NOTES

THE “REPUBLIC OF TAIWAN”:
A LEGAL-HISTORICAL JUSTIFICATION
FOR A TAIWANESE DECLARATION
OF INDEPENDENCE

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Taiwan exists in the international arena as a fully independent state in form, but it has never declared itself independent. Taiwan’s reticence to take this step is caused by the People’s Republic of China’s claim that Taiwan is a “renegade province” of China. In this Note, Christopher Carolan argues that an international law-based solution should be applied to determine whether Taiwan has a legitimate aspiration to declare independence. This approach takes into account the history of Taiwan-China relations, which shows that—except for brief periods—Taiwan has long had a separate political existence apart from China. Carolan contrasts the claim that Taiwan properly belongs to China because of shared ethnic and cultural ties with post-World War II events that have created in the Taiwanese a strong, predominant preference for continued separation from China. He argues that international law is an effective means to settle international disputes objectively, especially as compared to an alternative rooted not in justice but in power. Finally, he takes account of international law on self-determination and statehood to show that by these standards, Taiwan already exists as a de facto independent state.

INTRODUCTION

Taiwan exists today as a nation that dares not speak its name. Claimed as a “renegade province” by the People’s Republic of China (P.R.C.), it endures a twilight existence as a de facto state, possessing one of the world’s most vibrant and stable economies, a maturing

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1 The allusion is drawn from, with thanks (and apologies) to, Oscar Wilde.
2 See A Long Footnote, Economist, Nov. 7, 1998, Survey, at 7, 7 (stating that China does not recognize Taiwan as sovereign nation).
This twilight existence gives rise to a question that every nation must grapple with: Is Taiwan legitimately entitled to declare independence, given the opposition of the P.R.C. to such an action? Faced with this question, Taiwan has had to chart a careful course through treacherous waters. That military conflict has been largely avoided for fifty years is a testament to prudence on both sides of the Taiwan Strait. However, the absence of war does not indicate the presence of peace. Until a solution is found that resolves the status of the island, there will be no peace.

This Note will examine whether Taiwan could have a legitimate aspiration to declare independence under international law. Acknowledging the legitimacy of such an aspiration would not on its own require the international community to recognize any declaration of independence but rather would add another important, moderating factor in the consideration of Taiwan’s status. Part I will provide a historical overview showing that Taiwan exists, and has long existed, as an entity apart from China. Part II will explicate the underlying

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5 The Taiwan Strait separates Taiwan from the Chinese mainland. See Simon Long, Taiwan: China’s Last Frontier 1-2 (1991).

6 See Lasater, supra note 4, at 3-4 (discussing rising tensions between China and Taiwan); James W. Soong, Taiwan and Mainland China: Unfinished Business, 1 U.C. Davis J. Int’l L. & Pol’y 361, 362 (1995) (describing China-Taiwan dispute as “one of the most significant threats” to peace in region). For an example of how tensions over the Taiwan question pose continuing risks to stability in East Asia, consider the furor regarding proposed U.S. sales of arms to Taiwan. See Erik Eckholm & Steven Lee Myers, Taiwan Asks U.S. to Let It Obtain Top-Flight Arms, N.Y. Times, Mar. 1, 2000, at A1 (describing urgent requests from Taiwan to purchase U.S. Navy guided missile destroyers, Beijing’s furious opposition, and Washington’s nervous ambivalence); Suzanne Ganz, Taiwan Calls Chinese Missiles ‘Serious’ Threat, Japan Econ. Newswire, Mar. 15, 1999, available in Lexis, News Library, JEN file. Consider also the standoff in the Taiwan Strait between the United States and China during Taiwan’s national elections in 1996. See Patrick E. Tyler, War Games off Taiwan to Expand, Beijing Says, N.Y. Times, Mar. 10, 1996, at A12.

7 A formal declaration of independence would be a direct act of the Taiwanese government, through its duly constituted democratic and representative processes, indicating that the island considers itself a fully independent and sovereign nation. See Hurst Hannum, The Specter of Secession, Foreign Aff., Mar.-Apr. 1998, at 13, 15 (“[T]hose who claim to speak on behalf of their nation should be able to demonstrate their mandate through free and fair elections or referendums.”); cf. Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. f (1987) (“While the traditional definition does not formally require it, an entity is not a state if it does not claim to be a state.”).
nature of international law and apply international relations theory to show why a legal approach to the Taiwan question would tend to shape and constrain actors’ behavior. Part III will discuss three applicable areas of international law: China’s claim to the island, statehood criteria as defined by the Montevideo Convention, and the modern law of self-determination. Part IV will conclude that Taiwan has a legitimate aspiration to declare independence, an aspiration to which the international community should give great weight in all aspects of the Taiwan question.

I

HISTORY OF THE TAIWAN QUESTION SINCE 1886

The history of the Taiwan question shows that, while ethnically and culturally Taiwan may be said to be Chinese, the force of events has set the island and the mainland on different paths, providing a rationale for their current, continued separation. Only in 1886 did

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8 In the same manner as Austrians may be said to be ethnically and culturally German or North and South Koreans to be Korean.

9 The People’s Republic of China (P.R.C.) would, of course, reject this statement. See Taiwan Aff. Off. & Information Off. of the St. Council, P.R.C., The One-China Principle and the Taiwan Issue, Feb. 2000 <http://www.nytimes.com/library/world/asia/022100china-taiwan-text.html> [hereinafter One-China Principle] (stating that “facts and laws” show Taiwan is “inalienable part” of China); Chinese White Paper on Cross-Strait Relations: The Taiwan Question and Reunification of China, Aug. 1993 [hereinafter White Paper], reprinted in The International Status of Taiwan in the New World Order 267, 267-69 (Jean-Marie Henckaerts ed., 1996) [hereinafter New World Order] (stating official Chinese position that history has created indelible links between mainland China and Taiwan that suffice to bind two entities as one nation). China regards Taiwan as sovereign territory of the Chinese nation that was wrongly separated from the motherland by the Japanese at a time when China was weakened by the incursions of hostile foreign powers and interests. See One-China Principle, supra (discussing loss of Taiwan to Japan “through a war of aggression”); Tzu-Wen Lee, The International Legal Status of the Republic of China on Taiwan, 1 UCLA J. Int’l L. & Foreign Aff. 351, 354-56 (1996-97) (discussing grounds of Chinese claim to sovereignty over Taiwan). Accordingly, Taiwan’s current separate status is considered a source of continuing embarrassment. See Zhengyuan Fu, China’s Perception of the Taiwan Issue, 1 UCLA J. Int’l L. & Foreign Aff. 321, 332 (1996) (noting that Taiwan touches “very sensitive chord in the psyche of the Chinese people”); James Lilley, The United States, China, and Taiwan: A Future with Hope, 32 New Eng. L. Rev. 743, 743 (1998) (noting “emotional reasons” behind Chinese claim to Taiwan). Restoring the lost national territory is therefore vital to China’s image, the security of the state, the national pride of the people, and the legitimacy of the ruling Communist Party. See One-China Principle, supra (stating that Taiwan is “crucial . . . to safeguard China’s sovereignty and territorial integrity”); Anne Hsiu-An Hsiao, Is China’s Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?, 32 New Eng. L. Rev. 715, 717-18 (1998) (discussing P.R.C. position); Lilley, supra, at 748 (noting that Taiwan is “a principal target” of P.R.C. national security strategy). Consequently, China is adamantly opposed to Taiwanese independence and has promised to oppose such a declaration with military force if Taiwan does not take meaningful progressive steps to reunification. See One-China Principle, supra (stating that China will be compelled to use
Taiwan become a formal province of China. This proved to be a short-lived and rocky association, however, typified by insurgency against mainland “colonial” rule. In 1895, China was defeated by Japan in the brief Sino-Japanese War. China ceded Taiwan to Japan “in perpetuity” under the Treaty of Shimonoseki. While residents were given a treaty right to relocate in China, the overwhelming majority chose to remain in Taiwan. In an effort to avoid impending Japanese rule, Taiwan ineffectually declared itself an independent republic, but Japan soon crushed all resistance.

Taiwan remained a colony of Imperial Japan until the end of World War II. During that time, Japan invested heavily in the island, both to make its occupation a prosperous venture and to cement the island within its growing empire. Japanese legal and educational sys-
tems were installed, and use of Japanese customs and language was highly encouraged and in some instances required. Taiwan’s industrial progress was prodigious. By the 1930s, Taiwan, a small island, had the equivalent of one-quarter of the entire rail network of mainland China, the third largest nation in the world. Taiwan’s contacts with China in this period were negligible.

Taiwan’s status as a possession of Japan was not challenged until the advent of World War II. When China declared war on Japan in December 1941, it announced that “all treaties, conventions, agreements, and contracts regarding relations between China and Japan are and remain null and void.” This declaration was probably intended to include the Treaty of Shimonoseki, the instrument that transferred Taiwan to Japan.

The Cairo Declaration of 1943 also challenged Japanese possession of Taiwan. In that nonbinding statement, the United States, Britain, and China stated that “[a]ll the territories Japan has stolen from the Chinese, such as ... Formosa [Taiwan] ... shall be restored to the Republic of China.” This was restated two years later in the

16 See Long, supra note 5, at 29 (discussing Japanese attempts to dismantle all traces of Chinese imperial rule).

17 See Chang & Lim, supra note 11, at 406 (describing this as attempt by Japan to “assimilate” Taiwan).

18 See id. (stating that Taiwan possessed 2857 miles of rail track compared to China’s 9400). Commentators regard railroad networks to be a symbol of a nation’s industrial might, technological skill, and overall wealth. See, e.g., Paul Kennedy, The Rise and Fall of the Great Powers 144 (1987).

19 See Chang & Lim, supra note 11, at 406 (“During this period, the Taiwanese had no contact whatsoever with China.”).


21 See Shaw, supra note 10, at 32 (stating that Chinese declaration of war against Japan on December 9, 1941 was intended to abrogate Treaty of Shimonoseki).

22 See Cairo Declaration, Dep’t St. Bull., Dec. 4, 1943, at 393 (enunciating Allied objective to strip Japan of all territory gained by conquest).

23 Id. For a discussion of why the Cairo Declaration was nonbinding, see infra note 130 and accompanying text. The Soviet Union, which was not yet at war with Japan, endorsed the declaration at the Teheran Conference in 1943. See Foreign Relations of the United States, Diplomatic Papers: The Conferences at Cairo and Teheran 1943, 566-67 (1961). Formosa was the name bestowed on Taiwan by the first Portuguese explorers. See John F. Copper, Taiwan: Nation-State or Province? 24-25 (1996).
Potsdam Declaration in which the Soviet Union also joined.\textsuperscript{24} With the surrender of Japan in 1945, forces from Chiang Kai-shek's Kuomintang (KMT) arrived on Taiwan at the request of Supreme Allied Commander Douglas MacArthur, pending final settlement of its status.\textsuperscript{25}

This change of administration occurred without any consultation with the people of Taiwan.\textsuperscript{26} At the outset, the KMT seemingly was welcomed as a liberating force.\textsuperscript{27} However, sentiments changed as the KMT's actions revealed them to be conquerors in liberators' clothing.\textsuperscript{28} Moving ever closer to defeat in its mainland Civil War with Mao Zedong's Communists, the KMT tolerated no dissent in Taiwan.\textsuperscript{29} A contemporaneous U.S. State Department brief reports that "[the KMT] ruthlessly, corruptly, and avariciously imposed [its] regime."\textsuperscript{30} Government positions were exclusively filled by mainlanders\textsuperscript{31} and the KMT authorities were given unlimited powers.\textsuperscript{32} Consequently, "[e]conomically, politically, and culturally [Taiwan] was suddenly yanked out of the Japanese orbit and appended to China in another colonial relationship."\textsuperscript{33} This was so even as KMT authorities held that the Chinese constitution did not even apply to Taiwan, sug-

\textsuperscript{24} See Potsdam Declaration, Dep't St. Bull., July 29, 1945, at 137 (defining terms of Japanese surrender). The Soviet Union became a party to the declaration when it joined the war against Japan on August 8, 1945. See Hungdah Chiu, The International Legal Status of Taiwan, in New World Order, supra note 9, at 3, 4.

\textsuperscript{25} See Chen, supra note 11, at 677 (noting that Chiang's occupation was on behalf of Allied powers). However, the Republic of China (R.O.C.) unilaterally declared Taiwan to be a province of China the day after it occupied the island. See Chiu, supra note 24, at 4.

\textsuperscript{26} See Copper, supra note 23, at 34-35 (stating that Taiwanese viewed Kuomintang (KMT) government as "carpetbaggers" and that Taiwanese had little voice in political affairs).

\textsuperscript{27} See id., at 29-32 (stating that Japanese rule was often insensitive to Taiwan's customs and traditions); Memorandum on the Situation in Taiwan, from J. Leighton Stuart, U.S. Ambassador to China, to Generalissimo Chiang Kai-shek (Apr. 18, 1947) (visited Feb. 16, 2000) \textlangle http://newtaiwan.virtualave.net/228_01.htm \textrangle [hereinafter Ambassador's Memo] (stating that the Taiwanese then "revered the Generalissimo, believed [in] new opportunities, and looked forward expectantly to participation in the Central Government"); see also Chen, supra note 12, at 232 (stating that Japanese rule was often harsh).

\textsuperscript{28} See Chang & Lim, supra note 11, at 410, 416 (stating that KMT acted as "colonial masters" and describing human rights abuses); Chen, supra note 12, at 232 (stating that KMT rule was considered brutal and arbitrary in administration).


\textsuperscript{30} Department of State, United States Relations with China 309 (1949).

\textsuperscript{31} See, e.g., id. at 308; Ambassador's Memo, supra note 27 (stating that Taiwanese were excluded from all important offices).

\textsuperscript{32} See Department of State, supra note 30, at 309.

\textsuperscript{33} Thomas B. Gold, State and Society in the Taiwan Miracle 49-50 (1986); see also Cooney, supra note 4, at 517 (explaining why Taiwan was like KMT colony); Ambassador's
gesting that the Chinese themselves did not regard Taiwan as part of China.34

Significantly, the Taiwanese, with their international status in limbo, revolted against KMT rule in 1947 but were brutally repressed.35 The most deplorable event of the uprising was the massacre on February 28, 1947, of at least twenty thousand native Taiwanese by KMT soldiers.36 This period also witnessed "the jailing of political opponents, torture, executions, arbitrary censorship, and unlawful . . . surveillance of political dissidents."37 The lasting effect of this treatment created a divide between the native Taiwanese and the KMT that persists in muted tones even today.38

The 1949 victory of Mao's Communists in the Chinese Civil War39 led to massive upheaval for Taiwan. Chiang and the tattered remnants of his army fled to Taiwan, establishing the island as their sanctuary pending a return invasion of the mainland.40 Two million people, comprising most of China's intelligentsia, migrated to Taiwan with Chiang, adding to a population of only seven million.41 Though only a minority of the population, the mainlanders became the island's economic and political elite, causing some commentators to liken Tai-

34 See Cooney, supra note 4, at 514 (stating that Chinese constitution was drafted for mainland and originally delayed in application to Taiwan because authorities viewed Taiwanese as "politically backward").

35 See George H. Kerr, Formosa Betrayed 291-310 (1965) (providing detailed account of rebellion); Chang & Lim, supra note 11, at 413 (citing U.S. Central Intelligence Agency statement that rebellion was the result of "economic deterioration" and maladministration by KMT).

36 See Chang & Lim, supra note 11, at 413 (estimating death toll to be more than 28,000 Taiwanese); James D. Seymour & Daniel G. Anna, Taiwan: Republic of China, in Constitutions of the Countries of the World xiii (Albert P. Blaustein & Gisbert H. Flanz eds., 1992) (noting official government estimate of 20,000 deaths); Soong, supra note 6, at 363 (estimating around 30,000 deaths from violence).

37 Chang & Lim, supra note 11, at 412-13 (stating that "systematic looting, rap[e], and indiscriminate murder" were also prevalent); see also Chen, supra note 12, at 232 (noting that Taiwan's intelligentsia were singled out for abuse).

38 See Soong, supra note 6, at 362 (stating that many native Taiwanese "openly resent" KMT power and that many view KMT as "imperialists"); Is Taiwan Really Part of China?, Economist, Mar. 16, 1996, at 40, 40 (stating that many Taiwanese regarded KMT as occupying power, consistent with KMT's behavior after 1945).

39 See Hsü, supra note 29, at 639-43 (listing causes of KMT defeat as overstated military strength, inflation and economic collapse, and failure of social reforms); Colin P.A. Jones, United States Arms Exports to Taiwan Under the Taiwan Relations Act: The Failed Role of Law in United States Foreign Relations, 9 Conn. J. Int'l L. 51, 51 (1993) (stating that Mao "completely defeated" Chiang).

40 See Jones, supra note 39, at 52; Kuipper, supra note 11, at 13 (stating that Chiang vowed to return to mainland to "behead" communists).

41 See Attix, supra note 10, at 361; Little China, supra note 4, at 5 (calling this "largest single movement of an elite in world history").
wan to an "apartheid" state.\textsuperscript{42} Chiang decreed a state of martial law, which would last until 1987.\textsuperscript{43}

Despite its decisive mainland defeat, the KMT insisted that it was the true government of China and would one day return to power on the mainland.\textsuperscript{44} The P.R.C., for its part, considered Taiwan to be part of its territory and began long-term plans for an invasion.\textsuperscript{45} However, Mao delayed annexing Taiwan, preferring to focus on other more pressing problems.\textsuperscript{46} Although the United States maintained that a formal disposition of Taiwan's status had not been determined, it was initially resigned to Taiwan joining the P.R.C. in accordance with the Cairo and Potsdam Declarations.\textsuperscript{47} The Korean War and the politics of the Cold War,\textsuperscript{48} however, led the United States to change its stance, extinguishing any possibility that the P.R.C. flag would soon fly over Taipei.\textsuperscript{49} The United States became Taiwan's protector, signing a mutual defense pact, supplying Taiwan with aid and arms, and stationing significant forces on the island.\textsuperscript{50} This then was the genesis of the Taiwan question, as the United States, the United Nations, and most of

\textsuperscript{42} See Chang & Lim, supra note 11, at 416.
\textsuperscript{43} See Chen, supra note 12, at 233-34 (providing KMT's justifications for imposing martial law until 1987). The decree of martial law was necessary to allow the KMT to retain control of Taiwan in the face of the turmoil that attended the mainlanders' flight to the island. It continued in existence to ensure that social and political unrest would not break out on the island. Such unrest could provide the P.R.C. with a pretext for invasion. See id.
\textsuperscript{44} See id. at 231.
\textsuperscript{45} See Hungdah Chiu, The Question of Taiwan in Sino-American Relations, in China and the Taiwan Issue, supra note 10, at 147, 150 (stating that Chinese were planning to invade Taiwan).
\textsuperscript{46} See Copper, supra note 23, at 37 (stating that Mao claimed Taiwan but made no effort to capture it); Fu, supra note 9, at 326 (stating that even to his death in 1970s Mao was in no hurry to annex Taiwan). The P.R.C. describes this lack of effort as restraint and has indicated that since the accession of Macau and Hong Kong, its patience with Taiwan is evaporating. See One-China Principle, supra note 9 (stating that since these liberal entities were united with P.R.C., Taiwan cannot assert its political difference as reason for delaying unification and that P.R.C. insists on progress towards unification).
\textsuperscript{47} See Chiu, supra note 45, at 149-50 (describing how United States initially supported Taiwan's accession to China under Cairo and Potsdam Declarations but later changed its position); Fu, supra note 9, at 342-43 (same).
\textsuperscript{48} With the outbreak of the Korean War in 1950, Taiwan became central to U.S. strategy in East Asia. See Long, supra note 5, at 115; Chen, supra note 12, at 234 (noting importance of KMT to United States given context of Cold War). In addition, President Truman was being harshly criticized for "losing China." See David McCullough, Truman 743-44 (1992) (discussing Truman's efforts in face of criticism to show fall of KMT as inevitable and not related to U.S. policy failure).
\textsuperscript{49} See Chiu, supra note 45, at 150-51 (stating that Korean War prompted United States to change its position on Taiwan and hold that Taiwan's final status had not been determined). Taipei is the capital of Taiwan.
\textsuperscript{50} See Mutual Defense Treaty, Dec. 2, 1954, U.S.-R.O.C., 6 U.S.T. 433 (entered into force Mar. 3, 1955); Attix, supra note 10, at 362; see also Jones, supra note 39, at 52 (describing U.S. aid to Taiwan, its new "strategic ally").
the non-communist world recognized the rump Republic of China (R.O.C.) as the official government of all China and withheld any sort of recognition from the P.R.C.\footnote{See Chen, supra note 12, at 234 (stating that majority of states continued to recognize KMT as legal government of China).}

As a result of this, there were two Chinas: the Republic of China, located on Taiwan, and the People's Republic of China, located on the mainland.\footnote{See Kerr, supra note 35, at 434-50 (describing origin of "Two Chinas").} The P.R.C. actively campaigned for recognition as China and began to achieve success in the 1960s at the R.O.C.'s expense.\footnote{See Attix, supra note 10, at 362 (stating that other nations realized impracticality of refusing to recognize government of over seven hundred million people).} Finally, in 1971, the U.N. General Assembly voted to allow the P.R.C. to take China's U.N. seat.\footnote{See Resolution Regarding Restoration of the Lawful Rights of the People's Republic of China in the United Nations, G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8429 (1971) (stating that representatives of P.R.C. are sole lawful representatives of China to U.N.); see also Kuijper, supra note 11, at 14 n.14 (noting that resolution is remarkable for identifying R.O.C. as "the representatives of Chiang Kai-shek" not of China or Taiwan (emphasis added)).} The R.O.C. was then without U.N. representation\footnote{In retrospect, the R.O.C. may have committed a big error in rejecting a United States compromise proposal, which would have allowed Taiwan and the P.R.C. to be seated as separate states in the General Assembly but would have given China's seat on the Security Council to the P.R.C. See Chen, supra note 11, at 678; Ross H. Munro, Giving Taipei a Place at the Table, Foreign Aff., Nov.-Dec. 1994, at 109, 120-21.} and diplomatically isolated.\footnote{See Vincent Wei-cheng Wang, All Dressed Up but Not Invited to the Party: Can Taiwan Join the United Nations Now the Cold War is Over?, in New World Order, supra note 9, at 85, 103 (noting that "in 1971 the R.O.C. had diplomatic relations with 69 states" but in 1996 it had relations with only 30).}

To make matters worse for Taiwan, in the 1970s, as a result of the Sino-Soviet split, the United States began a process of normalizing relations with the P.R.C.\footnote{See Copper, supra note 23, at 148-49 (describing Nixon policy towards China); Chiu, supra note 45, at 179 (same); see also Jones, supra note 39, at 52-53 (stating that U.S.-P.R.C. rapprochement became "inevitable"); Attix, supra note 10, at 362 (stating that United States saw relations with P.R.C. as way to isolate Soviet Union).} through Richard Nixon's "opening to China" and the issuance of the Shanghai Communiqué.\footnote{Joint Statement Following Discussion with Leaders of the People's Republic of China [hereinafter Shanghai Communiqué], reprinted in China and the Taiwan Issue, supra note 10, at 246.} This process culminated in 1979 when Jimmy Carter officially recognized the P.R.C. as the government of China.\footnote{See Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, Jan. 1, 1979, reprinted in China and the Taiwan Issue, supra note 10, at 255. The United States also terminated its Mutual Defense Treaty with the R.O.C., withdrew its troops from the island, and agreed to a one-year freeze on arms sales to the island. See Jones, supra note 39, at 53.}

\footnote{51 See Chen, supra note 12, at 234 (stating that majority of states continued to recognize KMT as legal government of China).}
\footnote{52 See Kerr, supra note 35, at 434-50 (describing origin of "Two Chinas").}
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In communiqués to China, the United States acknowledged, without necessarily acceding to, the position that “there is but one China and Taiwan is part of China. The U.S. government does not challenge that position.” The United States also expressed support for a peaceful solution to “the Taiwan question by the Chinese themselves” and pledged eventually to withdraw all U.S. forces from Taiwan.

It is important to underscore that the United States consistently has stopped short of endorsing the P.R.C.’s claim that Taiwan is part of China. Rather, the United States merely “acknowledges” the claim, although the Chinese glibly translate the English “acknowledges” to the Chinese word for “recognize.” Nevertheless, the official U.S. position on Taiwan remains that Taiwan’s final status is as yet undetermined. This position is buttressed by the Taiwan Relations Act and has been reaffirmed by President Clinton’s “three noes.”

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60 Shanghai Communiqué, supra note 58, at 249.
61 Id.
62 See Michael E. Mangelson, Taiwan Re-Recognized: A Model For Taiwan’s Future Global Status, 1992 B.Y.U. L. Rev. 231, 234-45 (stating that United States acknowledged, but did not confirm, P.R.C’s claim to Taiwan); see also Copper, supra note 23, at 41 (stating that Nixon communiqué treated Taiwan issue with “calculated ambiguity”).
63 See Shanghai Communiqué, supra note 58 (striking noncommittal tone on Taiwan question); Taiwan: Hearings on S. 245 Before the Senate Comm. on Foreign Relations, 96th Cong. 88, 95 (1979) (statement of Herbert J. Hansell, Legal Adviser, Dep’t of State) (responding to inquiry on status of Taiwan by stating that United States acknowledged Chinese position that Taiwan is province of China, but that it did not have position on P.R.C’s claim that R.O.C. does not exercise sovereignty); see also Chiu, supra note 45, at 185 (stating that Chinese purposely translated “acknowledges” as Cheng-jen, which if retranslated into English means “recognizes”).
64 The United States is not alone in using ambiguous language to placate the Chinese without undermining the Taiwanese. See Lee, supra note 9, at 357-61 (finding that 119 states do not recognize or have reservations about P.R.C claim to Taiwan). Most of the remaining states that do support the P.R.C claim are either former republics of the Soviet Union that have always supported the P.R.C policy since the Cold War or poor, Third World states. See id. at 360. The only major power that fully supports the P.R.C position on Taiwan is France—and even France sells gunboats to Taiwan. See id.
65 22 U.S.C. §§ 3301-3316 (1994); see Jones, supra note 39, at 57 (stating that Taiwan Relations Act (TRA) affirmed U.S. intent to maintain close ties with Taiwan and to provide for its security and defense); Lilley, supra note 9, at 743 (stating that TRA provided continuity after derecognition and assurance after termination of Mutual Defense Treaty). The United States continues to take its responsibilities under the TRA very seriously, necessitating a delicate balancing act between its engagement policy with China and its statutory commitments to Taiwan. See Eckholm & Myers, supra note 6, at A1 (describing painful attempts by Clinton Administration to comply with TRA without unduly provoking China); Jane Perlez, A Tightrope Act over Taiwan, N.Y. Times, Aug. 5, 1999, at A8 (describing “delicate course” that Clinton Administration is attempting to steer between Beijing and Taipei). Recent legislation introduced in the House of Representatives would strengthen the U.S. commitment to Taiwan, but if it is passed, President Clinton has vowed a veto. See Erik Eckholm, House Vote to Fortify Military Ties with Taiwan Angers China, N.Y. Times, Feb. 3, 2000, at A7 (discussing proposed Taiwan Security Enhancement Act).
The next major watershed for Taiwan occurred in 1987 when martial law gave way to a fully functioning multiparty democracy.\(^6\) It has been suggested that Taiwan's remarkable economic growth\(^6\) caused this political transformation by creating a sense of "democracy entitlement" in the burgeoning middle class.\(^6\) However, Taiwanese officials, under pressure from the United States,\(^7\) may also have understood the added legitimacy that a democratic form of government would provide the state internationally.\(^7\) Furthermore, because Beijing has cited social instability on Taiwan as an event that could precipitate Chinese invasion,\(^7\) allowing democracy in 1987 may have seemed a prudent strategic choice.

As a result, for the first time in their history, the Taiwanese are self-governing.\(^7\) This new era of popular sovereignty has led the

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\(^6\) President Clinton stated on a visit to Shanghai in 1998 that the United States would not advocate "two Chinas," nor "one China, one Taiwan," nor Taiwan's membership in international organizations such as the United Nations. Apocalypse, Maybe, Economist, Nov. 7, 1998, Survey, at 6, 7 (stating that Clinton made America's rejection of Taiwanese independence more explicit without changing American policy).

\(^7\) See Chen, supra note 12, at 235 (describing 1989 democratic elections). Opposition political parties were legalized, military trials were no longer imposed on civilians, civil liberty restrictions were eased, and constitutional reform began. See Cooney, supra note 4, at 518-19.

\(^6\) Y. Dolly Hwang, The Rise of a New World Economic Power: Postwar Taiwan (1991) (discussing Taiwan's rise in economic power); Chen, supra note 12, at 239 (stating that Taiwan has eighteenth largest GDP in world, fourteenth largest trade economy, and seventh highest level of direct foreign investment).

\(^6\) See generally Stephan Haggard & Robert R. Kaufman, The Political Economy of Democratic Transitions 292-99 (1995) (stating that rapid economic growth and extensive social change in Taiwan generated increasing demands for political liberalization); see also Peter R. Moody, Jr., Political Change on Taiwan: A Study of Ruling Party Adaptability 48 (1992) (discussing need for Taiwan to maintain economic momentum generated by economic liberalization to avoid social discontent); Chang & Lim, supra note 11, at 422-23 (discussing efforts of Taipei government to placate democratic demands of people).

\(^7\) See Ian Buruma, Taiwan’s New Nationalists, Foreign Aff., July-Aug. 1996, at 83 (stating that United States applied pressure for democratic reforms on Taiwan around 1984); James C. Hsiung, The Paradox of Taiwan-Mainland China Relations, in New World Order, supra note 9, at 209, 210 (noting that in 1987 Taiwan was under "unrelenting pressure" from United States to democratize); see also Glenn R. Butterton, Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait, 47 Cath. U. L. Rev. 51, 52-54 (1997) (discussing deterrent effect of U.S. military presence in Taiwan Strait during Beijing-Taipei crisis surrounding Taiwan's 1996 elections, demonstrating U.S. leverage over Taiwan).

\(^7\) See Chang & Lim, supra note 11, at 422-23 (stating that establishment of democratic government adds support to statehood claim); Chen, supra note 12, at 235 (noting that other states view Taiwan as "a role model for democratization").

\(^2\) See Hsiao, supra note 9, at 718 (stating that "large social instability" in Taiwan would prompt Chinese invasion).

\(^7\) See Chen, supra note 12, at 235 (noting that 1989 election is considered first free and fair election in Chinese history). Voter turnout reached 75%. See id; see also Chen, supra note 11, at 679 (noting that by 1995 Taiwan "at last has had an equivalent of a parliament
R.O.C. to drop its claim to represent all of China\(^{74}\) and focus increasingly on gaining recognition for Taiwan.\(^{75}\) It has become increasingly clear since 1987 that Taiwan, both in its own image and in actuality, is separate from China.\(^{76}\)

II

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Before moving into the particular legal arguments that would support a declaration of independence by Taiwan, this Part will provide a theoretical overview demonstrating the efficacy of an international law-based solution to the Taiwan question. First, international law will be described conceptually, in order to show that international legal arguments regularly and significantly influence the decisions of world leaders, who prefer that their behavior generally conform with international law. Second, the international relations theories of institutionalism and constructivism will show how the development of legal norms exerts this behavior-moderating effect, in defiance of realist expectations that such moderation should not occur. Finally, this Part will show the desirability of crafting law-based solutions to international political problems, setting the stage for the development of such a solution to the Taiwan question.

A. The Behavior-Shaping Quality of International Law

International law is "a body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law."\(^{77}\) The corpus of this law consists of
"'implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.' According to John Foster Dulles, an architect of post-World War II international legal institutions, global peace and stability “depend[ ] most of all upon the existence of an adequate body of international law.”

International law figures prominently in the decisionmaking process of world leaders, even though, unlike domestic law, it exists without a central promulgating authority or a linear compliance procedure. Despite this, it famously has been said that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”

International law provides a definitive peaceful structure for legitimate expressions of state power. Accordingly, international law influences state behavior in four main ways: (1) as an element in forming goals and interests, (2) as part of the subject matter being

L. Rev. 665, 669 (1986) ("International law is traditionally defined as the body of rules governing the relations of nation-states.").


John Foster Dulles, War or Peace 198 (1950) (discussing need for stable system of international law).


See Byers, supra note 78, at 122 (discussing “legitimizing and constraining effects that the international legal system has on applications of state power”).
decided, (3) as a bargaining advantage in the hands of some of the actors, and (4) as part of the constraints on the bargaining process.\textsuperscript{64}

International law is obviously not dispositive in every question, especially where the law may be ambiguous on a given issue. However, since even the most powerful states feel obliged to invoke international law principles in explaining their behavior,\textsuperscript{85} it should be concluded that international law is powerful, relevant, and has a role to play in resolving any dispute among nations.\textsuperscript{86} Thus, the international law applicable to Taiwanese independence would be crucial in developing a coherent international response in advance of any crisis.

\textbf{B. Understanding the Relevance of International Legal Norms Through International Relations Theory}

International law is clearly relevant, then, to any dispute between nations. A debate still rages, however, between those who view international law instrumentally, as something to be manipulated by powerful states to suit their interests, and those who view international law normatively, as a body of rules and principles that has a profound and sometimes determinative effect on shaping state action.\textsuperscript{87} To address this debate, a rich new interdisciplinary approach has developed that applies international relations theory to international law to explain how international law is formed by—and in turn shapes—state behavior.\textsuperscript{88} This approach has produced an institutional-constructivist

\textsuperscript{64}See Diaz, supra note 78, at 1148-50.


\textsuperscript{88}See Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 Am. J. Int'l L. 205, 219-20 (1993) (tracing origin of political theorists' use of international law in conjunction with international relations); see also Anne-Marie Slaughter, Liberal International Relations Theory and International Eco-
perspective on international law that, as will be shown, demonstrates the efficacy of a legal solution to the Taiwan question.

Viewing international law through the lens of international relations theory, a school of political science, allows for a more nuanced understanding of legal institutions by addressing the political factors that impact and shape the law. This description explains not only a norm’s origins, but also, more importantly, suggests its future development. In short, by marrying international relations theory to international law, it becomes easier to craft a law-based solution for future challenges.

Much of the focus of the interdisciplinary approach falls on rebutting the structural realist attack on international law that arose in the wake of World War II. Realists claim that the world order is anarchic, lacking a central organizing authority. As such, it is shaped by a struggle of each state against every other state for survival. According to this dark view, the chief objective of every state leader is to serve the ends of national survival by attaining as much power as possible.

In contrast to this stark realist claim is institutionalism, which charges that realism fails to take into account the transformative

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90 See id. at 363 (discussing predictive effect of international relations theory).

91 See id. (stating that it is in “constructing law-based options for the future . . . that lawyers can play their greatest role and [international relations theory] can make its most significant contribution”).


95 See Arend, supra note 94, at 111 (“[i]t is only in the garnering of power that a state can preserve itself against the conflicting goals of other states.”).

96 For discussion of institutionalism, see generally Robert O. Keohane & Lisa L. Martin, The Promise of Institutionalist Theory, Int'l Security, Summer 1995, at 39 (defending institutionalism against realist critique); Lisa L. Martin & Beth A. Simmons, Theories
growth, development, and invention of many postwar transnational institutions, such as the U.N. and the World Bank, and the corpus of customary international law, which have been directed at setting limits and establishing law-regulating state behavior.97 Institutionalism is premised on the notion that international law can modify and mitigate anarchy.98 By introducing norms, rules, principles, and procedures, institutionalism makes it a rational choice for states to resolve disputes through these institutions rather than in direct confrontation, even where the institutions conflict with the states’ direct interests.99 Accordingly, institutionalism explains why states may cooperate in ways not predicted by realism.100

Constructivist theories of international relations take institutionalism one step further. Constructivism argues that the institutions of international law are intersubjective structures that have a transformative effect on states.101 Accordingly, “state identities and interests
are in some way constructed by these intersubjective structures.”102 As a result of this, legal rules are considered part of the international system itself and therefore benefit from a presumption of compliance.103

Constructivist and institutionalist approaches can work together to explain how a robust body of international law may modify anarchy and end the prisoners’ dilemma of realism. Once international law becomes institutionalized, its intersubjective qualities both reflect and shape state preferences and power.104 In accordance with this constructivist-institutionalist approach, rational pursuit of state interests remains the prime motive of state actors, but adherence to legal norms becomes part of that basket of state interests, altering the calculus of policymaking.105 Adherents to this approach believe that the international legal process creates norms that exert, in Thomas Franck’s phrase, a “compliance-pull” on state actors, making conformity with the norms more likely.106 Thus, “the legal rule itself provides a very strong reason for rule-consistent behavior.”107

The institutional-constructivist approach suggests that where a dispute implicates articulable tenets of international law, the governments involved in that dispute will be predisposed to make their behavior fit the law, as it is in their interest to do.108 In the case of Taiwanese independence, this means that international law may be used as a tool to aid in developing a peaceful resolution. By recognizing clear norms and principles of behavior in advance, all parties to a Taiwan crisis would be on notice as to the legal limits of their behavior and could expect some sort of international reprobation for exceeding

102 Kingsbury, supra note 81, at 358.
103 See Arend, supra note 94, at 131 (discussing role of constitutive rules in international system).
104 See id. at 130.
105 See Kingsbury, supra note 81, at 352; see also Kritsiotis, supra note 86, at 398 (suggesting that international law replaces “might, power, force, and war”).
106 See Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int’l L. 705, 705 (1988) (stating that international legal system may obligate voluntary normative compliance on part of states, even when that is not in their short-term self-interests).
107 Kingsbury, supra note 81, at 351; see also Phillip R. Trimble, International Law, World Order, and Critical Legal Studies, 42 Stan. L. Rev. 811, 839-40 (1990) (book review) (stating that this rule-consistent behavior stems from view that legal value, developed through legitimate process, merits compliance).
108 See Abbott, supra note 89, at 365-66 (suggesting that institutions may affect state behavior by changing context of state-to-state interactions, thereby facilitating negotiation and resolution); Arend, supra note 94, at 128-29 (stating that process of constructing international law itself shapes state preferences and power); Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 Int’l Org. 887, 904-05 (1998) (stating that where legal norm has been internalized by actors, conformity with norm is almost automatic).

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those limits. Such clarity was lacking in recent crises, such as Kosovo and East Timor, where the international community and affected states considered interests and legal rights in an ad hoc manner, only after the destabilizing crises had begun.\textsuperscript{109}

III

TAIWAN'S ELIGIBILITY FOR STATEHOOD UNDER INTERNATIONAL LAW

This Part will survey three areas of international law which support Taiwan's legitimate aspiration to declare independence. First, it will scrutinize China's claim to the island in order to evaluate whether a declaration of independence by Taiwan would represent a secession, which is discouraged under international law. As will be shown, however, China's claim is deficient. Second, it will examine international law on the elements of statehood to demonstrate that Taiwan could qualify as a state. Finally, it will employ international law on self-determination to show that Taiwan constitutes the type of political entity to which that law can apply.

A. China's Claim to Taiwan

The chief obstacle Taiwan would face in declaring independence would be the obdurate opposition of the People's Republic of China. As discussed in Part I, the P.R.C. considers Taiwan to be a breakaway province of its territory and insists that Taiwan ultimately must be re-incorporated into the mainland.\textsuperscript{110} In keeping with that position, the P.R.C. has made very credible threats to invade Taiwan should Taiwan not progress toward unification.\textsuperscript{111}

China's legal justification for this threat and for the invasion, should that come to pass, lies in its claim that Taiwan is now part of

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\begin{enumerate}
  \item See Morton M. Kondracke, East Timor Shows 'Clinton Doctrine' Is Empty Rhetoric, Roll Call, Sept. 20, 1999, at 6 (criticizing inconsistency of American responses to various world humanitarian crises, including Kosovo and East Timor); Charles Powell, Welcome to the Post-U.N. World, Wall St. J. Eur., Apr. 22, 1999, available in 1999 WL-WSJE 5512830 (stating that inconsistent approach of world powers to unfolding global humanitarian crises, such as Kosovo and East Timor, threatens to undermine international legal institutions, such as U.N.).
  \item See A Long Footnote, supra note 2, at 7 (stating that despite Taiwan's appearance as sovereign nation, China considers it "renegade province, to be returned in due time").
  \item See One-China Principle, supra note 9 (adamantly stating validity of P.R.C.'s option to use force against Taiwan); Apocalypse, Maybe, supra note 66, at 6 (same); Mark O'Nell, No Handover for Us Says Taiwan, South China Morning Post, July 13, 1997, available in Lexis, News Library, SCHINA file (same); Erik Eckholm, China Says Taiwan Cannot Continue Delaying Reunion, N.Y. Times, Feb. 22, 2000, at A1 (reporting Chinese threats to invoke Taiwan under certain circumstances).
\end{enumerate}
\end{footnotesize}
From this perspective, if Taiwan were to declare independence, it would be, in effect, seceding from China. China would then have the right to use force to quell the secession since "no rule of international law . . . forbids the mother state from crushing the secessionary movement, if it can." This argument, however, rests on the faulty premise that Taiwan is part of the P.R.C. and loses credence in the face of broader historical and political forces that have rendered Taiwan a separate and distinct entity.

The Chinese government, in its 1993 White Paper on Taiwan, argues that Taiwan is "an [i]nalienable [p]art of China" that "has belonged to China since ancient times." It claims that the "blood, sweat, and ingenuity" of the Chinese built Taiwan, recounts how Japan seized Taiwan from China, and states that reannexing Taiwan was an important objective for China when it declared war against Japan. However, the P.R.C.'s reliance on these points is misplaced.

First, as mentioned in Part I, Taiwan was not incorporated as a province of China until 1886. While it is true that from that time until it was lost to Japan in 1895 Taiwan became more integrated into the Chinese polity than it ever had before, this state of affairs lasted for barely a decade. Indeed, despite Taiwan's new status as a province, the Taiwanese—including immigrants from the mainland—were resistant to Chinese authority.

112 See supra note 9 (discussing Chinese position).
113 See Nii Lante Wallace-Bruce, Taiwan and Somalia: International Legal Curiosities, 22 Queen's L.J. 453, 468 (1997) (recognizing Chinese claim that Taiwan is part of China, and that Taiwanese independence would amount to secession); Henry A. Kissinger, No Place for Nostalgia in our China Dealings, Houston Chron., June 28, 1993, at 1C (stating that China views Taiwan as secessionist province).
114 Peter Malanczuk, Akehurst's Modern Introduction to International Law 78 (7th ed. 1997) [hereinafter Akehurst's].
115 White Paper, supra note 9, at 267 (laying out legal, political, and historical bases of P.R.C.'s claim to Taiwan).
116 See id. at 268 (stating that from very beginning Taiwan society derived from "the source of Chinese cultural tradition").
117 See id. at 269 (stating that cession to Japan "shocked the whole nation and touched off a storm of protest").
118 See id.
119 China's more recent statement on Taiwan reiterates these same arguments. See One-China Principle, supra note 9 (stating that China issued new statement to restate positions laid out in 1993 White Paper).
120 See Long, supra note 5, at 13-16 (discussing weak Chinese hold over island peppered with frequent rebellions); Shaw, supra note 10, at 12 (stating that Chinese had only "passive attitude" toward Taiwan until 1874).
121 See Long, supra note 5, at 22-23 (noting Taiwan integration with China).
122 See id. (stating that Taiwanese were xenophobic of mainlanders and "rarely . . . paid heed to . . . the distant northern capital").
Furthermore, while the Taiwanese opposed the advent of Japanese rule on the island, that by no means supports the idea that the Taiwanese wanted to remain part of China. In fact, Taiwanese resistance to the Japanese took the form of a revolt aimed at establishing an independent Taiwanese republic. In any case, the Japanese ruled Taiwan for fifty years, from 1895 to 1945. During that period, the Japanese invested heavily in Taiwan, advancing the island's prosperity and development beyond anything it had achieved previously. Thus, the Japanese interregnum established an intervening event, in temporal terms as well as socioeconomic and political, that weakened Taiwan's links to China.

Thus, to the extent that the Chinese claim to Taiwan rests on history, it probably fails. But the Chinese claim appears, at first blush, stronger when the Cairo and Potsdam Declarations are considered. These declarations of the United States, United Kingdom, Soviet Union, and China stated that Taiwan would be given to China after the defeat of Japan. Three points should be made about these war-

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123 See id. at 25-26. But see Shaw, supra note 10, at 18-19 (stating that Taiwanese republic was not intended to be "disloyal" to China).
124 See Shaw, supra note 10, at 20. While the Chinese rely on the declaration of war against Japan to negate the effects of Japanese sovereignty over Taiwan for their claim, such reliance is misplaced as international law does not recognize the abrogation of treaties establishing international frontiers. See Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565-66 (Dec. 22) (describing international legal obligation to respect preexisting boundaries); Conference on Yugoslavia Arb. Comm'n, Opinions on Questions Arising from the Dissolution of Yugoslavia, No. 3, Jan. 11, 1992, 31 I.L.M. 1499, 1500 (1992) (stating that existing national boundaries cannot be changed except by "agreement freely arrived at" by all concerned state parties).
125 Japan's economic development does not excuse its harsh and exploitative rule over the island, however, which led the Taiwanese continually to resist Japanese rule. See Shaw, supra note 10, at 21-24 (detailing harsh Japanese rule).
126 See Kuijper, supra note 11, at 11-12 (stating that China's historical claim to Taiwan is deficient and that term "reunification" in China-Taiwan context is inapt). The Chinese could assert that mere ethno-cultural links are enough to maintain the viability of their historical claim. However, analogous situations in other parts of the world suggest that a claim based solely on common cultural characteristics is not enough. If it were, Hungary would have a valid claim to parts of Slovakia, Russia to various parts of its old empire, including Ukraine and Belarus, and Germany to Austria. The reality that such claims would largely be considered meritless shows that something more than common cultural traits is needed to establish a claim to territory. See, e.g., Geri L. Haight, Unfulfilled Obligations: The Situation of the Ethnic Hungarian Minority in the Slovak Republic, 4 ILSA J. Int'l & Comp. L. 27, 31-33 (1997) (discussing Hungarian links to regions of Slovakia); Limit Cases, Economist, Oct. 23, 1999, Survey, at 14, 15 (discussing Russian interests in Ukraine); see also Laurence S. Hanauer, The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case, 9 Emory Int'l L. Rev. 133, 162, 166 (1995) (stating that Morocco's occupation of Western Sahara is not legitimized by Morocco's claim that Sahrawi people are ethnically Moroccan).
127 See supra notes 22-25 and accompanying text.
128 See supra notes 23-26 and accompanying text.
time declarations. First, they were not binding upon the Allies but were mere statements of intent designed to encourage continued Chinese participation in the war. Second, Taiwan was not legally part of the territory of any state party to the declaration. Since Taiwan was at the time legally part of Japan, its status could only be changed by Japan, as it would be by the San Francisco Peace Treaty. Third, even if the Allied declarations were binding, they indicated specifically that Chiang Kai-shek’s Republic of China, then still in power in China, would be the recipient of the territory. It is not clear that the P.R.C. could succeed to the R.O.C.’s claim in this regard since the R.O.C. government is still in existence.

The effect and validity of Cairo and Potsdam are called further into doubt by the later actions of the Allies. When Japan surrendered, the KMT derived their initial authority to occupy the island from the Allies on a similar basis as, say, the United States in Japan. This does not seem consistent with the notion that China had a natural, preexisting claim to Taiwan.

Indeed, it has been suggested that the then-prevailing view was that Taiwan’s fate should be determined by the Taiwanese themselves, in accord with principles of the United Nations Charter. Contemporary statements by John Foster Dulles, Secretary of State in the Eisenhower Administration, concerning the status of Taiwan support

129 See Chang & Lim, supra note 11, at 408 (stating that “declarations have no legal authority to dispose of territory of a sovereign country” and that their status as wartime declarations makes them “suspect”).

130 See supra note 124 (stating that transfer of territory from one nation to another requires consent of both states). It could be argued, however, that Japan did accept the principles of Potsdam in its instrument of surrender. See Attix, supra note 10, at 361 n.25 (stating that Potsdam became binding on Japan upon surrender).

131 Japan’s obligation, if it existed, could have been satisfied when it turned Taiwan over to the R.O.C. See Chiu, supra note 24, at 4-5 (stating that R.O.C. effectively controlled Taiwan).


133 Japanese forces on Taiwan were directed to surrender to Chiang Kai-shek by order of General Douglas MacArthur pursuant to the Instrument of Surrender. See Chiu, supra note 24, at 4.

134 See Chang & Lim, supra note 11, at 408-09 (describing R.O.C. as an occupying power acting as trustee for Allies); Chen, supra note 12, at 231 (stating that even though R.O.C. held Taiwan, it still formally was considered colony of Japan).

135 See Chang & Lim, supra note 11, at 408-09 (stating that sovereignty over Taiwan was not mentioned in San Francisco peace treaty and that omission was “no accident”). For relevant U.N. Charter provisions, see U.N. Charter art. 1, para. 2; art. 55; art. 73; art. 76(b). For a discussion of self-determination and Taiwan, see infra Part III.C.
this idea. In particular, Dulles stated that "technical sovereignty over [Taiwan]... has never been settled... [F]uture title is not deter-
mined." The peace treaties signed by Japan also fail to resolve this ambiguity.

Thus, the P.R.C.'s claim is undermined by two difficulties. First, it cannot show that Taiwan is an historic component of the Chinese state. Second, it cannot prove that the wartime declarations of the Allies suffice to establish Chinese sovereignty over Taiwan. As a result, there is no sufficient historical predicate on which to hang the P.R.C.'s claim to Taiwan, especially when Taiwan, as shown below, meets criteria for statehood and qualifies for the right to self-
determination.

B. Criteria for Statehood

If Taiwan's aspiration for independence is to be considered as legiti-
mate, it must possess the legal characteristics of a state under inter-
national law. This section will demonstrate that Taiwan does display
those characteristics. A declaration of independence would seek to
formalize that status.

The international legal criteria to determine whether an entity
qualifies for statehood were set out authoritatively in the 1933 Montevideo
Convention on the Rights and Duties of States. Even for
those states that are not parties to the convention, these criteria are
considered part of customary international law. In the United
States, the Montevideo criteria are recognized as authoritative on the
legal elements of statehood. According to Article 1 of the Conven-

137 See Treaty of Peace, Sept. 8, 1951, U.S.-Japan, art. 2, 3 U.S.T. 3169, 3172 (stating only that "Japan renounces all right, title, and claim to Formosa"); Treaty of Peace, Apr. 28, 1952, R.O.C.-Japan, art. 2, 138 U.N.T.S. 3 (referring only to terms of 1951 San Francisco Treaty without settling title to Taiwan).
nat'l L. 403, 408 (1999) (calling Montevideo Convention "source most often cited as au-
thority on the definition of the state").
139 See Chen, supra note 12, at 236-37 (stating that Montevideo criteria have been ac-
cepted throughout world); Lee, supra note 9, at 387 n.70 (stating that Convention repre-
sents criteria for statehood under customary international law).
140 See Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995) (restating Montevideo cri-
teria as definition of state in international law); New York Chinese TV Programs, Inc. v. U.E. Enters., 954 F.2d 847, 853 (2d Cir. 1992) (listing Montevideo criteria as constitutive of
tion, a state should possess "(a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with the other States."141

1. Permanent Population

Population, along with defined territory, constitutes the physical state itself.142 It simply requires that there be a significant population permanently residing within the confines of the entity.143 Taiwan, with a population of roughly twenty-one million, has a greater population than seventy-five percent of the member states of the U.N., and therefore easily meets this criterion.144

2. Defined Territory

Defined territory refers to the borders of a state. It "establishes the [state's] exclusive competence to take legal and factual measures within that territory" to the general exclusion of other states.145 Even if the boundaries of a state are imprecise, as where there is a border dispute with another state, the state may still meet this criterion.146

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142 See Brownlie, Principles of Public International Law 73 (4th ed. 1990) (stating that permanent population criterion is "intended to be used in association with that of territory, and connotes a stable community").
143 See Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. c (1987) (stating that Antarctica could not be state as it does not have significant permanent population).
144 See Chen, supra note 11, at 679 (stating that Taiwan meets permanent population requirement); Attix, supra note 10, at 367 (reporting that vast majority of Taiwanese trace back ancestry in Taiwan several centuries).
146 See Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. b ("An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled . . ."). The best example of this, aside from Taiwan itself, is on the Arabian peninsula, where the borders between Saudi Arabia and Yemen and Saudi Arabia and the United Arab Emirates have never been definitively determined. See The Middle East 330 (Daniel C. Diller ed., 8th ed. 1994).
Taiwan's territory is clearly defined by its island status. Nevertheless, it could be argued that Taiwan lacks a defined territory since, in its previous capacity as the R.O.C., it once laid claim to all of mainland China.\footnote{Taiwan seems to have dropped its claims to the mainland. In 1991, it unilaterally declared a formal end to the war with Beijing and engaged in "pragmatic diplomacy" even with those states that had recognized Beijing. See Copper, supra note 23, at 150.} However, the fact that a state lays claim to territory it does not possess does not detract from the legitimacy of the state over the territory it does control.\footnote{See Kuijper, supra note 11, at 15 (stating that state does not cease to exist when it loses part of its territory); see also North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4, 32 (Feb. 20) (stating that there is "no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not").} This can be understood by reference to the Republic of Ireland. Until 1999 amendments to its constitution, Ireland defined its physical territory as including British-held Northern Ireland,\footnote{See Ir. Const. art. 2 (repealed May 22, 1998) (visited Feb. 29, 2000) <http://www.irlgov.ie/taoiseach/publication/constitution/intro.htm> (stating that "[t]he national territory consists of the whole island of Ireland, its islands and the territorial seas"). This explicit claim was repealed in 1998 as part of the Good Friday Agreement, which established a peace plan for Northern Ireland. See Melanie Harvey & Chris Parkin, Irish Vote in Record Numbers, Press Ass'n Newsfile, May 22, 1998, available in Lexis, News Library, PANIEWS file (stating that amendments were approved in referendum); New Wording for Articles 2 and 3, Irish Times, Apr. 10, 1998 <http://www.ireland.com> (providing text of proposed amendment to Irish Constitution).} which historically was part of a united Ireland.\footnote{See D. George Boyce, Nationalism in Ireland 352 (2d ed. 1991) (citing statement by first leader of independent Ireland, Eamonn Devalera, that in not having Northern Ireland within its territory, Ireland has "lost many of her holiest and most famous places").} Yet, since its founding as a Free State in 1921\footnote{The Free State of Ireland was a semi-independent entity that still owed allegiance to the British Crown. See generally R.F. Foster, Modern Ireland 1600-1972, at 516-35 (1988).} and as an independent republic in 1949,\footnote{See Boyce, supra note 150, at 350-51 (noting that Irish sovereignty was so well established by 1949 that actual declaration was "anti-climactic").} Ireland has never exercised sovereignty over the North.\footnote{Ireland has been divided since the 1920 Government of Ireland Act was passed into law by the British Parliament. See generally Foster, supra note 151, at 501-04.} Despite that, Ireland's independence could not be seriously contested. So, too, it should not matter that until 1991 the R.O.C. laid claim to the mainland when it did exercise—and continues to exercise—complete and practically unchallenged sovereignty over Taiwan.\footnote{See Lee, supra note 9, at 387 (noting that even though R.O.C. claimed sovereignty over P.R.C., this does not disqualify Taiwan from "sovereign status").}

It could also be argued that Taiwan lacks a defined territory since the P.R.C. has a credible claim to the territory.\footnote{See supra notes 108-35 and accompanying text.} However, even if the P.R.C.'s claim were given every consideration in its favor, the
principle of effectiveness would legitimate Taiwanese sovereignty, even as against the P.R.C. 156

The principle of effectiveness holds that where a state has controlled a territory for a significant period of time with "the intention and will to act as sovereign," that state will be considered to have incorporated the territory. 157 Where two states have competing claims to a territory, the state that has exercised effective control over the territory has been given preference in international tribunals. 158 In the modern era of democratic self-governance, the intent and will to act as sovereign probably requires a showing of democratic consent by the governed and respect for human rights. 159 Taiwan, as one of the most successful democracies in East Asia, clearly fulfills this modern obligation of sovereignty.

Manifestly, Taiwan meets the requirements of effectiveness. It exercises total control over its defined territory, and as a democracy, does so with the consent of its citizens. As such, it does possess a defined territory for the purposes of the Montevideo Convention. 160

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156 Cf. Akehurst's, supra note 114, at 148-49 (discussing effective control).

157 See Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 184 (Dec. 18) (Sir Arnold McNair, dissenting) (stating that governments must be able to show authoritative exercise of jurisdiction to secure title); Legal Status of Eastern Greenland (Nor. v. Den.), 1933 P.C.I.J. (ser. A/B) No. 53, at 45-64 (Apr. 5) (holding that Denmark possessed valid title to Greenland based on lengthy control over territory); Brownlie, supra note 142, at 139 (stating that elements of effective occupation involve proof "of possession by states, of manifestations of sovereignty legally more potent than those of the other claimant"). But see Akehurst's, supra note 114, at 150-51 (noting that lack of acquiescence by losing state can defeat title to territory through prescription even when winning state has effective control).

158 See Eastern Greenland, 1933 P.C.I.J. (ser. A/B) No. 53, at 64 (determining that Denmark, rather than Norway, possessed valid title to Greenland); Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 870-71 (1928) (awarding possession of island disputed between then-U.S. territory of Philippines and Dutch-occupied Indonesia (then referred to as Dutch East Indies) to Netherlands on basis of effective control). While these cases arose in a colonial context, their basic principles for resolution of territorial disputes retain vitality. See Benjamin K. Sibbett, Note, Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea, 21 Fordham Int'l J. 1606, 1624-27 (1998) (applying Island of Palmas opinion as part of analytical framework for reaching resolution of dispute between Japan and South Korea over which country properly should possess Liancourt Rocks in Sea of Japan).


160 See Lee, supra note 3, at 323 (stating that Taiwan consists of 36,000 square kilometers of territory); Attix, supra note 10, at 367 (stating that Taiwan's defined territory consists of Formosa, Penghu Islands, Quemoy, and Mazu).
3. Government

The third criterion required by Montevideo is effective control by a government. The government must have some capacity to establish, execute, and enforce a legal order under a constitution. In the case of Taiwan, clearly this criterion is met as Taiwan functions under a constitution adopted in 1947. This constitution has provided the structure for continuous autonomous government to Taiwan since that time on both a national and international level.

4. Foreign Relations

The fourth criterion under Montevideo is the capacity to enter into foreign relations. This element is generally not considered essential but rather is additional proof of statehood and does not require that a state be accorded diplomatic recognition by others. Accord-
ing to the Restatement of the Foreign Relations Law of the United States, such capacity is present when a state "has competence, within its own constitutional system, to conduct international relations... as well as the political, technical, and financial capabilities to do so."\(^{167}\)

Thus, Texas and Scotland would fail to meet this criterion, even though they were once independent states, since their foreign affairs are now carried out by their federal or central governments.

In any case, Taiwan clearly possesses the capacity to enter into foreign relations.\(^{168}\) As of 1996, Taiwan maintained actual diplomatic relations with about thirty nations and unofficial relations with a great number more, entered into multilateral treaties, and was a member of several international bodies, such as the Asian Development Bank.\(^{169}\)

It also has an unofficial but fully integrated relationship with the Association of Southeast Asian Nations.\(^{170}\)

5. Ancillary Criteria

In addition to the four Montevideo criteria, scholars have suggested ancillary criteria.\(^{171}\) An increasingly common fifth criterion is the existence of a democratic government respectful of human

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\(^{168}\) See Lee, supra note 9, at 387-88.

\(^{169}\) See Chen, supra note 11, at 683 (discussing European Parliament's 1996 resolution urging European Union member states to encourage Taiwan's participation in international organizations); Hsiao, supra note 9, at 734 & n.107 (stating that countries recognizing Taiwan in 1998 were: Belize, Burkina Faso, Central African Republic, Chad, Costa Rica, Dominica, Gambia, Grenada, Guatemala, Honduras, El Salvador, Liberia, Malawi, Nauru, Nicaragua, Panama, Paraguay, St. Kitts & Nevis, St. Vincent & Grenadines, Sao Tome & Principe, Senegal, Solomon Islands, Swaziland, Tonga, Tuvalu, and Vatican); Lee, supra note 3, at 388 (stating that Taiwan has diplomatic relations with approximately 30 countries and unofficial relations with 63 more, including United States); Mark S. Zaid, Taiwan: It Looks Like It, It Acts Like It but Is It a State? The Ability to Achieve a Dream Through Membership in International Organizations, 32 New Eng. L. Rev. 805, 811-12 (1998) (stating that while Taiwan does not have formal recognition from most major nations, it is making "substantive diplomatic progress," leading many of them, such as Britain, to upgrade their level of unofficial diplomatic recognition); see also New York Chinese TV Programs, Inc. v. U.E. Enters., 954 F.2d 847, 850-51 (2d Cir. 1992) (discussing Taiwan-U.S. unofficial relations). Additionally, Taiwan is employing creative methods to become party to international conventions. See Attix, supra note 10, at 363 (describing Taiwan's use of bilateral treaties and agreements with bilateral partners to gain access to multilateral treaties).

\(^{170}\) See Shin-Yi Peng, Economic Relations Between Taiwan and Southeast Asia: A Review of Taiwan's "Go-South" Policy, 16 Wis. Int'l L.J. 639, 646 (1998) (discussing Taiwan's interactions with Association of Southeast Asian Nations).

\(^{171}\) See, e.g., Akehurst's, supra note 114, at 80 (identifying self-determination and recognition as two further criteria).
Since the beginning of the 1986 democratic reforms, Taiwan has flowered into a fully functioning sovereign democracy. It has been said that this popular sovereignty alone constitutes an "irrefutable argument" in favor of Taiwan's independence.

The law of state responsibility could serve as a sixth criterion of statehood here. This doctrine is designed to determine when, whether, and how a state may be held liable for breaches of international law. It has been argued that if Taiwan were really part of China, then China would be held liable for any wrongdoing committed by the Taiwanese government or its agents. However, state practice in this area has been to hold Taiwan accountable and China blameless for the liabilities of Taiwan, suggesting that, on a practical level, states regard Taiwan as a distinct, sovereign political entity.

The Maersk Dubai case illustrates this doctrine in practice. There, seven Taiwanese sailors were arrested in Nova Scotia, Canada, for the murder of three Romanian stowaways on their ship, the Maersk Dubai. Taiwan asked for the release of the sailors into its custody and promised to prosecute them in Taiwan. The P.R.C. also asked for the sailors, basing their jurisdiction on the claim that...
Taiwan is a part of China. The Canadian Ministry of Justice opted to allow the Taiwanese authorities to prosecute, however, and even agreed to turn over evidence and hearing transcripts. If Taiwan were not regarded as a competent, autonomous authority under which to try these suspects, Canada would have had no choice but to let the sailors go free or to extradite them to the P.R.C.

6. Taiwan: De Facto State

These six criteria demonstrate that under international law Taiwan merits recognition as an independent state and as such is already a de facto state. However, Taiwan has not been accorded formal recognition by and large for two reasons. First, Taiwan has never overtly declared its independence. It is a general axiom of law that obligations will not be thrust upon any entity without its consent and thus no nation can recognize Taiwanese independence until Taiwan asserts it. Indeed, the Restatement (Third) of the Foreign Relations Law of the United States suggests that Taiwan could meet the definition of statehood only if it declared independence.

The second reason is that, even though the statehood criteria are legal in nature, their application is usually determined on a political basis in each individual state. Thus, whatever the underlying equity of the situation, Taiwan finds itself at the mercy of the political calculations of various nations. The essential problem is that, since the P.R.C. will not interact with any government that formally recognizes
Taiwan, most countries embrace a policy of constructive ambiguity regarding the Taiwan question. However, in the event of a crisis, as say where the P.R.C. would actually attempt to conquer Taiwan, states would either have to oppose the P.R.C.'s action or acquiesce in it while the crisis was already unfolding. Accordingly, it is crucial that the legal case be laid out in advance so that all parties may consider all their options, depressing the likelihood of any crisis. Since the legal merits of the case strongly indicate a basis for Taiwan's independence, the international community would have reason, motive, and justification to support the legitimacy of Taiwan's independence. The law on self-determination, explicated below, further strengthens this basis.

C. Taiwanese Self-Determination

Under the modern law of self-determination, the Taiwanese merit recognition as a distinct people possessing the right of democratic self-rule. The U.N. General Assembly has defined self-determination as the right of "all peoples freely to determine, without external interference, their political status." Article 1 of the U.N. Charter lists "self-determination of peoples" as one of the fundamental purposes of the

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189 See Chen, supra note 12, at 247-48 (stating that Beijing demands recognition as sole government of China as precondition to diplomatic relations); Zaid, supra note 169, at 810-11 (discussing P.R.C. pressure against states that recognize Taiwan).

190 By this policy, states seek to maintain a relationship with both the P.R.C. and Taiwan in order to allow their trade and investment to flourish with both entities while avoiding the enmity of the P.R.C. U.S. policy is illustrative of this practice. See Butterton, supra note 70, at 68-69 (describing U.S. policy and its creation of "remarkably anomalous situation"); Lee, supra note 3, at 324-25 (discussing contradictions in U.S. policy towards Taiwan).

191 Lack of foresight and planning in the face of potential crisis has famously been cited as one of the causes of World War I. See L.C.F. Turner, Origins of the First World War 112 (1970) (stating that once crisis event that would initiate World War I occurred, the crisis gathered momentum and the calculations of statesmen were overwhelmed by the rapid succession of events, the tide of emotion in the various capitals, and the inexorable demands of military planning. . . . [T]he leading political figures soon lost contact with reality, while popular demands for victory . . . insisted on a ruthless prosecution of the war . . .).

192 The appropriate form of such support—anything from military intervention to economic sanctions against the P.R.C.—would presumably be decided on a state-by-state basis and/or through the United Nations. In any event, this question is beyond the scope of this Note.

International conventions have stated that no state may derogate the normative requirements of self-determination.

Despite, or perhaps because of, these definitions, self-determination has long been and currently remains a source of great intellectual and political ferment in international law. While the principle in its broad terms has always suggested self-rule for distinct peoples, it was first applied only to European populations after World War I. In the post-World War II era, the principle’s application was expanded to govern the dissolution of colonial empires, but only along the boundary lines of the colonies themselves; thus, restive nationalities were often bound together in union without their consent. Since the end of the Cold War, self-determination has been mentioned in the con-

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194 U.N. Charter art. 1, para. 2. Self-determination is also mentioned explicitly, see id. art. 55 (identifying self-determination as guiding principle in international relations), and implicitly, see id. art. 73 (regarding non-self-governing territories); id. art. 76(b) (regarding international trusteeship system); see also Franck, supra note 106, at 743-46 (discussing developments and retrenchments of concept of self-determination throughout twentieth century).


197 See Franck, supra note 159, at 54 (pointing out that principle of self-determination generally only applied to “vanquished lands of postwar Europe”); Hannum, supra note 7, at 3-12 (noting that self-determination was used as basis to divide Europe).

198 See Epps, supra note 196, at 435-36 (noting self-determination’s application to colonial empires). The nation-states of Africa are the most obvious example of this phenomenon, with the result that African nation building has been beset by crises of legitimacy and civil war. Consider the case of Sudan, a former British colony, where African Christians in the South were bound together with Arab Muslims in the North, leading to an almost perpetual state of civil war between the two groups. See Angela M. Lloyd, Note, The Southern Sudan: A Compelling Case for Secession, 32 Colum. J. Transnat’l L. 419, 439-40 (1994) (describing cultural and ethnic divergence between northern and southern Sudan and resultant state of conflict).
Because of this choppy evolution of self-determination, it is presently difficult to chart the frontiers of the law. Some would argue that self-determination applies only to already established states or to future states duly recognized as independent. To illustrate, this group would not apply self-determination to secessionist movements unless the movement was allowed to secede by the former national government, as was the case when Eritrea seceded from Ethiopia, or the breakaway province was never properly part of the metropolitan state, as was the case with the Baltic Republics of the former Soviet Union. Others at the opposite extreme would argue that self-determination is a basic human right, newly applicable even

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199 See Nanda, supra note 196, at 444 (noting that self-determination is no longer limited to colonial and non-self-governing territories); Derege Demissie, Note, Self-Determination Including Secession vs. the Territorial Integrity of Nation-States: A Prima Facie Case for Secession, 20 Suffolk Transnat'l L. Rev. 165, 166 (1996) (noting that self-determination is "springboard" into secession).


201 See Epps, supra note 196, at 439-40 (noting that discrimination against certain groups may legitimate their claim to secession); Kolodner, supra note 193, at 157-58 (noting that self-determination should be applied throughout world where "neo-colonial oppression" exists).


203 See Brietzke, supra note 202, at 70-71 (stating that currently recognized states are only ones "licensed" to represent nationalities); Deborah Z. Cass, Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories, 18 Syracuse J. Int'l L. & Com. 21, 29-31 (1992) (discussing "conventional view" that self-determination applies only within currently existing boundaries); Moris, supra note 202, at 204-05 (describing and distinguishing between external and internal self-determination).

204 See Ebenroth & Kemner, supra note 132, at 804-07 (discussing presumption against secession).

205 See id. at 807-10 (posing consent of sovereign as possible element needed for valid secession).

206 See Cass, supra note 203, at 35-36 (claiming that state practice will recognize secession where metropolitan state has done so, as Ethiopia did for Eritrea).

207 See Moris, supra note 202, at 217 (stating that Baltic states represent principle that limited right to secession exists where breakaway state had been illegally annexed).
within the borders of states. This group would allow secession as part of what they see as an emerging norm of international law.

Recent history does not, on its face, aid in resolving this debate. For example, the international community largely recognized a right to self-determination for the republics of the former Yugoslavia but not for the Nigerian province of Biafra. A possible explanation for this discrepancy is that the Yugoslav republics were recognized as successor states to a disintegrating metropole whereas Nigeria was still in existence and properly claimed possession over Biafra under the principle of *uti possidetis juris*. Such an explanation provides a formalistic answer that seems to neglect underlying issues of justice and human rights. This confusion breeds instability into international relations with the dangerous effect that where groups do not have clear conceptions of their rights, armed conflict becomes more likely. In a sense, it encourages groups, such as the Chechens,

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208 See Cass, supra note 203, at 30-31 (discussing this “controversial view”); Roy E. Thoman, Book Review, 16 Wis. Int'l L.J. 271, 272-73 (1997) (stating that territorial integrity limitation on self-determination “applies only to those states in which the regime represents the whole population by . . . permitting the exercise of internal self-determination”).


210 See Moris, supra note 202, at 217-18 (claiming that European reaction to breakup of Yugoslavia amounted to recognition of series of secessions).

211 See Hsiao, supra note 9, at 731 & n.90 (describing world acquiescence to Nigerian suppression of Biafra to uphold Nigerian territorial integrity). See generally M.G. Kaladharan Nayar, Self-Determination Beyond the Colonial Context: Biafra in Retrospect, 10 Tex. Int'l L.J. 321 (1975) (stating that Biafran claim to secession was deficient given need to preserve Nigerian territorial integrity).

212 See Moris, supra note 202, at 217-18 (explaining view that dissolution is distinct from secession).


214 See Brietzke, supra note 202, at 72 (discussing link between conceptual instability of self-determination and political instability); Cass, supra note 203, at 22 (stating that confusion surrounding self-determination's conceptual limits "promotes an unstable international environment by failing to provide a consistent measure upon which groups can rely").

start shooting in order to gain international recognition, with sometimes catastrophic consequences for their people.\textsuperscript{216}

This tendency to start shooting precisely demonstrates the urgent need for a coherent, articulated body of international law relevant to sovereignty and secessionist conflicts. As these types of conflicts proliferate, the interest of the international community in providing a framework from which to address these disputes becomes paramount. As previously noted, legal norms exert a compliance-pull on parties, suggesting that international law is likely to influence states strongly in their decisionmaking.\textsuperscript{217} Taiwan presents the international community with a clear test case to distill notions of self-determination.

The test question is, therefore, whether and how self-determination applies to the territory of Taiwan. One strand of scholarship contends that self-determination does not support Taiwanese independence because this would represent secession from China.\textsuperscript{218} If this position is accurate, then self-determination may not fully apply to the Taiwan context at all.\textsuperscript{219} The basis of this view is that the right to self-determination is limited by international law's reluctance to

\textsuperscript{216} See Ratner, supra note 213, at 590 (stating that without clear law, borders will be "drawn with blood," and remain extralegally ordained" (citation omitted)). Examples of this are, unfortunately, plentiful. In addition to examples mentioned elsewhere in this Note, consider the Kurdistan Workers Party's (P.K.K.) struggle for autonomy against Turkey. See Stephen Kinzer, Turkey Faces a Quandary on Rebellions by Its Friends, N.Y. Times, Nov. 28, 1999, at A4 (stating that Turkey takes hard line against Kurdish rebels seeking autonomy). Consider also the Tamil Tigers' efforts for independence from Sri Lanka. See Amal Jayasinghe, Tamil Tigers Force Baptism of Fire on Sri Lanka's Army, Agence France Presse, July 28, 1999, available in Lexis, News Library, AFP file (discussing recent rebel assaults on army in long-running Tamil war for independence). Finally, consider the Basque Liberation Army's efforts against Spain. See Raid in Spain Nets 8 in Basque Rebel Fight, Deseret News, Jan. 30, 2000, at A13, available in Lexis, News Library, DESNWS file (discussing renewed spate of violence in Spain's Basque separatist movement). Yet, where definitive political and legal structures exist to channel these autonomy demands, violence is far less prevalent. Consider the political movement for Quebec's independence from Canada. See Graham Fraser, Battered Bloc Renews Independence Fight, Toronto Star, Jan. 31, 2000, available in Lexis, News Library, TSTAR file (discussing efforts of Quebec's pro-independence party to win support at polls). Consider also the recurring referenda on Puerto Rico, currently a U.S. commonwealth, to determine that island's future status. See Puerto Ricans Demand to Know Commonwealth's Options, Balt. Sun, May 7, 1999, at 21A (discussing Puerto Rican frustration at Congressional failure to define Puerto Rican options).

\textsuperscript{217} See supra note 105 and accompanying text.

\textsuperscript{218} See Valerie Epps, Self-Determination in the Taiwan/China Context, 32 New Eng. L. Rev. 685, 692-93 (1998) (stating that since China views Taiwanese independence as illegal secessionary movement, it feels less pressure to find political solution).

\textsuperscript{219} See Ebenroth & Kemner, supra note 132, at 812-13 (arguing that Taiwan is unable to secede from China without consent of China); Epps, supra note 218, at 691 ("[T]he Taiwan/China case does not fit even the newer, more controversial models for declaring a right to self-determination or secession.")
recognize a right to secession. In order to rebut this position, it would be necessary to show that self-determination now applies fully to secessionist movements.

However, this Note has argued that Taiwan already exists as a de facto, undeclared state. This being the case, Taiwan cannot, by definition, secede from the P.R.C. when it already enjoys a separate and distinct international legal and political identity. Once the secession façade is deconstructed, Taiwan manifestly has a right to self-determination.

Some would argue that self-determination only applies to ethnic groups. This view would deny self-determination to the Taiwanese since they are largely the same ethnicity as mainland Chinese. In practice, however, the principle has not been so narrowly applied. For the purposes of self-determination, a “people” is any group possessing “a sense of solidarity[] directed towards preserving their culture, traditions, [or] religion.” This definition takes into account the goal as well as the nature of the group. Territorial contiguity

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220 See generally Demissie, supra note 199, at 191 (noting that controversy surrounding self-determination and secession is one of “epic proportions”); Frederic L. Kirgis, Jr., Editorial Comment: The Degrees of Self-Determination in the United Nations Era, 88 Am. J. Int'l L. 304, 306-07 (1994) (stating that right to secede is gradually and slowly evolving); T.M. Franck, Postmodern Tribalism and the Right to Seccession, in Peoples and Minorities in International Law 3, 16 (Catherine Brolman et al., eds., 1993) (finding no general right to secede, but narrow right may exist under certain circumstances); Schwartz & Waywood, supra note 209, at 1-10 (stating that reluctance to recognize right of secession stems from fear of “violence and chaos” and from desire to protect territorial integrity).

221 See Chen, supra note 11, at 678 (claiming that “Taiwan is a sovereign, independent state”); Chen, supra note 12, at 244 (stating that Taiwan’s actions demonstrate its movement towards independence); Jean-Marie Henckaerts, Self Determination in Action for the People of Taiwan, in New World Order, supra note 9, at 241, 251 (arguing that “[w]hatever its name, Taiwan is a state’); Hsiao, supra note 9, at 742 (“Taiwan is a de facto entity with a distinct international legal identity . . . ”).

222 See Rosenblatt, supra note 3, at 800 (noting that Taiwan is pioneering form of de facto independence).

223 See Hannum, supra note 7, at 15 (discussing self-determination as natural corollary to ethnic and linguistic identification).

224 See Jacques Gernet, A History of Chinese Civilization 6 (1982) (stating that majority of mainland Chinese and Taiwanese are Han Chinese); Lee, supra note 9, at 387 (noting that even though most Taiwanese are ethnic Chinese and share similar language and culture, this does not preclude existence of separate Taiwanese state).

225 See Chen, supra note 200, at 1292 (describing self-determination as “a process through which people forge and express their shared identity”).

226 Patrick Thornberry, The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism, in Modern Law of Self-Determination 102, 125 n.68 (Christian Tomuschat ed., 1993) (quotation marks omitted).

227 See Demissie, supra note 199, at 173.
and the wishes, aspirations, and self-identification of the people also carry great weight.\(^{228}\)

Taiwan qualifies under these considerations, even conceding the ethnic and linguistic heritage that the island shares with the mainland. First, Taiwan, an amalgam of Western liberalism and Chinese traditions, possesses a political and economic culture distinct from the P.R.C.\(^{229}\) It has a thriving free-market economy.\(^{230}\) It is a democratic polity that increasingly respects human rights and guarantees basic freedoms, such as freedom of expression.\(^{231}\) The P.R.C., as a communist regime, is hostile to these concepts.\(^{232}\) Its early experience with Hong Kong shows it has a tendency to undermine liberal institutions.\(^{233}\) As a result of these fundamental differences between the two states' legal, political, economic, and social orders, Taiwan's unique, hard-won identity should entitle it to self-determination.\(^{234}\)

Further, the island of Taiwan represents a distinct territory that for prolonged periods of history has been separate from mainland China.\(^{235}\) As such, the island forms a recognizable territorial unit. It has existed as such a unit, with a different name and identity from

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228 See Chen, supra note 200, at 1290 (identifying relevant factors in determining whether population segment is entitled to self-determination).
229 See Buruma, supra note 70, at 84-88 (stating that effect of Taiwan’s political development and history has been to create unique Taiwanese identity).
230 See In Praise of Paranoia, supra note 4, at 4; Little China, supra note 4, at 5.
233 See Hong Kong’s Troubled Voice, Economist, Oct. 23, 1999, at 47 (discussing centralization of power in Hong Kong, threat to democratic rule, and role of Beijing).
234 See infra note 259 and accompanying text.
235 See Copper, supra note 23, at 21-34 (discussing Taiwan’s separate history from China).
mainland China, for the past half-century. Moreover, Taiwan has spent more of its history apart from China than in union with it. As such, the Taiwanese have their own historical experience, which undergirds their sense of nationhood. In this respect, Taiwan is little different from ethnically German but politically separate Austria, or Australia and New Zealand. Finally, and perhaps most importantly, the will of the Taiwanese people demands that Taiwan remain, at least for the time being, a separate entity from the P.R.C. With all these points in its favor, Taiwan clearly qualifies for self-determination and provides a good opportunity to apply, and thus distill, this area of law.

IV
INTERNATIONAL LAW'S ANSWER TO THE TAIWAN QUESTION

The potentially explosive situation that could result from the standoff between Taiwan and China over Taiwan's future status begs for a law-based solution. Where Taiwan's legal status is uncertain, its opponents may feel emboldened and, perhaps, impelled, to take a broader range of actions, including possible military aggression. Indeed, in the absence of legal institutional constraints, a hypothetical Taiwan crisis would be played out with "no law or justice, no conception of right or wrong, and no morality."

However, if a meaningful discourse about Taiwan's international legal options could begin, legal institutional constraints could limit the use of force to settle the dispute over Taiwan. Taiwan should have a legitimate legal aspiration to declare itself an independent state. The validation of that aspiration by the international community will, under the institutionalist-constructivist approach, have a profound im-

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236 See id. at 37-39 (discussing R.O.C.'s existence as separate from P.R.C. over last fifty years); Long, supra note 5, at 56-59 (same).

237 See Mangelson, supra note 62, at 243 (stating that Taiwanese do not favor unification with P.R.C. until P.R.C. undergoes democratic reforms); Apocalypse, Maybe, supra note 66, at 7 (discussing Taiwanese people's preference to remain separate from China); Pro-Independence Support Grows, Asia Intelligence Wire, Sep. 22, 1998, available in Lexis, News Library, AIW file (reporting poll results showing more Taiwanese support separation from P.R.C.).


239 See, e.g., Friendly Relations Declaration, supra note 193, at 122-23:
Every State has the duty to refrain in its international relations from the threat or use of force. . . . Every State shall settle its international disputes with other States by peaceful means. . . . 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.
pact on how the crisis is resolved as norms affect state roles, obligations, and behavior.240

Once Taiwan is seen as having a legitimate aspiration to independence, it may explicitly claim all the rights, privileges, protections, and obligations of statehood.241 The institutional-constructivist approach suggests that other states would feel pressure to acknowledge the legitimacy of Taiwan’s claim.242 Not to recognize Taiwan’s claim would be to dilute the product of decades of international legal development, something that states would be hesitant to do.243 Further, a realist argument exists that not to recognize Taiwan’s legitimate claim would undermine the stability of all nations by discouraging a peaceful, legal framework in which to consider questions of self-determination and independence, exacerbating the fault line between the concepts of sovereignty and self-determination.244 Thus, there is a state interest in acknowledging that Taiwan has a legally legitimate aspiration to declare independence.245

Acknowledging this legal claim would not be a panacea, but it would increase the costs to China of trying to oppose Taiwanese independence militarily. Institutional constructivists would argue that China would face costs in credibility and prestige and, if Taiwan gained allies, perhaps would face an international coalition fighting

240 See Keohane, supra note 87, at 492 (noting that according to “normative optic,” norms and rules set terms of interpretive discourse).
241 See Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995) (recognizing obligation of de facto states to uphold international law); Restatement (Third) of the Foreign Relations Law of the United States § 202 cmt. b (1987) (stating that entity that meets requirements of statehood “is a state whether or not its statehood is formally recognized by other states”); Hsiao, supra note 9, at 716 (arguing that P.R.C.’s use of force against Taiwan would contravene international law); Zaid, supra note 169, at 806-07 (stating that Taiwan is entitled to all rights of statehood).
242 See supra notes 96-109 and accompanying text.
243 See Finnemore & Sikkink, supra note 108, at 916 (noting that empirical research in study of international relations demonstrates that “legal norms have powerful behavioral effects”); Hopf, supra note 101, at 177-80 (demonstrating how intersubjectivity, as described by constructivism, explains that states will be inclined to make future actions cohere with past practice); Martin & Simmons, supra note 96, at 742-43 (1998) (stating that institutions, once created, constrain and shape state behavior by their sheer presence); Slaughter, International Economic Law, supra note 88, at 724-26 (providing overview of institutionalist belief that development of international regimes makes it more difficult for states to ignore international norms).
244 See Hsiao, supra note 9, at 725-26 (noting that self-determination applies to de facto political entities); Nicholas Rostow, Taiwan: Playing for Time, 32 New Eng. L. Rev. 707, 709-11 (1998) (discussing threats to stability and rule of law inherent in any Taiwan crisis).
245 See Lilley, supra note 9, at 749-50 (discussing need for strong legal institutions to encourage peaceful resolution to Taiwan question); Rostow, supra note 244, at 712-13 (discussing United States interests of reaching peaceful, legal solution to Taiwan question).
This could make Chinese action against Taiwan prohibitively expensive, especially since China’s own military forces are not yet strong enough to guarantee victory. On the other hand, the recognition of the legal claim could encourage the unification goals which the P.R.C. pursues. Under this scenario, realizing that it had no safe military option against Taiwan, the P.R.C. would change its posture towards the island. Instead of demanding reunification and issuing dark threats, the P.R.C. would rather negotiate and seek to induce Taiwan to join in some sort of confederation. A starting point for this is, no doubt, provided by the “One Country/Two Systems” model under which Hong Kong has operated since its accession to China from Britain in 1997. Taiwan, for its part, could be responsive to these overtures for a variety of reasons, including economic and cultural, but also out of some latent anxiety about future Chinese military threats. Thus, international law, when viewed in light of international relations theory, is poised to play a potentially vital role, if not in definitively answering the Taiwan question, then at least in offering a framework for its peaceful resolution.

This question has broader significance for other flashpoints around the world. It addresses international law’s potentially powerful use as a resource not just for conflict resolution but conflict prevention. Using the Taiwan question as a paradigm for similar conflicts of sovereignty moves the international community away from its current ad hoc approach to crisis towards a primarily legal approach,

246 See Lasater, supra note 4, at 231-32 (proposing that United States maintain strong military presence in Pacific and commit aid to Taiwan in event of attack in order to deter China from using force against Taiwan); Butterton, supra note 70, at 57-59 (discussing role of deterrence strategies in preventing war so far).
247 See Fu, supra note 9, at 329-30 (noting Chinese attempts to increase military power); Craig S. Smith, New Chinese Guided-Missile Ship Heightens Tension, N.Y. Times, Feb. 9, 2000, at A3 (characterizing Beijing’s purchase from Russia as designed to counter American forces in Taiwan Strait); Douglas Waller, China’s Arms Race, Time, Feb. 1, 1999, at 32 (discussing China’s current military buildup).
248 See Epps, supra note 218, at 692-93 (stating that China would be more willing to negotiate if it knew Taiwan had clear rights).
249 See Apocalypse, Maybe, supra note 66, at 7 (noting that, even now, P.R.C. prefers “charm offensive” to win over Taiwan); see also Fu, supra note 9, at 325-30 (noting that Chinese strongly prefer peaceful solution but are prepared to use force).
250 See Cooney, supra note 4, at 501-07 (discussing “One Country/Two Systems” (OCTS) model and its applicability to Taiwan).
251 See id. at 507-09 (noting that Taiwan rejects OCTS as insufficient to protect Taiwan’s way of life, human rights, and liberal government); Chas. W. Freeman, Jr., Preventing War in the Taiwan Strait, Foreign Aff., July-Aug. 1998, at 6, 11 (stating that Taiwan cannot sustain arms race with China); Little Taiwan, Economist, Nov. 7, 1998, Survey, at 16, 16 (noting economic links between Taiwan and P.R.C.); Taiwan Decries New China Missile Deployment, Asia Intelligence Wire, Feb. 11, 1999, available in Lexis, News Library, AIW file (noting Taiwan’s discomfort at Chinese deployment of ballistic missiles).
where the international community's stance on a claim may be assessed in advance. This advance approach would reduce the area of surprise and uncertainty rooted in international affairs, encouraging decisionmakers to temper their actions accordingly. Such information can only act as a deterrent to aggression.