
Milena Sterio, Cleveland State University
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 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

¹ Assistant Professor of Law, Cleveland-Marshall College of Law. J.D., Cornell Law School, magna cum laude, 2002; Maitrise en Droit (French law degree), Université Paris I-Panthéon-Sorbonne, cum laude, 2002; D.E.A. (master’s degree), Private International Law, Université Paris I-Panthéon-Sorbonne, cum laude, 2003; B.A., Rutgers University, French Literature and Political Science, summa cum laude, 1998. The author would like to thank the Cleveland-Marshall College of Law library staff for its invaluable research assistance, as well as Professor Michael Scharf of Case Western Reserve University School of Law for its insightful ideas in the elaboration of this article.


⁴ Sterio, Evolution, supra note 1, at 247-48 (discussing the erosion of state sovereignty brought about by globalization forces).

⁵ See infra Part III.
demonstrated respect for human/minority rights; and a commitment to participate in international organizations, and to abide by a set world order. 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.

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, this Article will turn to an examination of the legal theory of statehood in its traditional form. Part IV will describe 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 inter-connectivity 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 will argue that the legal theory of statehood should be amended, to incorporate real changes in the existing global understanding of statehood and state sovereignty. Statehood is an important theory, as it provides a sovereignty shield to entities that qualify as states, and as it insulates some of their decisions from global scrutiny. 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 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?

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 (2005) [hereinafter Kelly].
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.” 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.” 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.” LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8-10 (1995).
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.” 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. The term Grotian Moment was coined in 1985 by Professor Richard Falk; since then, it has been employed by experts in a variety of ways. 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.”

The term “Grotian” refers to Dutch scholar, Hugo Grotius (1583-1645), who is hailed as the father of modern international law. 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.” Similarly 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. Moreover, the establishment of the United Nations Charter is an example of yet another Grotian Moment. Finally, scholars have applauded the recent establishment of the International Criminal Court as a Grotian Moment.

Scholars have used other terms to convey the idea of a Grotian Moment concept. Thus, Professor Bruce Ackerman used the term “constitutional moment” to describe the changes in American constitutional law resulting for the New Deal era. Professors Bardo Gassbender and Jenny Martinez have referred to the drafting of the U.N. Charter

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11 Id. at 3-4.
13 Scharf, supra note 10, at 6.
15 Scharf, supra note 10, at 4; see also HUGO GROTIUS, DE JURE BELLI AC PACIS (n.p. 1625).
17 Id.
as a “Constitutional moment” in the history of international law. Professor Leila Sadat has similarly referred to Nuremberg as a “constitutional moment in international law.” Finally, 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. 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.

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. Normally, customary international law is formed through gradual and widespread state practice and a sense of legal obligation to comply with the emerging norm. The process of establishing a norm of customary international law can take many decades, or even centuries. “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. 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. 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 widespread acquiescence or endorsement in response to State acts, rather than instant custom based solely on General Assembly resolutions.”

23 Scharf, supra note 10, at 6-7 (describing that a Grotian Moment “makes more sense when speaking of a development that has an effect on international law at large”).
25 Scharf, supra note 10, at 8.
26 See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (the U.S. Supreme Court recognized in this case that the process of forming customary international law can take centuries).
27 Cheng, supra note 24, at 36.
28 For a full discussion of problems associated with the “instant customary international law” theory, see Scharf, supra note 10, at 9-10.
29 Scharf, supra note 10, at 9, n.33.
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.

“The 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 where there is not 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 to keep up with the pace of developments.”  

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. In 1999, NATO forces intervened in Serbia to protect ethnic Kosovar Albanians from ethnic cleansing, instituted by the FRY government. The NATO campaign had not been authorized by the United Nations, but the global consensus on this intervention was that it was “unlawful but legitimate.” The international community responded to the intervention through a new doctrine called “Responsibility to Protect,” which authorizes humanitarian interventions in limited circumstances. A growing number of scholars has agreed that humanitarian intervention has become an emerging norm of customary international law, and that it ought to be recognized in some extraordinary circumstances. 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. Following September 11 attacks, the Security Council resolution...
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. Finally, lesser known Grotian Moment may consist of the situation when the United States and Soviet Union initially “developed the ability to launch rockets into outer space and place satellites in earth orbit.” 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 of outer space as their territory. This Declaration was widely accepted as law, and represents a time of change caused by accelerated technological developments, 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. 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, similarly to the examples above, this situation may comprise a Grotian Moment worth of 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. Statehood, according to these criteria, is a legal theory – something that a scholar or a judge could easily rely upon to decide

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38 Scharf, supra note 10, at 13.
40 Scharf, supra note 10, at 15 (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 9/11 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, 165 L.N.T.S. 19 (1933) [hereinafter Montevideo Convention].
whether an entity qualifies as a state. 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. Once an entity enters the international arena and presents itself as a state, external actors are free to recognize it as such or not. The decision to recognize is a purely political act and depends entirely on the governing regime of the external actors. Thus, such external actors could choose to treat an entity as a state although it doesn’t 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. 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. The Montevideo Convention, which describes the legal 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. 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. Thus, an entity cannot qualify as a state under this view unless external actors choose to treat it as a state. 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.” 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.

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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, Secession, 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 (2d ed. 2006) at 137 [hereinafter DUNOFF et al.] (“[a]n entity that meets the criteria of statehood immediately enjoys all the rights and duties of a state regardless of the views of other states.”).
48 Id. at 115.
49 Id. at 138.
50 Id. (“the 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 supra Part V.
The legal theory of statehood has produced strange results around the globe. 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; Israel’s borders have been challenged by most of its Arab neighbors. Yet, all three of these states have never lost their statehood, and no other countries have ever challenged it. Moreover, many states have transient populations and have experienced significant refugee crisis. The Democratic Republic of Congo, Sudan, and Iraq have all experienced population shifts over the last decade. Some states have micro-populations, like the Pacific Island state of Nauru (10,000) and the city-state of San Marion (24,000); these populations have never significantly grown. 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. 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. 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. 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 Australia. Similarly, some micro states depend on powerful allies for trade matters: many Pacific island

53 Sterio, Secession, supra note 42, at 148.
54 DUNOFF et al., supra note 47, at 115-16.
55 Sterio, Secession, supra note 42, at 148.
57 DUNOFF et al., supra note 47, at 115.
59 DUNOFF et al., supra note 47, at 116.
60 Sterio, Secession, supra note 42, at 148-49.
61 DUNOFF et al., supra note 47, at 116.
nations rely on the United States in matters of trade, and some do on Australia. 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, friendly states, under the guise of collective self-defense. 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. 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. 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. Israel has then closed these two territory’s borders, has built Israeli settlements, and has dictated a certain way of life for these territories’ inhabitants. Until Gaza and the West Bank qualify as states, Israel arguably has the

62 Id.
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 stability.” U.N. Charter, Article 51.
64 New Jersey v. New York, 523 U.S. 767 (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.”” I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 146 (4th ed. 1990); see also C. HYDE, INTERNATIONAL LAW 329 (rev. 2d ed. 1945); 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. Russia plants flag under N Pole, BBC NEWS, Aug. 2, 2007; Russia’s North Pole Obsession, N.Y. TIMES, Aug. 2, 2007. 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 Yenikeyeff and Timothy Fenton Krysiek, The Battle for the Next Energy Frontier: The Russian Polar Expedition and the Future of Arctic Hydrocarbons, Oxford Institute for Energy Studies, Aug. 2007.
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.
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. States also 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. Finally, states participate in important military endeavors and alliances, like NATO or ECOWAS. 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 has 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 geo-political or strategic reasons – has illustrated that

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68 On the status of U.N. General Assembly resolutions, see, for example DUNOFF et al., supra note 47; Scharf, supra note 10, at 10-12.
69 Sterio, Evolution, supra note 1, at 220-22 (discussing the proliferation of international organizations, and describing some of the most prominent international organizations where states participate).
70 Id.
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.

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. 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. 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. Other super-sovereign states dispose of enhanced rights and powers because of their wealth and military potential, such as Italy, German and Japan. 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, that wield power through the unpredictable and dangerous threat that they may exercise harmful military action against their enemies and neighbors.

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. 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

71 “State sovereignty, in its Westphalian form, typically includes the following characteristics: 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.” Sterio, Secession, supra note 42, at 153-54; see also Kelly, supra note 6, at 376.
72 See, e.g., Kelly, supra note 6, at 365; Sterio, Secession, supra note 42, at 154.
73 Sterio, Secession, supra note 42, at 154.
74 Id.
75 Id.
76 Kelly, supra note 6, at 365, 376.
they see fit.77 Other less sovereign states seem dependant on the super powers for their own sovereign exercise of international relations. In fact, their courses of action on the world scene seem directly dictated and orchestrated by the super states. 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 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

77 “Because the Great Powers are essentially more “sovereign” than other states, they may engage in interventions and cross other states’ borders, in the name or preserving some higher ideals.” Sterio, Secession, supra note 42, at 154.
78 DUNOFF et al., supra note 47.
79 See, e.g., Scharf, supra note 10, at 10 (noting that “States often vote for General Assembly resolutions to . . . curry favor with other States”).
80 Sterio, Secession, supra note 42, at 154.
81 U.N. Charter, Article 42 and Article 51.
82 U.N. Charter, Article 51.
83 See, e.g., Scharf, supra note 10, at 13; Responsibility to Protect doctrine, supra note 40.
85 Several influential authors have supported external intervention in Kosovovo on humanitarian grounds. See Thomas M. Franck, Lessons of Kosovo, 93 AM. J. INT’L L. 857 (1999); 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 (1999); Richard A. Falk, Kosovo, World Order, and the Future of International Law, 93 AM. J. INT’L L. 847 (1999); Louis Henkin, Kosovo and the Law of
Many scholars have supported the idea of humanitarian intervention, and most would agree that it has acquired the status of an emerging customary norm.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{90} Haass is perfectly comfortable with the idea that a country like the United States, a super power, can unilaterally decide to engage in an intervention in Afghanistan.\textsuperscript{91} Moreover, Haass does not see the need to involve international organizations, such as the United Nations or NATO, into the decision-

\textsuperscript{86} See, e.g., Scharf, supra note 10, at 13.

\textsuperscript{87} See Richard N. Haass, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University (Jan. 14, 2003), available at \url{http://www.state.gov/s/p/rem/2003/16648.htm} [hereinafter Georgetown Speech].

\textsuperscript{88} According to Haass, “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.” Haass constructed this theory initially in 2002, with respect to states which 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. See Georgetown Speech, supra note 87.

\textsuperscript{89} On Iraq and the allegations that Iraq had been developing and storing weapons of mass destruction, see Center for American Progress, In Their Own Words: Iraq’s ‘Imminent’ Threat, (Jan. 29, 2004), available at americanprogress.org (last visited on May 12, 2010). On Afghanistan and the allegations that it has been harboring terrorists, see The War In Afghanistan: That Nagging Evidentiary Question, Foreign Policy Blogs, 10 Dec. 2009; see also Obama Team Defends Policy on Afghanistan, N.Y. TIMES, Dec. 3, 2009.

\textsuperscript{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, which forfeit their sovereign privileges and their immunity from external, armed intervention.” Sterio, Secession, supra note 42, at 155.

\textsuperscript{91} According to Haass, sovereignty is not a “blank check.” Georgetown Speech, 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.
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 the 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 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

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\(^{92}\) Sterio, *Secession*, *supra* note 42, at 155-56.

\(^{93}\) On the sanctity of state borders, see, for example Case Concerning the Territorial Dispute (Libya/Chad), 1994 I.C.J. 6 (Feb. 3), para. 72 (“[o]nce 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, Article 2(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.

to the general ban on the use of force. 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. 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). This intervention, although not legally authorized by the U.N. Security Council, was regarded by many scholars as morally justified. 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. 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. Serbian statehood was affected in the name of minority rights. 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.

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. 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. Similarly to Serbia, Indonesia had not fully respected East Timorese minority rights. 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.

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. 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. Most western states during the initial decades of the Cold War supported Taiwan, engaged in

105 Id. at 67-70; see also Sterio, Secession, supra note 42, at 158-60 (describing the events in East Timor which ultimately led to its independence from Indonesia).
106 In fact, Indonesian rule over East Timor “imposed a military force that viciously led to human rights and humanity violations.” Purnawanty, supra note 104, at 69. It is estimated that between 60,000 and 200,000 people died in East Timor during the Indonesian occupation. JOE NUNES, EAST TIMOR: ACCEPTABLE SLAUGHTERS (1996).
107 In 1999, the U.N. organized a referendum in East Timor, whereby the East Timorese people voted to separate from Indonesia. Purnawanty, supra note 104, 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 (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, Secession, supra note 42, at 158-60; see also BBC NEWS, East Timor: birth of a nation, (May 19, 2002), available at http://news.bbc.co.uk/2/hi/asia-pacific/1996673.stm (last visited on June 4, 2009)
109 DUNOFF et al., supra note 47, at 159.
international relations therewith, and even entertained Taiwanese membership in the United Nations.\footnote{Id. at 159-61 (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).} The situation changed in 1971, when the Chinese delegation was seated in the United Nations.\footnote{Id. at 171.} However, many western states have retained international relations with Taiwan, and China has never attempted to militarily seize Taiwan.\footnote{“The United States and a number of other states continued to maintain unofficial relations with Taiwan through government-controlled private bodies.” Id.} 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.\footnote{DUNOFF et al., supra note 47, at 38.} 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.\footnote{Id.} 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.\footnote{Id.} Each ethnic group would have adequate representation in the government and in the parliament, and both groups would respect each other’s rights.\footnote{Id. at 39.} The agreement worked briefly, but the two groups found themselves unable to share their state in a peaceful manner.\footnote{Id. at 68.} 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.\footnote{Id.} Through the invasion, the northern part of Cyprus de facto separated from the south, to form an independent entity.\footnote{Id. (noting that the current demarcation line still holds today).} 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.\footnote{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 68. 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. Id. In 2003, Greek Cypriots signed an accession agreement with the E.U. on behalf of Cyprus, but Turkish Cypriots would not benefit from this agreement unless the island were 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.} No country 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.\(^{121}\) 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.\(^{122}\) 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.\(^{123}\) Because of political reasons, like Northern Cyprus, Republika Srpska has not been recognized as a state by any external actors. 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.\(^{124}\) However, the Commission’s opinions were legally inconsistent as they applied to the different Yugoslav republics, and the diverse treatments afforded to the different republics by the Commission are widely attributed to the political situation at the time.\(^{125}\) 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.\(^{126}\) While this reasoning could have been accurate in the early 1990’s, it is no 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.\(^{127}\) 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.

\(^{121}\) DUNOFF et al., supra note 47, at 129.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Conference on Yugoslavia Arbitration Commission Op. No. 2, 31 I.L.M. 1497 (1992) (the Badinter Commission opined that “the Serbian population in Bosnia-Hercegovina . . . 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.”).


\(^{126}\) For example, the former Serbian President Milosevic 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, e.g., Gillian Higgins, The Impact of the Size, Scope, and Scale of the Milosevic Trial and the Development of Rule 73bis Before the ICTY, 7 NW. U. J. INT’L HUM. RTS. 239, para. 5 (2009) (describing the ICTY indictment and the charges therein against Slobodan Milosevic).

\(^{127}\) DUNOFF et al., supra note 47, at 120 (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.”).
Similarly 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. 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. 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. 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. 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. 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. The Russian parliament even went as far as to recognize South Ossetia and Abkhazia as independent states, 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. Most of the western world however supports Georgia, which it sees as a natural ally in the Caucasus region against Russia. Thus, most western states have been reluctant to recognize South Ossetia and Abkhazia, as this move would chip away from the Georgian territorial sovereignty. Thus, although these two provinces arguably could satisfy the criteria of statehood, similarly to Kosovo, Republika Srpska, or Northern Cyprus, their quest for independence is unlikely to succeed because of the lack of political willingness of the

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129 Id.
130 Sterio, *Kosovo*, supra note 32, at 299, n.166 (noting that scholars had advanced the idea of separating Kosovo into two states). *But see* Paul Williams, ASIL meeting (arguing against the division of Kosovo).
132 Id.; see also Sterio, *Secession*, supra note 42, at 166.
136 Sterio, *Secession*, 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.
137 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. Steven Erlanger, *NATO Duel Centers on Georgia and Ukraine*, N.Y. TIMES, Dec. 1, 2008.
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. 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. 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. Domestic law has lost its omnipotent, “sovereign” power and is now supplemented, corrected, and watched over by international law. Thus, international law has undergone an evolutionary

138 Many scholars have attempted to define globalization. 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); see also infra 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 Foster, Making National Cultures in the Global Ecumene, 20 ANN. REV. ANTHROPOLOGY 235 (1991); Ulf Hannerz, The World in Creolisation, 5 AFR. 546 (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).

139 See infra Part II.


141 Id. at 936 (“[t]he 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
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.  

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. 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. 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. 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. 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.

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. 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

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unrecognizable.”); id. at 941 (“[i]n various ways, the scope of sovereignty today is determined in a ‘top-down,’ or vertical fashion, with international norms being imposed from without.”).  
142 Sterio, Evolution, supra note 1, at 214.  
143 Id.  
144 See supra Part IV.A.  
145 See supra Part IV.A.  
146 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.  
147 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).  
148 Sterio, Evolution, supra note 1, at 245 (on the impact of state behavior on other states and actors); see supra Part IV.A on intervention.
such requirements, and typically justify non-conforming behavior through exceptions, exemptions, self-defense, etc.\textsuperscript{149}

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.\textsuperscript{150} 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.\textsuperscript{151} In Africa, the Economic Community of West African States (“ECOWAS”) was created as a mixed organization: its mission is economic, but it encompasses mercenary forces that are charged with keeping peace in West Africa.\textsuperscript{152}

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 negotiation 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 20\textsuperscript{th} 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.\textsuperscript{153} Similarly, states within the same regions acted to create regional organizations charged with similar objectives. Organization for Security and Cooperation in Europe, Association of Southeast Asian Nations, Organization of American States as well as the Organization of African Unity are examples of such regional bodies.\textsuperscript{154}

The higher level of interaction among international law actors in the 20\textsuperscript{th} 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

\textsuperscript{149} 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 claimed that it has more sovereign rights than Iraq or Afghanistan, or any other state. See \textit{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, \textit{supra} note 10, at 13 (noting that the NATO intervention in Kosovo was seen as legitimate).

\textsuperscript{150} DUNOFF et al., \textit{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 its Security Council is charged with maintaining international peace and security).

\textsuperscript{151} \textit{Id.} at 26.

\textsuperscript{152} BARRY E. CARTER, PHILIP E. TRIMBLE, ALAN S. WEINER, \textit{INTERNATIONAL LAW} (5th ed. 2007) at 1070 (noting that “[ECOWAS] began peacekeeping operations in Liberia” and that “its forces have since operated in Sierra Leone and the Ivory Coast.”).

\textsuperscript{153} DUNOFF et al., \textit{supra} note 47, at 26.

\textsuperscript{154} \textit{Id.}
forum where states can assert their grievances. 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 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 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. 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. On the contrary, entities such as Tibet, Taiwan, Republika Srpska, Northern Cyprus, South Ossetia and Abkhazia have not been

155 Sterio, Evolution, supra note 1, at 220-22.
156 On a detailed discussion of the Great Powers, see Kelly, supra note 6, at 365.
157 See supra Part IV.A; see also Sterio, Secession, supra note 42, at 173-74.
able to persuade the Great Powers into 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. 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. Important 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.

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. 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. 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. 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,

158 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? Global Policy Forum (Mar. 13, 2008), available at http://www.globalpolicy.org/nations/emerging/2008/0313selfistans.htm (last visited on Jan. 25, 2009) (arguing that Tibet has been oppressed by China for many years). 159 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, Secession, 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.

160 The case of Macedonia perfectly exemplifies this proposition. See supra note 159.

161 See supra Part IV.A.


163 See supra Part IV.B.
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.164

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.165 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 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.166 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.167 Macedonia, when it sought statehood and recognition from the EU, promised in its constitution that it wouldn’t have any territorial claims to any of its neighboring states.168 And the East Timorese constitution was drafted by western scholars and law professors.169 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

164 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, Secession, supra note 42, at 162-66.

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

166 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 http://en.wikipedia.org/wiki/Rogue_state (last visited on May 12, 2010).


168 Conference on Yugoslavia Arbitration Commission Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and Its Member States, 31 I.L.M. 1507 (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 142.

169 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 (Mar. 14, 2001), available at http://www.greenleft.org.au/node/23161 (last visited on May 12, 2010).
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. Globalization has profoundly impacted state behavior, and has seriously limited state sovereignty. 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 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.

170 Sterio, Evolution, supra note 1, at 214.
171 Id.