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A GROTIAN MOMENT: CHANGES IN THE LEGAL THEORY OF STATEHOOD

MILENA STERIO*

I. INTRODUCTION

International law has undergone profound changes over the last decades. It has transformed itself from a set of rules governing inter-state relations, where states were the only actors, to a complex web of laws, treaties, regulations, resolutions and codes of conduct that govern a variety of state and non-state actors in their daily interactions.¹ Scholars have thus written about globalization and the changes brought about through its potent forces.² In the process of globalization, states have lost some attributes of sovereignty, and their bundle of sovereign rights has been meshed in with regional and global rules, which often supersede states' decision-making power.³ For example, states must consult international organizations and authorities before they decide to use force against other states, before they set applicable import and export trade tariffs, and before they determine that a minority group does not deserve any self-determination rights.⁴ If states choose to ignore the existing international order and to engage in independent decision-making processes in an area where international rules apply, such states risk interference by other states in the form of sanctions, isolationism, and possibly military intervention.

This kind of fundamental change in the existing world order – the increased chipping away of state sovereignty through the forces of globalization – has produced new rules regarding the legal theory of statehood. As this article argues below, statehood is no longer satisfied through the four traditional criteria of the Montevideo Convention: territory, government, population, and the capacity to

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1. Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 213-14 (2008).

2. See, e.g., Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 490 (2005); Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 537 (2001); Sterio, *supra* note 1.

3. Sterio, *supra* note 1, at 247-48 (discussing the erosion of state sovereignty brought about by globalization forces).

4. *Id.* at 246-47.

engage in international relations.⁵ Rather, for an entity to qualify as a state, and to continue to be regarded as a state on the world scene, additional criteria need to be fulfilled. These additional criteria are in reality subparts of the fourth pillar of statehood, the capacity to enter into international relations, and they include: the need for recognition by both regional partners, as well as the most powerful states, which I refer to as the Great Powers; a demonstrated respect for human/minority rights; and a commitment to participate in international organizations, and to abide by a set world order.⁶ This type of profound development in international law (globalization), causing the emergence of new rules and doctrines of international law (statehood), has been described as a Grotian Moment.⁷

This article will examine the Grotian Moment theory and its practical application toward the legal theory of statehood. To that effect, this article will describe, in Part II, the notion of a Grotian Moment. In Part III, it will examine the legal theory of statehood in its traditional form. Part IV describes changes in the legal theory of statehood brought about by the forces of globalization, in a Grotian Moment manner. These changes include a new notion of state sovereignty and the accompanying right to intervention, the emergence of human and minority rights which sometimes affect state territorial integrity, the existence of de facto states, like Northern Cyprus and Republika Srpska, and the concept of state interconnectivity and the proliferation of regional and international norms and organizations. This article will conclude that all these changes, caused by globalization, have affected the legal theory of statehood, in a Grotian Moment.

Moreover, this article argues that the legal theory of statehood should be amended, to incorporate real changes in the existing global understanding of statehood and state sovereignty.⁸ Statehood is an important theory, as it provides a sovereignty shield to entities that qualify as states and insulates some of their decisions from global scrutiny.⁹ While it is true that states no longer enjoy absolute sovereign freedom to make decisions within their own territory, it nonetheless remains accurate that states do enjoy a set of rights and privileges, which non-state entities do not. The traditional theory of statehood does not take into account modern-day features of state sovereignty, and as such, either treats

5. See *infra* Part III.

6. For a more detailed discussion of who the Great Powers are, see for example Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver": Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 365-66 (2005).

7. For a discussion of the Grotian Moment theory, see *infra* Part II.

8. See *infra* Part V.

9. It should be noted that the term "sovereignty" has been criticized by prominent scholars, such as Louis Henkin, who claimed that sovereignty was "a catchword, a substitute for thinking and precision." LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8 (1995). However, even Henkin acknowledged that "[s]overeignty, strictly, is the locus of ultimate legitimate authority in a political society . . ." and that "[i]t is an internal concept and does not have, need not have, any implication for relations between one state and another." *Id.* at 9. Moreover, Henkin advocated that the term "sovereignty" should be decomposed to its essential elements, which "do constitute essential characteristics and indicia of statehood today[]" and which include: independence, equality, autonomy, "personhood," territorial authority, integrity and inviolability, impermeability and "privacy." *Id.* at 10.

offending entities as states, thereby protecting them from outside interference, or, denies statehood to entities that otherwise deserve it. The Grotian Moment in the legal theory of statehood is important to capture, because it would enable scholars and international law practitioners to more accurately describe what statehood means today, and what states may and may not do on the international scene without repercussions.

II. WHAT IS A GROTIAN MOMENT?

Grotian Moment is a term that signifies a “paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.”¹⁰ In other words, a Grotian Moment is an instance in which a fundamental change in the exiting international system happens, thereby provoking the emergence of a new principle of customary law with outstanding speed.¹¹ Professor Richard Falk coined the term Grotian Moment in 1985; since then, experts have employed it in a variety of ways.¹² Here, I adopt the meaning given to the term Grotian Moment by Professor Michael Scharf: “a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.”¹³

The term “Grotian” refers to Dutch scholar, Hugo Grotius (1583-1645), who is hailed as the father of modern international law.¹⁴ In the mid-17th century, the concept of nation-states crystallized to form a fundamental political unit of Europe. Grotius, in his seminal work, *De Jure Belli ac Pacis* (The Law of War and Peace), “offered a new concept of international law designed to reflect that new reality.”¹⁵ Similar to how the negotiation of the Peace of Westphalia, in Grotian times, produced this novel understanding of international law by Grotius, more modern events have constituted Grotian Moments over the last several decades. Thus, many commentators agree that the creation of the Nuremberg Tribunal at the end of World War II was a Grotian Moment.¹⁶ Moreover, the establishment of the

10. Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Time of Fundamental Change*, 43 CORNELL INT’L L. J. 439, 440 (2010).

11. *Id.* at 44.

12. INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al. eds., 1985); see also BURNS H. WESTON, RICHARD A. FALK, HILARY CHARLESWORTH & ANDREW K. STRAUSS, INTERNATIONAL LAW AND WORLD ORDER 1265-86 (4th ed. 2006). For earlier work of Richard Falk on the concept of changing paradigm in international law, see Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 32 (Richard A. Falk & Cyril E. Black eds., 1969). See Scharf, *supra* note 10, at 444 n.20 (noting that scholars and the former U.N. Secretary-General, Boutros Boutros-Ghali, have used the term in different ways).

13. Scharf, *supra* note 10, at 444.

14. CHARLES S. EDWARDS, HUGO GROTIUS, THE MIRACLE OF HOLLAND 1, 8, 21 (1981).

15. Scharf, *supra* note 10, at 443 (citing John W. Head, *Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st-Century Economy*, 50 KAN. L. REV. 731, 771 (2002)); see also HUGO GROTIUS, *DE JURE BELLI AC PACIS* (n.p. 1625).

16. Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 9, 33-34 (2004) (arguing that along with the Peace of Westphalia, the Nuremberg Charter and the U.N. Charter include more recent Grotian moments).

United Nations Charter is an example of yet another Grotian Moment.¹⁷ Finally, scholars have applauded the recent establishment of the International Criminal Court as a Grotian Moment.¹⁸

As noted by Professor Scharf, other scholars have used other terms to convey the idea of a Grotian Moment concept. Professor Bruce Ackerman used the term “constitutional moment” to describe the changes in American constitutional law resulting for the New Deal era.¹⁹ Professors Bardo Fassbender and Jenny Martinez have referred to the drafting of the U.N. Charter as a “Constitutional moment” in the history of international law.²⁰ Professor Leila Sadat has similarly referred to Nuremberg as a “‘constitutional moment’ for international law.”²¹ Regarding more recent events, Professors Anne Marie Slaughter and William Burket-White have referred to the term “constitutional moment” when arguing that the September 11th attacks on the United States represent a change in the nature of threats facing the international community, justifying the development of new rules of customary law.²² The term “international constitutional moment” is similar to the concept of Grotian Moment; the latter, however, may signify a broader change and a wider-ranging development, which affects international law on the whole, and not merely subfields of international law.²³

Finally, the notion of Grotian Moment can also be distinguished from the concept of “instant customary international law,” which had been advanced by some scholars.²⁴ Normally, customary international law is formed through gradual and widespread state practice and a sense of legal obligation to comply with the emerging norm.²⁵ The process of establishing a norm of customary international

17. *Id.* at 33-34.

18. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 391 n.37 (2000).

19. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 51 (1991).

20. Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 573 (1998); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003).

21. Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206 (2007).

22. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L. J. 1, 2 (2002); see also Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 370 (2005) (arguing that 9/11 was a “constitutional moment,” which led toward the recognition of a new right for states to use force in self-defense against non-state entities operating with support of third states).

23. Scharf, *supra* note 10, at 445 (describing that a Grotian Moment “makes more sense when discussing a development that has an effect on international law at large.”).

24. Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?* 5 INDIAN J. INT'L L. 23, 35 (1965); see also PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 45-46 (7th ed. 1997); Benjamin Lengille, Note, *It's “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 146 (2003); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L. J. 333, 351 (1998).

25. Scharf, *supra* note 10, at 445.

law can take many decades, or even centuries.²⁶ “Instant customary international law,” on the other hand, is a theory which argues that state practice may not be necessary at all for the formation of customary law, if states’ *opinio juris* can be clearly demonstrated through their votes on General Assembly resolutions.²⁷ This theory presents several problems, because it focuses so closely on General Assembly resolutions, which may not represent the best evidence of states’ sense of legal obligations.²⁸ The Grotian Moment theory, however, looks beyond General Assembly resolutions and focuses on paradigmatic changes in international law caused by rapid and profound global developments. “[T]he ‘Grotian Moment’ concept contemplates accelerated formation of customary international law through states’ widespread acquiescence or endorsement in response to state acts, rather than instant custom based solely on General Assembly resolutions.”²⁹ The Grotian Moment theory may thus rely on General Assembly resolutions to a certain extent, to discover evidence of an emerging customary law norm, resulting from a period of fundamental change. Yet, General Assembly resolutions are purely one of the tools utilized by scholars seizing a Grotian Moment, as noted by Professor Scharf:

[T]he ‘Grotian Moment’ concept may be helpful to a court examining whether a particular General Assembly resolution should be deemed evidence of an embryonic rule of customary international law, especially in a case lacking the traditional level of widespread and repeated state practice. In periods of fundamental change - whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism - rapidly developing customary international law as crystallized in General Assembly resolutions may be necessary for international law to keep up with the pace of other developments.³⁰

Several recent events exemplify the notion of a Grotian Moment. First, the development of humanitarian intervention at the very end of the 20th century has been described as a Grotian Moment.³¹ In 1999, NATO forces intervened in Serbia to protect ethnic Kosovar Albanians from ethnic cleansing, instituted by the FRY government.³² The United Nations did not authorize NATO’s campaign but the global consensus on this intervention was that it was “illegal but legitimate.”³³ The international community responded to the intervention through a new doctrine

26. See, e.g., *The Paquete Habana*, 175 U.S. 677, 686 (1900) (recognizing that the process of forming customary international law can take centuries).

27. Cheng, *supra* note 24, at 38.

28. For a full discussion of problems associated with the “instant customary international law” theory, see Scharf, *supra* note 10, at 447-48.

29. *Id.* at 446 n.34.

30. *Id.* at 450.

31. Scharf, *supra* note 10, at 450-52.

32. Milena Sterio, *The Kosovar Declaration of Independence: ‘Botching the Balkans’ or Respecting International Law?*, 37 GA. J. INT’L & COMP. L. 267, 271-72 (2009).

33. See, e.g., THE INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 4 (2000), available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.

called "Responsibility to Protect," which authorizes humanitarian interventions in limited circumstances.³⁴ A growing number of scholars have agreed that humanitarian intervention has become an emerging norm of customary international law, and that it ought to be recognized in some extraordinary circumstances.³⁵ Thus, the notion of humanitarian intervention may have constituted a Grotian Moment.

Second, the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001 have had a profound impact on the international community's understanding of the laws of war.³⁶ Following the September 11 attacks, the Security Council adopted Resolution 1368, which confirmed the right to use force in self-defense in Afghanistan, against al-Qaeda, thus solidifying the idea that under international law, states may use force in self-defense against non-state actors.³⁷ Finally, a lesser-known Grotian Moment may consist of the situation when the United States and Soviet Union initially "developed the abilities to launch rockets into outer space and to place satellites in earth's orbit."³⁸ In response to this development, the U.N. General Assembly adopted Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, which provided that the provisions of the U.N. Charter generally apply to the outer space, and which attempted to limit states' ability to claim parts

34. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138-39, U.N. Doc. A/RES/60/L.1 (Sept. 15, 2005) (stating the world's Heads of State unanimous affirmation of the responsibility to protect doctrine); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity); INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xi-xiii (2001), available at <http://www.iciss-ciise.gc.ca/pdf/Commission-Report.pdf>;

35. Many authors have discussed the legality of humanitarian intervention. See, e.g., Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, 232, 256-57 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); Richard A. Falk, *NATO's Kosovo Intervention: Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 848, 852 (1999); Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 828-33 (1999).

36. See, e.g., British Foreign Secretary Jack Straw, Order out of Chaos: The Future of Afghanistan, Address at the International Institute of Strategic Studies (Oct. 22, 2001), quoted in Slaughter & Burke-White, *supra* note 22, at 2 (according to then British Foreign Secretary Jack Straw, "[f]ew events in global history can have galvanized the international system to action so completely in so short a time."); see also Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993 (2001) (arguing that the terrorist attacks on September 11, 2001 have had "shattering consequences for international law.").

37. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (calling on states to "work together urgently to bring to justice the perpetrators, organizers and sponsors" of the attacks, and reaffirming the inherent right of self-defense in accordance with article 51 of the U.N. Charter, in the context of the September 11 terrorist attacks). Security Council Resolution 1378, adopted after the U.S. invasion, condemned the Taliban for allowing the al-Qaeda network and other terrorist groups to use Afghanistan as a base, and for providing safe haven to Osama bin Laden, and other members of al-Qaeda and other associated groups. This resolution also supported U.S. efforts to establish a post-Taliban government in Afghanistan. S.C. Res. 1378, ¶ 1, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

38. Scharf, *supra* note 10, at 450.

of outer space as their territory.³⁹ This Declaration was widely accepted as law, and represents how accelerated technological developments can bring about a time of change such as the possibility to launch rockets into outer space.

As scholars have acknowledged, “[c]ommentators and courts should exercise caution, however, in characterizing situations as ‘Grotian Moments,’” and some of the above-described instances of profound change may need to be more strictly scrutinized to determine if they truly qualify as Grotian Moments.⁴⁰ What this article argues below is that because of increased globalization of our planet, the legal theory of statehood has undergone profound de facto changes over the last several decades, and that, similar to the examples above, this situation may comprise a Grotian Moment worth more intense scrutiny.

III. THE LEGAL THEORY OF STATEHOOD

Under international law, any entity that wishes to be treated as a state needs to satisfy four criteria. These criteria stem from the 1933 Montevideo Convention, and include the following: a defined territory; a permanent population; a government; and, the capacity to enter into international relations.⁴¹ Statehood, according to these criteria, is a legal theory – something that a scholar or a judge could easily rely upon to decide whether an entity qualifies as a state.⁴² In other words, as conceived by the 1933 Montevideo Convention, statehood is a positive legal theory, to be entirely divorced from the political act of state recognition.⁴³ Once an entity enters the international arena and presents itself as a state, external actors are free to recognize it as such or not.⁴⁴ The decision to recognize is a purely political act and depends entirely on the governing regime of the external actors.⁴⁵ Thus, such external actors could choose to treat an entity as a state although it does not satisfy the four criteria of statehood, and on the contrary, external actors could choose not to treat an entity as a state although it does satisfy the four criteria of statehood.⁴⁶ This view of recognition is referred to as the declaratory view, and it follows from the above-mentioned distinction between the two theories, statehood and recognition: the former is legal, whereas the latter is political.⁴⁷ The Montevideo Convention, which describes the legal criteria of

39. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, ¶¶ 3, 6, U.N. Doc. A/RES/1962(XVIII) (Dec. 13, 1963).

40. Scharf, *supra* note 10, at 452-53 (urging caution when recognizing the 1963 U.N. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, the responsibility to protect doctrine and the post September 11 right of self-defense as Grotian Moments, but declaring Nuremberg as an “exemplary” Grotian Moment).

41. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

42. Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Secession, and the Great Powers’ Rule*, 19 MINN. J. INT’L L. 137, 148 (2010).

43. *Id.* In fact, article 3 of the Montevideo Convention states that “[t]he political existence of the state is independent of recognition by the other states.” Montevideo Convention, *supra* note 41, art. 3.

44. Sterio, *supra* note 42, at 149-50.

45. *Id.*

46. *Id.* at 148-49 (noting some anomalous applications of the statehood theory).

47. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 138 (3d ed. 2010) [hereinafter DUNOFF ET AL.] (“An entity that meets the criteria of

statehood, was drafted purposefully to ignore the political tenements of recognition. The Convention's main proponents and drafters were Latin American states, which attempted to distinguish the legal theory of statehood from political influences of powerful states, by defining statehood in purely legal terms which left out any requirement of recognition.⁴⁸ Thus, in theory, an entity could qualify as a state although many states choose not to recognize it as such.

However, some support the so-called constitutive view of recognition, under which recognition by outside actors represents one of the main elements of statehood.⁴⁹ Thus, an entity cannot qualify as a state under this view unless external actors choose to treat it as a state.⁵⁰ The constitutive view is not supported by academics, but has teeth in practice nonetheless:

While international recognition is no longer widely considered to be a required element of statehood, in practice the ability to exercise the benefits bestowed on sovereign states contained in the Westphalian sovereignty package requires respect of those doctrines and application of them to the state in question by other states in the interstate system.⁵¹

In other words, states cannot exist in a vacuum, and if no other state wishes to engage in international relations with a particular entity, that entity will never become a fully sovereign partner on the international scene.⁵²

The legal theory of statehood has produced strange results around the globe.⁵³ Many entities have qualified as states because they once satisfied the four criteria of statehood. However, many such entities have lost one of the four attributes of statehood without losing their overall qualification as a state. In other words, statehood functions as a shield, assuring those entities that qualify as states a certain protection from attacks on their sovereignty. Minor cuts and bruises on the statehood shield do not affect the protected state; it is only in rare cases when the entire structure crumbles that a state may crumble and decompose into smaller units or become absorbed by larger ones.

For example, many states have disputed territories but have managed not to lose their statehood. South and North Korea have battled over their frontier, with both disputing their neighbor's territory and Israel's borders have been challenged by most of its Arab neighbors.⁵⁴ Yet, all three of these states have never lost their

statehood immediately enjoys all the rights and duties of a state regardless of the views of other states.”).

48. *Id.*

49. *Id.*

50. *Id.* (“[T]he refusal by states to afford recognition would mean that the entity claiming statehood would not be entitled to the rights of a state.”).

51. Kelly, *supra* note 6, at 382.

52. As this article argues below, the constitutive view of recognition has become the dominant theory on the international scene, as recognition by regional partners and so-called Great Powers truly has become a requirement of statehood. *See infra* Part V.

53. Sterio, *supra* note 42, at 148.

54. DUNOFF ET AL., *supra* note 47, at 115.

statehood and no other countries have ever challenged it.⁵⁵ Moreover, many states have transient populations and have experienced significant refugee crises. The Democratic Republic of Congo, Sudan, and Iraq have all experienced population shifts over the last decade.⁵⁶ Some states have micro-populations, like the Pacific Island state of Nauru (14,000) and the city-state of San Marino (30,000); these populations have never significantly grown.⁵⁷ Yet, none of their statehoods have ever been challenged on these grounds. Other states have not had stable governments in place for years. Somalia, for example, has been called a “failed state” because it has not had a stable government in place since the early 1990’s.⁵⁸ Afghanistan did not have a stable government throughout the 1990’s, and yet it remained treated as a state and retained its seat in all major international organizations.⁵⁹ Yet, it is still a state (the term “failed state” is an oxymoron in itself, but virtually everyone still conceives of Somalia and Afghanistan as states, albeit unsuccessful ones). Finally, some entities are viewed as states although they do not have the full capacity to enter into international relations. Many micro states voluntarily hand over their national defense to larger neighbors and protectors, thereby relinquishing their own capacity to conduct international relations in the field of national security.⁶⁰ Some of these states include Palau, which depends on the United States for its defense, Monaco, which relies on France, and the Cook Islands, which has aligned itself with New Zealand.⁶¹ Similarly, some micro states depend on powerful allies for trade matters: many Pacific island nations rely on the United States in matters of trade and some do on Australia.⁶² Yet, although these small entities have admitted they do not have the capacity to conduct international relations on their own, they are still viewed as states, and treated as such in the global arena.

Why is statehood important? What are its main features, and how does it protect state sovereignty? Why do Palau, Monaco, and the Cook Islands draw significant advantages from having qualified as states? As mentioned above, statehood functions as a sovereignty shield. An entity that is treated as a state derives direct protection from its own statehood. First, any time an unfriendly neighbor or a group of other states decide to cross its borders in a military fashion, the state can argue that an armed attack has occurred and can invoke the legal theory of self-defense to protect itself, or can request the assistance of other

55. Sterio, *supra* note 42, at 148.

56. REFUGEES INTERNATIONAL, THE IRAQI DISPLACEMENT CRISIS (2008), <http://www.reliefweb.int/rw/rwb.nsf/db900SID/VDUX-7GNT3D?OpenDocument>; Lydia Polgreen, *Refugee Crisis Grows as Darfur War Crosses a Border*, N.Y. TIMES, Feb. 28, 2006, <http://www.nytimes.com/2006/02/28/international/africa/28border.html>; Refugees International, *DR Congo*, <http://www.refugeesinternational.org/where-we-work/africa/dr-congo> (last visited Dec. 23, 2010).

57. DUNOFF ET AL., *supra* note 47, at 115.

58. See, e.g., Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Vol. 13, Issue 2, Feb. 6, 2009, <http://www.asil.org/insights090206.cfm>.

59. DUNOFF ET AL., *supra* note 47, at 116.

60. Sterio, *supra* note 42, at 148-49.

61. DUNOFF ET AL., *supra* note 47, at 115.

62. *Id.*

friendly states, under the guise of collective self-defense.⁶³ A non-state cannot do so easily. A non-state can be *terra nullius* – no man's land - in which case any nation can lay a claim thereon by being there first.⁶⁴ This has happened in the case of the North Pole: many states, including Russia and Canada, have claimed proprietary rights to the North Pole and its natural resources.⁶⁵ The North Pole itself could not claim self-defense in fending off an "attack" by Russia and Canada, because it is not a state. A non-state can also exist as a territory or province within the larger territory of another state, which usually claims the right to do whatever it wishes with the non-state. Thus, Israel has "occupied" Gaza and the West Bank and has claimed that these territories are a part of Israel.⁶⁶ Israel has then closed these two territories' borders, has built Israeli settlements, and has dictated a certain way of life for these territories' inhabitants.⁶⁷ Until Gaza and the West Bank qualify as states, Israel arguably has the legal right to exercise full control and to impose its own political, social, and legal decisions on these two territories.

Second, statehood protects state sovereignty by allowing states to participate in international organizations where major legal and political decisions are undertaken. Thus, states participate in the United Nations, where each state gets one vote in the General Assembly. The United Nations General Assembly has already passed significant resolutions, that although initially represent soft law and do not impose binding obligations on other states, may morph over time into customary law, which is then binding on every state on our planet.⁶⁸ States also

63. This assertion follows from the structure of the U.N. Charter: states may invoke their right to self-defense under article 51, or collective self-defense, under the same article, any time that an "armed attack" takes place, threatening their "territorial integrity" or "political independence." U.N. Charter art. 2, para. 4, art. 51.

64. *New Jersey v. New York*, 523 U.S. 767, 787-88 (1998) ("Even as to *terra nullius*, like a volcanic island or territory abandoned by its former sovereign, a claimant by right as against all others has more to do than planting a flag or rearing a monument. Since the 19th century the most generous settled view has been that discovery accompanied by symbolic acts give no more than 'an inchoate title, an option, as against other states, to consolidate the first steps by proceeding to effective occupation within a reasonable time.'") (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 146-47 (4th ed. 1990); 1 CHARLES HYDE, *INTERNATIONAL LAW* 329 (2d ed. 1945); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 439-41 (H. Lauterpacht ed., 5th ed. 1937)).

65. In 2007, Russia succeeded in the first ever manned attempt to descend to the ocean bottom at the North Pole; in a symbolic act, a Russian flag was placed on the seabed at the exact position of the North Pole. This move was largely seen as an act of displaying Russian dominance over the Arctic. Andrew C. Revkin, *Russia's North Pole Obsession*, N.Y. TIMES, Aug. 2, 2007, <http://thelede.blogs.nytimes.com/2007/08/02/russias-north-pole-obsession/>; *Russia plants flag under N Pole*, BBC NEWS, Aug. 2, 2007, <http://news.bbc.co.uk/go/pt/fr/-/2/hi/europe/6927395.stm>; Both Russia and Canada (as well as Norway and Denmark) have launched projects to base claims that certain portions of the North Pole should belong to them. Shamil Midkhatovich Yenikeeff & Timothy Fenton Krysiak, *The Battle for the Next Energy Frontier: The Russian Polar Expedition and the Future of Arctic Hydrocarbons*, OXFORD ENERGY COMMENT, Aug. 2007, www.oxfordenergy.org/pdfs/comment_0807-3.pdf.

66. On a detailed discussion of the Israeli claims over Gaza, see for example George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 47-50 (2009).

67. *Id.*

68. On the status of U.N. General Assembly resolutions, see for example, DUNOFF ET AL., *supra* note 47, at 73-77; Scharf, *supra* note 10, at 448-50.

participate in important regional organizations, like the European Union, the Organization of American States, the Organization of African Unity, inter alia. States participate in specialized world organizations, dealing with matters of global trade, health, labor, etc., including the World Trade Organization, the World Health Organization, the World Labor Organization, and the World Intellectual Property Organization.⁶⁹ Finally, states participate in important military endeavors and alliances, like NATO or ECOWAS.⁷⁰ Non-states generally do not have access to such force and are thus not invited participants in global affairs. Non-state entities are limited in their ability to influence the development of international law, to protest against existing international legal rules, or to lobby powerful states to engage in certain behaviors on the international scene.

Statehood is thus more than a legal theory. It casts a sovereignty shield on entities that qualify as states, and it thereby insulates some of their decision-making power from outside interference. It also allows qualifying members to continually work toward the development of international law, through participation in international treaties, organizations, working groups, alliances and conferences. Non-state entities are denied all these privileges, and because of this detriment, often try hard to prove their case of statehood. In today's globalized world, participation in the international world order has become of crucial importance to all states. Consequently, exclusion from the statehood club can have disastrous consequences on non-state entities. In order to determine which entities should be treated as states, the legal theory of statehood should be amended to correspond more accurately to our globalized existence.

IV. A GROTIAN MOMENT: CHANGES IN THE LEGAL THEORY OF STATEHOOD

How has the legal theory of statehood changed through the influence of globalization across our planet? First, the contours of state sovereignty and the right of intervention have changed, to reflect a more inter-connected existence and relationships among states. Second, the accepted theory of human and minority rights has sometimes chipped away at statehood, by infringing on state territorial integrity and altering state borders. Third, the emergence and continued existence of *de facto* states – non-state entities that come very close to satisfying the traditional criteria of statehood, but that are denied statehood because of geopolitical or strategic reasons – illustrate that statehood no longer functions as a legal theory, if applied *stricto sensu*. Fourth, as I argue throughout this article, globalization and state inter-connectivity have changed what states can and cannot do on the world scene, as behavior of one state may inadvertently affect several other states, causing them concern about the “offending” state. Finally, the proliferation of regional and international organizations and legal norms has also impacted states, which can now only engage in international relations if they respect the existing world order.

69. Sterio, *supra* note 1, at 220-22 (discussing the proliferation of international organizations and describing some of the most prominent international organizations in which states participate).

70. *Id.* at 221.

A. Sovereignty and Intervention

The above-described theory of statehood presumes that once an entity becomes a state, it becomes a sovereign, equal participant in world affairs. The concept of state sovereignty embraces the notion of state equality – that each state has a certain bundle of rights, and that every other state needs to respect those rights.⁷¹ The rights of state A are supposed to remain equal to those of states B, C, and D. The presumed equality of positive state rights also implies an equality of so-called negative rights. Thus, sovereign states are free of outside interference if their actions remain within the sphere of their positive rights. Thus, if state A undertakes a certain course of action within its territory, states B, C, and D have no intervention rights toward state A.

The contours of state sovereignty, however, have shifted over the years. Today, it is an accepted fact that some states are more sovereign than others.⁷² Some states, due to their powerful economic and military status, simply wield more power on the international scene; thus, their opinion matters more and their actions are examined through lesser scrutiny. These super-sovereign states include permanent members of the United Nations Security Council (United States, United Kingdom, France, Russia and China), which, through the United Nations' institutional structure enjoy unilateral veto power over all world affairs examined by the Security Council.⁷³ Other super-sovereign states dispose of enhanced rights and powers because of their wealth and military potential, such as Italy, Germany, and Japan.⁷⁴ Additional countries that have seriously approached the status of super-sovereign powers include non-declared nuclear states, such as India, Pakistan, and possibly Israel, as well as powerful rogue states like Iran and North Korea, which wield power through the unpredictable and dangerous threat that they may exercise harmful military action against their enemies and neighbors.⁷⁵

The notion of sovereignty, inherent and implicit in the legal theory of statehood, has morphed itself and has seriously affected world affairs, resulting in a pecking order of states.⁷⁶ The fourth criterion of statehood – the capacity to enter into international relations – seems most affected by this phenomenon. Super states are free to engage in international relations, and to exercise both their positive as well as negative rights as they see fit.⁷⁷ Other less sovereign states seem dependent on the super powers for their own sovereign exercise of international relations. In fact, super states seem to directly dictate and orchestrate

71. Sterio, *supra* note 42, at 153-54 (“State sovereignty, in its Westphalian form, typically includes: an equality of states within the international community, a general prohibition on foreign interference with internal affairs, a territorial integrity of the nation-state, and an inviolability of international borders.”); *see also* Kelly, *supra* note 6, at 375-76.

72. *See, e.g.*, Kelly, *supra* note 6, at 364-65; Sterio, *supra* note 42, at 154.

73. Sterio, *supra* note 42, at 154.

74. *Id.*

75. *See id.* at 147-54.

76. Kelly, *supra* note 6, at 364-65, 375-76.

77. Sterio, *supra* note 42, at 154 (“Because the Great Powers are essentially more ‘sovereign’ than other states, they may engage in interventions and cross other states’ borders, in the name of preserving some higher ideals.”).

the courses of action of less sovereign states on the world scene. For example, when the Yemen ambassador to the United Nations cast a negative vote on the Security Council (Yemen had a seat at that time) with respect to the Security Council's authorization to use force in Iraq in the First Gulf War, the U.S. ambassador to the United Nations allegedly declared to his Yemeni colleague that his vote was the most expensive one he had ever cast.⁷⁸ This remark perfectly illustrates the so-called Great Powers Rule and the dependency that less sovereign states enjoy vis-à-vis their more sovereign partners in the realm of international relations. In other instances, less sovereign states have simply abstained from voting either in the General Assembly or the Security Council, for fear of alienating the Great Powers.⁷⁹

As the contours of state sovereignty shifted, so did the positive and negative rights of states. More sovereign states acquired more sovereign rights and less sovereign states lost negative rights. In other words, super sovereign states earned the right to interfere in the affairs of their less powerful peer states in the form of intervention.⁸⁰

The idea of intervention is not entirely novel. The United Nations Charter provides all states with the right to cross the frontiers of another state in a military fashion, in the name of self-defense or when authorized by the Security Council.⁸¹ Moreover, states are allowed to intervene within the territory of another state in the form of collective self-defense: state A may call upon state B to help it fight off state C.⁸² Thus, both states A and B may send troops to fight in state C. The idea of intervention outside of the confines of the Charter's structure is more controversial. Over the last few decades, several new paradigms of intervention have evolved. One emerging theory of intervention is coupled with the rise of the human rights movement: the idea that states may intervene in the affairs of other states in the name of human rights protections.⁸³ Several of these interventions have taken place in the late 20th century. For example, an intervention on behalf of the Kurds in Iraq was staged in the early 1990's, when several countries launched an attack on Iraq to protect its ethnic Kurds.⁸⁴ Similarly, a NATO-led intervention took place in Kosovo, on the territory of the then existing Federal Republic of Yugoslavia, to protect ethnic Kosovar Albanians from the central FRY government.⁸⁵ Many scholars have supported the idea of humanitarian

78. DUNOFF ET AL., *supra* note 47.

79. See, e.g., Scharf, *supra* note 10, at 447 (noting that "states often vote for General Assembly resolutions to . . . curry favor with other states").

80. Sterio, *supra* note 42, at 147, 154.

81. U.N. Charter arts. 42, 51.

82. U.N. Charter art. 51.

83. See, e.g., Scharf, *supra* note 10, at 451; see also text accompanying notes 32-35.

84. See, e.g., Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 383 (2003).

85. Several influential authors have supported external intervention in Kosovo on humanitarian grounds. Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 25-29 (1999); Falk, *supra* note 35, at 855-56; Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857,

intervention, and most would agree that it has acquired the status of an emerging customary norm.⁸⁶

Additionally, some have advocated other forms of intervention. Richard Haass, a senior member of the George H.W. Bush administration, advocated the idea of the so-called involuntary sovereignty waiver.⁸⁷ According to this theory, states waive their sovereignty in an involuntary manner, thereby inviting intervention by external actors, if they engage in three different types of reprehensible behavior. These three behaviors justifying a waiver of sovereignty on behalf of the offending state include harboring terrorism, hiding weapons of mass destruction, and abusing human rights.⁸⁸ The United States-led interventions in Iraq, and more recently, Afghanistan, can certainly be explained under the first two reasons for the waiver of sovereignty: Iraq had been accused of harboring weapons of mass destruction, whereas Afghanistan has been accused of harboring terrorists.⁸⁹ The third reason for waived sovereignty, the abuse of human rights, fits within the already existing paradigm of humanitarian intervention.

The involuntary sovereignty waiver theory represents a significant change in the traditional perception of state sovereignty and equality. According to Haass, it is up to the super powers – those super sovereign states described above – to determine when an offending state has done something egregious to involuntarily waive its sovereignty and to invite outside intervention.⁹⁰ Haass is perfectly comfortable with the idea that a country like the United States, a super power, can

857-58, 860 (1999); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824, 826 (1999); Wedgwood, *supra* note 35, at 834. Other authors have supported NATO actions against the FRY with reservations, arguing that the Kosovo case should not set a precedent for the future but should be considered an exception due to regional (European) considerations. See W. Michael Reisman, *Kosovo's Antinomies,* 93 AM. J. INT'L L. 860, 860-61 (1999).

86. See, e.g., Scharf, *supra* note 10, at 450-51.

87. See Richard N. Haass, Dir. of Pol'y Planning, U.S. State Dep't, *Sovereignty: Existing Rights, Evolving Responsibilities,* Remarks to the School of Foreign Service and the Mortara Center for International Studies at Georgetown University (Jan. 14, 2003), available at <http://www.iwar.org.uk/news-archive/2003/01-15.htm>.

88. Haass's position is that "countries constructively waive their traditional sovereignty shield and invite international intervention when they undertake to massacre their own people, harbor terrorists, or pursue weapons of mass destruction." Sterio, *supra* note 42, at 155. Haass constructed this theory initially in 2002 with respect to states that commit atrocities against their people or harbor terrorists. Nicholas Lemann, *The Next World Order,* NEW YORKER, Apr. 1, 2002, at 42. Haass then amended this theory in 2003, when he included states that pursue weapons of mass destruction. Haass, *supra* note 87.

89. On Iraq and the allegations that Iraq had been developing and storing weapons of mass destruction, see *In Their Own Words: Iraq's 'Imminent' Threat,* CENTER FOR AMERICAN PROGRESS (Jan. 29, 2004), <http://www.americanprogress.org/kf/quotes.pdf>. On Afghanistan and the allegations that it has been harboring terrorists, see Rob Grace, *The War In Afghanistan: That Nagging Evidentiary Question,* LAW AND SECURITY STRATEGY, Dec. 10, 2009, <http://lawandsecurity.foreignpolicyblogs.com/2009/12/10/the-war-in-afghanistan-that-nagging-evidentiary-question/>; see also Elisabeth Bumiller, *Obama Team Defends Policy on Afghanistan,* N.Y. TIMES, Dec. 2, 2009, <http://www.nytimes.com/2009/12/03/world/asia/03policy.html>.

90. "Haass further reasoned that 'sovereignty is not a blank check,' and considered that Great Powers have unique intervention rights with respect to rogue regimes that have forfeited their sovereign privileges and their immunity from external, armed intervention." Sterio, *supra* note 42, at 155 (quoting Haass, *supra* note 87).

unilaterally decide to engage in an intervention in Afghanistan.⁹¹ Moreover, Haass does not see the need to involve international organizations, such as the United Nations or NATO, in the decision-making process. Haass recognizes the fact that some states are more sovereign than others, but simply sees nothing wrong with it.⁹² To the extent that this theory prevails in international relations, it represents a true Grotian moment. Through this theory, state equality and sovereignty may have been replaced by a system of unequal power and a rule of the Great Powers. While the Great Powers have always had more clout on the world scene *de facto*, the Grotian Moment arising from Haass' theory is in the fact that this theory legitimizes the Great Powers rule, turning it into a serious international relations theory.

The legal theory of statehood has changed, and notions of state sovereignty and intervention on our globalized planet are vastly different today. In a Grotian Moment-like manner, globalization has chipped away at state sovereignty, and intervention has become an accepted exception to the absolute ban on the use of force against states. Statehood no longer implies that states may engage in any kind of behavior within their border without repercussions. On the contrary, it seems that certain kinds of offensive behaviors produce direct sanctions by other states.

B. Secession and Minority Rights

The formal criteria of statehood have also changed in a Grotian Moment manner with respect to minority rights, and, more importantly, remedial secession. Under traditional international law, a pillar of state sovereignty is the notion of territorial integrity of every state – the idea that state borders, once established, are inviolable.⁹³ This principle follows both from customary international law, as well as from the U.N. Charter, which declares in its Article 2(4) that no state shall use force against the “territorial integrity . . . of any state.”⁹⁴ Territory is one of the four fundamental requirements of statehood: the very first criterion of statehood in the Montevideo Convention is that the entity “applying” for statehood must have a defined territory.⁹⁵

In recent years, however, the principles of territorial integrity and of the inviolability of state borders have yielded to the rising norm of respect for minority and human rights in general.⁹⁶ Thus, states are no longer immune from criticism or

91. According to Haass, sovereignty is not a “blank check.” Haass, *supra* note 87; *see also* Kelly, *supra* note 6, at 403. Thus, Great Powers have unique intervention rights with respect to “rogue” regimes which forfeit their sovereignty. *Id.*

92. Sterio, *supra* note 42, at 155-56.

93. On the sanctity of state borders, *see*, for example, Territorial Dispute (Libyan Arab J'amahiriya/Chad), 1994 I.C.J. 6, ¶ 72 (Feb. 3) (“Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court.”).

94. U.N. Charter art. 2, para. 4.

95. *See* Montevideo Convention, *supra* note 41, art. 1.

96. On the rise of the human rights movement in general, *see* DUNOFF ET AL., *supra* note 47, 441-526.

intervention if they abuse and disrespect minority rights within their own territory. Scholars have advanced the idea of outside interference in the form of humanitarian intervention to aid minority groups oppressed by their mother state.⁹⁷ Humanitarian intervention has become a morally acceptable norm, and a *de facto* recognized exception to the general ban on the use of force.⁹⁸ The respect for the territorial integrity of the mother state can be trumped by the need to protect and advance minority rights, even at the expense of altering territorial borders of the mother state. Even under the involuntary sovereignty waiver theory advanced by Richard Haass and described above, one of the situations warranting intervention by the Great Powers against another state is if that state abuses human rights.⁹⁹ State territory under modern international law is permanent and defined, but not infinitely. State territory can be altered to protect minority rights. Conversely, the respect of minority rights seems to have become a *de facto* requirement of statehood, or at least of the continuity of statehood. States that do not respect minority rights risk intervention by outside actors, which can, in extreme circumstances, lead to remedial secession by a subpart of the offending state, where the oppressed minority has lived.

The most recent example of such outside intervention leading to secession took place in the former Yugoslavia. After allegations of human rights abuses in Kosovo by the Serbian leadership, NATO countries engaged in a prolonged campaign of air strikes on the territory of the then Federal Republic of Yugoslavia (FRY).¹⁰⁰ This intervention, although not legally authorized by the U.N. Security Council, was regarded by many scholars as morally justified.¹⁰¹ Moreover, this intervention fits neatly into the evolving theory of humanitarian intervention – a situation when the territorial integrity of the mother state (in this case, the FRY) is attacked by outside forces (NATO) in the name of protecting a specific minority group (the Kosovar Albanians). The Kosovar Albanians unilaterally declared independence from Serbia in February of 2008, exercising their right to remedial secession and altering thereby the borders of their mother state, Serbia.¹⁰² The Kosovar declaration of independence was largely supported by NATO countries that had staged an intervention on behalf of the Kosovars a decade earlier; thus, NATO countries (and some other powerful states) determined not to honor the territorial integrity of Serbia by recognizing the Kosovar secession and accepting Kosovo as a new state.¹⁰³

97. See, e.g., Cassese, *supra* note 85, at 25-29; Falk, *supra* note 35, at 856; Henkin, *supra* note 85, at 826-27; Franck, *supra* note 35, at 859; Wedgwood, *supra* note 35, at 834.

98. See, e.g., Cassese, *supra* note 85, at 25-29; Falk, *supra* note 35, at 856; Henkin, *supra* note 85, at 826-27; Franck, *supra* note 35, at 859; Wedgwood, *supra* note 35, at 834.

99. Haass, *supra* note 87; see also Kelly, *supra* note 6, at 404.

100. IAIN KING & WHIT MASON, PEACE AT ANY PRICE: HOW THE WORLD FAILED KOSOVO 43-45 (2006) (describing the events leading up to the NATO air strikes in the former Yugoslavia); Sterio, *supra* note 32, at 271.

101. Scharf, *supra* note 10, at 450-51; see also *supra* note 85 for a list of scholars approving the NATO intervention in Kosovo.

102. Sterio, *supra* note 32, at 269.

103. *Id.* (noting that many powerful countries recognized Kosovo within days of its unilateral

Recently, the International Court of Justice confirmed the legality of the Kosovar unilateral declaration of independence, albeit stopping short of endorsing a general right for minority groups to secede from their mother states, in what some commentators have criticized as a disappointing opinion.¹⁰⁴ The world court held that the Kosovar declaration of independence was not prohibited by general international law, or by any other specific sources thereof.¹⁰⁵ However, the world court reserved judgment on the more difficult question of whether Kosovar independence was justified based on the principle of remedial self-determination. In fact, the world court specifically refused to address the tension between the principles of self-determination (for the Kosovars) and territorial integrity (for Serbia). The court instead concluded that the authors of the Kosovar declaration of independent were not bound by any specific rules of international law, as they did not act “in the capacity of an institution created by and empowered to act within [a] legal order,” but rather as the “democratically-elected leaders” of Kosovars, who “set out to adopt a measure the significance and effects of which would lie outside that [legal] order.”¹⁰⁶

However, despite the world court ruling refusing to admit any antimony between the Kosovar right to self-determination and Serbia’s rights to the respect of its territorial integrity, Serbian *statehood* was affected in the name of minority rights. As a result of the Kosovar exercise of remedial self-determination, the contours of Serbia as a state changed, and one of the prongs of statehood (territory) was specifically altered in the case of Serbia. It is possible to assume that had Serbia respected minority rights, Kosovar Albanians would not have been supported in their quest to secede from Serbia. The Kosovar example demonstrates the idea that abusing minority rights by a mother state may affect that entity’s statehood in the form of a negative alteration of its territory.

Another example of a successful exercise of minority rights in the form of minority secession, supported by the Great Powers, is the case of East Timor. East Timor, a former Portuguese colony, was a province of Indonesia until 1999.¹⁰⁷ Through outside interference, military, financial, and logistical aid, the East Timorese were able to exercise their right to remedial secession in 2002, and to form their own state, at the expense of Indonesian territorial integrity.¹⁰⁸ Similar to

declaration of independence); *see also Kosovo Declares Independence from Serbia*, MSNBC, Feb. 18, 2008, <http://www.msnbc.msn.com/id/23203607> (last visited on November 09, 2010).

104. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (July 22, 2010) *available at* <http://www.icj-cij.org/docket/files/141/15987.pdf>; for criticism of the opinion, *see, e.g.* Jean d’Aspremont, *The Creation of States Before the International Court of Justice: Which (I)legality?*, HAGUE JUSTICE PORTAL (2010), http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/DAspremont_Kosovo_EN.pdf (discussing the disappointment of some scholars with the world court decision on the Kosovar declaration of independence).

105. Kosovo Advisory Opinion ¶¶ 79-80.

106. *Id.* ¶¶ 105, 107.

107. Jani Purnawanty, *Various Perspectives in Understanding the East Timor Crisis*, 14 TEMP. INT’L & COMP. L.J. 61, 66 (2000).

108. *Id.* at 67-70; *see also* Sterio, *supra* note 42, at 158-60 (describing the events in East Timor which ultimately led to its independence from Indonesia).

Serbia, Indonesia had not fully respected East Timorese minority rights.¹⁰⁹ Like in the case of Serbia, it is reasonable to assume that had Indonesia been more respectful of minority rights in East Timor, this island would not have been supported in its struggle for secession and independence. While the intervention in East Timor by external actors did not rise to the level of humanitarian intervention, it is widely documented that external actors and international organizations, like the U.N., played a tremendously supportive role in aiding the East Timorese to secede from Indonesia.¹¹⁰

The Grotian Moment with respect to minority rights and its impact on the legal theory of statehood resides in the growing acceptance of secession, and the notion that if minority rights are abused by the mother state, the latter forfeits the right to have its territorial integrity respected, thereby inviting outside intervention. Although defined territory still constitutes a pillar criterion of statehood *de jure*, in practice, state territory can be “undefined” and altered if the result is needed to protect a minority group.

C. De Facto States: Taiwan, Northern Cyprus, Republika Srpska, Northern Kosovo, South Ossetia and Abkhazia

Statehood has become a malleable and somewhat anomalous theory in the latter half of the 20th century, because of the phenomenon of *de facto* states. *De facto* states are entities that satisfy the four criteria of statehood enumerated in the Montevideo Convention. However, for political and/or strategic reasons, these entities are not recognized as states, are denied membership in major international organizations, and are thus unable to engage in international relations and become true states.¹¹¹ Examples of such *de facto* states include Taiwan, Northern Cyprus, Republika Srpska, Northern Kosovo, South Ossetia and Abkhazia.

Taiwan has enjoyed ambiguous status on the world scene ever since the Chinese Maoist revolution, when the Chinese government of Chiang Kai-shek was expelled from China and fled to Taiwan in 1949, where it formed a new, *de facto* state.¹¹² Most western states during the initial decades of the Cold War supported

109. In fact, Indonesian rule over East Timor “imposed a military force that viciously led to human rights and humanity violations.” Purnawanty, *supra* note 107, at 68-69. It is estimated that up to 200,000 people died in East Timor during the Indonesian occupation. Anthony Lewis, Op-Ed., *Abroad at Home: The Hidden Horror*, N.Y. TIMES, Aug. 12, 1994.

110. In 1999, the U.N. organized a referendum in East Timor, whereby the East Timorese people voted to separate from Indonesia. Purnawanty, *supra* note 107, at 67. After Indonesia contested the referendum results and intervened militarily in East Timor, the U.N. established a peacekeeping force, the International Force for East Timor, to safeguard East Timor. *Id.* at 70; *see also* Jean d’Aspremont, *Post-Conflict Administration as Democracy-Building Instruments*, 9 CHI. J. INT’L L. 1, 9-10 (2008). Subsequently, East Timor was administered by the U.N., with significant support from other countries, and it ultimately gained independence in 2002. *See* Sterio, *supra* note 42, at 158-60; *see also East Timor: Birth of a Nation*, BBC NEWS, May 19, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/1996673.stm>.

111. *See* Scott Pegg, *De Facto States in the International System* 1-2 (Univ. of British Columbia Inst. of Int’l Relations, Working Paper No. 21, 1998), available at <http://www.ligi.ubc.ca/sites/liu/files/Publications/webwp21.pdf>.

112. DUNOFF ET AL., *supra* note 47, at 153.

Taiwan, engaged in international relations therewith, and even entertained Taiwanese membership in the United Nations.¹¹³ The situation changed in 1971, when the Chinese delegation was seated in the United Nations.¹¹⁴ However, many western states have retained international relations with Taiwan, and China has never attempted to militarily seize Taiwan.¹¹⁵ Taiwan thus remains a *de facto* state: it has a defined territory, a permanent population, a government, and the capacity to enter into international relations, but for political reasons, it has never been officially recognized as a state.

Cyprus was a British colony until 1960, inhabited by a majority of ethnic Greeks living in the south, and a minority of ethnic Turks living in the north.¹¹⁶ Great Britain decided to negotiate Cypriot independence with representatives from Greece and Turkey; after the initial agreements were drafted, Greek Cypriot and Turkish Cypriot representatives were also invited to a meeting to finalize the agreements.¹¹⁷ According to a series of treaties negotiated in 1960, Cyprus would be an independent state, governed through a power-sharing agreement between the Greeks and the Turks.¹¹⁸ Each ethnic group would have adequate representation in the government and in the parliament, and both groups would respect each other's rights.¹¹⁹ The agreement worked briefly, but the two groups found themselves unable to share their state in a peaceful manner.¹²⁰ In 1974, Turkey staged an intervention on behalf of the Cypriot Turks and invaded the northern part of the island, where the Turkish Cypriots predominantly live.¹²¹ Through the invasion, the northern part of Cyprus *de facto* separated from the south, to form an independent entity.¹²² The United Nations sent peacekeepers to Cyprus to prevent conflict from escalating between the island's north and south, but attempts by the international community to reunify Cyprus have been unsuccessful.¹²³ No country

113. *Id.* at 153-55 (noting that the United States and other western countries retained diplomatic ties with Taiwan, and describing the legal fight that ensued regarding the representation of China in the United Nations).

114. *Id.* at 155.

115. *Id.* (“[t]he United States and a number of other states continued to maintain unofficial relations with Taiwan through government-controlled private bodies.”).

116. *Id.* at 34.

117. *Id.*

118. *Id.* The power-sharing structure in Cyprus was reflected in three agreements, negotiated in 1959 between Great Britain, Greece and Turkey: a Basic Structure of the Republic of Cyprus, a Treaty of Guarantee Between the Republic of Cyprus and Greece, the United Kingdom, and Turkey, and a Treaty of Alliance Between the Republic of Cyprus, Greece, and Turkey. *Id.*

119. *Id.* at 34-35.

120. *Id.* at 35.

121. *Id.*

122. *Id.* at 35-36 (noting that the current demarcation line still holds today).

123. *Id.* at 36. In 1992, then U.N. Secretary-General Perez de Cuellar drafted a “set of ideas” calling for the establishment of a bi-zonal federal state, with politically equal Greek and Turkish federal subcomponents. *Id.* at 64. In 2002, then U.N. Secretary-General Kofi Annan drafted a comprehensive plan for the resolution of the Cyprus dispute, by calling for the creation of one common state composed of two political component states, one Greek and the other Turkish Cypriot. *History of Cyprus*, HISTORYOFNATIONS.NET, 2004, available at <http://www.historyofnations.net/europe/cyprus.html> (last visited Nov. 15, 2010). In 2003, Greek Cypriots signed an accession agreement with the E.U. on behalf

has ever recognized Northern Cyprus as an independent state, although in reality, it functions as such. Just like Taiwan, Northern Cyprus has a defined territory, a permanent population, a government, and some capacity to enter into international relations. The fourth criterion of statehood seems to be the most difficult one to fulfill in the case of Cyprus, because a state may not be able to engage in meaningful international relations if other states do not want to treat it as a sovereign partner. However, because Northern Cyprus functions as a *de facto* state in every other aspect, it would have true potential to entertain international relations with other states.

Republika Srpska is technically a part of Bosnia.¹²⁴ It is inhabited by ethnic Serbs and represents the northeastern part of the country. Ever since the Yugoslav civil wars, Republika Srpska has functioned as a *de facto* state.¹²⁵ It has its own system of law enforcement, government, schools, and public offices and services that are entirely separate from those existing in the other part of Bosnia.¹²⁶ Because of political reasons, like Northern Cyprus, no external actors have recognized Republika Srpska as a state. When addressing the legality of secession issues as they applied to the various Yugoslav republics and provinces in the early 1990's, the Badinter Commission, a body of experts commissioned to deal with these difficult issues, refused to recognize that Serbs in Republika Srpska had the right to self-determination.¹²⁷ However, the Commission's opinions were legally inconsistent as they applied to the different Yugoslav republics, and the Commission's diverse treatments afforded to the different republics are widely attributed to the political situation at the time.¹²⁸ Serbia was portrayed as the culprit and initiator of the Yugoslav civil wars, and the international community feared that if Republika Srpska had been allowed to secede from Bosnia, it would have rejoined Serbia and augmented the territory and power of this "rogue" state.¹²⁹ While this reasoning could have been accurate in the early 1990's, it is no

of Cyprus, but Turkish Cypriots would not benefit from this agreement unless the island was reunited. In order to facilitate the reunification of the island, in 2004, the Annan Plan was put to votes in the Greek and Turkish Cypriot communities, but it failed to obtain majority support within both communities. Thus, only the Greek Cypriots joined the E.U. on May 1, 2004, and the island remains divided. *Id.*

124. DUNOFF et al., *supra* note 47, at 123.

125. *Id.*

126. *Id.*

127. Opinions on Questions Arising from the Dissolution of Yugoslavia, Op. No. 2, 31 I.L.M. 1488, 1497 (Conf. on Yugo. Arb. Comm'n 1992) (opining, by the Badinter Commission, that "the Serbian population in Bosnia-Herzegovina . . . is entitled to all the rights accorded to minorities and ethnic groups under international law" and that members of minority and ethnic groups must be afforded "the right to choose their nationality").

128. See, e.g., Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 76 (2000).

129. For example, the former Serbian President Milošević was indicted before the International Criminal Tribunal for Yugoslavia, and accused of having attempted to create a "Greater Serbia," by inciting ethnic Serbs in Bosnia to rebel, to secede, and to later join Serbia. See Gillian Higgins, *The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis Before the ICTY*, 7 NW. U. J. INT'L HUM. RTS. 239, paras. 5-6 (2009) (describing the ICTY indictment and the charges therein against Slobodan Milošević).

longer reflective of the political situation in the Balkans. Since the 1995 Dayton Peace Accords, the new states created through the wars have peacefully existed, and Republika Srpska has functioned, somewhat isolated, as a *de facto* state.¹³⁰ Like Northern Cyprus, it has a defined territory, government, a permanent population, and would enjoy the capacity to enter into international relations, if other states were willing to treat it as a state.

Similar to Republika Srpska, the northern part of Kosovo has functioned as an independent, *de facto* state, ever since the Kosovar separation from Serbia in February of 2008. The northern part of Kosovo is inhabited by ethnic Serbs, whereas most of the southern portion of Kosovo is populated by ethnic Albanians.¹³¹ The ethnic Serbs have expressed reluctance to share an independent state with ethnic Albanians, and have, like their counterpart in Republika Srpska, formed their own *de facto* state. Northern Kosovo has its own Serbian language schools, Serbian law enforcement officers, and a shadow Serbian government.¹³² Although some scholars have advanced the idea of allowing northern Kosovo to secede from Kosovo, and to rejoin Serbia, widespread support for this proposition seems to be lacking.¹³³ Until a further resolution of this issue, Northern Kosovo functions as a *de facto* state.

South Ossetia and Abkhazia are provinces in the former Soviet republic of Georgia.¹³⁴ Since the USSR broke up in the early 1990's, Georgia has been an independent state, albeit with its share of troubles. South Ossetia and Abkhazia have been fighting for independence from Georgia for several years, and function as *de facto* independent states.¹³⁵ In the summer of 2008, these so-called "break-away" provinces attracted global attention when Russia decided to intervene militarily in Georgia, in order to assist the two provinces in their secessionist struggle.¹³⁶ The Russian parliament even went as far as to recognize South Ossetia and Abkhazia as independent states,¹³⁷ and the South Ossetian president has publicly relied on the Kosovo precedent to argue that his "state" had a better legal case for secession than Kosovo did, and that South Ossetia ought to be recognized as an independent state by the rest of the world.¹³⁸ Most of the western world

130. DUNOFF ET AL., *supra* note 47, at 123 (noting that Bosnia remains divided between the Muslim-Croat federation and Republika Srpska, and that each of these has "separate government structures, schools, and economies").

131. Sterio, *supra* note 32, at 298.

132. *Id.* at 298-99.

133. *Id.* at 299 n.166 (noting that scholars had advanced the idea of separating Kosovo into two states).

134. See Nikolai Pavlov, *Russia, Georgia Seek Control of South Ossetia Capital*, REUTERS, Aug. 8, 2008, <http://www.reuters.com/article/worldNews/idUSL768040420080808?pageNumber=2&virtuaBrandChannel=0>.

135. Sterio, *supra* note 42, at 166; Pavlov, *supra* note 134.

136. *Heavy Fighting in South Ossetia*, BBC NEWS, Aug. 8, 2008, <http://news.bbc.co.uk/2/hi/europe/7546639.stm>.

137. Gregory L. White & John W. Miller, *Russia Raises Ante on Separatist Georgia Regions*, WALL ST. J., Aug. 26, 2008, <http://online.wsj.com/article/SB121964909482268691.html>.

138. *Bush Warns Moscow over Breakaway Autonomy*, CNN, Aug. 25, 2008, <http://www.cnn.com/2008/WORLD/europe/08/25/russia.vote/index.html> (stating that the South Ossetian President, Eduard

however supports Georgia, which it sees as a natural ally in the Caucasus region against Russia.¹³⁹ Thus, most western states have been reluctant to recognize South Ossetia and Abkhazia, as this move would chip away from the Georgian territorial sovereignty.¹⁴⁰ Thus, although these two provinces arguably could satisfy the criteria of statehood, similar to Kosovo, Republika Srpska, or Northern Cyprus, their quest for independence is unlikely to succeed because of the lack of political willingness of the western Great Powers to engage with South Ossetia and Abkhazia as sovereign state partners.

The above examples demonstrate a Grotian Moment type change in the legal theory of statehood. In fact, several state-like entities exist on our planet and function as *de facto* states. If one were to apply the legal theory of statehood to these entities *stricto sensu*, they could all potentially qualify as states. However, because of the political unwillingness of powerful states to treat these entities as sovereign partners, these *de facto* states have been denied the official designation of statehood. It can be inferred that the legal theory of statehood now comprises a fifth element: the need for recognition by the Great Powers of any statehood-seeking entity. This Grotian Moment most likely resulted from the Great Powers Rule phenomenon itself, and the fact that the power balance on the world scene shifted at the end of the Cold War to provide for an unchecked concentration of power in the most potent states. The Grotian Moment in the legal theory of statehood has resulted in the adding of a fifth, political criterion: the need for recognition by the Great Powers of any non-state entity seeking to prove that it ought to be treated as a state.

D. Globalization or State Inter-Connectivity

Globalization, a phenomenon which can be described as inter-connectivity between regions, peoples, ethnic, social, cultural, and commercial interests across the globe, has affected different legal fields, one of which is international law.¹⁴¹

Kokoity believed his region had “more political-legal grounds than Kosovo to have [its] independence recognized”).

139. Sterio, *supra* note 42, at 174. In fact, most NATO countries would prefer that Georgia remain intact, as they have been exploring the possibility of Georgia joining NATO. Steven Erlanger, *NATO Duel Centers on Georgia and Ukraine*, N.Y. TIMES, Dec. 1, 2008, <http://www.nytimes.com/2008/12/01/world/europe/01nato.html>.

140. In fact, even Russia is rumored to secretly want to annex South Ossetia and Abkhazia; if this rumor were true, it would mean that Russia itself were against these two states' independence. Erlanger, *supra* note 139.

141. Many scholars have attempted to define globalization. See, e.g., Berman, *supra* note 2, at 490; Sands, *supra* note 2 at 537; see also *supra* Part II. Legal scholars also refer to globalization, for example, by calling for the need for a broader frame of analysis entitled “law and globalization.” Berman, *supra* note 2, at 490. Moreover, the term “globalization” has been used in many different fields besides the law, such as anthropology, sociology, etc. For example, anthropologists have argued that we live in the “global cultural ecumene” or a “world of creolization.” Ulf Hannerz, *Notes on the Global Ecumene*, PUB. CULTURE, Spring 1989, at 66; Robert J. Foster, *Making National Cultures in the Global Ecumene*, 20 ANN. REV. ANTHROPOLOGY 235 (1991); Ulf Hannerz, *The World in Creolisation*, 5 AFR.: J. INT'L AFR. INST. 546, 551 (1987). Sociologists, similarly, have shifted their emphasis from bounded “societies” to a “starting point that concentrates upon analyzing how social life is ordered across time and space . . .” ANTHONY GIDDENS, *THE CONSEQUENCE OF MODERNITY* 64 (1990).

Reshaped by the potent forces of globalization, international law has transformed itself from a set of legal rules governing inter-state relations, to a complex web of transnational documents, providing a normative framework for all sorts of different actors on the international legal scene.¹⁴² Phenomena which used to belong to domestic realms are now examined and monitored through the international legal lens. Our planet is “shrinking” because issues such as the environment, nuclear weapons, disease, and terrorism have become of global concern, and are thus measured by international law parameters.¹⁴³ Domestic law has lost its omnipotent, “sovereign” power and is now supplemented, corrected, and watched over by international law.¹⁴⁴ Thus, international law has undergone an evolutionary process over the recent decades, transforming itself from an inter-state conflict resolution instrument, to a powerful global tool, present in every-day life and influential of many state actors’ and non-state entities’ decisions and policies.¹⁴⁵

Because international law has expanded its role in such a drastic way, it has thereby eroded traditional state sovereignty. It is no longer true that states may do whatever they wish within their territory; rather, what states do internally often has an impact on other states, and often results in reactionary responses by other states.¹⁴⁶ States have become inter-connected through globalization, and their behaviors affect each other and provoke interferences, sanctions, and interventions. For example, as mentioned above, if a state abuses human rights, other states may decide to intervene in the name of humanitarian intervention.¹⁴⁷ If a state harbors terrorism or hides weapons of mass destruction, one of the Great Powers may decide to intervene, in the name of the involuntary sovereignty waiver theory.¹⁴⁸ If a state engages in a harmful trade practice, other states may seek to alter the harmful practice by applying to the World Trade Organization, a true global regulator of trade and commercial matters among states.¹⁴⁹ If a state condones anti-competitive economic behaviors by a group of economic operators, and if that behavior negatively affects other states, other states may intervene by applying their antitrust laws extra-territorially, to reach the anticompetitive behavior at its roots, in the offending country.¹⁵⁰

142. See *supra* Part II.

143. John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT’L L. 907, 910 (2006).

144. *Id.* at 936 (“The traditional Westphalian notion of sovereignty by which a state had absolute territorial control and the right to exercise domestic powers free from external constraints has, in large part, become unrecognizable.”); *id.* at 941 (“In various ways, the scope of sovereignty today is determined in a ‘top-down,’ or vertical fashion, with international norms being imposed from without.”).

145. Sterio, *supra* note 1, at 214.

146. *Id.*

147. See *supra* Part IV.A.

148. *Id.*

149. On the role of the WTO in the global trade, as well as its current dispute resolution mechanism, see DUNOFF ET AL., *supra* note 47, at 828-30, 834-46.

150. On the extra-territorial application of antitrust laws, see for example DUNOFF ET AL., *supra* note 47, at 364-75; see also Milena Sterio, *Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules*, 13 U.C. DAVIS J. INT’L L. & POL’Y 95 (2007).

The proliferation of international law norms, actors, and organizations has thus restricted every mode of state behavior, so that many “offenses” committed by states within their own territory will provoke a swift global response and some form of interference by other states.¹⁵¹ This Grotian Moment was brought about through the forces of globalization, and has affected the fourth criterion of the legal theory of statehood, the capacity to enter into international relations. As argued above, this criterion has become the pillar of the statehood theory; moreover, this criterion has changed in a Grotian Moment-like fashion. On our global planet, states are not only expected to engage in international relations with one another, they are also required to behave in a certain way, unless they wish to risk sanctions, global ostracism, shunning, or more intrusive forms of intervention. A state, in order to remain a truly sovereign entity on the world scene, must now respect international legal norms, and must obey a particular global code of conduct. While these behavior requirements seem to apply in a less strict fashion to the Great Powers, which, because of their potent status, enjoy more discretion in their global decisions, even the Great Powers in theory profess respect for such requirements, and typically justify non-conforming behavior through exceptions, exemptions, self-defense, etc.¹⁵²

E. Regionalization and International Organizations Proliferations

International law has witnessed an expansion in the number of international legal organizations. The end of World War II saw the creation of the United Nations, the supreme international organization, charged with many tasks, but most importantly, conceived as a global peacekeeper that would replace any unilateral use of force with joint decision-making and acting on the international legal scene.¹⁵³ In the wake of the United Nations establishment, other regional bodies, assuming the roles of regional peacekeepers, were equally born. In Europe, the North Atlantic Treaty Alliance (“NATO”) was established with mostly Western European states as members, as well as the United States, as a way of countering the constant communist threat lurking from the former Union of the Soviet Socialist Republics (“USSR”), and its allies.¹⁵⁴ In Africa, the Economic Community of West African States (“ECOWAS”) was created as a mixed

151. Sterio, *supra* note 1, at 245 (discussing the impact of state behavior on other states and actors); see *supra* Part IV.A.

152. For example, when the United States, the epitome of a Great Power, decided to send troops to Iraq in 2003, and to Afghanistan in 2001 and then again in 2009, it invoked its legal right to self-defense. The United States did not invoke its Great Power status, or somehow claim that it has more sovereign rights than Iraq or Afghanistan, or any other state. See *supra* note 89. Moreover, when NATO countries intervened in the FRY, they relied on the theory of humanitarian intervention. NATO countries did not claim super-sovereign status over the FRY. See, e.g., Scharf, *supra* note 10, at 450-51 (noting that the NATO intervention in Kosovo was seen as legitimate).

153. DUNOFF ET AL., *supra* note 47, at 25 (noting the United Nations was formed in 1945, that it is a multilateral body designed to address a diverse set of issues, and that the Security Council is charged with maintaining international peace and security).

154. *Id.* at 26.

organization: its mission is economic, but it encompasses mercenary forces that are charged with keeping peace in West Africa.¹⁵⁵

Embracing the post-World War I ideas of preventing conflict by transferring substantive decision-making in different areas to international bodies, international actors engaged in negotiations to create international monetary, trade, economic, insurance, investment, and other types of organizations. Thus, a multitude of international organizations were created in the latter half of the 20th century, including the International Monetary Fund, the WTO, the World Bank, the International Center for the Settlement of Insurance Disputes, World Intellectual Property Organization (“WIPO”), etc.¹⁵⁶ Similarly, states within the same regions acted to create regional organizations charged with similar objectives. The Organization for Security and Cooperation in Europe, the Association of Southeast Asian Nations, the Organization of American States, as well as the Organization of African Unity, are examples of such regional bodies.¹⁵⁷

The higher level of interaction among international law actors in the 20th century seems to have produced a myriad of international and regional bodies charged with resolving states’ differences on substantive levels and with providing an institutional forum where states can assert their grievances.¹⁵⁸ This proliferation of international organizations over the last half-century has affected the legal theory of statehood in another Grotian Moment type fashion. States seem to have willingly delegated portions of their capacity to engage in international relations to regional and international organizations. The fourth criterion of statehood, which on the one hand represents the pillar of statehood, has, on the other hand, morphed into a requirement for states to participate in a set world order, including membership in various global organizations, abidance by those organizational rules and codes of conduct, and regional or international decision-making in matters of global peace and security. Instead of their traditional ability to make sovereign decisions in international relations, a presupposition of statehood in the 1930’s, when the Montevideo Convention was drafted, states now enjoy the capacity to participate in an ordered global system of international legal norms, actors, and organizations. Those who respect the order are treated as states; those who do not may see some of their sovereign statehood attributes threatened through external interference and/or intervention.

V. GROTIAN MOMENT: A NEW THEORY OF STATEHOOD

The four traditional criteria of statehood no longer suffice to prove that an entity ought to be treated as a state under modern-day international law. In a Grotian Moment – an accelerated formation of new customary legal norms in times of fundamental change (globalization) – the requirements of statehood have

155. BARRY E. CARTER, PHILIP E. TRIMBLE & ALAN S. WEINER, *INTERNATIONAL LAW* 1070 (5th ed. 2007) (noting that “[ECOWAS] began peacekeeping operations in Liberia” and that “its forces have since operated in Sierra Leone and the Ivory Coast.”).

156. DUNOFF ET AL., *supra* note 47, at 26.

157. *Id.*

158. Sterio, *supra* note 1, at 220-22.

evolved. While it is true that an entity vying for statehood must still show that it has a territory, a population, and a government, such an entity must also demonstrate a new kind of capacity to engage in international relations. This article argues that the fourth criterion of statehood can be broken into several sub-components, all of which have become crucial in a new state's quest to gain global acceptance into the statehood club.

The capacity to engage in international relations, for the purposes of statehood, includes the following sub-criteria: the need for recognition by both regional partners, as well as the Great Powers; a demonstrated respect for human/minority rights; a commitment to participate in international organizations, and to abide by a set world order. If an entity is not able to satisfy all of these requirements, it may be forever relegated into the *de facto* state category, as the above-described examples demonstrate.

First, any statehood-seeking entity must garner the support of the Great Powers. The Great Powers' decision to recognize, or not recognize, a particular new entity as a state, directly influences that entity's ability to become a true sovereign state partner. This conclusion follows from the current Great Powers' rule – a concentrated amount of power in the hands of several powerful states that, unfortunately, dominate global relations.¹⁵⁹ For example, Kosovo garnered the Great Powers' support in its struggle for statehood, and it relatively easily managed to assert independence from Serbia and to obtain its new place in the club of statehood.¹⁶⁰ On the contrary, entities such as Tibet, Taiwan, Republika Srpska, Northern Cyprus, South Ossetia, and Abkhazia have not been able to persuade the Great Powers of the need to grant them the badge of statehood; thus, they have lacked entry into the global relations scene and are formally considered parts of larger states.¹⁶¹ Often, to persuade the Great Powers that its case for statehood merits approval, the statehood-seeking entity must garner the support of its most powerful regional partners. If the non-state entity's regional partners – those states that likely can be affected by the decision to recognize, or not, the same entity as a new state – are willing to approve the statehood quests, this decision is likely to influence the Great Powers into also granting statehood approval.¹⁶² Important

159. On a detailed discussion of the Great Powers, see Kelly, *supra* note 6, at 365.

160. See *supra* Part IV.A; see also Sterio, *supra* note 42, at 173-74.

161. On discussions of Taiwan, Republika Srpska, Northern Cyprus, South Ossetia and Abkhazia, see *supra* Part IV.C. On a discussion of Tibet, see Sreeram Chaulia, *A World of Selfistans?*, FOREIGN POLICY IN FOCUS, Mar. 13, 2008, http://www.fpif.org/articles/a_world_of_selfistans (arguing that Tibet has been oppressed by China for many years).

162. For example, when the former Yugoslav Republic of Macedonia applied for recognition within the E.U., Greece, its more powerful neighbor and E.U. member state objected to the use of the name Macedonia and feared that a newly recognized state of Macedonia would exert territorial claims over northern Greece. Thus, as a condition of recognition, Macedonia was required to change its name to the "Former Yugoslav Republic of Macedonia," and to insert a provision into its constitution promising that it would not lay any territorial claims outside of its present borders. DUNOFF ET AL., *supra* note 47, at 143; see also Sterio, *supra* note 42, at 152-53 (discussing the case of Macedonia). This is a classic example of a more sovereign state (albeit not a Great Power) exerting pressure on a less sovereign entity and imposing conditions on the latter's ascension into statehood.

regional partners may be strategic and political allies of some of the Great Powers, or, in some instances, may belong to the Great Powers' club themselves; thus, regional approval of statehood for a non-state entity may facilitate the latter's struggle for recognition as a new sovereign partner.¹⁶³

Second, any statehood-seeking entity must in addition demonstrate that it will respect human/minority rights. From the discussion above, it can be asserted that states, and entities seeking statehood, risk sanctions and intervention if they choose to abuse human rights.¹⁶⁴ Human and minority rights have at times trumped state territorial integrity, and states have suffered alterations to their territories, to accommodate minority rights movements seeking independence. When the former USSR and the former Yugoslavia collapsed in the early 1990's, European Union countries refused to recognize any new country in Europe unless it specifically committed to respecting human rights.¹⁶⁵ In other instances, powerful countries have intervened in the affairs of sovereign states to protect human rights, in the name of humanitarian intervention, and have helped minority movements obtain recognition and at times, remedial secession. Above examples of Kosovo and East Timor, *inter alia*, solidify this idea and confirm that minority rights sometimes erode state territorial sovereignty.¹⁶⁶ In fact, states have lost some of their sovereign attributes of statehood when they have abused human rights. At times, because of human rights abuse, states have lost parts of their territory, as those parts became new, sovereign states. Not only are new states required to pledge to respect human rights, existing states, with the exception of the Great Powers and their closest allies, are also expected to do the same, at the risk of grave sanctions and intervention.¹⁶⁷

Third, any statehood-seeking entity must show its willingness to participate in international organizations and to abide by the existing world order. Because of the proliferation of international organizations and legal norms, which now exist in virtually every aspect of state life, it is impossible for any state-like entity to function while ignoring international organizations.¹⁶⁸ It has become impossible to trade unless the trade is accomplished within the WTO; it is illegal to use force outside of the confines of the U.N.; it is very difficult to attract foreign investment

163. The case of Macedonia perfectly exemplifies this proposition. *See supra* note 162.

164. *See supra* Part IV.A.

165. Council of the European Community, Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," 31 I.L.M. 1485, 1486 (1992) (requiring "respect for the provisions of the Charter of the United Nations . . . especially with regard to the rule of law, democracy and human rights," and "guarantees for the rights of ethnic and national groups and minorities" in order for a new state to be recognized).

166. *See supra* Part IV.B.

167. Kosovo is a great example for this proposition. When Serbia (a non Great Power) abused human rights in Kosovo, it incurred an intervention staged by NATO countries on its territory. Thus, Serbia, because it abused human rights, lost an aspect of its sovereignty: the right to territorial integrity and the right to be free of outside interference. Moreover, because of human rights abuses in Kosovo, Serbia ultimately lost a portion of its territory (Kosovo), which became an independent state. On a detailed discussion of Kosovo, see Sterio, *supra* note 42, at 162-66.

168. On the proliferation of international organizations, see Sterio, *supra* note 1, at 220-22.

outside of the scope of prevailing investment treaties; it is probable that an entity will be labeled “rogue” if it chooses not to respect dominant human rights norms. States like North Korea and Syria, because of their unwillingness to participate in the world order, have become so isolated in their existence that their capacity to enter into international relations with other states has been seriously endangered.¹⁶⁹ And entities seeking to become states have no chance of succeeding unless they can seriously demonstrate their respect for the existing order. Thus, when Kosovo asserted its independence from Serbia in February of 2008, its declaration of independence promised the respect of human rights and other existing legal norms.¹⁷⁰ Macedonia, when it sought statehood and recognition from the EU, promised in its constitution that it would not have any territorial claims to any of its neighboring states.¹⁷¹ And western scholars and law professors drafted the East Timorese constitution.¹⁷² The respect of the international legal status quo has thus become a firm requirement of statehood.

The fourth criterion of statehood, the capacity to enter into international relations, has become the crucial component of any entity’s statehood quest. As I argue in this article, this component can be decomposed into three new subparts, which any statehood-seeking entity must fulfill. The theory of statehood should thus be amended, to capture this Grotian Moment, to include these new requirements, and to ensure that the statehood label is more accurately bestowed on applying entities.

VI. CONCLUSION

From a simple set of tools governing inter-state relations, international law has transformed itself into a global net of norms, rules and regulations, governing most aspects of state existence.¹⁷³ Globalization has profoundly impacted state behavior, and has seriously limited state sovereignty.¹⁷⁴ This change in international law has, in a Grotian Moment manner, caused shifts and changes in the legal theory of statehood. The traditional notion of statehood, encompassing four requirements of territory, population, government, and the capacity to enter

169. North Korea and Syria are routinely labeled as “rogue” states; some regimes have engaged in a politic of total isolationism toward these countries, such as the former U.S. President George W. Bush. On the concept of rogue states, see ROBERT S. LITWAK, *ROGUE STATES AND U.S. FOREIGN POLICY: CONTAINMENT AFTER THE COLD WAR* (2000) – need to find a source for this assertion – Silke did not put this source she found in the source doc so we need to either find it or find a new source.

170. *Kosovo Declares Independence from Serbia*, *supra* note 103.

171. *Opinions on Questions Arising from the Dissolution of Yugoslavia*, Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and Its Member States, 31 I.L.M. 1488, 1507 (Conf. on Yugo. Arb. Comm’n 1992). Note that the debate over Macedonian recognition was sparked by Greek claims that Macedonia would have territorial claims against northern Greece, a region also known as Macedonia. DUNOFF ET AL., *supra* note 47, at 143.

172. The author had several conversations with Professor Muna Ndulo of Cornell Law School, who was one of the experts consulting on the drafting of the East Timorese Constitution. The Constitution was officially drafted by a Constituent Assembly. See Vanya Tanaja, *East Timor: Debate Over Constituent Assembly Election Process*, GREEN LEFT WEEKLY, Mar. 14, 2001, <http://www.greenleft.org.au/node/23161>.

173. Sterio, *supra* note 1, at 213-14.

174. *Id.* at 214.

into international relations, should thus be amended. This article argues that additional criteria of statehood, all of which could exist within the fourth pillar, the capacity to enter into international relations, include the following: the need for the statehood-applying entity to garner the support of regional partners and the Great Powers, to respect human and minority rights, and to pledge its support and participation in the existing international organizations and world order. It is only if the statehood-seeking entity fulfills these additional criteria that it will be truly able to engage in international relations with other states. Statehood-seeking entities that have not fulfilled these criteria have been banished to the status of *de facto* states, and as such, have been denied many important attributes of state sovereignty. If the legal theory of statehood is amended to include these new criteria, then it will be more accurately applied to existing applicants, and will produce more just results across our planet.

Statehood, despite all sovereign attributes that it has lost because of globalization, remains an enormously important legal theory. If it is anachronistically described and applied, it can produce anomalous results and lead to unfortunate situations on our globalized planet.



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Sterio, M. (2011). grotian moment: Changes in the legal theory of statehood. *Denver Journal of International Law and Policy*, 39(2), 209-238.

Chicago 7th ed.

Milena Sterio, "A Grotian Moment: Changes in the Legal Theory of Statehood," *Denver Journal of International Law and Policy* 39, no. 2 (2011): 209-238

McGill Guide 9th ed.

Milena Sterio, "A Grotian Moment: Changes in the Legal Theory of Statehood" (2011) 39:2 *Deny J Intl L & Pol'y* 209.

MLA 8th ed.

Sterio, Milena. "A Grotian Moment: Changes in the Legal Theory of Statehood." *Denver Journal of International Law and Policy*, vol. 39, no. 2, 2011, p. 209-238. HeinOnline.

OSCOLA 4th ed.

Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2011) 39 *Denv J Int'l L & Pol'y* 209

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