

THE ENTITY THAT DARE NOT SPEAK ITS NAME:  
UNRECOGNIZED TAIWAN AS A RIGHT-BEARER  
IN THE INTERNATIONAL LEGAL ORDER\*

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*James Crawford's magisterial 2006 second edition of The Creation of States in International Law, updating his 1979 text in light of the intervening period's vast accumulation of international practice, was much awaited in Taiwan, which has seen a major transformation in its external relations over the last quarter-century. Though Crawford asserts that the suppression by force of 23 million people cannot be consistent with the United Nations Charter, and that therefore to that extent there must be a cross-Strait boundary for the purposes of the use of force, he finds that "Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as State distinct from China." Apart from its dysfunctionality in encouraging Taiwanese to believe that a more definitive expression of their desire for statehood is all that stands in the way of their goal, Crawford's analysis is not persuasive on the merits. Contrary to the prevailing objective theory of statehood that Crawford reaffirms, it is the tacit positions adopted by reacting states, whether in coordination or simply in the aggregate, that determine whether an entity possesses the rights, powers, obligations, and immunities of statehood. By this gauge, Taiwan's legal status is indeterminate. There is much concrete behavior of the community of states toward Taiwan that confutes the official rhetoric of non-recognition of Taiwan's independence. The case for attributing to Taiwan the properties of Statehood improves the more that Taipei can establish external relationships beyond the permissible confines of mere de facto recognition and inconsistent with the PRC assertions of sovereign prerogative over Taiwan's external affairs.*

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## I. INTRODUCTION

The landslide victory of Kuomintang (KMT) candidate Ma Ying-jeou in Taiwan's March 2008 Presidential election<sup>1</sup> has, at least for the short term, altered the political dynamics of the Taipei government's relationship with the People's Republic of China (PRC). Whereas the previous government under President Chen Shui-bian took an aggressive approach to establishing for Taiwan an international profile overtly incompatible with the PRC's sovereignty claim,<sup>2</sup> prompting PRC

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<sup>1</sup> President Ma, the former mayor of Taipei and the candidate of the KMT-led "Pan-Blue" alliance, defeated Frank Hsieh (Hsieh Chang-ting, also known as Sie Jhang-Ting), candidate of the Democratic Progress Party (DPP) and its pro-Independence "Pan-Green" alliance, by a score of 58.45% to 41.55%. Election Study Center, National Chengchi University, *Detailed Results of Candidates for the 4rd Direct Presidential Election*, Mar. 22, 2008, <http://vote.nccu.edu.tw/engceec/vote3.asp?pass1=A2008A0000000000aaa> (last visited May 10, 2009).

<sup>2</sup> Perhaps the most outwardly provocative of these was to use the name "Taiwan" instead of "Republic of China" in Taipei's predictably futile (i.e., fifteenth consecutive) 2007 bid for separate United Nations membership. See Mainland Affairs Council, *Position Paper Regarding the Referendum on Joining the United Nations Under the Name of Taiwan*, Sept. 7, 2007, <http://www.mac.gov.tw/english/english/un/02e.pdf> (last visited May 10, 2009). Chen's government sought to procure a mandate for this move in a referendum held at the time of the 2008 Presidential election, but fell well short of the voter participation necessary to validate the outcome. See Alex Kireev, *Taiwan: UN Membership Referendum*, Electoral Geography 2.0, <http://www.electoralgeography.com/new/en/countries/t/taiwan/taiwan-un-membership-referendum-2008.html> (last visited May 10, 2009) (reporting on Taiwanese voters' responses to the UN Membership Referendum, where even though 94.91% responded "yes" to the question of whether Taiwan should apply for UN membership under the name "Taiwan," voter turnout was only 35.82%).

counter-moves and saber-rattling, the new Government's "flexible diplomacy" aims to expand cooperation with the Mainland and to avoid confrontations over the question of official status. The new government has abandoned its predecessor's symbolic campaign for United Nations membership and the use of "checkbook diplomacy" to obtain and retain official foreign-state recognitions (currently numbering twenty-three) for the "Republic of China" (ROC), instead renewing Taipei's focus on finding ways to participate functionally in international organizations without making such efforts into test-cases of the entity's status.<sup>3</sup> This turn away from confrontation appears to enjoy substantial popular support in Taiwan.<sup>4</sup>

The fundamental issue of sovereign authority, however, remains salient. While conciliation may prove a more effective way to dissuade the PRC from obstructing Taiwan's external relations and issuing threats of force, the new overtures tend to obfuscate rather than to obviate the question of underlying rights, a question that will arise anew if and when the spirit of amity dissipates. And indeed, President Ma has felt the need to emphasize that his diplomatic approach does not signal a renunciation of "the sovereignty and dignity of the Republic of China on Taiwan"; to the contrary, Ma has affirmed that the "ROC is a sovereign country" and that the "future of Taiwan shall be decided commonly by the 23 million people on Taiwan."<sup>5</sup> International lawyers thus continue to confront the

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<sup>3</sup> See Press Release, Ma Ying-jeou, President Ma's Remarks at Ministry of Foreign Affairs: The Concept and Strategy of the "Flexible Diplomacy" (Aug. 4, 2008), [http://www.president.gov.tw/en/prog/news\\_release/print.php?id=1105499762](http://www.president.gov.tw/en/prog/news_release/print.php?id=1105499762) (last visited May 10, 2009) (emphasizing the importance of democracy, "willingness to maintain cross-strait stability," and "fulfill[ing] obligations to the international community"). President Ma has summarized his position as one of "no unification, no independence, and no use of force." Ralph Cossa, *Looking Behind Ma's 'Three Noes,'* TAIPEI TIMES, Jan. 21, 2008, at 8, available at <http://www.taipetimes.com/News/editorials/archives/2008/01/21/2003398185> (last visited May 10, 2009).

<sup>4</sup> A December 2008 poll showed that only 37.2% regarded the (greatly increased) pace of cross-strait exchanges as "too fast," while 47.5% regarded the pace as "just right," the highest percentage to so respond in the eight years the question has been asked. Press Release, Mainland Affairs Council, MAC Public Opinion Survey: Cross-Strait Direct Transport Links are Conducive to the Enhancement of Taiwan's Competitiveness, at app. I (Dec. 25, 2008), <http://www.mac.gov.tw/english/english/news/08110a.pdf> (last visited May 10, 2009).

<sup>5</sup> *Id.* See also Ma Ying-jeou, *New Year's Day Celebratory Message*, Jan. 1, 2009, available at <http://www.mac.gov.tw/english/english/macpolicy/ma980101e.htm> (last

puzzle of Taiwan's legal status.

James Crawford's magisterial 2006 second edition of *The Creation of States in International Law* updated his highly authoritative 1979 text in light of the intervening period's vast accumulation of international practice in this area. This volume was long awaited, and nowhere more so than in Taiwan, which has seen a major transformation in its external relations over the last quarter-century. For those who may have hoped that Professor Crawford, perhaps the world's foremost authority on the recognition of states, would boldly challenge the conventional wisdom in assessing Taiwan's international legal status, the author's characteristically judicious and nuanced assessment will come as a disappointment.<sup>6</sup> Crawford finds that "Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China," and yet he acknowledges that "the suppression by force of 23 million people cannot be consistent with the [United Nations] Charter," and that therefore "[t]o that extent there must be a cross-Strait boundary for the purposes of the use of force."<sup>7</sup>

Diplomats and jurists alike can be expected eagerly to invoke the new book's analysis, since it lends Crawford's prestige to a combination of positions that, while consistent with observable patterns of state practice, reflects political convenience more than it embodies doctrinal coherence.<sup>8</sup> To make the point in these terms is not to criticize

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visited May 10, 2009) ("[W]e should seize this opportunity to enhance Taiwan's economic standing in the world, but as economic relations between Taiwan and the mainland become increasingly interdependent, we must also preserve the sovereignty and dignity of the Republic of China on Taiwan.").

<sup>6</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 198–221 (2d ed. 2006).

<sup>7</sup> *Id.* at 219, 221.

<sup>8</sup> This middle position between statehood and "renegade province" status might be seen as the most expedient for both the Taiwanese population and the international community. A December 2008 poll indicates that while 48% of Taiwan's inhabitants are opposed to unification with China at any time (favoring either declared independence or indefinite perpetuation of the *status quo*), and only 11% who favor immediate or eventual unification, 41% prefer to maintain the *status quo* while leaving open the question of unification. These percentages have remained roughly stable over the course of the decade. Mainland Affairs Council, *Public Opinion on Cross-Strait Relations in the Republic of China* (Dec. 2008), <http://www.mac.gov.tw/english/english/pos/9712/po9712e.htm> (last visited May 10, 2009). Taiwan inhabitants are equally divided between those who regard themselves as "Taiwanese" (46.1%) and as "both Taiwanese

Crawford's analysis for being weak; it is to note that Crawford's analysis is *self-consciously* weak. In a self-effacing footnote to his requirement that Taiwan "unequivocally assert" independent statehood—a requirement for which he can cite no direct authority—Crawford explains that "[o]f course it is also true that the reason why Taiwan has not more clearly stated its position is concern, on its own part and that of its allies, at the likely consequences of doing so (i.e., a military attack from the mainland)." <sup>9</sup> The irony—indeed, the contradiction (i.e., identifying as a further legal requisite a course of conduct conceded to be precluded by credible threats of concededly illegal violence)—is hardly lost on Crawford, but the incoherent aspects of his analysis reflect an incoherence in the underlying source material. The legal state of affairs on which Crawford reports is itself incoherent.

If Crawford's analysis is to be faulted, it is in its failure to clarify the sources of the contradiction. Crawford refuses to depart from the conventional wisdom that denies Taiwan statehood status, notwithstanding that Taiwan "appears to comply in all respects with the criteria for statehood based on effectiveness."<sup>10</sup> Yet, Crawford ascribes to Taiwan state-like properties—especially, immunity from forcible incorporation into the PRC—despite lacking any obvious basis in international legal doctrine for ascribing such legal properties to a non-state entity. Such an *ad hoc* attribution of legal entitlement, even if consistent with such instances of state practice and manifestations of *opinio juris* as can be adduced, has an arbitrary quality. Advocates for the PRC can be forgiven for questioning how an entity that possesses neither the status of sovereign statehood nor a right to statehood under the doctrine of self-determination could be something other than an integral part of China, and thus how a forcible solution to cross-Strait relations could be something other than an internal affair. To respond by

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and Chinese" (45.4%). Election Study Center, National Chengchi University, *Changes in the Taiwanese/Chinese Identity of Taiwanese as Tracked in Surveys* (2008), <http://esc.nccu.edu.tw/eng/data/data03-2.htm> (last visited May 10, 2009). Polls nonetheless reflect decisive opposition (73.2% to 9.6% in 2002) to a Hong Kong-style one-country, two-systems approach. Monique Chu, *Public Growing More Confident in Taiwan: Poll*, TAIPEI TIMES, May 10, 2002, available at <http://www.taipetimes.com/News/taiwan/archives/2002/05/10/135425> (last visited May 10, 2009).

<sup>9</sup> CRAWFORD, *supra* note 6, at 219 n.78.

<sup>10</sup> *Id.* at 198.

characterizing Taiwan as an “entity *sui generis*” would be merely to admit, rather than to fill, the doctrinal gap.

What is missing is a coherent account of the indeterminacy that marks Taiwan’s status in the international legal order. Such an account requires a reconceptualization of the relationship between statehood and recognition, as well as an appreciation of background norms that affect states’ legal consciousness.

The discussion below will first examine Taiwan’s characteristics in light of the criteria commonly articulated as the legal test for the objective existence of statehood. It will then argue that this supposed test, assigning recognition a purely “declaratory” role, fails adequately to account for the ambiguities of the Taiwan case or for the international community’s broader pattern of practice. It will instead contend that the true test of statehood lies in international actors’ tacit attribution, *vel non*, of rights, powers, obligations, and immunities that international law ascribes uniquely to states. It will go on to invoke the principle of self-determination of peoples, not as a direct determinant of the issue, but as a background norm affecting the legal sensibilities that bear on the problem. Finally, it will offer a guarded judgment about Taiwan’s current legal status and a prudential assessment of the prospects for further efforts to bolster Taiwan’s position in the international system.

## II. TAIWAN AND THE OBJECTIVE ASPECTS OF STATEHOOD

The characteristics of statehood are routinely said to be those four listed in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States: “(a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states.”<sup>11</sup> This enumeration reflects the Convention’s overall embrace of the principle of effectivity: the question is one not of moral entitlement or political predilection (as to which competing values and interests promise to generate endless controversy), but of whether the entity constitutes an objective political unit, not subject to the law of another state, that must be reckoned with on the basis of international law.<sup>12</sup>

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<sup>11</sup> Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, reprinted in 28 AM. J. INT’L L. SUP 52, 75 (1934).

<sup>12</sup> The Convention arose in the context of a hemispheric repudiation of prior

As independent criteria for statehood, “permanent population” and “defined territory” are not particularly useful, since virtually all statehood claims, whether or not accepted in the international legal order, characteristically include sufficiently precise claims on behalf of a permanent population to a defined territory.<sup>13</sup> What matters in the Montevideo Convention context is that the “permanent population” and “defined territory” be united by some common and distinguishing pattern of effective governance. The reference to “the capacity to enter into relations with other states” was apparently intended as little more than an exclusion of entities whose international relations are confessedly subordinate to another state—i.e., units of federal states (e.g., Michigan, Tasmania) and territories that have full internal self-governance but are dependent in external affairs (e.g., “associated statehood” arrangements, such as the relationship of the Cook Islands to New Zealand).<sup>14</sup> Thus, if taken as the legal standard for international personality, the Montevideo criteria would confer sovereign rights, powers, obligations, and immunities on any territorially-coherent political community found under the long-term effective control of an independent government.<sup>15</sup>

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doctrines of recognition of governments that had, in practice, allowed the United States and its allies to choose whether to respect a disfavored government’s standing to assert the sovereign rights of a state. See, e.g., Richard Millett, *Central American Paralysis*, 39 FOREIGN POL’Y 99, 101 (1980) (quoting a 1927 State Department memorandum boasting that, “Until now Central America has always understood that governments which we recognize and support stay in power, while those we do not recognize and support fall.”).

<sup>13</sup> Precise delineation of the boundaries of citizenship and territory has not been deemed an essential prerequisite to recognition of statehood, as evidenced by international recognition of Estonia (notwithstanding the uncertain status of ethnic Russians living in Estonia) and Israel (notwithstanding uncertain borders).

<sup>14</sup> A state “has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. e (1987). See also Christopher J. Carolan, *The “Republic of Taiwan”: A Legal-Historical Justification for a Taiwanese Declaration of Independence*, 75 N.Y.U. L. REV. 429, 455 (2000) (noting that Texas and Scotland are no longer considered independent states because their “foreign affairs are now carried out by their federal or central governments”).

<sup>15</sup> It is the underlying political community, not the government, which the international legal order identifies as a bearer of sovereignty. That political community, in turn, makes and un-makes internal laws (including constitutions), whether by internally lawful processes or by violence. It is always error to characterize a constitution as “constitutive” of statehood. Rather, a constitution presupposes statehood, and inherent

If statehood were an “objective” matter and recognition merely “declaratory,” the case for Taiwan’s statehood would be overwhelming. For over half a century, the Taipei government has independently maintained effective control over a “permanent population” within a “defined territory.” It has never lacked the material “capacity to enter into relations with other states”—indeed, it held a U.N. seat for the first twenty-two years, and at this moment maintains formal diplomatic relations with over two dozen states, as well as informal quasi-diplomatic relations with scores of others—nor is its capacity to represent Taiwan (and the islands of Penghu, Kinmen, and Matsu) subordinated to any other government or encumbered by any claim (at least since 1993) that it also represents the whole of China.<sup>16</sup>

It is true that the international system is remarkably slow to

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in statehood is the authority to overthrow the constitution. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration] (“Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”).

Crawford seems to say otherwise in respect of Cypriot independence in 1960. *See* CRAWFORD, *supra* note 6, at 89 (“[W]hile Cyprus under its 1960 Constitution was an independent State it was not sovereign, because the Constitution placed a wide range of acts beyond its power.”). The limitations on Cypriot independence, however, are properly traced not to the Cypriot Constitution, but to the accompanying Treaty of Guarantee that purported to license external armed intervention to enforce adherence to the constitution’s terms. The Cypriot government immediately thereafter contended, very plausibly, that this aspect of the treaty violated the United Nations Charter and was therefore legally ineffective. *See, e.g.*, Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 246–47 (1986) (explaining the Cypriot government argument that the treaty violated its right to self-determination and interfered in its internal affairs); R. St. J. MacDonald, *International Law and the Conflict in Cyprus*, 19 CAN. Y.B. INT’L L. 3, 17 (1981) (posing the question of whether the treaty was void since a state cannot contract out sovereignty and at the same time keep it).

<sup>16</sup> Between 1949 and the early 1990s, the Taipei regime entered into international relations, albeit with ever-declining success, as a belligerent contestant for standing to represent the state of (one) China. It arguably follows that Taiwan, as a mere province of a “Republic of China” that legally encompassed the whole expanse of China, had no “capacity to enter into relations with other states” in its own right. From the time that the Taipei regime renounced its claim to such standing and purported to represent Taiwan alone (as by pursuing separate U.N. representation in 1993), however, Taipei’s external relations can be attributed to Taiwan as such.

acknowledge secession. Even though traditional doctrine holds that a new state should be recognized once the central government's armed efforts to re-establish control have ceased or become manifestly hopeless,<sup>17</sup> state practice is more reticent, and usually has acknowledged secession only after the central government's formal relinquishment of the rebellious territory.<sup>18</sup> This case, however, is peculiarly straightforward, because the PRC never held any control at all over the territory in question, and such meager efforts as there were to assail the territory ended nearly a half-century ago.

Crawford points out that this state of affairs is owing to U.S. naval interference with the PRC's efforts to assimilate Taiwan during the 1950s. Since he quite correctly dismisses the theory that the ROC has been administering Taiwan for over half a century as a delegate of the Allied Powers,<sup>19</sup> Crawford sees fit to note (though does not rely upon) the

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<sup>17</sup> See HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 12 (1947) ("When the struggle for independence has obtained a tangible measure of success accompanied by a reasonable prospect of permanency, international law authorizes third States to declare, by means of recognition of the nascent community, that the sovereignty of the parent State is extinct."); see also *id.* at 93–94 (making the parallel point for recognition of governments).

<sup>18</sup> James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, 69 *BRIT. Y.B. INT'L L.* 85 (1998). An example is the international recognition of Eritrea, which occurred only after Ethiopia's formal relinquishment, despite far earlier establishment of the facts on the ground. *Id.* at 106–07. According to Crawford:

Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State. By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time.

*Id.* at 92; see also *id.* at 116 (summarizing "patterns of international responses to unilateral secession and threats of such secession in the non-colonial context"). A seeming exception is the case of the breakaway republics of the Socialist Federal Republic of Yugoslavia (SFRY). However, as will be discussed below, this situation was conceptualized (correctly or not) as, not a series of secessions, but a non-consensual "dissolution" of an existing state into its component parts, such as to extinguish the legal personality of the SFRY itself.

<sup>19</sup> See CRAWFORD, *supra* note 6, at 207–11 (considering different views, which assumed that Taiwan was not a separate State, and concluding that "Taiwan is, if not a separate State, part of the State of China"); accord Brad R. Roth, *Taiwan's Nation-Building and Beijing's Anti-Secession Law: An International Law Perspective*, in

argument that this interference “constituted intervention in the civil war, and an attempt to disrupt the territorial integrity of China,” thereby implicating “the principle that an entity is not a State if created through a violation of the rules relating to the use of force.”<sup>20</sup>

The problem with this argument is that (as noted at greater length below) external interference of the same nature, albeit in the more indirect form of *materiel* and logistical support, has persisted openly and notoriously ever since. While the PRC cannot be said to have acquiesced in this practice, virtually all other elements of the international community have manifestly become reconciled to it. For all of their reluctance to regularize relations with Taiwan, states and intergovernmental organizations do not characterize Taiwan’s *de facto* distinctness as the product of an internationally unlawful situation, nor do they express disapproval of the defensive military assistance supplied to Taiwan by the U.S. and other states. Indeed, by the time that Taiwan could no longer plausibly be regarded as Allied-occupied Japanese territory or as unallocated territory relinquished by Japan in the 1951 Peace Treaty of San Francisco, the stability of the cross-Strait division was such that forcible action by the PRC to incorporate Taiwan would necessarily have been seen as a matter of serious international concern, discouragement of which was widely welcome, even if not granted any specific imprimatur.<sup>21</sup> It is therefore very difficult to characterize Taiwan’s continued distinctness as an inadmissible fruit of unlawful intervention, from which legal consequences are forever disallowed.

This leaves what Crawford characterizes as the “determinative” point: “there is even now widespread agreement that Taiwan is not a State but part of a larger China.”<sup>22</sup> Neglecting the wide range of legally irrelevant notions that this affirmation of a “larger China” might reflect,<sup>23</sup> he

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SOVEREIGNTY, CONSTITUTION, AND THE FUTURE OF TAIWAN 1, 14–15 (Chen Chi-sen et al. eds., 2006) (discussing the pitfalls of the “Allied trusteeship” theory).

<sup>20</sup> See CRAWFORD, *supra* note 6, at 211.

<sup>21</sup> Crawford implies as much in saying that “attempts to solve the problem of Taiwan otherwise than by peaceful means must now constitute a situation ‘likely to endanger the maintenance of international peace and security’ under Article 33 of the Charter.” *Id.* at 220.

<sup>22</sup> *Id.* at 211.

<sup>23</sup> Surely, there is no logical inconsistency in, nor lack of precedent for, the idea that two political entities, each possessing all of the legal attributes of statehood, might encompass distinct parts of a larger “nation,” where political unity remains a shared

contends that “Taiwan itself has by no means rejected” this view.<sup>24</sup> Without citing any particular authority, Crawford maintains:

Claims to statehood are not to be inferred from statements or actions short of explicit declaration; and in the apparent absence of any claim to secede the status of Taiwan can only be that of a part of the State of China under separate administration.<sup>25</sup>

Apart from its dysfunctionality in encouraging Taiwanese to believe that a more definitive expression of their desire for statehood is all that stands in the way of their goal, Crawford’s application of law to fact is not persuasive on the merits.

Without any doubt, the current Taiwan Question is complicated by its origins in an earlier controversy that falls within a different conceptual frame, that of recognition of governments. From 1949 until the early 1990s, the dispute between the Beijing and Taipei governments was over standing to represent an undivided China. Until the early 1990s, the Taipei government’s claim to exercise sovereignty was, however unrealistically, predicated on its belligerent status as a contestant for control of one China. Even after all serious efforts to restore control militarily over the Mainland were abandoned in the mid-1950s, those states that continued to recognize the “Republic of China” (as did the United Nations prior to 1971) nominally regarded it as the *de jure* government of the Mainland.<sup>26</sup> So clearly untenable was this state of affairs that its persistence into the 1970s, even in purely nominal terms, seems surprising in retrospect.

Although a governmental apparatus purporting to represent the “Republic of China” has existed continuously since 1911, that apparatus is not, in itself, a bearer of sovereign rights. A government can assert sovereign rights only if the entity for which it speaks has a legal existence as a state—on one or both sides of the Strait. The Taipei Government thus can be recognized either as representing an undivided

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aspiration for the indefinite future. Crawford acknowledges the 1999 statements of then-President Lee Teng-hui to just this effect, *id.* at 216–17, but manages to sidestep their import.

<sup>24</sup> *Id.* at 211.

<sup>25</sup> *Id.*

<sup>26</sup> A state recognizing one belligerent faction as the legitimate government of the state can, in principle, accord the opposing faction only such limited accommodations consistent with “*de facto* recognition.” See *infra* Part IV.

China or as representing Taiwan alone; there is no third option. As a doctrinal matter, any assertion of sovereign rights by the “Republic of China” that disavows the exercise of those rights on behalf of the Mainland necessarily implies an assertion of Taiwan’s independence.

In the early 1990s, the Taipei Government began to campaign for the proposition that the two sides of the Strait constituted “two legal entities in the international arena,”<sup>27</sup> “each . . . entitled to represent the residents of the territory under its de facto control” separately as a United Nations member.<sup>28</sup> Only then did the question of an international status for the territory, separate from “one China,” formally arise. Subsequent pronouncements from Taipei under Presidents Lee Teng-hui and Chen Shui-bian edged ever further toward an assertion of sovereignty in the name of an independent Taiwan. Thus, according to a November 3, 2006 pronouncement of Taipei’s Mainland Affairs Council (MAC), “The Republic of China is an independent sovereign country. The status quo in the Taiwan Strait is that both sides across the Strait have no jurisdiction over each other. There is no such issue of ‘independence’ or ‘unification’ between them.”<sup>29</sup> Although in 2008, new President Ma Ying-jeou rhetorically reversed course, characterizing cross-state

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<sup>27</sup> SHIRLEY A. KAN, CHINA/TAIWAN: EVOLUTION OF THE “ONE CHINA” POLICY—KEY STATEMENTS FROM WASHINGTON, BEIJING, AND TAIPEI 52 (Dec. 13, 2007) (citing Mainland Affairs Council, Executive Yuan, Republic of China, *Explanation of Relations Across the Taiwan Strait*, July 5, 1994), available at <http://www.fas.org/sgp/crs/row/RL30341.pdf> (emphasis omitted) (last visited May 10, 2009). The 1994 statement is, to put the point charitably, a model of hair-splitting:

[R]elations between the two sides of the Taiwan Strait are not those between two separate countries, neither are they purely domestic in nature. . . . [E]ach [side] has jurisdiction over its respective territory and [the two sides] should coexist as two legal entities in the international arena. As for their relationship with each other, it is that of two separate areas of one China and is therefore ‘domestic’ or ‘Chinese’ in nature.

*Id.* (emphasis omitted).

<sup>28</sup> *Id.* at 51 (quoting from a September 17, 1993 ROC statement on “The Case for Taipei’s U.N. Representation”) (emphasis omitted).

<sup>29</sup> Mainland Affairs Council, Executive Yuan, *The Government’s Position Paper on Ma Ying-jeou’s Stance about “Taiwan’s Pledge of Not Seeking Independence in Exchange for China’s Commitment of Not Using Force against Taiwan,”* Nov. 3, 2006, <http://www.mac.gov.tw/english/english/macpolicy/951103e.htm> (last visited May 10, 2009).

relations as between “regions” and reaffirming the ROC’s constitutional position that it encompasses mainland China,<sup>30</sup> he has asserted no less commitment to “the sovereignty and dignity of the Republic of China on Taiwan.”<sup>31</sup> In the face of such pronouncements, Crawford’s claim that “Taiwan is not a State because it still has not unequivocally asserted its separation from China” rings fairly hollow.

In sum, if the statehood status is understood as a purely objective question, there is no persuasive doctrinal basis for denying that Taiwan is a state. However, contrary to the dogma that Crawford seeks (at least, nominally) to uphold, statehood status is not a purely objective question, but rather depends directly on the response of the international community to the objective circumstances.

### III. THE ROLE OF RECOGNITION: CONSTITUTIVE OR DECLARATORY?

If one puts aside the seemingly improvised contention that a statehood claim objectively requires the incantation of certain magic words, the perennial doctrinal controversy over the role of recognition in determining statehood remains. As only some two dozen “mostly very small” states currently accord official recognition to the Taipei government, and as these do so only as inasmuch as that government represents “the Republic of China,”<sup>32</sup> Crawford takes refuge in the proposition that Taiwan is not generally recognized in the international community “as a State distinct from China”<sup>33</sup> Yet reliance on this point poses difficulties for the cohesiveness of Crawford’s book, which generally insists on assigning recognition a merely “declaratory” rather than a “constitutive” role: “An entity is not a State because it is

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<sup>30</sup> Ko Shu-Ling, *Ma Refers to China as ROC Territory in Magazine Interview*, TAIPEI TIMES, Oct. 8, 2008, available at <http://www.taipetimes.com/News/taiwan/archives/2008/10/08/2003425320> (last visited May 10, 2009).

<sup>31</sup> Ying-jeou, *supra* note 5.

<sup>32</sup> Crawford concedes that “States establishing or maintaining diplomatic relations with the Republic of China since 1991 presumably did so on the basis that the Republic of China claims no control over the mainland.” CRAWFORD, *supra* note 6, at 219 n.79. He nonetheless continues to assign importance to the fact that “[t]he government in Taiwan continues to characterize itself as the ‘Republic of China’ and to stress its continuity, while increasingly practicing discontinuity.” *Id.* at 218.

<sup>33</sup> *Id.* at 219.

recognized; it is recognized because it is a State.”<sup>34</sup> Crawford nonetheless maintains that recognition can

have important legal and political effects. Recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or ‘recognize’ entities the status of which is doubtful: depending on the degree of unanimity and other factors this may be evidence of a compelling kind.<sup>35</sup>

But evidence of what? Crawford’s declaratory approach would seem to demand that statehood turn on some set of objective criteria, but since the presence or absence of such criteria can, by nature, be separately ascertained (and indeed, far more accurately so in the absence of the distortions introduced by diplomacy), it makes no sense to speak of recognition as providing “evidence”—let alone “practically conclusive” evidence—for an entity’s fulfillment of such criteria. What recognition establishes is not some empirical truth about the entity, but rather the position that states and intergovernmental organizations take toward the entity. What must be answered is the question of whether, and on what logic, recognition has independent legal significance in determining statehood status.

Part of the confusion that permeates the discourse about “declaratory” and “constitutive” theories of recognition derives from the tendency of the international law literature first to establish definitions of terms, such as “state” and “recognition,” and only then to inquire about the legal consequences attaching to those designations, rather than first to identify the practical legal question to which the designation supplies an answer. Thus, the traditional literature tends to identify “recognition” exclusively with overt and purely discretionary state gestures—such as the opening of full diplomatic relations, the issuance of certificates of recognition addressed to internal courts, or the admission of the entity to an international organization for which statehood is a requirement—and then to ask whether these public acts are “declaratory” or “constitutive.” Understandably, the largest body of traditional literature rules out the

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<sup>34</sup> *Id.* at 93.

<sup>35</sup> *Id.* at 27 (footnotes omitted).

most reductive version of the latter theory, which would allow any state to exempt itself from legal obligation to an entity merely by unilaterally repudiating that entity's status. The tendency is thus to assert the former theory.<sup>36</sup> The seeming incoherence of Crawford's position on Taiwan—recognition is merely declaratory, and yet it is the lack of recognition that dooms Taiwan's claim to statehood—is a product of the artificial constraint that the traditional pattern of the discourse places on his analysis.

If, however, one understands statehood as entailing a particular package of legal attributes—rights, powers, obligations, and immunities—that affect the obligations of other states, it follows necessarily that those other states bear the onus of adopting, whether overtly or tacitly, a legal position on whether a given entity bears such attributes. There can be no question that the positions adopted by states, whether in coordination or simply in the aggregate, principally determine whether the entity's putative rights, powers, obligations, and immunities are given effect, since it is typically those states, rather than international judicial bodies, that are in a position to accord or deny effect to these putative legal properties. The remaining question is whether the position adopted by states, collectively or aggregatively, can be said to create the entity's entitlements, or whether, by contrast, the entitlements are so fully objective that where the bulk of the international community is seen to misapply the fixed legal criteria, it would make sense to say that most of the world's states are systematically in breach of their legal obligations toward the entity. Either view is conceptually possible, but as a practical matter, the latter view is implausible.

To whatever extent the international legal system rises to the level of a coherent standard of global order, statehood is a normative and not an

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<sup>36</sup> By rejecting “constitutive” declaration, Crawford responds to the question of “whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if [the entity] was not a State—to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law.” *Id.* at 27. Here, however, Crawford is speaking of a unilateral withholding of recognition, and of recognition as a discretionary and overt act of political will; he makes no general statement on the legal effect of widespread express or implied acknowledgment, *vel non*, of an entity's legal status. Indeed, his position on Taiwan seemingly cannot be sustained without according constitutive effect to such acknowledgment. *Id.* at 219.

empirical fact. A state does not simply cease to be a state when its government is ousted by a foreign invasion, nor is it reduced in size by such part of the territory as an invading army effectively controls; it is not erased from the map when its governing structure implodes and gives way to chaos, nor does it split into two or three states along the boundaries of even relatively stable insurgent zones of control. Events such as these do not have direct effect on legal status in the international community. Rather, it is the acquiescence or resistance of the international community—whether or not guided by normative considerations such as the integrity of the peace and security scheme—that determines whether these events are permitted to affect a state's legal status.

The constitutive nature of widespread express or implied affirmation<sup>37</sup> of an entity's legal status manifests itself in the countless instances in which the international community, often with a surprising degree of coordination, has selected the factual developments that it has been willing to accord or deny legal confirmation. The international community has not only denied recognition to the results of unlawful acts such as interstate aggression<sup>38</sup> and colonial settler secession,<sup>39</sup> but has continued to recognize unitary states where control has been heavily contested. Once a unit of the international system has been defined and accorded legal personality, that unitary personality endures notwithstanding internal divisions and crises. Occasionally, the United

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<sup>37</sup> To avoid confusion, one might prefer to call this "acknowledgment," of which what has traditionally been termed "recognition" is generally a sufficient, but not a necessary, condition. In a previous work, this author has attempted to characterize as "legal recognition" the overt or tacit acknowledgment of a putative state or government as a bearer of the legal attributes in question. See BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 124-32 (1999) (some of which discussion has been adapted for inclusion herein). This effort at persuasive redefinition of the term "recognition" has, however, proved prone to serious misunderstanding.

<sup>38</sup> See Friendly Relations Declaration, *supra* note 15, at 123 (proclaiming that states may not recognize "a territorial acquisition resulting from the threat or use of force").

<sup>39</sup> See S.C. Res. 216 (Nov. 12, 1965) (condemning unilateral declaration of independence in Southern Rhodesia); S.C. Res. 217 (Nov. 20, 1965) (denying recognition to Southern Rhodesia and calling upon the United Kingdom to "quell this rebellion of the racist minority"); see also G.A. Res. 31/6 A, U.N. Doc. A/RES/31/6 A (Oct. 26, 1976) (denying recognition to Transkei, in part because it was established to perpetuate apartheid).

Nations has directly intervened to sustain or restore effective governance and territorial integrity in an unraveling state, such as in Congo-Leopoldville in 1960 and Somalia in 1993. More often, the international community has simply continued to recognize as unitary states countries where insurgents have held significant zones of control (e.g., Angola in 1975-95, Cambodia in 1970-75), where secessionists have exercised control in most of the claimed territory (e.g., Biafra within Nigeria in 1967-70 and Eritrea within Ethiopia from the late 1970s to early 1990s), and where the effectiveness of the central government has simply dissipated (e.g., Lebanon from 1975 to the early 1990s).

Such continued recognition is not exceptional, but in accordance with general principles of international law that regard “premature” changes in recognition status as unlawful intervention in “internal” affairs.<sup>40</sup> That formulation itself presupposes that the boundaries of the “internal” are independent of the boundaries of effective control, until and unless the latter somehow “mature.” Historically, assessments of such “maturation” have been transparently independent of any “objective” application of fixed criteria.<sup>41</sup>

A state is essentially a territorial political community that existing states collectively decide *ought* to be self-governing, whether based on existing, remembered, or foreseen patterns of governance within it. Where effective independent governance within the specified territory is presently lacking, agreement on this “ought” is most likely to be found

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<sup>40</sup> See, e.g., LORI F. DAMROSCH, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 264 (4th ed. 2001) (quoting HYDE, *INTERNATIONAL LAW* 152–53 (2d rev. ed. 1945) on premature recognition of secession).

<sup>41</sup> Some entities within stable boundaries, such as the Turkish Republic of Northern Cyprus and Georgia’s breakaway republics of Abkhazia and South Ossetia, are denied recognition as fruits of unlawful foreign intervention. Others, such as Eritrea in an earlier period or Somaliland (the northwestern region of Somalia today), remain unrecognized as a result of an evident reluctance to disturb the legal *status quo*. See, e.g., Paul Reynolds, *Somaliland’s ‘Path to Recognition,’* BBC NEWS, Apr. 25, 2008, <http://news.bbc.co.uk/1/hi/world/africa/7365002.stm> (last visited May 10, 2009) (discussing Somaliland’s struggle to be recognized by other states). Meanwhile, a substantial number of states have recognized Kosovo, notwithstanding that the Security Council’s preclusion of Serbian control over the territory was supposed to have been without prejudice to Serbia’s territorial integrity and political unity. See S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (“[r]eaffirming [a] commitment . . . to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region”).

where that political community (within those boundaries) has been self-governing in the recent past, both because the peace and security system's *status quo* orientation naturally leads it to champion the immediate *status quo ante* and because no alternative principles are likely to find consensus. Yet where agreement can be founded on another basis, such as the widely perceived illegitimacy of overseas colonialism and undesirability of fragmentation, the result is not different in kind.<sup>42</sup>

It must be added that the "ought" is as prudential as it is principled. The international community will hold out for restoration only of what is reasonably susceptible of being restored, and only when adherence to principle does not entail a cost that states collectively are unwilling to bear. A constitutive approach to recognition is the only approach that reflects the international system's indispensable pragmatism.

According to the most celebrated publicist of recognition practice, Sir Hersch Lauterpacht (writing in 1947), the view of recognition:

approximating most closely to the practice of States and to a working juridical principle is: (a) that recognition consists in the application of a rule of international law by way of ascertaining the existence of the requisite conditions of statehood; and (b) that the fulfillment of that function in the affirmative sense—and nothing else—brings into being the plenitude of the normal rights and duties which international law attaches to statehood.<sup>43</sup>

Thus, members of the international community (either separately or in coordination) have a duty to recognize as states those entities that qualify for the status under applicable legal criteria, but it is only their implementation of this duty that brings statehood into being. Lauterpacht expressed the point as follows:

[T]he full international personality of rising communities . . . cannot be automatic . . . [A]s its ascertainment requires the prior determination of

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<sup>42</sup> On this basis, Congo-Leopoldville (1960) and Angola (1975) were originally recognized notwithstanding that no single independent government held or had ever held effective control of the full territorial unit. See, e.g., CRAWFORD, *supra* note 6, at 56–58, 181. Colonial sovereignty had been relinquished (in keeping with, if not necessarily as a result of, prevailing international norms) and fragmentation was undesirable (and, as far as Angola's warring factions were concerned, undesired).

<sup>43</sup> LAUTERPACHT, *supra* note 17, at 73.

difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.<sup>44</sup>

Crawford rejects this reasoning on the grounds that in international law, generally, neither individual nor collective determinations of states have definitive legal effect.<sup>45</sup> But the notorious puzzle of the role of *opinio juris* in customary law formation is precisely that a legal duty is constituted, in part, by the widespread state perception of the existence of the duty. The anomaly seems no worse in the application of norms than in their formation.

Once again, the recognition that performs the constitutive function is not the express declaration—whether it be the opening of full diplomatic relations, the issuance of certificates of recognition addressed to domestic courts, or the conferral of membership in an intergovernmental organization—but the tacit recognition that can be inferred from the nature of states' interaction with the entity and from the states' express or implied acknowledgment of legal duties that would follow only if the entity were understood to have the status.<sup>46</sup> Formal expressions of recognition may well be a sufficient, but are not a necessary, condition of a finding that the rights and obligations of statehood have been acknowledged. Where states fail to articulate grounds for their actions, or where their declarations show evidence of expressing political considerations rather than legal judgments, identifying the legal acknowledgment entails nothing more or less than the task international lawyers commonly face in identifying *opinio juris* (as distinct from mere political pronouncement).

To conclude, then: Strict adherence to the declaratory theory of recognition—that is to say, the objective theory of statehood that Crawford purports to embrace in the abstract—would lead unequivocally

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<sup>44</sup> *Id.* at 55, quoted in CRAWFORD, *supra* note 6, at 20.

<sup>45</sup> CRAWFORD, *supra* note 6, at 20.

<sup>46</sup> The behavior of the United States towards the legal capacities of the government of the Soviet Union prior to recognition in 1933 illustrates this phenomenon.

to the conferral on Taiwan of statehood status. It turns out, however, that the declaratory theory is not a persuasive account of international practice, and Crawford seems to concede as much by his implicit recourse to constitutivism in his analysis of the Taiwan Question. The determinative question, then, is whether states generally have expressly or impliedly adopted the position that Taiwan possesses the rights, powers, obligations, and immunities of which statehood is a necessary condition.

#### IV. TACIT ACKNOWLEDGMENTS OF TAIWAN'S LEGAL STATUS

Beyond the small group of (twenty-three, mostly small) states that officially recognize Taipei, a great many states carry on interactions that fall well short of full diplomatic relations. It is true that in formal terms, the ROC on Taiwan has been subjected to the “most drastic form of diplomatic isolation, namely non-recognition of its very statehood by most members of the international community.”<sup>47</sup> On the other hand, Taipei maintains what have been referred to as “substantive” relations with scores of states on a semi-official or unofficial basis. Official diplomatic relations have in many cases simply been replaced with, in the words of one commentator, “a veritable network of alternative missions or ersatz embassies, usually on a reciprocal basis.”<sup>48</sup> States such as the United States, the United Kingdom, Japan, Australia, Austria, Belgium, France, and Greece maintain offices in Taipei, typically staffed by officials nominally “on leave” from their governments’ foreign ministries.<sup>49</sup> These offices, and their ROC counterparts, are accorded

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<sup>47</sup> DEON GELDENHUYS, *ISOLATED STATES: A COMPARATIVE ANALYSIS* 126 (1990) (emphasis omitted). Indeed, former U.S. Secretary of State Henry A. Kissinger has recently reiterated the point in remarkably unnuanced terms: “Almost all countries—and all major ones—have recognized China’s claim that Taiwan is part of China. So have seven American presidents of both parties—none more emphatically than George W. Bush.” Henry A. Kissinger, *China: Containment Won’t Work*, WASH. POST, June 13, 2005, at A19. The same passage nonetheless asserts, with little acknowledgment of the paradox, “[China] understand[s] that the United States requires the solution to be peaceful and is prepared to vindicate that principle.” *Id.*

<sup>48</sup> GELDENHUYS, *supra* note 47, at 148 (noting that by 1987, 22 countries had established unofficial offices in Taipei, and that the ROC has established 76 offices in 40 other countries).

<sup>49</sup> See Cheri L. Attix, Comment, *Between the Devil and the Deep Blue Sea: Are*

privileges and immunities characteristic of those accorded to official diplomatic missions.<sup>50</sup>

In principle, a renegade province could be the object of *de facto* recognition. Insurgent forces, whether fighting in the name of secession or with the goal of ultimately replacing the central government, frequently gain control of substantial territory within a state. Under such circumstances, foreign states find it, as Lauterpacht put it, “expedient to enter into contact with the insurgent authorities with a view to protecting national interests in the territory occupied by them, to regularizing political and commercial intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities.”<sup>51</sup> Indeed, the need for such relations would seem to follow from the proposition that the loss of control over the territory relieves the central government from legal responsibility for acts carried on in insurgent-held territory by or at the direction of the insurgents.<sup>52</sup>

Nonetheless, in carrying on relations with a renegade province without the permission of the central government, on the basis of *de facto* recognition, foreign states are obligated to take care not to act in ways that contradict the central government’s claim of sovereignty over the territory in question.<sup>53</sup> Where foreign states carry on relations with

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*Taiwan’s Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT’L L.J. 357, 364 (1995) (describing how various countries set up unofficial consulates general “staffed by government officials on leave from their usual agencies”).

<sup>50</sup> GELDENHUYS, *supra* note 47, at 148.

<sup>51</sup> LAUTERPACHT, *supra* note 17, at 270. Indeed, even the conclusion of bilateral treaties, once taken to be a tacit recognition of statehood, has come to be regarded as consistent with mere *de facto* recognition. See Linjun Wu, *Limitations and Prospects of Taiwan’s Informal Diplomacy*, in THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS 35, 38 (Jean-Marie Henckaerts ed., 1996) (citing Article 8 of the Draft Code on the Law of Treaties).

<sup>52</sup> See Joseph H. Beale, Jr., *The Recognition of Cuban Insurgency*, 9 HARV. L. REV. 406, 407 & n.3 (1895-96), cited in P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 114 & n.23 (1994) (discussing the utility of recognizing “belligerency” in international law). See also HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 25 (1988) (quoting THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES 999 (Herbert W. Briggs ed., 2d ed. 1953), to say that the state should be responsible only for such “acts of insurgents which by due diligence it might have prevented.”).

<sup>53</sup> An early codification of this principle can be seen in the Inter-American Convention on Duties and Rights of States in the Event of Civil Strife, art. 1(3), Feb. 20,

the province that cannot be reconciled with the central government's retention of sovereign authority, they are either (a) engaged in an unlawful intervention in the internal affairs of the unitary state or (b) tacitly manifesting the view that the central government's claim of sovereign authority is no longer valid.

The Taiwan Relations Act,<sup>54</sup> the legislative basis for U.S. interaction with Taipei since the 1979 official recognition of the PRC, is a model of authorization for dealings with Taiwan that are substantively irreconcilable with the PRC's sovereignty claim.<sup>55</sup> Section 2(b) of the Act specifies the following policies:

- (3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
- (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts and embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;
- (5) to provide Taiwan with arms of a defensive character; and
- (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.<sup>56</sup>

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1928, 134 L.N.T.S. 45 (declaring that states are bound “[t]o forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied”). See also Friendly Relations Declaration, *supra* note 15 (renouncing generally “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States,”; moreover, “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State,” and “No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State”).

<sup>54</sup> Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified at 22 U.S.C. §§ 3301–3316 (2006)).

<sup>55</sup> Tellingly, section 4(b)(1) of the Act provides that “[w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.” *Id.*

<sup>56</sup> *Id.* The PRC Anti-Secession Law of 2005 thus directly provokes a crisis by using the words “non-peaceful means,” as if to deliberately challenge the Taiwan Relation Act’s

The Act further promises to “make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”<sup>57</sup> The U.S. government has consistently and massively implemented this promise, notwithstanding PRC protests, and it has not been alone in providing Taiwan with military assistance inconsistent with acknowledgment of PRC sovereignty over the island.<sup>58</sup> The international community has evinced little support for PRC protests of the military assistance that foreign states have provided to Taiwan. Indeed, Japan’s response to the PRC’s 2005 Anti-Secession Law, affirming its commitment to Taiwan’s security,<sup>59</sup> reflects a contrary *opinio juris* that has not been widely contradicted.<sup>60</sup>

Other aspects of foreign states’ relations with Taiwan seem to reflect a similar *opinio juris*. For example, notwithstanding that the Convention on International Civil Aviation ascribes to every state “complete and exclusive sovereignty over that airspace above its territory,”<sup>61</sup> direct airline flights to Taipei run from such diverse countries as Japan, Australia, New Zealand, the Netherlands, Russia, Vietnam, the Philippines, Lebanon, Indonesia, Thailand, and the United Arab Emirates, on the basis of either government-to-government or indirect agreements, without PRC approval and at times over PRC objection.<sup>62</sup> This activity

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implicit assessment of the international legal relationship between China and Taiwan. *Text of China’s Anti-Secession Law*, BBC NEWS, Mar. 14, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4347555.stm> (last visited May 10, 2009).

<sup>57</sup> Taiwan Relations Act, *supra* note 54, at § 3(a).

<sup>58</sup> Although France and Germany officially curtailed their arms industries’ substantial dealings with Taiwan in the face of PRC protests, German shipyards continued to supply Taiwan’s navy with submarines through indirect channels. Attix, *supra* note 49, at 383–85 & n. 228.

<sup>59</sup> See Anthony Faiola, *Japan to Join U.S. Policy on Taiwan: Growth of China Seen Behind Shift*, WASH. POST FOREIGN SERV., Feb. 18, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A33297-2005Feb17.html> (last visited May 10, 2009).

<sup>60</sup> Similarly, international reactions to the 1996 Taiwan elections in the face of PRC saber-rattling gave at least the indirect impression “that the majority of non-participant states . . . on the balance viewed China as the wrongful *agent provocateur*.” NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 244 (2007).

<sup>61</sup> Convention on International Civil Aviation art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 259.

<sup>62</sup> Attix, *supra* note 49, at 382 & nn. 209–14.

would appear by implication to acknowledge complete and exclusive sovereignty for Taiwan over its own airspace, even though such sovereignty is an attribute of statehood and is incompatible with the PRC's contradictory assertions.<sup>63</sup>

Still, most interactions of states and intergovernmental entities with Taiwan manage to avoid, by careful choreography, such clashes with PRC sovereignty claims. Thus, Taiwan is party to the World Trade Organization as a "Separate Customs Territory," to the Convention for the Conservation of Southern Bluefish Tuna as a "Fishing Entity," and so on.<sup>64</sup> It retains membership alongside in the Asian Development Bank, an organization for which statehood remains a nominal membership requirement, but as "Taipei, China."<sup>65</sup> The theme of these interactions is studied ambiguity, and the result is that no definitive conclusion can responsibly be drawn about the collective *opinio juris*, beyond an affirmation that Taiwan is not subject to the sovereign prerogatives of the PRC.

#### V. SELF-DETERMINATION OF PEOPLES AS A RELEVANT BACKGROUND PRINCIPLE

The U.N. Charter embodies an international law of peace and security based on the principle of sovereign equality. This equality under the Charter extends expressly to the "Members" of the Organization,<sup>66</sup> membership being "open to all . . . peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."<sup>67</sup> Yet the Preamble ascribes authorship of the Charter to "We the Peoples of the

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<sup>63</sup> A similar inference might be drawn from the U.S. Government's position that Taiwan is not bound by the PRC's adherence to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air. See *Mingtai Fire & Marine Ins. Co. v. UPS*, 177 F.3d 1142, 1144 (9th Cir. 1999) ("the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] that the propriety of the exercise of that power is not open to judicial review") (citing *United States v. Pink*, 315 U.S. 203, 222–23 (1942)).

<sup>64</sup> CRAWFORD, *supra* note 6, at 203–04, 219–20.

<sup>65</sup> *Id.* at 203–04.

<sup>66</sup> U.N. Charter art. 2, para. 1.

<sup>67</sup> *Id.* art. 4, para. 1.

United Nations”]; far from a mere compact among ruling apparatuses, the Charter purports to codify the relationship among states *qua* political communities, “based on respect for the principle of equal rights and self-determination of peoples.”<sup>68</sup>

The process of decolonization occasioned a more concrete expression of the relationship between self-determination and sovereignty. In 1960, without a dissenting vote, the U.N. General Assembly effectively elevated what had for some time been recognized as a “principle” of international law to the level of a “right”: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>69</sup> By adopting this position, the international community set about a sweeping de-legitimization of colonial and quasi-colonial arrangements, thereby marking a fundamental shift in sovereignty norms. Yet although the consequences of that shift for Western European “salt water colonialism” were concrete, with debate remaining only at the margins, the broader consequences were and remain unclear.

The statement of the rule itself is doubly indeterminate. First, it contains a disguised tautology: Since the definition of “peoples” is not fixed independently of the entitlement to self-determination, it remains open for argument that a group is certifiable as a “people” only once it is ascertained to possess the entitlement.<sup>70</sup> Whatever considerations of religion, race, ethnicity, culture, kinship, territorial separateness, or prior conquest may bear on the question, a “people” in the final analysis is a political community, recognition of which is conferred only in restricted

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<sup>68</sup> *Id.* art. 1, para. 2.

<sup>69</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), para. 2, U.N. Doc. A/4684 (Dec. 14, 1960) [hereinafter Granting of Independence]. The Security Council reaffirmed the statement in S.C. Res. 183, para. 4 (Dec. 11, 1963). The same language is repeated in other declarations and instruments, and constitutes Article 1(1) of both the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] and the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>70</sup> See, e.g., Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT'L L. 423, 432-35 (2004) (discussing schools of thought of the “self-determination” principle).

circumstances, lest the Pandora's Box of secessionism be opened.

An accompanying resolution, framed rather innocuously as an interpretation of an obscure obligation under the Article 73(e) of the Charter to "transmit information" on "economic, social, and educational conditions" in "Non-Self-Governing Territories," in effect specified the territories upon the populations of which the previous resolution had conferred an immediate right to "freely determine their political status" by opting for sovereign independence.<sup>71</sup> This category includes any "territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it" and which is subject to "administrative, political, juridical, economic or historical" factors that "arbitrarily place[ it] in a position or status of subordination."<sup>72</sup> The "territory and its peoples" realize self-determination in one of three ways: "(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State."<sup>73</sup> The first option is framed not only as an absolute right, but as the presumptive outcome, whereas the latter two choices are laden with requisites calculated to assure that they result from a genuine exercise of popular will.<sup>74</sup>

In purporting to interpret Article 73(e), Resolution 1541 noted that the Charter authors "had in mind" its application to "territories which were then known to be of the colonial type."<sup>75</sup> The resolution was clearly intended to have no broader application, but its articulation of principle may not be so easily cabined. Although the colonial context is acknowledged as having called for special means of implementation, the self-determination right itself is widely interpreted to be of general application, albeit of contingent and controverted effect in non-colonial contexts.<sup>76</sup>

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<sup>71</sup> See Granting of Independence, *supra* note 69, para. 5 ("Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations . . . to enable them to enjoy complete independence and freedom.")

<sup>72</sup> G.A. Res. 1541 (XV), princ. IV, V, U.N. Doc. A/4684 (Dec. 15, 1960).

<sup>73</sup> *Id.*, princ. II, VI.

<sup>74</sup> *Id.*, princ. VII, VIII, IX.

<sup>75</sup> *Id.*, princ. I.

<sup>76</sup> See James Crawford, *The Right of Self-Determination in International Law: Its*

The 1970 Friendly Relations Declaration “squares the circle” in an instructive way. It follows its elaboration of the right to self-determination with the following “safeguard clause”:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*<sup>77</sup>

Subsequent iterations have broadened the last clause of the qualifier to speak of “a [g]overnment representing the whole people . . . without distinction of any kind.”<sup>78</sup>

This subtle and nuanced provision is best read in context of the year it was written, 1970, when only a minority of states espoused liberal-democratic political principles. In that context, the provision reflects the animating principles of a global legal order marked by pronounced ideological pluralism and extraordinary deference to states’ choices of “political, economic, social, and cultural systems” (including, on the basis of sovereign equality, one-party regimes that tolerate no organized opposition). The above italicized qualification to the imperatives of territorial integrity and political unity seems to have been designed to function, not as an ongoing operative exception to the sovereign prerogative of existing states, but as a moral rationalization for singling out “colonial domination, foreign occupation and racist (i.e., apartheid) regimes” as special cases of derogation from the otherwise-fiercely-

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*Development and Future in PEOPLES’ RIGHTS* 7, 28 (Philip Alston ed., 2001) (noting that the Netherlands, France, and the Federal Republic of Germany objected when India, citing “the essence of national integrity,” attached to its ICCPR ratification a declaration interpreting the right of self-determination to “apply only to the peoples under foreign domination and [not] to sovereign independent States or to a section of a people or nation”).

<sup>77</sup> Friendly Relations Declaration, *supra* note 15 (emphasis added).

<sup>78</sup> See G.A. Res. 50/6, at 13, U.N. Doc. A/RES/50/6 (Oct. 24, 1995) (recognizing the 50th anniversary of the United Nations); United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661, 1665 (1993).

reaffirmed non-intervention norm.

In this reading, each existing state is the presumed manifestation of the self-determination of “the whole people belonging to the territory.” This presumption allows the Declaration to justify attributing to the state the people’s “inalienable right to choose its political, economic, social and cultural systems, without interference in any form,” a choice that the state’s effective government (even where objectively tyrannical) is further presumed to embody.<sup>79</sup> Thus, the qualification, which appears to open a door, is best understood as an ingenious effort to keep that very door closed, while at the same time rendering a moral rationale for the disparate treatment of Western European colonialism and its vestiges.

Still, having articulated the principle, the fraternity of sovereign states cannot blunt its edge entirely.<sup>80</sup> Where a government manifestly fails to “represent the whole people belonging to the territory without distinction,” such as by ethnic cleansing, the imperatives of “territorial integrity” and “political unity” lose their rationale. Arguably, being subjected to gross and systematic discrimination reveals a minority group (whether marked by ethnic or other characteristics) to be a “people” with its own right to self-determination, though no minority (as distinct from “indigenous”) group in the non-colonial context has ever been authoritatively declared to be a “people.”<sup>81</sup> More likely, patterns of

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<sup>79</sup> Friendly Relations Declaration, *supra* note 15.

<sup>80</sup> The combination of the affirmed applicability of the self-determination right outside the colonial context and the overwhelming international resistance to a right of secession has prompted some international jurists to speak of a “right to internal self-determination.” This language is, however, misleading insofar as it suggests an international legal mandate for any of the consociational devices that certain domestic systems have employed to empower sub-national groups—such as territorial autonomy, representational quotas in governmental and other institutions, and super-majority legislative voting rules for group-sensitive subject matter. Except for “indigenous and tribal peoples” (additional victims of the Western European colonialism that represent the “original sin” for which the international system seeks to atone), sub-national groups, whether or not territorially coherent, have no established standing in international law. Individuals, however, may have special rights in consideration of their group membership. See ICCPR, *supra* note 69, art. 27 (stating that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”).

<sup>81</sup> *Cf.* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) (deciding that the self-determination right, though applicable in the non-colonial context, did not justify

extreme discrimination are now seen as justifying the international community—especially collectively, through Security Council action under Chapter VII of the Charter—in derogating from the system’s ordinary respect for territorial integrity and political unity, as in the case of the international trusteeship that supplanted Serbian rule over Kosovo.<sup>82</sup>

Although Taiwan plainly does not fit the favored model of the Non-Self-Governing Territory stemming from Western European colonialism, it also does not fit the disfavored model of a rebellious territory seeking to disrupt an existing political unity. To acknowledge Taiwan as a distinct political community with a right of self-determination is not to “dismember or impair, totally or in part, the territorial integrity or political unity of [a] sovereign and independent State[] . . . possessed of a government,” for it is Taiwan’s self-government that represents the *status quo*.<sup>83</sup>

Not only has the PRC never governed Taiwan, but Taiwan has been governed as part of “one China” for a mere four of the past one hundred fourteen years.<sup>84</sup> Taiwan is “geographically separate” from China, not

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unilateral secession). In arriving at this decision, the court managed to sidestep the elemental question of whether the “people” entitled to self-determination was comprised of (a) the entire Quebec population, (b) the Quebec territorial population, minus the First Nations, (c) Francophone Quebecois, or (d) all Francophone Canadians. *Id.* para. 125. It stressed merely that none of these groups was blocked from the meaningful exercise of self-determination, since Canada “possessed of a government representing the whole people belonging to the territory without distinction.” *Id.* para. 136. *But see* Crawford, *supra* note 76, at 59–60 (construing the court’s position as consistent with “both the view that self-determination applies to peoples in the ordinary sense of the term, and is not confined to the whole population of existing states, and the view that several peoples may co-exist in relation to a particular territory”).

<sup>82</sup> See S.C. Res. 1244, U.N. Doc. S/Res/1244 (June 10, 1999) (paying lip service to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia while setting up an international administration to hold those norms in abeyance, at least temporarily); see also S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998) (invoking Chapter VII powers in addressing the Kosovo situation prior to the NATO intervention). Even if the international community and the International Court of Justice uphold Kosovo’s 2008 declaration of independence, acceptance of Kosovo’s statehood is unlikely to be overtly predicated on the right of Kosovar Albanians to self-determination. See G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008) (requesting an advisory opinion on the legality of Kosovo’s declaration).

<sup>83</sup> Friendly Relations Declaration, *supra* note 15.

<sup>84</sup> Ironically, during the lone four-year period of rule from the Mainland from 1945

merely in the superficial sense of being separated from it by the waters of the Strait, but in the more profound sense of the Strait having constituted a significant barrier to interaction with the Mainland for roughly a century. Although Taiwan had developed as part of the Chinese Empire for over two hundred years (the bulk of its current population being traceable to settlement during that period), the patterns of its development changed substantially in the course of both its accommodation of and its resistance to Japanese colonialism. It then continued to develop independently from the Communist Mainland, first under the state-capitalist-oriented Kuomintang (KMT) dictatorship and then in the process of reform and peaceful struggle leading to the establishment of a liberal-democratic polity and society.

“Reunification” would be an attempt to reinstate a nineteenth-century phenomenon in the twenty-first century, under political, economic, social, and cultural conditions that bear no resemblance, on either side of the Strait, to those of the Qing Dynasty. The political, economic, social, and cultural life of Taiwan is so manifestly distinct from that of the Mainland that any effort by the PRC to affect Taiwan’s status by “non-peaceful means” amounts, not to the maintenance of any existing political unity, but to an “alien subjugation” within the meaning of the Friendly Relations Declaration.

Moreover, strict neutrality between democratic and non-democratic forms of government, once deemed a corollary of the sovereign equality of states, has given way, whether or not to the “emerging right to democratic governance” cited by many scholars, at least to the intensive international promotion of “free and fair elections.”<sup>85</sup> Elections and civil

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to 1949, the international community regarded Taiwan as part of Allied-occupied Japan, with its sovereign status yet to be determined. See Y. Frank Chiang, *One-China Policy and Taiwan*, 28 *FORDHAM INT’L L.J.* 1, 20–38 (2004) (reflecting on the views of “leading allies” with respect to post-surrender occupation and the Peace Treaty of San Francisco). Although Japan renounced its sovereignty over Taiwan in 1951, the territory’s status was never officially resolved, leading some to argue that post-war Taiwan never actually became part of “China.” See *id.* However, over the next four decades, both ROC and PRC governments claimed the territory part of China, and no voice in the international community challenged the assumption that Taiwan was within the sovereign entity that the two contestant regimes sought to represent.

<sup>85</sup> See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT’L L.* 46 (1992) (demonstrating how the radical vision of democracy, while not yet fully law, is rapidly becoming a normative rule of the international system); Gregory H.

wars are no longer considered legally equivalent modes of exercising self-determination.<sup>86</sup> Whereas traditional doctrine favored withholding judgment about political transformations within crisis-ridden states until after internal warfare sorted out the winners and the losers, the current trend is to prejudge outcomes in the hope of preempting violence. Such was the case when the European Community's arbitral commission on the former Yugoslavia, faced with referenda and/or legislative acts reflecting clear majority support for independence in Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia (four of Yugoslavia's six republics), contrived—albeit perhaps quite improvidently—to reach a conclusion protective of the democratic will of the populations of well-established, albeit internal, territorial units.<sup>87</sup>

Taiwan is now widely acknowledged as a democracy; the PRC clearly is not. While a coercive unification of the two sides of the Strait under a fully democratized PRC might plausibly find acceptance as a realization of the self-determination of a unitary Chinese people, a coercive incorporation of a democratic Taiwan into an authoritarian China would not be an equivalent development. One would thus expect juridical creativity to be summoned forth to deny such a development a legal imprimatur. This would be true *a fortiori* if mere words on the part

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Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992) (discussing how domestic developments occurring in the broader context have affected traditional concepts of state sovereignty in international law). See generally Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 REV. INT'L STUDIES 327 (2001) (elaborating contrasting positions on whether and to what extent a "democratic entitlement" is emerging in international law); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000) (presenting a range of views on questions relating to a right to democratic governance). For a skeptical, but not dismissive, view, see ROTH, *supra* note 37.

<sup>86</sup> Note, for example, the continued recognition of elected Haitian and Sierra Leonean governments ousted in 1991 and 1997, respectively, and later restored by U.N.-approved foreign military operations. See *id.* at 366–87, 405–12.

<sup>87</sup> Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992) ("Badinter Commission" opinions). For further discussion and critique of the Badinter Commission opinions, see Roth, *supra* note 19, at 51–58; see generally Waters, *supra* note 70, at 438–44 (contemplating the dissolution of Yugoslavia); PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW (2002) (analyzing the breakup of Yugoslavia from an international law perspective, in particular the development and application of the principles developed by the EC's Arbitration Commission).

of Taiwan were met with actual armed force by the PRC.

Thus, even though states and intergovernmental organizations are unlikely to apply the self-determination doctrine overtly and directly to the question of Taiwan's status, the underlying principle is part of the juridical consciousness that affects the perception of the relevant legal obligations. This phenomenon does not guarantee Taiwan a right to statehood, but it does help to substantiate Crawford's point that "the suppression by force of 23 million people cannot be consistent with the Charter."<sup>88</sup>

## VI. TAIWAN AND STATEHOOD: A PROVISIONAL CONCLUSION

Taiwan's legal status is best understood to be indeterminate and fluid. Although an authoritative treatment of this topic would require a comprehensive review of the details of Taiwan's external relations and of PRC and international reactions to each aspect, it suffices for present purposes to note that there is much concrete behavior of the community of states toward Taiwan that confutes the official rhetoric of non-recognition of Taiwan's independence.<sup>89</sup> The case for attributing to Taiwan the full range of rights, powers, obligations, and immunities attendant to statehood improves the more that Taipei can establish external relationships beyond the permissible confines of mere *de facto* recognition and inconsistent with the PRC assertions of sovereign prerogative over Taiwan's external affairs.

For precisely this reason, however, each such effort will prove to be a political irritant, straining cross-Strait relations and embarrassing Taiwan's most important ally, the United States. Although the United States has behaved in a manner manifestly inconsistent with the PRC's legal position, it has made every diplomatic effort to obfuscate this

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<sup>88</sup> CRAWFORD, *supra* note 6, at 221.

<sup>89</sup> That denial of an entity's political status as a separate nation can co-exist with acknowledgment of its possessing legal prerogatives unique to statehood is illustrated in the 1972–1990 relationship of the Federal Republic of Germany to the German Democratic Republic. See Markus G. Puder, *The Grass Will Not Be Trampled Because the Tigers Need Not Fight—New Thoughts and Old Paradigms for Détente Across the Taiwan Strait*, 34 VANDERBILT J. TRANSNAT'L L. 481, 522–25 (2001) (suggesting that the PRC and Taiwan use treaty frameworks to increase exchanges and bridge their differences).

contradiction. As President Clinton's 1998 "Three Noes" statement ("we don't support independence for Taiwan, or two Chinas, or one Taiwan-one China") made clear, the United States refuses to support Taiwan's membership "in any organization for which statehood is a requirement,"<sup>90</sup> so as to avoid bringing the question to a head. Steps designed to improve the legal argument may thus have prohibitive political costs, given that the legal argument's practical significance lies primarily in its contribution to the garnering of political support.<sup>91</sup>

It is also worth noting that recognition can be a Pyrrhic victory. Although the international order conferred recognition on Bosnia and affirmed the legal inviolability of its boundaries, the international community mostly stood by while those same boundaries were grossly violated, and forces heavily supplied from across the Serbian border subjected the Bosnian civilian population to sustained and grotesque violence. Indeed, in imposing an arms embargo on the whole of the former Yugoslavia that failed to distinguish aggressor from victim, the Security Council inflicted a disparate disadvantage on the defenders of the supposedly sacrosanct Bosnian state, in derogation of that state's "inherent" right under Article 51 of the U.N. Charter to receive aid from its allies for its self-defense.<sup>92</sup>

Insofar as the legal opinions issued at the onset of the Yugoslav conflict by the European Community's arbitral commission (the Badinter Commission), or any international diplomacy set in motion by those opinions, emboldened the Bosnian Government to make a unilateral declaration of independence over the opposition of a militant Bosnian Serb minority backed by the military power of the army of the dissolving Yugoslavia, it prompted a fatal miscalculation.<sup>93</sup> A declaration of legal

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<sup>90</sup> William J. Clinton, Remarks in a Roundtable Discussion on Shaping China for the 21st Century in Shanghai, China (June 30, 1998), in 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1267, 1272 (1998).

<sup>91</sup> Note, for example, the statement by Singaporean Prime Minister Lee Hsien-loong that, "If Taiwan goes for independence, Singapore will not recognize it. In fact, no Asian country will recognize it. China will fight. Win or lose, Taiwan will be devastated." John Burton, *Singapore Warns Taipei On Independence*, FIN. TIMES, Aug. 22, 2004, at 7.

<sup>92</sup> See, e.g., Paul C. Szasz, *Peacekeeping in Operation: A Conflict Study of Bosnia*, 28 CORNELL INT'L L.J. 685, 697 (1995) (citing three arguments against the application of the embargo to Bosnia and Herzegovina).

<sup>93</sup> *Id.* at 693 ("to the extent that these opinions encouraged the Bosnian Government to seek early independence, that step provoked the disaster").

strictures, however authoritative, is unlikely to forestall uses of force by those who perceive their vital interests to be at stake. Absent resolve on the part of powerful actors to risk blood and treasure to uphold the entitlements of others, reliance on legal rights, however accurately ascertained, may merely engender a false sense of security.

At any rate, bold moves, such as constitutional reforms that overtly assert Taiwan independence, are not likely to affect the determinants of Taiwan's legal status, and are still less likely to be beneficial to Taiwan's position in practical terms. Ma Ying-jeou's Presidency may be seen as both resulting from, and embodying, this realization. Taiwan's hopes for full enjoyment of the rights, powers, obligations, and immunities of statehood, with or without the word "independence," lie along the path of continued indirect and incremental progress. It is by measured steps that the Taipei Government can build on an international legal consciousness of Taiwan's non-subjection to PRC claims of sovereign prerogative, and of the Taiwanese population's right to be free of the threat or use of force by a power that is palpably external.