meet the requirement of effective authority. Yet, neither the declaratory theory, nor the constitutive theory may accord statehood to these entities, as they do not meet the factual criteria for statehood.
In contrast, the situation of Somaliland demonstrates the existence of de facto, (but not de jure) States. These are States that meet the factual requirements for statehood, but are not recognized as (sovereign) States by existing States. De facto States may be considered States in accordance with the predominant declaratory theory, as they meet the factual criteria for statehood. Yet, it is exactly the de facto States, that are faced with the most legal uncertainty.
Without recognition, a State will not be able to exercise rights inherent in statehood. An example of such an inherent right may be membership of the United Nations. Somalia (as a de jure State) is a member of the United Nations, while Somaliland (a de facto State) is not. In addition, Somaliland cannot become a member of the United Nations as long as it remains unrecognized by existing States. If it were to be argued that membership of the United Nations is not a right inherent in statehood, it is undeniable that (de jure) States such as Somalia are (at least in principle) entitled to respect for their independence and territorial integrity, by virtue of their sovereignty. A key component in this regard is prohibition of the use of force between States, which is controlled by both customary international law and by treaty law. Somaliland (as a de facto State) is unlikely to be able to invoke any such rights against other States (including Somalia), as long as it lacks (formal) recognition by the international community. Meanwhile however, Somaliland may still be subject to certain duties under international law, such as those relating to State liabilities, as in the case of the DDR.
While the above distinction between States is artificial, it does reveal that neither the declaratory, nor constitutive theory of recognition can satisfactorily explain the objective legal situation of States in international law. If Somaliland has achieved statehood, the continuity and territorial integrity of Somalia should be affected. Yet, Somalia's statehood and borders remain internationally uncontested by existing States. This causes the curious situation where Somaliland is a State according to the predominant declaratory theory, yet it is Somalia which continues to (formally) exist
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through recognition. Subsequently, it enjoys all rights inherent in statehood. On the other hand, if Somaliland is not a State, the declaratory theory would be inadequate, as the classic criteria for statehood have been met for well over two decades.
Some legal scholars have attempted to explain some of these ambiguities by arguing that the factual criteria for statehood as described in the Montevideo Convention might have been intended as criteria for assessing the creation of States rather than criteria for assessing the continuation of States. This explanation falls short however, as both during and after the process of decolonization, territorials entities have managed to achieve and maintain statehood, despite lacking effectiveness. But perhaps even more importantly is the legal nature of statehood. As Talmon notes: „The legal status of “State” describes a state of affairs, not a one-off event; therefore, the criteria for statehood

serve as a test for both the creation and the continued existence of the State.
It is therefore not surprising that an extensive debate exists in the legal doctrine about whether the current criteria for statehood suffice, or whether they should be supplemented with additional norms. Norms that are either regarded as additional criteria of legality regulating the creation of States, or as reasons for the nullity of the States creation. While it was not the purpose of this thesis to establish whether any additional norms for statehood exist - as these go beyond the generally accepted criteria of the declaratory and constitutive theories – it can be said that the use of additional norms of ius cogens and erga omnes obligation for statehood should not be adopted too easily, as they may be uncertain, changeable or even contradictory.
In addition, the use of additional norms to explain the objective legal situation of States in international law only applies to situations where a territorial entity meets the three factual criteria for statehood, but remains unrecognized by the international community. The existence of such norms does not address situations where a territorial entity has achieved (formal) statehood, without fulfilling the factual criteria for statehood. Subsequently, the use of additional criteria for statehood would only provide answers to situations where the requirements of the declaratory theory have been met. Additional norms would not explain situations where a territorial entity has achieved (and maintains) statehood but fails to meet the requirement of effective authority, as required by both the declaratory and constitutive theories.
On the basis of the above, it seems that (non-) recognition of territorial entities is of
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such great significance, that it can essentially function as a substitute for the factual criteria for statehood, by either allowing or preventing the creation of States. Given this immense influence of international relations – which manifests itself through recognition - on the (legal) notion of statehood, the question must be raised whether the State is an objectively determinable entity at all, or whether it is a abstract entity (mostly) subjected to the discretion of the international community.
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There are no comments yet.