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Grotian Moments and Statehood

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I. INTRODUCTION

Grotian Moments are instances of accelerated formation of customary law, sparked by significant world events, such as wars, terrorist attacks, or natural catastrophes.[1] This Article will apply the Grotian Moment theory to the legal criteria of statehood, in an attempt to assess whether an evolution in specific elements of statehood has resulted in such paradigm-shifting Grotian Moments. In Part II, this Article will analyze the Grotian Moment theory, while distinguishing it from other types of customary law formation. Part III will focus on the legal theory of statehood and each of its constitutive elements. Part IV will discuss whether any such elements of statehood have evolved over time, resulting in Grotian Moments. Finally, Part V will propose a reconceptualization of the legal theory of statehood, in light of its evolving criteria, which may have constituted Grotian Moments.

II. WHAT IS A GROTIAN MOMENT?

Customary law typically evolves at a slow pace. The creation of a customary norm may require decades, if not centuries, of consistent State practice, coupled with the demonstration that the specific State practice is being undertaken out of a sense of legal obligation (*opinio*

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1. Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law During Times of Fundamental Change*, 43 CORNELL J. INT'L L. 439, 440 (2010).

juris).[2] In fact, Professor Myres McDougal of Yale Law School has famously described the process of formation of customary law as one of continuous claim and response.[3] Consider the following example, as an illustration of this lengthy process. State X may claim that it is allowed to enter the territory of State Y, in order to arrest a terrorist leader, without State Y's consent. The claim would imply a change in the existing rules of international law, which normally do not authorize such a breach of State sovereignty.[4] State Y, as well as other States, may provide a response to this claim; if the response is overwhelmingly positive, this would trigger the process of generating a new rule of customary law. Through this process of claim and response, as well as third-party State support, acquiescence, or repudiation, new rules of customary law may emerge. "[A]s pearls are produced by the irritant of a piece of grit entering an oyster's shell, so the interactions and mutual accommodations of States produce the pearl—so to speak—of customary law."[5] Most scholars agree that no formula exists for identifying how many States are needed and how many years must elapse before a new rule of customary law is generated.[6] However, most scholars converge around the idea that many States' acquiescence with the new rule is required, and that such acquiescence must take place over many years.[7]

Notwithstanding the normal processes of customary law creation, cataclysmic world events, such as World War II, sometimes provoke a rapid formation of customary norms. Some scholars have referred to such transformative events as "International Constitutional Moments" and have applied this label to the drafting of the United Nations

2. *See, e.g.*, G.I. Tunkin, *Remarks on the Judicial Nature of Customary Norms in International Law*, 49 CALIF. L. REV. 419, 420 (1961); Manley O. Hudson (Special Rapporteur on Article 24 of the Statute of the Int'l Law Comm'n), *Ways and Means for Making the Evidence of Customary International Law More Readily Available*, U.N. Doc. A/CN.4/16 (Mar. 3, 1950); *see also* Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17 SUP. CT. ECON. REV. 279, 282 (2009).

3. M.S. McDougal & N.A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 656 (1955).

4. *See, e.g.*, Mary C. Tsai, *Globalism and Conditionality: Two Sides of the Sovereignty Coin*, 31 L. & POL'Y INT'L BUS. 1317, 1319 (2000).

5. MAURICE H. MENDELSON, THE FORMATION OF CUSTOMARY INTERNATIONAL LAW 190 (1998).

6. Daniel M. Bodansky, *The Concept of Customary International Law*, 16 MICH. J. INT'L L. 667, 674 (1995).

7. *See e.g.*, Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT'L L. 127, 129, 132 (1937).

Charter and the creation of the Nuremberg tribunal.[8] More recently, Professors Anne-Marie Slaughter and William Burke-White have referred to the term "constitutional moment" when arguing that the September 11th attacks against the United States constituted a change in the nature of future threats facing the international community, thereby justifying the more rapid development of new rules of customary law.[9]

In 1985, Richard Falk coined the term "Grotian Moment," a reference to Hugo Grotius, the seventeenth-century Dutch scholar whose masterpiece, *De Jure Belli ac Pacis*, is widely considered the foundation of modern-day international law.[10] Grotian Moments are paradigm-shifting instances of accelerated formation of customary law, provoked by significant world events, such as wars, terrorism, natural phenomena, or catastrophes.[11] Grotian Moments are thus similar to constitutional moments, but are to be distinguished from so-called "instant customary international law," a phenomenon advanced by some scholars.[12] Instant customary international law is a theory which argues that State practice may not be necessary for the formation of customary law, if States' *opinio juris* is clearly demonstrated through

8. For example, Jenny Martinez has written that the drafting of the U.N. Charter was a "constitutional moment" in the history of international law. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003). Professor Leila Sadat has described Nuremberg as a "constitutional moment for law." Leila Nadya Sadat, *Enemy Combatants After* Hamdan v. Rumsfeld*: Extraordinary Renditions, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206 (2007).

9. 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).

10. *See* BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK 1369 (3d ed. 1997). Grotius is widely considered to be the founder of modern-day international law. *See* HEDLEY BULL ET AL., HUGO GROTIUS AND INTERNATIONAL RELATIONS 2–3 (1992). Other scholars have also used the term "Grotian Moment" more recently; *see also* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 212 (2014); Milena Sterio, *Humanitarian Intervention Post-Syria: A Grotian Moment*, 20 ILSA J. INT'L & COMPAR. L. 343 (2014).

11. Professor Michael Scharf has defined the term "Grotian Moment" as follows: "a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance." Scharf, *supra* note 1, at 444.

12. *Id.* at 446.

General Assembly resolutions.[13] Grotian Moments, unlike instant customary international law, contemplate accelerated formation of customary law through States' widespread acceptance or endorsement in response to other States' acts.[14]

Scholars have identified several Grotian Moments: the creation of the Nuremberg Tribunal; the formation of the law of the continental shelf; the development of outer space law; and the emergence of customary international humanitarian law in the wake of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") trials.[15] In addition, the existence of specific points in time when customary law develops rapidly has been acknowledged by the Max Planck Encyclopedia of Public International Law. This highly reputable publication has observed that "recent developments show that customary rules may come into existence rapidly" and has further explained:

> This can be due to the urgency of coping with new developments of technology, for instance, drilling technology as regards the rules on the continental shelf, or space technology as regards the rule on the freedom of extra-atmospheric space . . . Or it may be due to the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts such as those in Rwanda and Yugoslavia that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts.[16]

The Grotian Moment concept has several practical applications. First, it can provide greater legitimacy to those new rules of customary law which have formed with urgency and based on necessity. Second, it can guide States when to seek General Assembly resolutions, as well as how to ensure that such resolutions are drafted to position them as a capstone of the formation of a new customary norm. Third, it can strengthen a litigation case, by providing litigants with greater support for their claim. And, fourth, it can encourage international courts to

13. *See* Milena Sterio, *Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209, 213 (2011).

14. *Id.* ("The Grotian Moment theory may thus rely on General Assembly resolutions to a certain extent, to discover evidence of an emerging customary 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.").

15. Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMPAR. L. 305, 339 (2014); Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT'L L.J. 1609, 1613 (1995).

16. Tullio Treves, *Customary International Law*, *in* MAX PLANCK ENCYC. PUB. INT'L L. ¶ 24 (2006) (internal citations omitted).

recognize a new norm of customary law in appropriate cases, despite the lack of lengthy and uniform State practice.

With the above in mind, this Article examines whether the concept of Grotian Moments applies within the theory of statehood. The next section will analyze the legal theory of statehood while assessing whether specific pillars of this theory have evolved over time and whether its reconceptualization may give rise to a Grotian Moment.

III. THEORY OF STATEHOOD

The positive law criteria of statehood stem from the 1933 Montevideo Convention, and include the following (1) a defined territory; (2) a permanent population; (3) a government; and (4) the capacity to enter into international relations.[17] This Convention was drafted purposefully to ignore the political reality of recognition.[18] In fact, the Montevideo Convention's main proponents were Latin American States, whose primary purpose was to shield the legal theory of statehood from political influences of powerful States, by excluding recognition as one of the foundational elements of statehood.[19] According to the Montevideo Convention criteria, statehood is a legal theory, distinct from the political act of State recognition.[20] In other words, when an entity satisfies the four legal criteria of statehood, it ought to become a State, regardless of other States' willingness to recognize the emerging entity as a new sovereign partner. Unlike statehood, recognition is a purely political act and depends entirely on the governing regime and strategic interest of the recognizing State.[21] Thus, an existing State could choose to treat an entity as a State although the latter does not satisfy the four criteria of statehood. On the contrary, an existing State could choose not to treat an entity as a State although the latter does satisfy the four criteria of statehood.[22] 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.[23]

17. 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].

18. Sterio, *supra* note 13, at 215–16.

19. *Id.* at 216.

20. Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 148–50 (2010).

21. *Id.* at 149.

22. *Id.* at 149–50.

23. *Id.* at 149.

In contrast to the declaratory view, some support the so-called constitutive view of recognition, under which recognition by outside actors represents one of the main elements of statehood.[24] An entity cannot qualify as a State under this view unless external actors choose to treat it as a State. Although the constitutive view is not supported by most academics, this view has important practical implications:

> 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.[25]

In addition to the declaratory and constitutive theories of recognition described above, an intermediary view posits that although statehood and recognition are independent of one another, existing States have a duty to recognize an emerging entity if the latter objectively satisfies the four criteria of statehood.[26]

Regardless of which view of recognition one accepts, several observations may be made about the linkage of statehood and recognition.

First, the legal theory of statehood on its own seems only relevant and applicable at the time of a State's creation. Many "States" lack one or more of the four attributes of statehood during their existence without losing their statehood status.[27] For example, several States, including South Korea and North Korea, Armenia and Azerbaijan, and Croatia and Slovenia, have disputed territorial borders and arguably do not satisfy the statehood criterion of having a "defined territory."[28] Other States, such as Syria, Sudan, Iraq, or the Democratic Republic of Congo, have experienced enormous migration and refugee crises, rendering their populations non-permanent, and thereby not satisfying their fulfillment of the "permanent population" criterion of statehood. Moreover, States such as Somalia or Afghanistan have not had stable

24. *Id.* at 150.

25. Sterio, *supra* note 13, at 216.

26. *Id.* at 215.

27. *Id.* at 216. ("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.").

28. *Id.*

governments in place for the past several decades, putting into question their satisfaction of the "government" criterion of the Montevideo Convention statehood theory.[29] Last, but certainly not least, many small or micro States do not have the full capacity to enter into international relations, because they delegate aspects of their sovereignty to other States, such as national defense or trade.[30] Yet, these small States continue to be viewed and accepted as States, despite the fact that they objectively fail to satisfy the fourth criterion of statehood, the capacity to enter into international relations.[31] Thus, although statehood is a fundamental theory of international law, the fulfillment of its four criteria seems to matter only at the beginning of a State's existence.

Second, the label of statehood is important. Statehood functions as a sovereignty shield and protects its subject from external intervention. A State, if attacked by others, can claim the sovereign right to self-defense, or it can request the assistance of other States in collective self-defense.[32] A non-State cannot easily protect itself, a situation best exemplified by the situation of Palestine. Because Palestine is not a State, it remains subject to Israeli policies, as well as the latter's political, legal, and societal decisions which, some would argue, have been harmful to the well-being of Palestinians.[33] Along similar lines, only a State can participate in regional military and mutual defense alliances, such as the North Atlantic Treaty Alliance ("NATO")[34] or the Economic Community of West African States ("ECOWAS").[35] Moreover, the label of statehood allows States to participate in world organizations where major legal and political decisions are continuously undertaken, such as the United Nations; regional organizations such as the European Union, the Organization of American States, or the Organization of African Unity; and more specialized organizations such

29. *Id.* at 217.

30. *Id.*

31. *Id.*

32. This assertion is based upon the United Nations Charter's right of self-defense, in Article 51, as well on customary law of self-defense. U.N. Charter art. 2, ¶ 4; *see also* U.N. Charter art. 51; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

33. See George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 47–50 (2009), for a detailed account of the Israel-Palestine conflict in Gaza. See *Israeli-Palestinian Conflict*, COUNCIL ON FOREIGN AFF., https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict [https://perma.cc/XF69-GYR5], for a general discussion of the Israeli-Palestinian conflict.

34. Sterio, *supra* note 13, at 219.

35. *Id.*

as the World Trade Organization, the World Health Organization, or the World Intellectual Property Organization.[36]

Third, as the following section will outline, State practice suggests that emerging entities cannot exist as States in a vacuum. Despite the fact that an entity objectively satisfies the four elements of statehood, such objective fulfillment of statehood criteria remains meaningless absent some existing States' willingness to accept the entity as a new State. For example, Nagorno-Karabakh, a Caucasus region disputed between Azerbaijan and Armenia, has declared its independence in the early 1990s.[37] No other State in the international arena recognized the declaration of independence, and as of now, Nagorno-Karabakh remains de jure a part of Azerbaijan (although this is disputed by Armenia).[38] Similarly, two other Caucasus provinces, South Ossetia and Abkhazia, have declared independence from Georgia without international recognition; as of today, the provinces remain de jure part of Georgian territorial borders.[39] Recent unsuccessful secession attempts by Kurdistan and Catalonia further underscore this point: a statehood-seeking entity must garner the support of other States in the international arena, regardless of whether such an entity satisfies the objective criteria of statehood.[40] Expressed differently, the four criteria of statehood may be the starting point on the path to statehood, but recognition by existing States represents a necessary ingredient for the ultimate realization of statehood.

IV. GROTIAN MOMENTS AND STATEHOOD

It may be argued that the legal theory of statehood has evolved over time, and that such changes constitute Grotian Moments. While no specific cataclysmic world event can be designated as the catalyst

36. *Id.* ("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.").

37. *Nagorno-Karabakh Profile*, BBC (Nov. 18, 2020), https://www.bbc.com/news/world-europe-18270325 [https://perma.cc/N5KN-4Y4A].

38. *Nagorno-Karabakh*, BRITANNICA, https://www.britannica.com/place/Nagorno-Karabakh [https://perma.cc/W9V3-LTJ7].

39. Jakub Lachert, *Post-Soviet Frozen Conflicts: A Challenge for European Security*, WARSAW INST. (Mar. 14, 2019), https://warsawinstitute.org/post-soviet-frozen-conflicts-challenge-european-security/ [https://perma.cc/2GQ6-A857].

40. Milena Sterio, *Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, 22 AM. SOC'Y INT'L L. ASIL INSIGHTS (Jan. 5, 2018), https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan [https://perma.cc/2CTS-RR82].

for these Grotian Moments, the overall trend of globalization, coupled with the proliferation of international legal norms and institutions, may provide explanation for the evolving theory of statehood. While the Montevideo Convention theory of statehood sufficed in the 1930s, it may be argued that this theory no longer corresponds to the reality of State creation and State existence in the twenty-first century. States in today's world co-depend on each other, as well as on meddling international institutions and legal norms. Thus, the objective criteria of statehood, as espoused in the Montevideo Convention, do not encompass the modern world's criteria of statehood. The following section will analyze such alterations in the theory of statehood, including the relationship between State sovereignty and intervention, secessionist movements which may alter State sovereignty, the emergence of de facto States, and the proliferation of regional and international organizations and legal norms. These changes in the theory of statehood may constitute Grotian Moments.

State sovereignty is an elusive and criticized concept. Yet, in its most traditional iteration, State sovereignty implies an equality of States within the international community, a general prohibition on foreign interference with internal affairs, territorial integrity, and an inviolability of international borders.[41] The contours of State sovereignty have shifted over time, and today some States enjoy a higher degree of sovereignty than others, due to their powerful economic and military status.[42] These super-sovereign States include permanent members of the United Nations Security Council (United States, United Kingdom, France, Russia and China), who enjoy unilateral veto power through their institutional status on the Security Council.[43] Additional super-sovereign States include Italy, Germany and Japan, in light of their wealth and military capability, as well as non-declared nuclear States such as India, Pakistan, and Israel.[44] "Rogue" nations such as North Korea or Iran may also be viewed as super-sovereign, because of their unpredictable and threatening leadership and potential military threat to their neighboring countries.[45]

41. Daniel Philpott, *Sovereignty*, STAN. ENCYC. OF PHIL. (June 22, 2020), https://plato.stanford.edu/entries/sovereignty/ [https://perma.cc/7559-HVFN].

42. *See* 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).

43. U.N. Charter art. 23, ¶ 1; U.N. Charter art. 27.

44. *See* DIEGO LOPES DA SILVA ET AL., STOCKHOLM INT'L PEACE RSCH. INST., TRENDS IN WORLD MILITARY EXPENDITURE 2020 (2021); *see also Status of World Nuclear Forces*, FED'N AM. SCIENTISTS, https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/ [https://perma.cc/Z5JY-SGTV].

45. *See* Kelly, *supra* note 42, at 404.

This pecking order of States, has resulted in a Grotian Moment: the fourth criterion of statehood (capacity to enter into international relations) is no longer an objective criterion but rather a capacity directly linked to the given State's degree of sovereignty. In particular, less-sovereign States seem dependent on the super-sovereign States for their exercise of international relations. Super-sovereign States seem to dictate and orchestrate the course of action of less-sovereign States on the world scene. For example, super-sovereign States often pressure less-sovereign States into voting a specific way within the United Nations, as well as other international organizations.[46] Moreover, super-sovereign States often interfere in the affairs of less-sovereign States, through military intervention. Over the past several decades, super-sovereign States have launched military interventions on the territory of other States, often under the guise of humanitarian intervention. An intervention on behalf of the Kurds in Iraq took place in the early 1990s, a NATO-led intervention took place on the territory of the Federal Republic of Yugoslavia ("FRY") in 1999, and most recently, the United Kingdom, France, and the United States used air strikes against Syrian leadership.[47] Support for the legality of humanitarian interventions has been growing in the international community.[48] The air strikes against Syria, for example, were accompanied by official rationales from the

46. *See* Samuel Brazys & Diana Panke, *Why Do States Change Positions in the United Nations General Assembly?*, 38 INT'L POL. SCI. REV. 70, 79–80 (2017).

47. See Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 383 (2003), for an overview on the intervention to support the Kurds in Iraq. See Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 857–58, 860 (1999) and Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 826 (1999), for an overview on the 1999 NATO-led air strikes against the Federal Republic of Yugoslavia ("FRY"); See Press Release, Security Council, Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression, U.N. Press Release SC/13296 (Apr. 14, 2018), https://www.un.org/press/en/2018/sc13296.doc.htm [https://perma.cc/LDZ3-8T6U] [hereinafter Following Air Strikes], for information on the 2018 air strikes against Syria.

48. Several scholars had supported the legality of the 1999 NATO-led air strikes against the FRY. *See e.g.*, 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); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 855–56 (1999). The recent State-led legal support of humanitarian intervention in Syria, through the French, United Kingdom, and U.S.-led air strikes in 2018, further exemplifies the growing international consensus regarding the legality of humanitarian intervention. *See, e.g.*, Following Air Strikes, *supra* note 47 (reporting that the United Kingdom had stated at the Security Council meeting that "any State was permitted under international law to take measures to alleviate extreme humanitarian suffering.").

U.K. government that humanitarian intervention is legal, and an exception to the general ban on the use of force under international law.[49] While it is possible to accept and defend the humanitarian character of each of these interventions, it should be noted that such interventions are always launched by super-sovereign States against weaker States, and that the acceptance of such interventions within the international community signals an erosion of the traditional concept of State sovereignty and a weakening of the target State's capacity to engage in international relations. This changing nature of State sovereignty—the sliding scale of States' ability to conduct themselves as they wish in their external relations—may constitute a Grotian Moment.

Under traditional international law, a fundamental pillar of State sovereignty is the notion of territorial integrity—that borders, once formally established, are inviolable.[50] The norm of territorial integrity of States is present in treaty law, such as in the United Nations Charter itself, as well as in customary law.[51] Territory is one of the main criteria of statehood under the Montevideo Convention.[52] Over the past several decades, the principles of territorial integrity and the sanctity of State borders have been under pressure, due to norms protecting human and group rights. States have been subject to external interventions if they abuse and oppress minority rights within their borders. The best example of this is the 1999 NATO air strikes against the territory of the FRY, mentioned above, over the FRY's abuses of human rights in Kosovo.[53] Following the air strikes, Kosovo was administered by the United Nations, and in 2008, Kosovo unilaterally declared independence.[54] Although Kosovo has to this date not become a member of the United Nations,[55] it has functioned as a State and has been

49. *See* Following Air Strikes, *supra* note 47.

50. Philpott, *supra* note 41.

51. U.N. Charter art. 2, ¶ 4; *see also* Territorial Dispute (Libyan Arab Republic/Chad), Judgment, 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.").

52. *See* Derek Wong, *Sovereignty Sunk? The Position of 'Sinking States' at International Law*, 14 MELB. J. INT'L L. 1, 8 (2013).

53. 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).

54. *See* Dan Bilefsky, *Kosovo Declares Its Independence from Serbia*, N.Y. TIMES (Feb. 18, 2008), https://www.nytimes.com/2008/02/18/world/europe/18kosovo.html [https://perma.cc/CC7C-AYWT].

55. *See* United Nations Member States, https://www.un.org/en/about-us/member-states [https://perma.cc/ZF6N-QXMH].

recognized by over one hundred other sovereign States.[56] Because of its abuse of human rights, the FRY (now Serbia) has lost a part of its territory.[57] The respect for the territorial integrity "can be trumped by the need to protect and advance minority rights, even at the expense of altering territorial borders of the mother state."[58] Conversely, it appears that the respect for minority and human rights has become a de facto requirement for the preservation of a State's territory.[59] Thus, the criterion of territory for the legal theory of statehood could be re-envisaged as "territory, unless the state abuses human or group rights."[60]

De facto States are entities which satisfy the four criteria of statehood from the Montevideo Convention, but remain unrecognized because of political or other reasons. Carnegie Europe notes:

> The term refers to a place that exercises internal sovereignty over its citizens but is not recognized by most of the world as the de jure legal authority in that territory. In each case, the de facto state broke away from a parent state that is internationally recognized and still claims sovereignty.[61]

Unrecognized State-like entities are denied membership in international organizations and are unable to engage in international relations.[62] Examples of such de facto States include Taiwan, Northern Cyprus, Republika Srpska, South Ossetia and Abkhazia.[63]

Taiwan has been a de facto State since the late 1940s, when the Chinese government of Chiang Kai-shek fled from China to Taiwan.[64] Most western States supported Taiwan in the first two decades of its existence. But starting in the early 1970s, most States recognized the

56. *See* U.S. Dep't of State, Bureau of Eur. & Eurasian Aff., *U.S. Relations with Kosovo: Bilateral Relations Fact Sheet* (July 28, 2021), https://www.state.gov/u-s-relations-with-kosovo [https://perma.cc/GWY4-M7BJ].

57. *See* Bilefsky, *supra* note 54.

58. Sterio, *supra* note 13, at 224.

59. *Id.*

60. *Id.* at 226. ("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.").

61. THOMAS DE WAAL, UNCERTAIN GROUND: ENGAGING WITH EUROPE'S DE FACTO STATES AND BREAKAWAY TERRITORIES 9 (2018).

62. *See id.* at 6.

63. *See id.*

64. *The Chinese Revolution of 1949*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/chinese-rev [https://perma.cc/WF76-EVMU].

People's Republic of China as the official government of China. Yet, most western States have continued to maintain trade and other diplomatic ties with Taiwan. The island remains a de facto State: it has a defined territory, government, population, and some capacity to enter into international relations.[65] For political reasons, however, Taiwan has never been recognized as a State.[66] Northern Cyprus was invaded by Turkey in 1974; since then, Northern Cyprus has functioned as a separate entity, unrecognized by most other countries and thus unable to engage in meaningful international relations.[67] However, Northern Cyprus does have a territory, population, government, and the potential capacity to engage in international relations.[68] Republika Srpska is de jure a part of Bosnia-Herzegovina but has, since the civil war in the 1990s, functioned as a de facto State, with a separate system of law enforcement, education, and local government.[69] The entity remains unrecognized for political reasons. Because Republika Srpska is supported by Serbia, and deemed by most western nations to be the culprit for the Yugoslav Wars in the 1990s, those same States fear that the recognition of Republika Srpska would lead to an expansion of Serbia.[70] However, like Taiwan and Northern Cyprus, it has a defined territory, population, government, and the capacity to enter into international relations with other States—if the latter chose to recognize it.[71] Finally, South Ossetia and Abkhazia are provinces within Georgia.[72] Starting in 2008, the two provinces broke away from Georgia and proclaimed their independence.[73] They have remained unrecognized because both appear to be heavily influenced by Russia, and most western States are fearful of further Russian expansion into the Caucasus and a weakening of their NATO ally, Georgia. Yet, the two provinces have a territory, government, population, and capacity to enter into international relations.[74] The above examples demonstrate

65. *See What's Behind the China-Taiwan Divide?*, BBC NEWS, https://www.bbc.com/news/world-asia-34729538 [https://perma.cc/P6QM-27KY].

66. *See id.*

67. DE WAAL, *supra* note 61, at 12, 49.

68. *Id.*

69. *See* U.S. DEP'T OF STATE, BOSNIA AND HERZEGOVINA 2020 HUMAN RIGHTS REPORT 1, 6, 31 (2020).

70. Sabine Freizer, *What Does Republika Srpska Want?*, INT'L CRISIS GRP. (Oct. 4, 2011), https://www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/what-does-republika-srpska-want [https://perma.cc/DJR6-PEZJ].

71. *See* DE WAAL, *supra* note 61.

72. *See id.*

73. *Id.* at 23.

74. *See id.*

that the application of the legal theory of statehood would result in the bestowing of the statehood label upon these four State-like entities. From this, it may be argued that a Grotian Moment has occurred in the legal theory of statehood: that the theory now comprises a fifth element, which is recognition by other powerful States.

In light of increasing globalization, international law has transformed itself from a set of legal norms governing inter-State relations to a complex web of transnational documents, providing a framework for all sorts of different actors in the international arena. Domestic law has lost its "sovereign" power and is now often supplemented and corrected by international legal norms.[75] Some scholars may argue that this proliferation of international legal norms has eroded traditional State sovereignty: "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."[76] For example, as mentioned above, a State which abuses human rights may be subject to intervention by other States. A State which engages in a harmful trade practice may be sanctioned by the World Trade Organization.[77] If a State violates intellectual property protections, it may become subject of World Intellectual Property Organization fines and other coercive measures.[78] This emerging requirement that States behave in a specific manner in the international arena, respect international legal norms, and a global code of conduct constitutes a Grotian Moment. Moreover, international law has witnessed a proliferation in the number of international organizations, such as the United Nations; regional organizations and alliances such as the European Union, NATO, the Organization of American States, the African Union, and the Economic Community of West African States; and specialized international organizations have formed, such as the WTO, WIPO, the International Monetary Fund, the World Bank, and the International Center for the Settlement of Investment Disputes.[79] This expansion of global organizations has affected the legal theory of statehood in another manner: the fourth criterion of statehood, the capacity to enter into

75. *See, e.g.*, John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 935 (2006).

76. *Id.* at 936.

77. *See e.g.*, CRAIG VANGRASSTEK, THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION 138 (2013).

78. *The TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2b_e.htm [https://perma.cc/ZN3C-BKCE].

79. See Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 220–22 (2008), for an overview on the proliferation of international organizations.

international relations, now requires State participation in global and regional organizations.[80]

V. A NEW THEORY OF STATEHOOD?

In light of the above, it may be argued that the legal theory of statehood has evolved, constituting a Grotian Moment, and that the theory today encompasses new elements. Statehood today encompasses, in addition to the four criteria of the Montevideo Convention, the need for recognition by super-sovereign States, demonstrated respect for human and minority rights, as well as a commitment to abide by a set world order. Entities which do not satisfy these novel criteria of statehood remain de facto States, as the examples of Taiwan, Northern Cyprus, Republika Srpska, South Ossetia and Abkhazia demonstrate.

First, statehood-seeking entities must garner the support of super-sovereign States; the latter wield a tremendous amount of power in the international arena, including the ability to block statehood requests through the United Nations Security Council. Moreover, super-sovereign States hold enormous military and economic powers and may be in a position to support a State-like entity in its quest for statehood, as well as to block another one from achieving statehood. For example, Kosovo, supported by the United States and other western super powers, has been able to easily assert independence from Serbia, as well as to gain access to some international organizations.[81] However, because of the lack of Russian support, Kosovo has not been admitted to the United Nations and has not achieved the full status of statehood.[82] Palestine, which faces prominent United States opposition, has similarly been denied statehood, although this entity has become an non-member observer State in the United Nations and has recently succeeded in lobbying the International Criminal Court to treat it as a State for the purposes of the Court's jurisdiction.[83] Often, State-seeking

80. Sterio, *supra* note 13, at 233. ("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.").

81. *See id.* at 234.

82. See David I. Efevwerhan, *Kosovo's Chances of UN Membership: A Prognosis*, 4 GOETTINGEN J. INT'L L. 93, 117, 120–27 (2012), for a discussion on the prospects of Kosovo's admission to the United Nations.

83. The International Criminal Court's judges confirmed on February 5, 2021 that the Court has jurisdiction over the situation in Palestine, thereby acknowledging that Palestine was to be regarded as a State under the Rome Statute. *See Israel/Palestine: ICC Judges Open Door for Formal Probe*, HUM. RTS. WATCH (Feb. 6, 2021), https://www.hrw.org/news/2021/02/06/israel/palestine-icc-judges-open-door-formal-probe [https://perma.cc/3S24-S8TM].

entities must garner the support of regional super powers. For example, when the former Yugoslav Republic, Macedonia, applied for recognition within the European Union, Greece, its more powerful neighbor and EU Member State objected to the use of the name Macedonia and demanded that Macedonia change its name, as well as adopt a specific constitutional provision promising that it would not seek additional territory.[84] This is an example of a more sovereign State (Greece) pressuring a less powerful statehood-seeking entity into accepting specific conditions on the latter's ascension into statehood.[85]

Second, a statehood-seeking entity must demonstrate that it is willing to respect human and minority rights. When the former Soviet and Yugoslav republics applied for recognition within the EU, the latter imposed, as a condition of recognition of these new States, the pledge of respect of human and minority rights.[86] Existing States have lost parts of their territory because of their lack of respect for human and minority rights, through intervention by super-sovereign States and the international community. Thus, Serbia has de facto lost control over Kosovo, because of the former's repeated violations of human rights in Kosovo and the NATO countries' intervention in Kosovo, as well as the United Nations' involvement.[87] It may be argued that Indonesia would have kept territorial control over East Timor had it not engaged in brutal human rights violations, which in turn invited the international community's involvement and led to the eventual independence of East Timor.[88] Thus, the lack of respect of human and

84. Alexander Smith, *Macedonia and Greece Vow to Solve Decades-Old Name Dispute*, NBC NEWS (Jan. 10, 2018), https://www.nbcnews.com/news/world/macedonia-greece-vow-solve-decades-old-name-dispute-n836396 [https://perma.cc/3A94-WH6G].

85. *See* Helena Smith, *Greek MPs Ratify Macedonia Name Change in Historic Vote*, THE GUARDIAN (Jan. 25, 2019), https://www.theguardian.com/world/2019/jan/25/greek-mps-ratify-macedonia-name-change-historic-vote [https://perma.cc/ZW9M-TJAQ].

86. 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 to a new state to be recognized).

87. Sterio, *supra* note 20, at 225 ("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.").

88. This Article does not justify the Indonesian occupation over East Timor, which was illegal and which resulted in close to 200,000 deaths. *See* Anthony Lewis, Opinion, *Abroad at Home: The Hidden Horror*, N.Y. TIMES, Aug. 12, 1994, at 23. Instead, this Article argues that but for the international community's involvement in East Timor, caused by the Indonesian violations of human rights, the people of East Timor may not

minority rights can lead toward an erosion of State sovereignty, and a threat to a State's continued existence.

Third, statehood-seeking entities must demonstrate their willingness to participate in the existing world order and international organizations. Because international law has proliferated, through an expansion of legal norms and international organizations, it is impossible for any State or State-like entity to function without participating in this regime of norms, rules, and institutions. For instance, it has become impossible to function in the international arena outside of the United Nations, to trade without the World Trade Organization's involvement, and to attract investment outside of the scope of investment treaties. Rogue States like North Korea or Syria, because of their unwillingness to participate in the world order and abide by legal and institutional norms, have become isolated and incapable of conducting international relations. No State or State-like entity can exist in a vacuum, and it may be argued that today's criteria for statehood encompass a requirement of respect for global order.

In sum, the theory of statehood has evolved, through a Grotian Moment, to capture new criteria for statehood. These criteria include the support of other super-sovereign States, the State's willingness to respect human and minority rights, and the State's participation in the existing world order and international organizations.

VI. CONCLUSION

The legal theory of statehood, developed in 1934 by the drafters of the Montevideo Convention, has evolved over time, in light of globalization forces and the proliferation of international legal norms and institutions. Statehood in today's world encompasses additional criteria, which have become necessary for a State's creation as well as for its existence. Such additional criteria include the support of powerful, super-sovereign States, the State's willingness to respect human and minority rights, and the State's participation in the existing global institutional order. This change in the legal theory of statehood may constitute a Grotian Moment: a paradigm-shifting reconceptualization brought about by specific factors in the global arena, such as globalization and the proliferation of international law.

have been able to achieve independence and statehood. "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 . . . . 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." Sterio, *supra* note 20, at 226.