

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.¹ Claimed as a “renegade province” by the People's Republic of China (P.R.C.),² it endures a twilight existence as a de facto state,³ possessing one of the world's most vibrant and stable economies, a maturing

* I would like to thank Professor Jerome Alan Cohen for his patient suggestions, advice, and thoughtful readings of earlier drafts. I would also like to thank Professors Anne-Marie Slaughter and Benedict Kingsbury for their assistance. Finally, but by no means least of all, I would like to give special thanks to Shara Frase, Philip Rohlik, Breen Haire, Andrew Weinstein, Troy McKenzie, and the entire staff of the *New York University Law Review* for their support. Any oversights and errors are mine alone.

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).

³ See Stephen Lee, *American Policy Toward Taiwan: The Issue of the De Facto and De Jure Status of Taiwan and Sovereignty*, 2 *Buff. J. Int'l L.* 323, 323-25 (1995-96) (stating that Taiwan's status as independent political entity is “undeniable fact”); Peter R. Rosenblatt, *What Is Sovereignty? The Cases of Taiwan and Micronesia*, 32 *New Eng. L. Rev.* 797, 797 (1998) (stating that Taiwan is de facto independent).

democratic government, and a highly sophisticated and skilled population.⁴ 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.⁵ 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.⁶

This Note will examine whether Taiwan could have a legitimate aspiration to declare independence under international law.⁷ 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

⁴ See Martin L. Lasater, *The Changing of the Guard: President Clinton and the Security of Taiwan* 4 (1995) (discussing 1986 advent of "true democracy" in Taiwan); Sean Cooney, *Why Taiwan Is Not Hong Kong*, 6 *Pac. Rim L. & Pol'y J.* 497, 518-24 (1997) (discussing democratization of Taiwan); *An Army of Ants*, *Economist*, Nov. 7, 1998, Survey, at 8, 8 (discussing Taiwanese economic success); *In Praise of Paranoia*, *Economist*, Nov. 7, 1998, Survey, at 3, 3 (praising Taiwan's economic acumen in light of Asian financial crisis); *Little China*, *Economist*, Nov. 7, 1998, Survey, at 4, 5 (calling Taiwan model democracy in East Asia).

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,⁸ the force of events has set the island and the mainland on different paths, providing a rationale for their current, continued separation.⁹ Only in 1886 did

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.¹⁰ This proved to be a short-lived and rocky association, however, typified by insurgency against mainland “colonial” rule.¹¹ 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.¹² While residents were given a treaty right to relocate in China, the overwhelming majority chose to remain in Taiwan.¹³ In an effort to avoid impending Japanese rule, Taiwan ineffectually declared itself an independent republic, but Japan soon crushed all resistance.¹⁴

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.¹⁵ Japanese legal and educational sys-

force if negotiations on unification break down); Fu, *supra*, at 329-30 (discussing Chinese military preparations for invasion of Taiwan); Jane Perlez, Warning by China to Taiwan Poses Challenge to U.S., *N.Y. Times*, Feb. 27, 2000, at A1 (interpreting China’s statement of policy as indicating it would use force to settle issue if negotiations “dragged on” indefinitely).

¹⁰ For discussion of Taiwanese history prior to 1886, see Long, *supra* note 5, at 4-23; Yu-ming Shaw, *Modern History of Taiwan: An Interpretative Account*, in *China and the Taiwan Issue* 7, 7-20 (Hungdah Chiu ed., 1979); Cheri L. Attix, Comment, *Between the Devil and the Deep Blue Sea: Are Taiwan’s Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 *Cal. W. Int’l L.J.* 357, 359-60 & nn.16-20 (1995).

¹¹ See Parris Chang & Kok-ui Lim, *Taiwan’s Case for United Nations Membership*, 1 *UCLA J. Int’l L. & Foreign Aff.* 393, 405 (1996) (stating that “Taiwan’s history since the 17th century has been one of continuous colonial rule” and that its “status as a province [of China] was short-lived”); Lung-chu Chen, *Taiwan’s Current International Legal Status*, 32 *New Eng. L. Rev.* 675, 677 (1998) (describing Taiwan’s relationship with China in this period as “tenuous”); Hans Kuijper, *Is Taiwan a Part of China?*, in *New World Order*, *supra* note 9, at 9, 10 (arguing that Taiwan’s union with China lasted only eight years and that Beijing had weak control over territory).

¹² Treaty of Shimonoseki, Apr. 17, 1895, Japan-China, art. II, reprinted in 1 *Treaties and Agreements with and Concerning China 1894-1919*, at 18, 18-19 (John V.A. MacMurray ed., 1973); see also Angeline G. Chen, *Taiwan’s International Personality: Crossing the River by Feeling the Stones*, 20 *Loy. L.A. Int’l & Comp. L.J.* 223, 230 (1998) (discussing reasons for Chinese defeat).

¹³ See Treaty of Shimonoseki, *supra* note 12, art. V; see also Lung-chu Chen & W.M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 *Yale L.J.* 599, 610 n.38 (1972) (noting that only 0.16% of Taiwanese population opted for Chinese nationality).

¹⁴ See Hungdah Chiu, Comments, in *Multi-System Nations and International Law* 36, 38-39 (University of Md. Sch. of Law Contemporary Asian Studies Series No. 8, Hungdah Chiu & Robert Downen eds., 1981) (commenting on Ray E. Johnston, *Assessing the International Status of Partitioned Nations: Theories and Findings*) (describing resistance to Japanese rule); Harry J. Lamley, *The 1895 Taiwan War of Resistance: Local Chinese Efforts Against a Foreign Power*, in *Taiwan: Studies in Chinese Local History* 23, 25-31 (Leonard H.D. Gordon ed., 1970) (same). But see Kuijper, *supra* note 11, at 11 (stating that Chinese on Taiwan did not collectively oppose Japanese and that Japanese occupation encountered less resistance in Taiwan than in Korea).

¹⁵ See Long, *supra* note 5, at 28-29 (stating that Japanese wish was to integrate Taiwan’s economy into Japan’s); Kuijper, *supra* note 11, at 11 (stating that Taiwan was “part and

tems were installed,¹⁶ and use of Japanese customs and language was highly encouraged and in some instances required.¹⁷ 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.¹⁸ Taiwan's contacts with China in this period were negligible.¹⁹

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."²⁰ This declaration was probably intended to include the Treaty of Shimonoseki, the instrument that transferred Taiwan to Japan.²¹

The Cairo Declaration of 1943 also challenged Japanese possession of Taiwan.²² 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."²³ This was restated two years later in the

parcel of the Japanese economy"); Attix, *supra* note 10, at 360 n.21 (sketching overview of Japanese domination, including improvements in infrastructure and imposition of Japanese culture) (citing Ian Buruma, *Taiwan*, *Granta*, Issue 26, at 144, 148-49 (1989)).

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.").

²⁰ China's Declaration of War on Japan, Dec. 9, 1941, reprinted in *China and the Question of Taiwan: Documents and Analysis* 204 (Hungdah Chiu ed., 1973). Of course, China and Japan had fought a fierce war in 1931, when Japanese forces invaded the northeastern Chinese province of Manchuria. See Theodore Ropp, *War in the Modern World* 359-60 (1962) (describing Japanese advances through Manchuria). Protracted struggle began when Japan launched a full scale invasion along the Chinese coast in 1937. See *id.*

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.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.²⁵

This change of administration occurred without any consultation with the people of Taiwan.²⁶ At the outset, the KMT seemingly was welcomed as a liberating force.²⁷ However, sentiments changed as the KMT's actions revealed them to be conquerors in liberators' clothing.²⁸ Moving ever closer to defeat in its mainland Civil War with Mao Zedong's Communists, the KMT tolerated no dissent in Taiwan.²⁹ A contemporaneous U.S. State Department brief reports that "[the KMT] ruthlessly, corruptly, and avariciously imposed [its] regime."³⁰ Government positions were exclusively filled by mainlanders³¹ and the KMT authorities were given unlimited powers.³² Consequently, "[e]conomically, politically, and culturally [Taiwan] was suddenly yanked out of the Japanese orbit and appended to China in another colonial relationship."³³ This was so even as KMT authorities held that the Chinese constitution did not even apply to Taiwan, sug-

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.

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.

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).

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) <http://newtaiwan.virtualave.net/228_01.htm> [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).

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).

²⁹ See Chang & Lim, supra note 11, at 411 (stating that KMT instituted "one-party dictatorship" in Taiwan). For a discussion of the Chinese Civil War, see generally Immanuel C.Y. Hsü, *The Rise of Modern China* 553, 630-33 (1983); Edwin E. Moise, *Modern China: A History* 91-123 (1986).

³⁰ Department of State, *United States Relations with China* 309 (1949).

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

³² See Department of State, supra note 30, at 309.

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-

Memo, supra note 27 (stating that "unscrupulous officials" engaged in private smuggling, trading, and theft).

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 Hsu, 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; Kuijper, 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.⁴² Chiang decreed a state of martial law, which would last until 1987.⁴³

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.⁴⁴ The P.R.C., for its part, considered Taiwan to be part of its territory and began long-term plans for an invasion.⁴⁵ However, Mao delayed annexing Taiwan, preferring to focus on other more pressing problems.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.⁴⁷ The Korean War and the politics of the Cold War,⁴⁸ however, led the United States to change its stance, extinguishing any possibility that the P.R.C. flag would soon fly over Taipei.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.⁵⁰ This then was the genesis of the Taiwan question, as the United States, the United Nations, and most of

⁴² See Chang & Lim, *supra* note 11, at 416.

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.*

⁴⁴ See *id.* at 231.

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).

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).

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).

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).

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.

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.⁵¹

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.⁵² 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.⁵³ Finally, in 1971, the U.N. General Assembly voted to allow the P.R.C. to take China's U.N. seat.⁵⁴ The R.O.C. was then without U.N. representation⁵⁵ and diplomatically isolated.⁵⁶

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.⁵⁷ through Richard Nixon's "opening to China" and the issuance of the Shanghai Communiqué.⁵⁸ This process culminated in 1979 when Jimmy Carter officially recognized the P.R.C. as the government of China.⁵⁹

⁵¹ See Chen, *supra* note 12, at 234 (stating that majority of states continued to recognize KMT as legal government of China).

⁵² See Kerr, *supra* note 35, at 434-50 (describing origin of "Two Chinas").

⁵³ See Attix, *supra* note 10, at 362 (stating that other nations realized impracticality of refusing to recognize government of over seven hundred million people).

⁵⁴ 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)).

⁵⁵ 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.

⁵⁶ 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).

⁵⁷ 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).

⁵⁸ 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.

⁵⁹ 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.

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.”⁶⁰ 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.⁶¹

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.⁶² Rather, the United States merely “acknowledges” the claim, although the Chinese glibly translate the English “acknowledge” to the Chinese word for “recognize.”⁶³ Nevertheless, the official U.S. position on Taiwan remains that Taiwan’s final status is as yet undetermined.⁶⁴ This position is buttressed by the Taiwan Relations Act⁶⁵ and has been reaffirmed by President Clinton’s “three noes.”⁶⁶

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 re-translated 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.⁶⁷ It has been suggested that Taiwan's remarkable economic growth⁶⁸ caused this political transformation by creating a sense of "democracy entitlement" in the burgeoning middle class.⁶⁹ However, Taiwanese officials, under pressure from the United States,⁷⁰ may also have understood the added legitimacy that a democratic form of government would provide the state internationally.⁷¹ Furthermore, because Beijing has cited social instability on Taiwan as an event that could precipitate Chinese invasion,⁷² 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.⁷³ This new era of popular sovereignty has led the

⁶⁶ 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).

⁶⁷ 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.

⁶⁸ See generally 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).

⁶⁹ See 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).

⁷⁰ See Ian Buruma, *Taiwan's New Nationalists*, *Foreign Aff.*, July-Aug. 1996, at 88 (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. Butterson, *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).

⁷¹ 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").

⁷² See Hsiao, *supra* note 9, at 718 (stating that "large social instability" in Taiwan would prompt Chinese invasion).

⁷³ 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 China⁷⁴ 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

that represents” current population and territory of state). In 1996, the people of Taiwan voted for their President for the first time in history. See *id.*

⁷⁴ See Attix, *supra* note 10, at 366 (reporting that, in 1991, President Lee formally renounced KMT’s claim to be only legitimate government of China).

⁷⁵ See Che-Fu Lee, *China’s Perception of the Taiwan Issue*, 32 *New Eng. L. Rev.* 695, 699 (1998) (stating that President Lee’s use of phrase “Republic of China on Taiwan” in 1991 speech at Cornell University signals this change); *Equality Goal Unchanged, Wording Is Something Else*, *Asia Intelligence Wire*, July 22, 1999, available in Lexis, News Library, AIW file (stating that President Lee merely clarified Taiwan’s longstanding desire to be treated as equal in status to P.R.C.); Seth Faison, *Taiwan President Implies His Island Is Sovereign State*, *N.Y. Times*, July 13, 1999, at A1 (stating that President Lee implicitly declared Taiwan to be separate, sovereign state apart from China); Seth Faison, *Taiwan’s President Declines to Soften His New Doctrine*, *N.Y. Times*, July 23, 1999, at A8 (same).

⁷⁶ See Seth Faison, *New Goal in Taiwan: To Be Left Alone*, *N.Y. Times*, Aug. 9, 1999, at A6 (stating that there is no public support for unification with China and that unification is impossible without such support); *Pro-Independence Support Grows*, *Asia Intelligence Wire*, Sep. 22, 1998, available in Lexis, News Library, AIW file (reporting that 71% of Taiwan’s residents considered Taiwan already independent and only 17% disagreed).

⁷⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* 122 (1977); see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 *UCLA*

“implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”⁷⁸ 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.”⁷⁹

International law figures prominently in the decisionmaking process of world leaders,⁸⁰ even though, unlike domestic law, it exists without a central promulgating authority or a linear compliance procedure.⁸¹ 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.”⁸²

International law provides a definitive peaceful structure for legitimate expressions of state power.⁸³ 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.”).

⁷⁸ Carlos Fernando Diaz, *With Law in Their Minds: Some Reflections on the Nature of Public International Law at the Light of Current Political Science Theory*, 4 *ILSA J. Int’l & Comp. L.* 1133, 1135 (1998) (quoting Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *International Regimes* 1, 2 (Stephen D. Krasner ed., 1983)). International law is created either through treaty law or through custom. Treaties and conventions create law in a straightforward process of “expressly accepted obligations spelled out in international agreements freely adhered to by states.” Trimble, *supra* note 77, at 669. Customary law arises from actions taken by, or refrained from being taken by, states out of a sense of legal obligation. See *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 *I.C.J.* 226, 253 (July 8); *Continental Shelf (Libya v. Malta)*, 1985 *I.C.J.* 13, 29 (June 3) (stating that customary international law must be “looked for primarily in the actual practice and *opinio juris* of States”); see also *Statute of the International Court of Justice*, June 26, 1945, art. 38(1)(b), 59 *Stat.* 1055, 1060 (listing customary law as acceptable source of international law); Michael Byers, *Custom, Power, and the Power of Rules*, 17 *Mich. J. Int’l L.* 109, 136 (1995) (discussing state practice and *opinio juris* as elements of customary law).

⁷⁹ John Foster Dulles, *War or Peace* 198 (1950) (discussing need for stable system of international law).

⁸⁰ See Mary Ellen O’Connell, *New International Legal Process*, 93 *Am. J. Int’l L.* 334, 337 (1999) (citing studies concluding that law “constrained” and “justified” decisionmakers’ actions).

⁸¹ Cf. Anthony D’Amato, *Is International Law Really “Law”?*, 79 *Nw. U. L. Rev.* 1293, 1293-1301 (1984) (arguing that enforcement disability of international law does not affect whether it is truly “law”); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 *Mich. J. Int’l L.* 345, 346-48 (1998) (arguing that “compliance” is not free-standing, adequately defined concept, but rather only exists as extension of prior theories of law).

⁸² Louis Henkin, *How Nations Behave* 42 (1968).

⁸³ 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.⁸⁴

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,⁸⁵ it should be concluded that international law is powerful, relevant, and has a role to play in resolving any dispute among nations.⁸⁶ Thus, the international law applicable to Taiwanese independence would be crucial in developing a coherent international response in advance of any crisis.

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.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.⁸⁸ This approach has produced an institutional-constructivist

⁸⁴ See Diaz, *supra* note 78, at 1148-50.

⁸⁵ China itself is sensitive to the importance of international law. See One-China Principle, *supra* note 9 (invoking international law generally and specific instruments, such as U.N. Charter); see also Melanne Andromedea Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 *Buff. J. Int'l L.* 285 (1995) (showing China's attempts to justify its actions in terms of international law); Leo Gross & Vratislav Pechota, *Book Review*, 79 *Am. J. Int'l L.* 851, 851 (1985) (reviewing Chinese Soc'y of Int'l Law, *Selected Articles from Chinese Yearbook of International Law* (1983)) (stating that China has placed emphasis on study of international law after years of neglect); China Opens Symposium on International Humanitarian Law, BBC Worldwide Monitoring, July 13, 1999, available in 1999 WL 19124542 (showing Chinese awareness of role of international law).

⁸⁶ See Dino Kritsiotis, *The Power of International Law as Language*, 34 *Cal. W. L. Rev.* 397, 402 (1998) (stating that "international law is . . . a force to be reckoned with"); Jiangming Shen, *The Basis of International Law: Why Nations Observe*, 17 *Dick. J. Int'l L.* 287, 342-43 (1999) (stating that states find international law necessary for regulating their international relations).

⁸⁷ See generally Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 *Harv. Int'l L.J.* 487 (1997) (discussing instrumentalist and normative optics of international relations).

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.⁸⁹ This description explains not only a norm's origins, but also, more importantly, suggests its future development.⁹⁰ In short, by marrying international relations theory to international law, it becomes easier to craft a law-based solution for future challenges.⁹¹

Much of the focus of the interdisciplinary approach falls on rebutting the structural realist⁹² attack on international law that arose in the wake of World War II.⁹³ 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.⁹⁴ 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.⁹⁵

In contrast to this stark realist claim is institutionalism,⁹⁶ which charges that realism fails to take into account the transformative

nomi Law, 10 *Am. U. J. Int'l L. & Pol'y* 717, 717 (1995) [hereinafter Slaughter, *International Economic Law*] (noting collaboration of political scientists and international lawyers).

⁸⁹ See Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 *Am. J. Int'l L.* 361, 362-63 (1999) (describing helpfulness of international relations theory in performance of three intellectual tasks: description, explanation, and institutional design).

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").

⁹² For description of realism, see generally Kingsbury, *supra* note 81, at 350-51; John J. Mearsheimer, *A Realist Reply*, *Int'l Security*, Summer 1995, at 82, 82-83 (defending realism against institutionalist critique); Slaughter, *International Economic Law*, *supra* note 88, at 721-24.

⁹³ See Burley, *supra* note 88, at 208-09 (providing overview of realist critique of post-war international law and response of legal scholars to critique); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2615-16 (1997) (book review) (stating that, post-World War II, international law fell into disrepute).

⁹⁴ See Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 *Va. J. Int'l L.* 107, 111 (1998) (discussing realist view of international order); Kritsiotis, *supra* note 86, at 397-98 (stating that, under realist view, "the . . . world . . . is held hostage by . . . national interests").

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 Institutional 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

and Empirical Studies of International Institutions, 52 *Int'l Org.* 729 (1998) (describing empirical basis and research agenda of institutionalism). Realism is also opposed by another international relations school, liberalism. While not employed in this Note, liberalism explains interactions and outcomes between states as being determined by the interests of those in power, not necessarily by a mere rote calculation of relative capabilities of rival states. Liberalism thus would argue that the most powerful states would tend to support Taiwanese independence because the ruling interests in Taiwan share common ideologies with those states—such as free market capitalism, democracy, and rule of law—and because all of those parties generally support the institutional growth and development of international law itself. See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *Int'l Org.* 513, 513 (1997) (noting that "the configuration of state preferences matters most in world politics"); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *Eur. J. Int'l L.* 503, 508 (1995) (restating assumption of liberalism that aggregation of preferences represented in state determines outcome of state interactions).

⁹⁷ See Koh, *supra* note 93, at 2614 (giving examples of these institutions including United Nations and its sub-organs, and other institutions such as World Bank and World Court).

⁹⁸ See Slaughter, *International Economic Law*, *supra* note 88, at 724 (stating that institutionalism reflects belief that mitigation of anarchy allows inter-state cooperation).

⁹⁹ Arend, *supra* note 94, at 120 ("[I]nstitutions and regimes can play significant roles in affecting the behavior of international actors."); see Slaughter, *International Economic Law*, *supra* note 88, at 724.

¹⁰⁰ See Arend, *supra* note 94, at 120-22 (providing overview of advantages of institutions that help explain state behavior); Kingsbury, *supra* note 81, at 352 (describing rationalist explanation of state behavior); Slaughter, *International Economic Law*, *supra* note 88, at 725 (noting that institutionalism can "offer an alternative paradigm to [r]ealism").

¹⁰¹ For discussion of constructivism, see generally Ted Hopf, *The Promise of Constructivism in International Relations Theory*, *Int'l Security*, Summer 1998, at 171, 171-72 (defining constructivism and clarifying its primary claims); John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 *Int'l Org.* 855 (1998) (describing development and agenda of constructivism); Alexander Wendt, *Constructing International Politics*, *Int'l Security*, Summer 1995, at 71, 81 (defending constructivism against neorealist critique).

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).

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.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.¹¹⁰ In keeping with that position, the P.R.C. has made very credible threats to invade Taiwan should Taiwan not progress toward unification.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

¹⁰⁹ 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.).

¹¹⁰ 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").

¹¹¹ 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'Neill, *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 invade Taiwan under certain circumstances).

China.¹¹² From this perspective, if Taiwan were to declare independence, it would be, in effect, seceding from China.¹¹³ 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.”¹¹⁴ 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.”¹¹⁵ It claims that the “blood, sweat, and ingenuity” of the Chinese built Taiwan,¹¹⁶ recounts how Japan seized Taiwan from China,¹¹⁷ and states that reannexing Taiwan was an important objective for China when it declared war against Japan.¹¹⁸ However, the P.R.C.’s reliance on these points is misplaced.¹¹⁹

First, as mentioned in Part I, Taiwan was not incorporated as a province of China until 1886.¹²⁰ 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.¹²¹ Indeed, despite Taiwan’s new status as a province, the Taiwanese—including immigrants from the mainland—were resistant to Chinese authority.¹²²

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 protests”).

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.¹²³ In any case, the Japanese ruled Taiwan for fifty years, from 1895 to 1945.¹²⁴ During that period, the Japanese invested heavily in Taiwan, advancing the island's prosperity and development beyond anything it had achieved previously.¹²⁵ Thus, the Japanese interregnum established an intervening event, in temporal terms as well as socioeconomic and political, that weakened Taiwan's links to China.¹²⁶

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.¹²⁷ 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.¹²⁸ Three points should be made about these war-

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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³²

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.¹³³ This does not seem consistent with the notion that China had a natural, preexisting claim to Taiwan.¹³⁴

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.¹³⁵ 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).

¹³² See Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. Pa. J. Int'l Econ. L. 753, 756 (1996) (defining state succession as taking place "when a former state becomes extinct" and explaining that even radical changes in government may not amount to creation of new state).

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 determined.”¹³⁶ The peace treaties signed by Japan also fail to resolve this ambiguity.¹³⁷

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 legitimate, it must possess the legal characteristics of a state under international 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.¹³⁸ Even for those states that are not parties to the convention, these criteria are considered part of customary international law.¹³⁹ In the United States, the Montevideo criteria are recognized as authoritative on the legal elements of statehood.¹⁴⁰ According to Article 1 of the Conven-

¹³⁶ John Foster Dulles, Purpose of Treaty with Republic of China, News Conference Statements (Dec. 1, 1954), in Dep’t St. Bull., Dec. 13, 1954, at 896 (issued on occasion of signing of Mutual Defense Treaty between United States and R.O.C.); Chiu, *supra* note 45, at 150 (citing statement of President Truman that Taiwan’s status remained undetermined in 1950).

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).

¹³⁸ See Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 21, 25 [hereinafter Montevideo Convention]; see also Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 Colum. J. Transnat’l L. 403, 408 (1999) (calling Montevideo Convention “source most often cited as authority on the definition of the state”).

¹³⁹ See Chen, *supra* note 12, at 236-37 (stating that Montevideo criteria have been accepted throughout world); Lee, *supra* note 9, at 387 n.70 (stating that Convention represents criteria for statehood under customary international law).

¹⁴⁰ See *Kadic v. Karadzic*, 70 F.3d 232, 244-45 (2d Cir. 1995) (restating Montevideo criteria 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

nation, without citing Montevideo Convention); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47-49 (2d Cir. 1991) (denying statehood status to PLO under Montevideo criteria); Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. a (1987) (pointing out that definition of “state” in Restatement is “nearly identical to that in Article 1 of the Montevideo Convention”). These principles resonate in U.S. caselaw from the nineteenth century. See, e.g., *Ford v. Surget*, 97 U.S. 594, 620 (1878) (Clifford, J., concurring) (identifying “full and actual exercise of sovereignty over a territory and people large enough for a nation” as elements of statehood).

¹⁴¹ Montevideo Convention, *supra* note 138, 49 Stat. at 3100, 165 L.N.T.S. at 25.

¹⁴² See Ian 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).

¹⁴⁵ See *Island of Palmas (Neth. v. U.S.)*, 2 R.L.A.A. 829, 838-40 (1928) (discussing practical effect of sovereign control over territory). See generally M.N. Shaw, *Territory in International Law*, 13 *Netherlands Y.B. Int’l L.* 61 (1982) (examining role of territory in statehood and issues related in international law); Santiago Torres Bernardez, *Territorial Sovereignty*, 10 *Encyclopedia Pub. Int’l L.* 487, 487-94 (1987) (providing overview of legal function of “territory,” characteristics of territorial sovereignty, and limitations upon territorial sovereignty).

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.¹⁴⁷ 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.¹⁴⁸ 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,¹⁴⁹ which historically was part of a united Ireland.¹⁵⁰ Yet, since its founding as a Free State in 1921¹⁵¹ and as an independent republic in 1949,¹⁵² Ireland has never exercised sovereignty over the North.¹⁵³ 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.¹⁵⁴

It could also be argued that Taiwan lacks a defined territory since the P.R.C. has a credible claim to the territory.¹⁵⁵ However, even if the P.R.C.'s claim were given every consideration in its favor, the

¹⁴⁷ 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.

¹⁴⁸ 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").

¹⁴⁹ See Ir. Const. art. 2 (repealed May 22, 1998) (visited Feb. 29, 2000) <<http://www.irigov.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, PANews 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).

¹⁵⁰ 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").

¹⁵¹ 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).

¹⁵² See Boyce, *supra* note 150, at 350-51 (noting that Irish sovereignty was so well established by 1949 that actual declaration was "anti-climactic").

¹⁵³ 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.

¹⁵⁴ 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").

¹⁵⁵ See *supra* notes 108-35 and accompanying text.

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

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.L.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 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).

¹⁵⁹ See Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 *Mich. J. Int'l L.* 1141, 1171 (1998) (discussing human rights obligations of new states); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *Am. J. Int'l L.* 46, 46 (1992) (stating that democracy is becoming normative requirement for governmental legitimacy).

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.¹⁶¹ The government must have some capacity to establish, execute, and enforce a legal order under a constitution.¹⁶² In the case of Taiwan, clearly this criterion is met as Taiwan functions under a constitution adopted in 1947.¹⁶³ This constitution has provided the structure for continuous autonomous government to Taiwan since that time on both a national and international level.¹⁶⁴

4. *Foreign Relations*

The fourth criterion under Montevideo is the capacity to enter into foreign relations.¹⁶⁵ 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.¹⁶⁶ Accord-

¹⁶¹ Cf. James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 *Eur. J. Int'l L.* 307, 308-10 (1990) (stating that Palestinian state declared in 1988 by Palestinian groups resisting Israeli occupation failed to fulfill statehood criteria due to lack of self-governing control over territory); Siegfried Mageira, *Government*, 2 *Encyclopedia Pub. Int'l L.* 603, 605-06 (1995) (stating that effective control of population and territory, stability, and independence are criteria for legal government).

¹⁶² See Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 *Harv. L. Rev.* 44, 64-65 (1941) (arguing against distinction between law and state and suggesting instead that state necessarily is legal order); cf. R.W.M. Dias, *Legal Politics: Norms Behind the Grundnorm*, 1968 *Cambridge L.J.* 233, 233 ("A revolution in a country is complete in law as soon as its courts hold the new regime to be lawful."). Legal order and constitutional primacy are two separate requirements, as it could be possible to establish a type of legal order without recourse to a written, defined constitution. Consider Somalia, where, in the absence of any national government, amorphous regional power structures have developed that function as quasi-legal organs absent a national constitution. See, e.g., Ruth Gordon, *Growing Constitutions*, 1 *U. Pa. J. Const. L.* 528, 576-81 (1999) (discussing provisional government established in Somaliland, northern breakaway territory of Somalia, which operated in absence of constitution).

¹⁶³ See Attix, *supra* note 10, at 367. For more information about the branches of government and the changes to Taiwan's constitution since the advent of democracy, see *id.* at 367-68. The fact that until relatively recently Taiwan was governed under martial law does not suggest that Taiwan was governed extraconstitutionally during that period. See Cooney, *supra* note 4, at 514-15 (stating that President's martial law powers were constitutional owing to grant of authority from legislature).

¹⁶⁴ See Lee, *supra* note 9, at 387 (stating that Taiwan's government has been relatively stable and now possesses democratic mandate with 1996 first direct election of president).

¹⁶⁵ See Grant, *supra* note 138, at 434 (stating that fourth and most controversial criterion on Montevideo list is capacity to enter into relations with other states); see also James Crawford, *The Creation of States in International Law* 47 (1979) (stating that foreign relations capacity is "a consequence, rather than a condition of statehood"); Ingrid Detter, *The International Legal Order* 43 (1994) (same).

¹⁶⁶ See Montevideo Convention, *supra* note 138, art. 3 (stating that state's international political status is not related to presence of foreign relations with other states). Guinea-Bissau was recognized by Germany and the United States in the 1970s on the basis of only the first three Montevideo criteria. See Akehurst's, *supra* note 114, at 79.

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

¹⁶⁷ Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. e (1987).

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 368 (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).

rights.¹⁷² Since the beginning of the 1986 democratic reforms, Taiwan has flowered into a fully functioning sovereign democracy.¹⁷³ It has been said that this popular sovereignty alone constitutes an “irrefutable argument” in favor of Taiwan’s independence.¹⁷⁴

The law of state responsibility could serve as a sixth criterion of statehood here.¹⁷⁵ This doctrine is designed to determine when, whether, and how a state may be held liable for breaches of international law.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸

The *Maersk Dubai*¹⁷⁹ 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*.¹⁸⁰ Taiwan asked for the release of the sailors into its custody and promised to prosecute them in Taiwan.¹⁸¹ The P.R.C. also asked for the sailors, basing their jurisdiction on the claim that

¹⁷² See Chang & Lim, *supra* note 11, at 422 (stating this as nontraditional fifth element of statehood); Franck, *supra* note 159, at 46 (stating that democracy is becoming element of governmental legitimacy).

¹⁷³ See *supra* notes 66-75 and accompanying text.

¹⁷⁴ See Buruma, *supra* note 70, at 79, 81 (describing newly democratized Taiwan as “state without a nation” in that democracy gives it essence of separate identity from P.R.C.).

¹⁷⁵ See Chen, *supra* note 12, at 238 (calling state responsibility “strong indicator of statehood and sovereignty”). For discussion of state responsibility, see 1 Ian Brownlie, *System of the Law of Nations: State Responsibility* 22-34 (1983) (discussing nature of state responsibility as insuring that dilatory state return to “normal standards of international conduct”). The International Law Commission has been engaged in a long process of codifying this compendious area of law. See *The International Law Commission’s Draft Articles on State Responsibility* 2-30 (Shabtai Rosenne ed., 1991) (discussing history of codification).

¹⁷⁶ See Akehurst’s, *supra* note 114, at 254 (“The law of state responsibility is concerned with . . . whether there has been a wrongful act . . . , what the legal consequences are . . . , and how such international responsibility may be implemented . . .”).

¹⁷⁷ See Chen, *supra* note 12, at 237 (discussing state responsibility).

¹⁷⁸ See *id.*

¹⁷⁹ *State of Romania v. Cheng*, [1997] N.S.R.2d 13, 45 (Can.) (denying Romanian extradition request for suspects in murder on high seas in Taiwan flag vessel due to lack of jurisdiction). State responsibility for the acts of private natural or legal persons may be based upon some ultimate default by the organs of the state. See Brownlie, *supra* note 175, at 159. Sailors here might be considered private persons, because in committing murder they acted outside the scope of their agency to Taiwan.

¹⁸⁰ See Chen, *supra* note 12, at 237-38 (discussing facts of case).

¹⁸¹ See Moira McConnell, “Forward This Cargo to Taiwan”: Canadian Extradition Law and Practice Relating to Crime on the High Seas, 8 *Crim. L.F.* 335, 339-40 (1997) (stating that Taiwan’s prosecutor promised that officers would be charged, and that Canadian Min-

Taiwan is a part of China.¹⁸² The Canadian Ministry of Justice opted to allow the Taiwanese authorities to prosecute, however, and even agreed to turn over evidence and hearing transcripts.¹⁸³ 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.¹⁸⁴ However, Taiwan has not been accorded formal recognition by and large for two reasons. First, Taiwan has never overtly declared its independence.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

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.¹⁸⁸ 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

ister of Justice indicated government belief that there would be trial in Taiwan and justice would be done).

¹⁸² See Chen, *supra* note 12, at 237-38.

¹⁸³ See McConnell, *supra* note 181, at 340 (noting that Canadian government supported return of officers to Taiwan for trial and agreed to provide evidence and hearing transcripts to Taiwan). Note also that under the Taiwan Relations Act, Taiwan's access to U.S. courts is guaranteed. See 22 U.S.C. § 3303(a)-(b) (1994).

¹⁸⁴ See Akehurst's, *supra* note 114, at 83-84 (noting that prevailing view in international law is that recognition is only declaratory and actual existence of state turns on its objective fulfillment of statehood requirements); cf. Chen, *supra* note 12, at 239 (stating that in terms of its trade and economy, "Taiwan operates as a separate and sovereign nation-state apart from mainland China").

¹⁸⁵ See Attix, *supra* note 10, at 366 (noting that Taiwan has never claimed statehood status and thus is not recognized as such).

¹⁸⁶ See Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. f (1987).

¹⁸⁷ See *id.*

¹⁸⁸ See Michael C. Davis, *Toward Modern Concepts of Sovereignty and Statehood*, in *New World Order*, *supra* note 9, at 21, 23 (noting that recognition of state's independence is more question of politics than of law); Lee, *supra* note 9, at 388 (noting that no global legal authority exists to force recognition of entity that meets statehood criteria).

Taiwan,¹⁸⁹ most countries embrace a policy of constructive ambiguity regarding the Taiwan question.¹⁹⁰

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.¹⁹¹ 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.¹⁹² 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."¹⁹³ Article 1 of the U.N. Charter lists "self-determination of peoples" as one of the fundamental purposes of the

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.

¹⁹³ See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (1971) [hereinafter Friendly Relations Declaration]. For discussion of the early history of self-determination, see Eric Kolodner, *The Future of the Right to Self-Determination*, 10 *Conn. J. Int'l L.* 153, 154-57 (1994) (tracing evolution of self-determination from sixteenth century to present).

U.N.¹⁹⁴ International conventions have stated that no state may derogate the normative requirements of self-determination.¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ Since the end of the Cold War, self-determination has been mentioned in the con-

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).

¹⁹⁵ See International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Annex, Supp. No. 16, at 53, U.N. Doc. A/6316 (1967) (stating that states are obligated to "promote the realization of the right of self-determination"); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Annex, Supp. No. 16, at 49, U.N. Doc. A/6136 (1967) (same); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960) (stating that "[all] peoples have the right to self-determination"); Akehurst's, *supra* note 114, at 327 (identifying self-determination as binding obligation on all states); see also Kolodner, *supra* note 193, at 156 (discussing self-determination conventions).

¹⁹⁶ See, e.g., Morton H. Halperin & David J. Scheffer, *Self-Determination in the New World Order* (1992) (arguing for need to revisit concepts of self-determination); Valerie Epps, *The New Dynamics of Self-Determination*, 3 *ILSA J. Int'l & Comp. L.* 433, 433 (1997) (stating that "self-determination still teeters on the borders of evolving legal precept"); Franck, *supra* note 106, at 745-49 (noting seemingly incoherent applications of self-determination principles by comparing, *inter alia*, decolonization in Africa with fall of Iron Curtain in Eastern Europe); Kolodner, *supra* note 193, at 157-59 (discussing debate on extension of self-determination); Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 *ILSA J. Int'l & Comp. L.* 443, 443-45 (1997) (arguing for reassessment of self-determination).

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).

text of secession¹⁹⁹ and human rights,²⁰⁰ with the effect that it might now be applied for largely the first time to nationalities within states.²⁰¹

Because of this choppy evolution of self-determination, it is presently difficult to chart the frontiers of the law.²⁰² Some would argue that self-determination applies only to already established states or to future states duly recognized as independent.²⁰³ To illustrate, this group would not apply self-determination to secessionist movements²⁰⁴ unless the movement was allowed to secede by the former national government,²⁰⁵ as was the case when Eritrea seceded from Ethiopia,²⁰⁶ 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.²⁰⁷ Others at the opposite extreme would argue that self-determination is a basic human right, newly applicable even

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).

²⁰⁰ See Guyora Binder, *The Case for Self-Determination*, 29 *Stan. J. Int'l L.* 223, 247-48 (1993) (discussing position that self-determination is synonymous with individual human rights); Lung-chu Chen, *Self-Determination and World Public Order*, 66 *Notre Dame L. Rev.* 1287, 1288 (1991) (noting that self-determination is "rooted in human dignity and human rights").

²⁰¹ See Epps, *supra* note 196, at 439-40 (noting that discrimination against certain groups may legitimize 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).

²⁰² See Paul H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 *Wis. Int'l L.J.* 69, 73-76 (1995) (discussing confusing state of law); Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 *ILSA J. Int'l & Comp. L.* 201, 201 (1997) (noting uneven application of principle of self-determination).

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 (positing 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.²⁰⁸ This group would allow secession as part of what they see as an emerging norm of international law.²⁰⁹

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 Yugoslavia²¹⁰ but not for the Nigerian province of Biafra.²¹¹ A possible explanation for this discrepancy is that the Yugoslav republics were recognized as successor states to a disintegrating metropole,²¹² whereas Nigeria was still in existence and properly claimed possession over Biafra under the principle of *uti possidetis juris*.²¹³ Such an explanation provides a formalistic answer that seems to neglect underlying issues of justice and human rights. This confusion breathes instability into international relations with the dangerous effect that where groups do not have clear conceptions of their rights, armed conflict becomes more likely.²¹⁴ In a sense, it encourages groups, such as the Chechens,²¹⁵ to

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”).

²⁰⁹ See Demissie, *supra* note 199, at 166-67 (noting that right to self-determination serves as “springboard” to right to secession). See generally Dr. Bryan Schwartz & Susan Waywood, A Model Declaration on the Right of Secession, *N.Y. Int’l L. Rev.*, Summer 1998, at 1 (proposing list of factors legitimizing secession under principles of international law).

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).

²¹³ See C. Lloyd Brown-John, Self-Determination, Autonomy, and State Secession in Federal Constitutional and International Law, 40 *S. Tex. L. Rev.* 567, 588-90 (1999) (defining *uti possidetis* as principle that state’s boundaries remain what they were at independence and recognizing tension with self-determination); Moris, *supra* note 202, at 214 (defining *uti possidetis juris* as requiring respect of preestablished political borders); Steven R. Ratner, Drawing a Better Line: *Uti Possidetis* and the Borders of New States, 90 *Am. J. Int’l L.* 590, 592-600 (1996) (describing concept of *uti possidetis*).

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”).

²¹⁵ See Michael R. Gordon, ‘Nothing Is Left’ in Grozny, Returning Refugees Discover, *N.Y. Times*, Feb. 12, 2000, at A1 (“Russian soldiers did not capture Grozny [capital of Russia’s secessionist province of Chechnya]. They obliterated it.”).

start shooting in order to gain international recognition, with sometimes catastrophic consequences for their people.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.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.²¹⁸ If this position is accurate, then self-determination may not fully apply to the Taiwan context at all.²¹⁹ The basis of this view is that the right to self-determination is limited by international law's reluctance to

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).

²¹⁷ See *supra* note 105 and accompanying text.

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).

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.²²⁰ 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.²²¹ 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.²²²

Some would argue that self-determination only applies to ethnic groups.²²³ This view would deny self-determination to the Taiwanese since they are largely the same ethnicity as mainland Chinese.²²⁴ In practice, however, the principle has not been so narrowly applied.²²⁵ For the purposes of self-determination, a “people” is any group possessing “a sense of solidarity[] directed towards preserving their culture, traditions, [or] religion.”²²⁶ This definition takes into account the goal as well as the nature of the group.²²⁷ Territorial contiguity

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, 83 *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 Secession*, in *Peoples and Minorities in International Law* 3, 16 (Catherine Brolmann 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

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.

²³¹ See *Constitutional Crossroads for Taiwan*, *Asia Intelligence Wire*, Sept. 8, 1999, available in Lexis, News Library, AIW file (discussing proposed constitutional reforms); *Justices Drop Ban Against Independence*, *Asia Intelligence Wire*, Jan. 23, 1998, available in Lexis, News Library, AIW file (showing example of judicial review in Taiwan); *Lee Praised for Democratization Efforts*, *Asia Intelligence Wire*, May 22, 1998, available in Lexis, News Group Library, AIW file (discussing democratic advancements made during Lee presidency).

²³² See Franz Michael, *Ideology, Reality, and Human Rights*, in *Human Rights in the People's Republic of China* 102, 102-05, 116-17 (Yuan-li Wu et al. eds., 1988) (tracing Chinese difficulties on human rights to Marxist-Leninist and Maoist totalitarian predilections); Yuan-li Wu & Franz Michael, *Let the Record Speak for Itself*, in *Human Rights in the People's Republic of China*, *supra*, at 289, 289-91 (discussing frequent, large-scale, "insidious assault[s]" on human rights in China); Dana Parsons, *For Chinese Activist, Freedom Is Price of Religious Work*, *L.A. Times* (Orange County Ed.), Sept. 24, 1997, at B1, available in 1997 WL 13983153 (discussing ordeal of Guoxing Xu, persecuted and jailed by Chinese authorities for preaching Christianity); Jane Perlez, *U.S. Report Harshly Criticizes China for Determining of Human Rights; Russia Also Faulted*, *N.Y. Times*, Feb. 26, 2000, at A8 (discussing recent State Department report documenting systematic P.R.C. human rights violations); Lori Reese, *In the Path of a Crackdown*, *Time Asia*, Mar. 15, 1999, at 16, available in 1999 WL 7394613 (discussing China's suppression of proto-opposition China Democracy Party).

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.²³⁶ 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.²³⁷ 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."²³⁸

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.²³⁹ 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-

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.).

²³⁸ Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 Cal. W. Int'l L.J. 193, 196 (1980).

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).

alongside Taiwan.²⁴⁶ This could make Chinese action against Taiwan prohibitively expensive, especially since China's own military forces are not yet strong enough to guarantee victory.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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 1997.²⁵⁰ 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.²⁵¹ 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.