In recent years, the modern international system based upon complete territorial sovereignty of a government over a specified region has experienced some new challenges: the existence of regions that do not fit into the international order of juridically equal states. These regions are easily identified as trouble spots in today’s media--Somalia, Kurdistan, and the Waziristan region between Afghanistan and Pakistan. De-recognition opens up the possibility that troubled regions could be dealt with based on their actual governance structure, instead of a system that makes the same demands of two very different regions. It would also add further stability to the entire international order by creating a mechanism in which international criminals and terrorists hiding within these poorly governed regions could be brought to justice. International juridical de-recognition has the potential to be a very conservative and stabilizing addition to a system that has striven to reduce conflict and promote order.
The modern international state system and its practices have provided unprecedented international stability since the conclusion of World War Two. In recent years, however, it has been challenged by the increased prominence of transnational and sub-national armed groups. The doctrine of complete and permanent legal sovereignty for each state has run into conflict with the actual inability of many parts of the world to be governed by a central, internationally recognized authority. Ungoverned areas have become havens for international criminal elements as no effective domestic state authority exists to control the region, and foreign nations are legally prevented from interfering in the domestic affairs of another state. Furthermore, the leadership in ‘states’ that are held up by the exoskeletal forces of de jure international legal recognition, but not by effective domestic social contracts face strong disincentives to improving the quality of human rights or enabling more democratic systems of governance. Should these regions continue to be recognized as equals with strong, developed, and effective states? Or should they be treated as what they are—collapsed and ungoverned regions, so that they might be dealt with as such?

The purpose of this paper is to investigate the option of de-recognition in the case of states or ungoverned regions in relation to the current practice of strictly observing the international legal sovereignty of every territory, regardless of its actual status. The first section of the paper will set out the categories for international statehood, de jure and de facto, and look at current practice in some instances when only de facto sovereignty exists. The next section will examine the principles of the current international system of states, and more specifically, how areas with de jure sovereignty, but not under the de facto control of their internationally recognized governments, are dealt with in the current system, particularly the areas of Kurdistan and the Waziristan region of Pakistan. Finally, the paper will lay out the legality, history, and possible implications that de-recognition of collapsed states or regions may have and show that, while rigidly maintaining the status quo may have been the most pragmatic choice immediately following the Second World War, certain situations today must be dealt with in a different fashion: one that recognizes reality and can, in some cases, actually be a more conservative approach to international law.

**Statehood**

Perhaps the most important question that must be addressed before proceeding to the following discussion is what precisely is a state? Additionally, identifying what falls outside this category of statehood may help more accurately demarcate the principal actor under discussion. The first article of the 1933 Montevideo Convention on Rights and Duties of States sets out four main characteristics, but with exceptions to each: “(a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States.” In addition to these, Ian Brownlie, the prolific British jurist whose works are considered standard text in the field of international law, adds several more requirements of statehood with varying importance over the years, including a degree of permanence, willingness to observe international law, a degree of civilization, sovereignty, and the ability to function as a state.

The first requirement of a state—to have a population sufficient to form a political association and achieve the category of statehood—is laid out by the Montevideo Convention. Yet even this most basic requirement has been overlooked in the case of the Vatican, which has no permanent population but is recognized by many as a state.

The next major requirement for statehood is a defined territory, since the state is essentially a territorial construct constituted by political control over a definite area of people. This is, in fact, the attribute that separates one state from another, as states are territorially defined and described. In some areas where borders are not completely settled or stabilized however, as with the recognition of Israel, and Albania in 1913, there has been a precedent of bending this requirement in the face of imprecisely defined or disputed borders.

The existence of a government is the third requirement for statehood, and according to Brownlie, “the shortest definition of a state … is perhaps a stable political community, supporting a legal order, in a certain area.” The existence of a government is absolutely critical since it will be the only, and absolute, legal operator and retainer of statehood within the defined territory. There have been numerous exceptions to this requirement, and one need look no further than newspaper articles on terrorist safe havens to locate areas where there is no government control over a region. This requirement of government, along with its ability to respond to the rights and expectations of its residents, is essential.

Ryan Delaney is a senior pursuing a major in History with a focus on the Middle East. He is also minoring in Middle Eastern Languages. He first became interested in failed states while studying Somalia, and became further interested in different ways to deal with them while taking courses on Islamic law and international law theory. He is currently examining the ways in which early modern European state interactions might be applied to the failed states of today.
supposedly equal peer states on the world stage, is perhaps most central to the international disputes subsequently examined in this paper.

Independence is a requirement of statehood in order to differentiate the state from other legal entities such as protectorates, colonies, or sub-territories like provinces. To meet this requirement, a government must be the “sole executive and legislative authority” in a region and exist “independent[ly] of other legal orders.” The actual inequality between states and the power of some sub-state actors blurs the lines of this requirement a little in practice, but in theory one government, at the head of a state, should be responsible for its territory to all other states; this is the principle that justifies the doctrine of non-interference between states.

Brownlie mentions several other requirements for statehood that various theorists determined to be important at one time or another, but the most applicable in modernity is state willingness to adhere to and observe international law. Although this requirement is frequently criticized as illogical since an entity would have to already be a state in order to fulfill this requirement, it is worth considering, as states that do not follow international law quickly become pariahs in the international community. Perhaps unwillingness or incapacity to follow international law would be grounds for de-recognition of such a polity.

There is one additional distinction between two types of international juridical state recognition: recognition de facto and de jure. De facto recognition is the acceptance that, within a given territory, the requirements for statehood are met, without necessarily having any further diplomatic ties between the two countries (a good example of this is Taiwan, which is dealt with by the United States through a corporation, not an embassy). De jure recognition is the formal and explicit acceptance of the existence of a state by the international legal and political community, usually embodied by the exchange of ambassadors.

While there are specific exceptions to the requirements for statehood in practice, in theory they are excellent categories if the world is indeed to be divvied up into juridically equal units that cannot interfere with one another domestically. The failure of a state to meet this requirement should not be taken lightly, but instead its case should be rigorously tested to see if it is indeed a just exemption. However, no exception should be made that “contradicts the liberty of foreign nations to require that a definite territory shall have a definite government with whom they can deal.” If incapable states are recognized as peers, the rights of all other states are impugned for no other reason than to allow a single region to continue enjoying the privileges of statehood without meeting its obligations as an equal among states.

The Current Practice of Maintaining the Status Quo

In the wake of the chaos that was the Second World War, the international system has been extremely conservative in maintaining its participants and locking into place fixed borders. With the exception of South Vietnam, whose existence was short lived and arguably the result of a premature recognition durante bello to begin with, states after World War Two have not disappeared, and even countries which have been conquered have been later liberated, and the illegal changes rolled back. This system has greatly reduced the number of international conflicts in the last sixty years, and helped promote the general international stability, which we now witness across the globe.

The current international order, with its extreme legal emphasis on equality, has effectively eliminated the wars between great powers that were so devastating in the early part of the 20th century. From this perspective, the new order has been remarkably successful; there has not been a third world war nor any sort of nuclear conflict, even though much of human history before this period was shaped by great conflicts and violent redrawing of the global political map, including the period of total war that characterized the first half of the 20th century. From this environment, the current order, with its propensity for static borders and states, with powerful disincentives for international conflict, has emerged as remarkably successful in maintaining the status quo.

Not only are larger, powerful countries protected by the current system, small countries now also enjoy excellent security as ensured by the entire community of states. Kuwait, for example, is a small, rich, and militarily unviable state; any of its three powerful neighbors could easily conquer it, were there no global community to retaliate. When, in 1991, Kuwait was conquered by Iraq, it was unable to put up any real resistance to one of the largest armies in the world; however, the global community succeeded in reversing the illegal territorial change. This event sent a powerful message to states everywhere that militarily viability—one of the most crucial aspects of maintaining statehood in the past—need not be maintained in order to survive and indeed flourish within their borders. This also displayed the strong disincentives for aggressive states to try and expand their borders, or take things from other states by means of war. Not only is the international community willing to roll back illegal changes, but there
is also a framework in place for extended economic and political punishment following the conflict in the form of sanctions.

However, a problem has arisen in new states born out of the process of decolonization, where their de jure international legal recognition is covering up for more than simply their military weakness, as in the case of Kuwait, and disguising more serious problems that would previously have been the cause of state death. Historically, this is not only a problem for post-colonial states. Europe also once had an inordinate number of unviable states but “by 1900 there were around 20 times fewer independent polities in Europe than there had been in 1500.” The process of arriving at the viable states, which are now juridically locked-in in Europe, has not transpired in other parts of the world, creating a condition in which “states in the post-1945 Third World have not been allowed to fail; perversely, this has prevented many of them from succeeding.” Some states in the Third World have indeed failed in reality, but the current system has had difficulty in dealing with these failures, leading to great ambiguity when control over a certain region does not match the theoretical, recognized, polity.

Indeed, the legal status of territories can become quite complex in practice. In an extradition case in Britain, the defendant challenged his impending extradition to Israel because that state was not recognized de jure by Britain. However, the courts decided that there was recognition de facto and hence Israel could be legally dealt with according to the applicable statutes. Brownlie said that “such an approach avoids a legal vacuum in such territories and provides sensible solutions without the necessity for lengthy inquiry into roots of title, or the legal quality of a protectorate or trusteeship,” demonstrating the very pragmatic and conservative tendencies of the current international structure. However, there are some territories where this approach cannot be taken for one reason or another, leading to undesirable effects. One instance of this is Britain’s refusal to accept evidence from a Turkish Republic of North Cyprus (TRNC) court and allow witness statements via satellite from the TRNC. This “status as a juridical black-hole in the international system,” observed Scott Pegg, “may also appeal to organized criminals. Its lack of taxation and extradition agreements with other countries led one member of the Russian mafia to describe it as the perfect setting because ‘No one can touch you in the Turkish sector.’”

The case of the TRNC may just be an exception, however, and one would expect that in any region where effective government exists, the pragmatic approach would be taken by international lawyers in order to keep the system intact and functioning correctly. However, in general “non recognition for any reason,” wrote Brownlie, “cannot outweigh […] the de facto character [of a state] according to the standard set by international law.” But the system does have extreme difficulty in dealing with regions that lack effective government and the ability to claim real de facto control, but still retain their de jure legal sovereignty.

One such situation that current practice has had difficulty in dealing with is the Waziristan tribal region, legally in the state of Pakistan, on the border with Afghanistan. The government of Pakistan has been completely unable, and unwilling, to extend central rule into this region and reign in groups which have set up check points along the roads, launched attacks against both Afghanistan and Pakistan itself, and are assuming many roles of government in the region. The NATO coalition in Afghanistan, led by the United States, cannot legally invade this region of Pakistan, and so has been limited to asking, and even demanding, that Pakistan reign in this lawless region to no avail. According to international law, however, the region is considered to be under the same level of domestic control as Arizona or Alsace-Lorraine.

The UNITAF intervention in Somalia exemplifies another approach within current practice to dealing with a collapsed region. Because of the requirements surrounding legal sovereignty, the United States was forced into dealing with, and therefore legitimizing, the warlords in Mogadishu. Due to these circumstances, both in theory and in practice, the warlords in Mogadishu took responsibility for policing, the difference being in the execution; the idea was to create responsible warlords with constituencies that they protected. In actuality however, it
exacerbated factional divisions, precluding the possibility that an effective national government could emerge to control the area that the modern international system had decided should be ruled as a single state unit. In this specific case, when the ‘outside’ (no ‘inside’ really existed in an unfragmented, diamic sense) forces left, the area quickly devolved into a lawless and ungoverned region unable to support itself in any sort of fashion.

A third way the international system has recently dealt with ungoverned, or unresponsive, regions that threaten international stability is to simply break international law and then not enforce the consequences. This is what happened in February 2008 when as many as 10,000 Turkish soldiers entered the Kurdistan region of northern Iraq to deal with militant elements launching cross-border raids from there, in much the same fashion as the Taliban in the Waziristan region. While this attack was relatively successful in reducing the power of militants in the region, and the presence of over a hundred thousand foreign troops occupying Iraq made the circumstances unique, the structural problems of taking this approach repeatedly are, needless to say, dangerous. Although it worked one time, the precedent of flaunting international legal rules and their selectivity in enforcement is hardly the effect that a generally conservative international legal order, or any order for that matter, would desire.

Each of these three examples has exposed flaws in the current international system that, without a different legal approach, will continue to allow the complications and unforeseen consequences of new, weaker states to fester and threaten the international stability that has been relatively well preserved over the past several decades.

**De-recognition of States**

One method of dealing with the problem of weak or ineffective states in a region, one that has both theoretical and historical precedents, is de-recognition of the existence of a state in that territory. Just as there are requirements for recognition of a state’s existence, should there not be a comparable check and resultant action for cases in which factual requirements are no longer present? Why should troublesome areas of lawlessness continue to exist, or costly ad-hoc international interventions be forced to take place when they may not be necessary? This section will examine what de-recognition is, the precedent behind it, and finally, the implications it might have not only for troublesome regions, but also as a tool for helping to improve some of the undemocratic outcomes of decolonization.

In one sense, de-recognition is the most realistic approach to dealing with troubled regions; if states are internationally equal political entities, that have certain requirements for achieving that title, places that do not possess those characteristics should not be termed nor dealt with as states, for they are not in fact, states. Labeling and attempting to deal with incapable regions as states is unfair and dangerous for everyone involved. Why should Afghanistan be put at risk because transnational groups are hiding in an area which is another state in name only? If another state actually existed there, then its leaders could be held responsible for the actions of ‘citizens,’ and be expected fairly to resolve the problem. Pakistan is clearly incapable of exercising state functions over the border region and is put in an unnecessary situation in which foreign states are making requests that the Pakistani state does not have the capability of fulfilling. Current practice “places foreign nations in the necessity of seeing their intercourse with a given territory cut off, and their rights and interests imperiled, because it refuses to allow them either to vindicate those rights [of states] themselves, or to concert with an existing government their vindication against rebels.”

The inability of Pakistan to handle the situation as a responsible state should, especially in the face of international pressure, puts undue domestic pressure on the state from regions in which the government does exercise state functions, and where the government must be, and is, responsive.

De-recognition need not be applied to the entire area where a state once was, nor need it be an excuse for military intervention; in fact, quite the opposite is true.
Its intention, in admitting and recognizing reality over the theoretical equality of every region of the planet with regard to every other, is to help resolve conflict and promote stability and conflict resolution. De-recognition would allow foreign states to deal with what were previously sub-state actors on a basis commensurate with their actual level of control and the degree of representation with which they govern their area. While it may be impossible to deal with sub-state actors in current situations, opening up the possibility of dialogue with de-recognized areas may defuse a situation and prevent what might currently demand an international war or ‘intervention.’

De-recognition could also apply to a region spread across several states and would allow for more natural polities to be accepted into the world community and dealt with on the realistic basis of what areas they control, and whom they represent, instead of what colonial borders had present. This aspect of de-recognition could allow for the resolution of several trans-state conflicts and hopefully the stabilization of the infra-state conflicts that have been not just allowed, but compelled, to fester under current practice.

The theoretical basis for de-recognition is both implicit in the positive definition of what a state is, and explicit in the works of several theorists and writers. Lauterpacht elucidated this explicit argument:

Recognition is not a contract or grant. It is a declaration of capacity as determined by objective facts. These facts are not necessarily enduring. A State may lose its independence or the necessary degree of cohesion as an organized community; a government may cease to wield effective authority; a recognized belligerent may be utterly defeated. In all these cases the basis of recognition disappears, and outside States are entitled and bound to take cognizance of that fact.22

Additionally, Fauchille made a similar argument earlier, but based most of his case on the now less-respected condition of statehood of being a ‘civilized state,’ and conducting itself as such to maintain its standing in the international community.23 Lauterpacht recognized that in most cases, both theoretical and practical, the de-recognized region would be immediately replaced by another state, either entirely new or encompassed by another.24 This means that most cases of de-recognition have not been explicitly made by other governments, but instead have been made implicit in the positive recognition of another polity’s control over the region that was formerly under the control of a now-defunct state.25 This explains the lack of direct documentation and infrequent discourse on withdrawal or de-recognition of states, termed as such. While Lauterpacht envisioned states as whole units either created or subsumed into one another,26 de-recognition has also been thought about in the context of fracturing or fragmenting states, as well as regions infringing on multiple states.

Thomas Baty, who wrote in the 1930s, was concerned with the interactions between foreign states and regions that had either collapsed into anarchy, or rule by multiple factions with each clearly unable to assume the mantle of what had previously been a state (either de facto or de jure).27 He argued that “foreign states cannot be expected to treat as a single state a region in which there are even two perfectly independent governments, equally devoid of title.”28 He concluded that, as a result, realism must take precedence in order to afford all the states involved their full rights, help resolve conflicts, and maintain international stability.

The one historical case in which de jure statehood was withdrawn without recognition of control given to another state in return, was one that, unfortunately, turned out to be a pretense for invasion and conquest. In February 1932, Japan wrote a letter to the League of Nations stating that “it must be emphasised that the Japanese Government does not and cannot consider that China is an ‘organised people’ within the meaning of the Covenant of the League of Nations,” effectively saying that China was neither currently under a central government, nor capable of being dealt with as a single entity.29 “Fictions” of statehood, they wrote, “cannot last forever, nor can they be tolerated when they become grave sources of practical danger.” While history has shown that Japan’s primary interest in this was imperial expansion and conquest, there was a genuine problem with the factionalization of China at the time and an inability of the current practice to effectively deal with any conflict arising from the lack of centralized control existent at the time.

Before the emergence of Nationalist and Communist Chinese forces during World War Two, there were a multitude of warlords each in control of one of numerous regions in the ‘state’ of China.30 The irresponsible and aggressive actions of these warlords presented problems for surrounding nations. However, with the world’s attention focused on Europe and domestic problems, the international community was unable to keep Japan’s subsequent actions in check. This lack of attention, coupled with Japan’s aggressive imperialism, led to the actions taken after de-recognition, which were not in the interests of international stability and conflict avoidance. However, the act of de-recognition itself need not have been inherently malicious, and both Lauterpacht and Baty seem to say that it was necessitated by the lack of de facto state control in China.31
De-recognition, or at least the threat of de-recognition, may also prove to be a worthwhile tool in helping to improve the representative nature and quality of life in post-colonial Third World States, which are noted for their despotism. The current practice of indefinite de jure sovereignty despite the de facto reality presents strong disincentives for authoritarian rulers to reform. The problem, according to Pegg, is because they are already sovereign, the longing for independence cannot serve as an incentive for incumbent rulers to mobilize and organize their populations to strive for freedom. On the contrary, sovereignty gives incumbent elites a strong incentive to maintain their privileges by preserving the status quo. 32

By removing, or at least threatening to remove this international crutch for Third World authoritarian governments through de-recognition, the international community may be able to force "political leaders in badly governed and post-conflict countries to craft deals with their own citizens that could give rise to self-enforcing institutions of the sort that improve life generally for a society and all those living within it." 33

What then would be the status of regions de-recognized as states or removed from a state? A region could be dealt with directly and not through the ineffective intermediary of whatever state was nominally in charge before de-recognition. In this manner, foreign states in the international community could initiate all sorts of bilateral talks and negotiations without the interests and inefficacy of the previous government interfering. Additionally, some regions could be allowed to coalesce into more natural and stable polities than the occasionally arbitrary borders drawn by colonial powers in the past, allowing a more lasting and genuine international structure to emerge. Finally, there may exist the situation in which a new state does not emerge and the resultant territory continues to have elements that impugn the rights or territorial integrity of surrounding states. These territories would presumably fall under the same categorization as the Seas under the United Nations Convention on the Law of the Sea, Article 101 of which "defines piracy to include acts directed against a ship, aircraft, persons or property in a place outside the jurisdiction of any State." 34 This categorization would allow limited policing actions by other states in situations where the previous de jure legal sovereign may have been unwilling to grant permission but also incapable of exerting real control. Furthermore, this would help avoid the possibility of an international war if a nation decides that it is absolutely necessary to undertake policing action in a lawless area against the will of a nominal de jure sovereign. In some situations then, de-recognition can be a more conservative legal tool than current practice in achieving international stability and dispute resolution without international war, as well as improving the quality of both life and statehood in Third World countries.

In the case of the Waziristan region of Pakistan, de-recognition would put several new options on the table, each of which is preferable to international war and the continuation of trans-national insurgencies. De-recognition would also alleviate the continued weakening of the Pakistani government due to pressure from international forces to deal with a region clearly not under the control of the government. First, de-recognition of Waziristan would free Pakistan from a responsibility that the country is unable to meet and help it improve its international standing; after all, even the British Empire was unable to bring effective state control to this region. 35 Secondly, it would allow the interested parties, Afghanistan and the NATO Coalition forces there, to engage directly with the tribal leaders in the area, which however unlikely in this particular case to lead to a peaceful resolution, at least makes such an outcome a possibility. If negotiations and the threat of force are not enough to bring stability to the region, Afghanistan must be able to defend itself and its territory by undertaking a policing action. With de-recognition, Afghanistan could target the lawlessness and banditry in the area in a way that would avoid international war, since the base argument is not now between states, but between a state and a lawless region that was formerly protected by the scaffolding of current international practice.

In Somalia, it is possible that some areas that already experience a measure of independence and political rule would coalesce into potentially viable states, while other regions could be dealt with by international forces for what they in fact are: lawless territories with bandits and ‘land pirates.’ Perhaps the colonial borders in the Horn of Africa were not drawn in a manner conducive for sustaining the creation and continuation of modern states. De-recognizing the area, then, would be the first step in creating a resolution that would both benefit the people in the region and help stabilize an area of the world vital for international trade. The current practice, however, of letting conditions worsen for over a decade and allowing Somalia to become a safe-haven for international criminal elements is counterproductive to realizing the conservative international system that has striven to resolve conflicts and eliminate the specter of international war. Additionally, it has placed “native populations in the impossibility of carrying on a normal and healthy state life, simply because
of unsubstantial claims which they or their neighbors are unwilling formally to give up.”

In Kurdistan, de-recognition from, at least, Iraq, without formally creating a state in its place that surrounding countries oppose, would allow for a discourse to take place between authorities there and in surrounding states. As in Waziristan, actual discussion with those in charge of the region would allow for a peaceful settlement of any trans-border issues without resorting to a forceful intervention. However, even if a threat is not enough and a state such as Turkey needs to undertake an actual policing action in order to deal with international criminals, at least it will not amount to a territorial breach of a nation that contains over a hundred thousand US soldiers and previously had one of the largest armies in the world. Such a situation could lead to something that has been avoided by the international system for over sixty years: a massive world war. In the case of Turkey’s recent incursion, it is extremely easy to envision the stirring up of intense jingoistic sentiments and the devolution of the entire region into a massive conflict, as opposed to the cool, calm response by Iraqi leaders, both Kurdish and non-Kurdish.37 While it is most fortunate that the response was not more passionate, the system was still violated and no repercussions ensued, perhaps because the actions of Turkey did not seem unreasonable. With de-recognition on the table as an option, this episode could have been dealt with in a legal, less volatile, and more conservative fashion than leaving the outcome to chance.

**Conclusion**

As is evident from both the historical instance of de-recognition and the possible scenarios for its current application discussed here, some aspects of de-recognition could lead to a 'slippery slope' in certain situations and possibly be used as a pretense for conflict in others. It is important to remember, however, that de-recognition does not operate in a vacuum and should be tempered by international norms and reasoned judgment. De-recognition as a political and legal option should not be disregarded, nor left off the table, as it has a great potential to help stabilize the international scene and even improve the quality of life within some states. Current practice, for the most part, has worked well and prevented the major wars and devastating conflicts of the first half of the 20th century. However, following decolonization, some new ‘states’ that do not fit the same description as the old, stable states in Europe and elsewhere, which has led to some risky and unpredictable international situations. The current toolset is not the most conservative approach in all situations for achieving stability, reducing international conflict, and improving human rights globally. In some cases, de-recognition of states may allow for a more stabilizing, pragmatic, and predictable outcome. §

**Endnotes**

2 Brownlie, 75-77.
3 Brownlie, 64-65.
4 Ibid., 71.
5 Ibid.
6 Brownlie, 72.
7 Ibid. pp. 75-76.
13 Pegg, 178.
14 Brownlie, 113.
15 Pegg, 178.
16 Brownlie, 87.
18 Except for some reported CIA intervention in the region, although this is technically illegal.
21 Baty, 454.
23 Fauchille vol I(i), No. 213 BYBIL in “De Facto Recognition” pg. 181.
24 Lauterpacht, 181.
25 Lauterpacht, 181.
27 Baty, 444-455.
28 Ibid., 454.
31 Lauterpacht, 181.
32 Pegg, 162.
34 Brownlie, 174.
35 Perlez.
36 Baty, 454.
37 Rubin.