

# Statehood Theory and China's Taiwan Policy

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# Statehood Theory and China's Taiwan Policy

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## I. INTRODUCTION

The Taiwan issue remains the major concern of the Chinese government even though cross-strait tension has been significantly eased. Since Ma Ying-jeou took office in May 2008, great achievements have been made in economic cooperation: flights, ships and postal deliveries may now travel directly from one side to the other without detouring through a third territory; about one thousand mainland tourists are allowed to visit the island each day, up from a trickle in the past; one hundred sectors have been opened up to mainland investors; a memorandum of understanding on financial cooperation has been signed, and a free-trade agreement is being negotiated and is anticipated to be concluded within 2010. Nevertheless, both sides admitted that these are relatively easy steps among the many problems to be tackled. When it comes to the difficult part, such as Taiwan's international status and removal by mainland China of missiles currently aimed at Taiwan, the Chinese government finds itself in a dilemma. Ma Ying-jeou has repeatedly called on mainland China to withdraw missiles targeting the island. To build mutual trust, removal of the missiles might be the wisest course. However, China has good reason to worry about what could happen in the event that the Democratic Progressive Party (DPP) returns to power after China removes the missiles. With regard to Taiwan's international space, China faces the same concern that if greater space is granted to Taiwan, the DPP, once it resumes power, might abuse Taiwan's international presence to pursue Taiwan's secession from China.

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At the heart of China's concern is nothing but Taiwan's possible secession from China. To prevent such possible secession, in 2005 China enacted the Anti-Secession Law, providing for some circumstances under which non-peaceful means would be employed to prevent Taiwan's secession. These circumstances include: (1) where "Taiwan independence" secessionist forces effectuate Taiwan's secession from China, no matter under what name or by what means,<sup>1</sup> (2) where a major incident occurs which will lead to Taiwan's secession from China, or (3) where the opportunity for peaceful reunification is exhausted. Under any one of these three circumstances, the Anti-Secession Law authorizes the central government and central military committee to employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.<sup>2</sup>

This provision makes it clear that China's use of force will largely depend on the fact or likelihood that Taiwan will secede from China. However, what constitutes Taiwan's secession? By what criteria may China claim that Taiwan has seceded or is likely to secede?

To answer these questions, we must bear in mind an important assumption underlying the Anti-Secession Law: at present, Taiwan is still within China and has not seceded. Secession is a possible future state of affairs which needs to be prevented. All provisions of this legislation will appear to be nonsense without this assumption.

Whether Taiwan has already seceded from China depends on whether Taiwan has acquired independent statehood. According to a declaratory theory of statehood,<sup>3</sup> Taiwan clearly has fulfilled all the requirements for statehood.<sup>4</sup> According to a constitutive theory of statehood,<sup>5</sup> diplomatic recognition by other states confers independent statehood, and Taiwan maintains formal diplomatic ties

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<sup>1</sup> See the Anti-Secession Law of China, art. 8 (2005), available at <http://www.china.org.cn/english/2005lh/122724.htm>. It must be noted that the widely cited English translation of this article, stating "In the event that 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China . . . the state shall employ non-peaceful means or other necessary measures to protect China's sovereignty and territorial integrity," does not accurately reflect its original meaning. In Chinese, the first circumstance which triggers non-peaceful means is: "'台独'分裂势力以任何名义, 任何方式造成台湾从中国分裂出去的事实," which means, "the 'Taiwan independence' secessionist forces have caused the fact that Taiwan has been in fact seceded from China, no matter under what name or by what means," not as suggested by the translation that the mere action toward secession would trigger non-peaceful means.

<sup>2</sup> *Id.*

<sup>3</sup> See TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* (L.C. Green ed., New York: Frederick A. Praeger, Inc., 1951).

<sup>4</sup> See *id.* at Part II (A).

<sup>5</sup> See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 15-24 (New York: Oxford University Press 2005).

with over twenty countries, although these countries are all small states with little military or economic power.<sup>6</sup> Under prevailing international law theory of statehood, it seems the assumption underlying the Anti-Secession Law, as well as China's general policy towards Taiwan is untenable.

Therefore, it is extremely important for China to find a legal ground to justify the above-mentioned assumption. This article attempts to take on this challenging job.

Part II of this article outlines contemporary international law theories on statehood. Emphasis will be placed on the declaratory theory of statehood and its application to Taiwan. Part III begins with a discussion of some cases running afoul of contemporary theories of statehood and suggests that the creation of the United Nations (UN) had a profound impact on international practices concerning recognition of statehood. The criteria stated in Montevideo Convention are not conclusive for statehood anymore. Instead, collective recognition through the mechanism of the UN dictates whether an entity is a state or not. This theory is titled as the "new constitutive theory" in this article. Part IV concludes by arguing that by applying the new constitutive theory to the issue of Taiwan's statehood, Taiwan's secession from China is impossible as long as China maintains its powerful position in the international community. Deploying missiles against Taiwan is not necessary. The battlefield for fighting against secession is in the political ground of the international arena alone. Peaceful development strategy is the most efficient way to prevent Taiwan's secession.

## II. STATEHOOD THEORY: CONSTITUTIVE V. DECLARATORY

Does a state come into being by fact or by recognition from other established states? Different answers to this question lead to two different prevailing statehood theories in international law: the constitutive theory and the declaratory theory. Constitutive theory holds that an entity has to be "legitimized" as such by other states in order to be a state,<sup>7</sup> while declaratory theory considers the existence of a state as a question of fact and not of law.<sup>8</sup> The criterion of statehood is not legitimacy but effectiveness, i.e., to become a state, an entity must meet certain qualifications to demonstrate it has a

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<sup>6</sup> See WIKIPEDIA, FOREIGN RELATIONS OF THE REPUBLIC OF CHINA, [http://en.wikipedia.org/wiki/Foreign\\_relations\\_of\\_the\\_Republic\\_of\\_China](http://en.wikipedia.org/wiki/Foreign_relations_of_the_Republic_of_China) (listing countries with diplomatic relations with Taiwan).

<sup>7</sup> See CRAWFORD, *supra* note 5.

<sup>8</sup> See CHEN, *supra* note 3.

government that can take effective control over a defined territory and its citizens.

The key difference between these two theories is that the constitutive theory regards recognition by the international community, i.e., legitimacy, as a constitutive element for statehood. In contrast, declaratory theory takes recognition as only a symbolic act of expressing goodwill, which does not affect legal status.

While both theories have some elements of reasonableness, neither may claim that it can satisfactorily explain modern international practices. The major problem with constitutive theory is that the notion of the state is far too subjective, and based on ad hoc, discretionary diplomatic recognition.<sup>9</sup> Declaratory theory has been criticized for having confused fact with law: "A state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices."<sup>10</sup>

It is believed that before the 20<sup>th</sup> century, the constitutive theory of statehood prevailed over declaratory theory. However, during the 20th century, declaratory theory gained the upper hand.<sup>11</sup> The classical application of the declaratory theory was demonstrated in the Montevideo Convention on Right and Duty of States.<sup>12</sup>

Although it is a regional treaty, the Montevideo Convention is regarded as a restatement of customary international law as it codified existing legal norms on statehood.<sup>13</sup> In Article 1, the Convention sets out the four criteria for statehood:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

According to the declaratory view of statehood, once an entity satisfies the above four criteria, it becomes a state, and "[the] political existence of the state is independent of recognition by the other states."<sup>14</sup>

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<sup>9</sup> See P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES* 23 (1994).

<sup>10</sup> See CRAWFORD, *supra* note 5, at 4.

<sup>11</sup> A. CASSESE, *INTERNATIONAL LAW* 12-13 (Oxford: Oxford University Press 2001).

<sup>12</sup> Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097.

<sup>13</sup> D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 99 (London: Sweet & Maxwell 2004).

<sup>14</sup> See Montevideo Convention, *supra* note 12, at art. 3.

A number of Taiwan politicians and pro-independence analysts argue Taiwan satisfies all four criteria for statehood:<sup>15</sup>

*A. A Permanent Population*

A permanent population does not mean that the population has to reside for a minimum amount of time in one place. The permanent population requirement only implies the need for a stable community.<sup>16</sup> Additionally, there is no minimum requirement for the size of the population. Therefore, even territories like Nauru with a population less than ten thousand people fulfill this criterion.<sup>17</sup>

Taiwan has a population of nearly twenty-three million. Since 1949 when more than one million mainlanders arrived in Taiwan, the Taiwanese population has been stable. Thus it is generally uncontested that Taiwan satisfies the first criterion.<sup>18</sup>

*B. A Defined Territory*

States are territorial entities.<sup>19</sup> However, under the Convention there is no minimum requirement as to the size of the territory.<sup>20</sup> Moreover, according to the majority view, even claims by other states to the entire territory of an entity do not necessarily weaken its claims to statehood. As James Crawford commented, “A State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to or is claimed by any other State.”<sup>21</sup>

Taiwan encompasses a well-defined territory, consisting of the island of Taiwan itself plus dozens of smaller islands in the Taiwan Straits. Taiwan’s boundaries have been clear and stable for over half a century. Although Taiwan’s sovereignty over this territory has been challenged by the People’s Republic China, which maintains that China’s entire territory encompasses both mainland China and

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<sup>15</sup> See Parris Chang & Kok-ui Lim, *The International Legal Status of Taiwan: Taiwan’s Case for United Nations Membership*, 1 UCLA J. INT’L L. & FOR. AFF. 393 (1997) (advocating admission into the United Nations as a new state).

<sup>16</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 73 (Oxford: Oxford University Press, 4th ed. 1990).

<sup>17</sup> See HARRIS, *supra* note 13, at 103.

<sup>18</sup> See C.I.A., *THE WORLD FACTBOOK* (2009), <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> (containing Taiwan’s information).

<sup>19</sup> See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 5 (New York: Oxford University Press 1979).

<sup>20</sup> See HARRIS, *supra* note 13, at 103.

<sup>21</sup> James Crawford, *The Criteria for Statehood in International Law*, in *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 112 (Oxford, Clarendon Press, 1976-77). This author suggests Israel is a good example of a State which meets the criteria for statehood established in James Crawford’s comment.

Taiwan, as explained above this challenge does not necessarily indicate that Taiwan fails in the requirement that it maintain a stable territory.

### *C. A Government*

To be considered a state, the government of an entity must exercise effective power over its territory and citizens. In addition, considered together with criterion (d), the government must be actually independent of any other state. In sum, the government must be the highest law-making authority within the state, and must be independent in its governance of external affairs.<sup>22</sup>

Taiwan satisfies this criterion because for more than half a century, Taiwan has been under the governance of the ROC. For a long time, this government also claimed legitimate jurisdiction over the whole of China, a claim that most of the international community did not take seriously. Nonetheless, the ROC's effectiveness in governing Taiwan is generally unquestioned. The People's Republic of China (PRC) government has never ruled over Taiwan.

Since 1991 the ROC has undergone a series of constitutional reforms. Although the territory of the ROC has been untouched, these reforms effectively withdraw its claim over mainland China. According to these reforms, Taiwan's governmental body would only represent Taiwan people.<sup>23</sup>

### *D. The Capacity to Enter into Relations with Other States*

Although this criterion is highly controversial, from the pure declaratory view, its implication is clear. Taking into consideration of Articles 3 and 6 of the Montevideo Convention, which clearly state the existence of the state is independent of recognition by the other states, this criterion should not be interpreted as to require a state to be recognized by other states in order to engage in diplomatic relations with them. Rather, it merely reflects the external requirement of the effectiveness of government. It demands that an entity be able to engage in the dealings and ties ordinarily undertaken among states and that it not be subordinate to another government within the territory in conducting those relations.<sup>24</sup>

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<sup>22</sup> See H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 28 (Cambridge: Cambridge University Press 1947).

<sup>23</sup> For detailed information concerning the constitutional reform of Taiwan, see *The Significance of Taiwan's Constitutional Reforms*, <http://www.gio.gov.tw/taiwan-website/4-0a/20050610/2005061001.html>.

<sup>24</sup> See CRAWFORD, *supra* note 19, at 47, 61-68. See also BROWNLIE, *supra* note 16, at 74.

In this sense, this criterion constitutes no obstacle for Taiwan to claim its statehood: Taiwan need not seek permission from other governments in dealing with the world. The diplomatic relations over twenty countries are evidence that Taiwan has independent diplomatic capacity. If not for the political obstruction posed by the PRC government, Taiwan could well enter into relations with any states as it wishes.

In sum, under the declaratory theory of statehood, Taiwan, with a population of twenty-three million, a well-defined territory, a well-functioning government and the capacity to enter into relations ordinarily undertaken among states, satisfies all the criteria for statehood. Such a conclusion renders not only China's Taiwan policy, and many countries' opposition to Taiwan's pursuit of UN membership, groundless. Nonetheless the reality of this opposition remains. What is going wrong, the theory or the state practices?

### III. UN AND STATEHOOD THEORY

The Montevideo Convention on the Rights and Duties of States was signed in 1933. Since then, international relations and state practices have undergone fundamental changes. Among them, the creation of the UN and the emergence of a large number of new states<sup>25</sup> after the Second World War have significantly reshaped contemporary international law.

#### A. *UN Redefined Statehood*

Statehood must be understood in the context of international laws which provide for rights and obligations a state enjoys and bears. International law consists of a body of treaties, customary laws, judicial decisions and other relevant sources that play a central role in promoting economic and social development, and international peace and security among the nations of the world. As an international organization which is designed to facilitate international security, economic development, social progress and human rights issues, the UN has vastly expanded the existing body of international law.<sup>26</sup> It is estimated that the UN has helped conclude more than five hundred multilateral treaties and agreements.<sup>27</sup> These treaties have formed the basis of the primary laws governing relations among

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<sup>25</sup> In 1945 when the United Nations was created, it has only 51 member states. Today this number has increased to 192. See <http://www.un.org/members/growth.shtml>.

<sup>26</sup> See generally UNITED NATIONS, <http://www.un.org> (concerning all U.N. information used in this article).

<sup>27</sup> *Id.*



nations. Many conventions directly influence the individual lives of people all over the world.

The UN's influence on international law can be seen in almost every aspect of the relations among states. For example, the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963) constitute the cornerstone of rules guiding day-to-day inter-states relations.<sup>28</sup> In terms of human rights protection, thanks to the UN, the world now has an impressive array of conventions protecting the rights of all people, including children, women and minorities.<sup>29</sup> This recognition and protection of human rights fundamentally changes the traditional notion of state and sovereignty. Regarding environmental protection,<sup>30</sup> international treaties covering issues such as desertification, biological diversity, bio-safety, climate change, migration, biological diversity, biosafety, climate change, control of the movement and disposal of hazardous wastes across boundaries, the ozone layer, trans-boundary air pollution, endangered species and marine pollution, have imposed a series of obligations on the states.

For example, the Cartagena Protocol on Biosafety (2000) makes it compulsory that states clearly label exports of agricultural commodities that may contain genetically modified organisms, and allows governments to state whether or not they are willing to accept such imports. Another similar treaty is the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (1989). This treaty obligates states to reduce shipping and dumping of dangerous wastes across borders, to minimize the amount and toxicity generated by hazardous waste, and to ensure the environmentally sound management of such waste. Concerning terrorism, the UN and its specialized agencies, such as the International Civil Aviation Organization, the International Maritime Organization and the International Atomic Energy Agency, have developed a network of international agreements for fighting against terrorism. These include the convention on offences committed on aircraft (1963), on the seizure of aircraft (1971), on

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<sup>28</sup> *See id.*

<sup>29</sup> The major instruments for international protection of human rights include: (1) Charter of the United Nations; (2) Universal Declaration of Human Rights; (3) Covenant on Civil and Political Rights; (4) Optional Protocol to the Covenant on Civil and Political Rights; (5) Covenant on Economic, Social, and Cultural Rights; (6) Convention Against Torture; (7) Convention Against Genocide; (8) The Geneva Conventions; (9) Convention on the Rights of the Child; (10) Convention on Elimination of Discrimination Against Women.

<sup>30</sup> The major treaties for environmental protection include: (1) United Nations Framework Convention on Climate Change; (2) Kyoto Protocol; (3) Vienna Convention for the Protection of the Ozone Layer; (4) Montreal Protocol; (5) Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal; (6) Convention on Biological Diversity.

hostage-taking (1979), on the protection of nuclear material (1979) and on marking plastic explosives to make them detectable (1988). In 1997, the UN adopted the International Convention against Terrorist Bombing, which requires states either to prosecute or extradite those accused of terrorist bombing.<sup>31</sup> With respect to the use of sea, the Convention on the Law of the Sea (finalized in 1994 after 36 years of negotiations) is considered the world's most important international maritime law. This law covers all aspects of ocean space and its uses, including navigation and overflight, resource exploration and exploitation, conservation and pollution, and fishing and shipping.<sup>32</sup>

In the area of international trade, the UN Commission on International Trade Law (UNCITRAL) has developed a number of conventions, model laws, rules and legal guides to harmonize international trade. Established by the General Assembly in 1966, UNCITRAL has helped develop some of the most fundamental treaties regulating international trade. These include the 1985 UNCITRAL Model Law on International Commercial Arbitration, the 1976 UNICTRAL Arbitration Convention, the 1980 UNCITRAL Conciliation Rules, the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services and the 1995 UN Convention on Independent Guarantees and Standby Letters of Credit. In 1996, the General Assembly adopted the UNCITRAL Model Law on Electronic Commerce.<sup>33</sup>

In sum, the influence of the UN on each state has been sweeping and profound. The UN has fundamentally changed people's understanding of states and their rights and duties. Today, when people talk about the concept of state, they talk about it in the context of contemporary international law regime. They mean a state which has all the rights and obligations as a member of the UN. An entity enjoys these rights and privileges, and bears the related obligations not because it has satisfied certain criteria, but because it has been admitted to the UN. In this sense, statehood begins only after admittance to the UN.

#### *B. The Practice of Admission to the UN Virtually Discards the Declaratory Theory of Statehood*

Article 4 of the UN Charter states:

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<sup>31</sup> See *supra* note 30.

<sup>32</sup> *Id.*

<sup>33</sup> See *supra* note 30.

- 1) Membership in the UN is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
- 2) The admission of any such state to membership in the UN will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Thus, only states can become UN members. Applying the declaratory theory of statehood, to be admitted as a UN member, an entity has to satisfy the criteria for statehood which has been defined in the Montevideo Convention. Additionally, an entity which satisfies the criteria for statehood and declares that it will accept the obligations contained in the Charter should be admitted as a member of the UN. The practice of admission to the UN, however, has demonstrated that neither of the above conclusions is true.

The admission of Congo to the UN in 1960 exemplified that even a territorial entity without an effective government can be granted UN membership. It is widely accepted that the new government of Congo did not have effective control over the country when Congo declared independence from Belgium under the name of the Republic of Congo (then renamed as the Democratic Republic of the Congo) in 1960.<sup>34</sup> According to the declaratory theory of statehood, Congo could hardly be regarded as a state at that time. However, such a situation did not constitute an obstacle for its UN membership. On September 20, 1960, several months after the declaration of independence, Congo was admitted to the UN.

Congo's admission to the UN before it satisfied the requirement of effectiveness is not unique. In fact, in the context of decolonization, the requirement of effectiveness has given way to the right of self-determination, which requires that colonial peoples be granted independence despite "inadequacy of political, economic, social or educational preparedness."<sup>35</sup>

Conversely, the case of Southern Rhodesia's unilateral independence from the British Empire indicates that even if an entity satisfies all the requirements of effectiveness, it could be rejected UN admission.

Southern Rhodesia and Northern Rhodesia were both British colonies before independence. In 1964, Northern Rhodesia was granted independence by Britain, and Southern Rhodesia remained a

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<sup>34</sup> See CRAWFORD, *supra* note 19, at 42-43.

<sup>35</sup> G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961).

British colony governed under the white-dominated Smith Administration. On November 11, 1965, the Smith Administration unilaterally announced the independence of Southern Rhodesia from Britain. The British government deemed this an act of rebellion.<sup>36</sup> It should be noted that at the time of its declaration of independence, the Smith Administration was an effective government of Southern Rhodesia, and Southern Rhodesia well satisfied the statehood qualifications as spelled out in the Montevideo Convention.<sup>37</sup> In spite of this, the day after the unilateral declaration of independence of Southern Rhodesia, the UN Security Council adopted Resolution 216, condemning it as a declaration of independence “made by a racist minority,” and calling upon all states to refuse the “illegal racist minority regime” in Southern Rhodesia recognition and to refrain from rendering any assistance to it.<sup>38</sup> A few days later, the UN Security Council adopted Resolution 217, further elaborating on its condemnation of the unilateral independence regime and proposing steps to be taken to address the crisis.<sup>39</sup> It was not until 1980 when the British government granted its independence that Southern Rhodesia became a member state of the UN under the name of Zimbabwe.

Again, Southern Rhodesia’s case is not a sole exception. The UN has always been unwilling to accept unilateral independences. With regard to the independence of colonial territories, James Crawford noted:

[T]he principle of self-determination . . . did not involve an automatic right of unilateral secession for the people of those territories. In the vast majority of cases, the progress to self-government or independence was consensual. It occurred with the agreement of the State responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that State and local leaders. These arrangements dealt with the modalities of transfer of power and, in many cases, made provision for succession with respect to treaties, property and debt. The United Nations General Assembly urged that rapid decisions be made as to the self-government or independence of those territories, especially after the adoption of the Declaration on the Granting of Independence to Colonial

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<sup>36</sup> See WIKIPEDIA, UNILATERAL DECLARATION OF INDEPENDENCE OF RHODESIA, [http://en.wikipedia.org/wiki/Unilateral\\_Declaration\\_of\\_Independence\\_%28Rhodesia%29](http://en.wikipedia.org/wiki/Unilateral_Declaration_of_Independence_%28Rhodesia%29).

<sup>37</sup> See HARRIS, *supra* note 13, at 111.

<sup>38</sup> S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965).

<sup>39</sup> S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965).

Countries and Peoples in 1960. But it did not advocate or support unilateral rights of secession for non-self governing territories, except where self-determination was opposed by the colonial power.<sup>40</sup>

As to the practice regarding unilateral secession of non-colonial territories, James Crawford commented:

Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent states, in situations where the secession is opposed by the government of that state. In such cases the principle of territorial integrity has been a significant limitation. There is only one clear example of successful unilateral secession during this period, viz. Bangladesh. Since 1945 no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor state. By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time.<sup>41</sup>

And even for the case of Bangladesh, its admission to the UN happened after its recognition by Pakistan, from which Bangladesh seceded.<sup>42</sup>

In addition, according to the declaratory theory, an entity which originally satisfied all criteria for statehood should lose its status as a state if it later fails to satisfy one of the criteria. For example, an important criterion for statehood is an effective government. However, there is no shortage of examples where a once-effective government lost control of the country, and that country was plunged into chaos. In line with the declaratory theory, under such a situation, the “state” should lose its state status. However, never have we seen a case in which a member state of the UN was suspended of its membership because of its internal chaos.

Based on the foregoing, it is fair to conclude that since the birth of the UN, the declaratory theory of statehood has been gradually stepping down from the historical stage as the basis for determining statehood.

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<sup>40</sup> James Crawford, *State Practice and International Law in Relation to Unilateral Secession* (Feb. 19, 1997), in *SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED* 31 (Anne F. Bayefsky ed., 2000).

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

*C. New Constitutive Theory of Statehood Based on the UN's Collective Recognition Mechanism*

As discussed earlier, constitutive theory based on unilateral recognition has been virtually discarded. Declaratory theory has also turned out to be outdated. However, as long as states remain the key players in the international arena, statehood will still be an important concept meriting further discussion, and statehood theory will still be indispensable for international law practice. The question is: what is the right theory?

Let's look back on the evolution of statehood theory. We will find constitutive theory has undergone a subtle change, which largely accounts for its eclipse and replacement by declaratory theory.

Oppenheim is widely regarded as a proponent of constitutive theory. However, his position articulated in his most influential *International Law* is very similar to that of modern declaratory theory. Oppenheim did not say that a state comes into being only after it has been recognized by other states. On the contrary, he asserts that being recognized as a member of civilized society, in which international law is commonly obeyed by its member states, only makes a state an international person which is bound by international law and treated by other members in accordance with international law.<sup>43</sup> It is not necessary for a state to be admitted into that society. States not so admitted are not bound by international law.<sup>44</sup> In his view, recognition has nothing to do with the existence of a state, which is a matter of fact, but only through recognition can a state gain its status as an international person.<sup>45</sup>

Moreover, recognition does not mean diplomatic recognition as later widely understood. In the 8th edition of *International Law* Oppenheim expresses the following: "New states which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of their admittance."<sup>46</sup> Subsequently, in the 9th edition, this sentence was amended as follows: "Thus new states which come into existence and are admitted into the international community thereupon become subject to the body of rules for international conduct in force at the time of their admittance."<sup>47</sup> In this sense, constitutive theory in the 19th century was very different from how people understand it today. At

<sup>43</sup> OPPENHEIM'S INTERNATIONAL LAW 14, 128 (Robert Jennings & Arthur Watts eds., 8th ed. 2008).

<sup>44</sup> *Id.* at 87.

<sup>45</sup> *See id.* at 14.

<sup>46</sup> *Id.* at 18.

<sup>47</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 45.

that time, the “Family of Nations” or “international community” consisted of a handful of European “civilized countries”, or “Christian Nations”.<sup>48</sup> Admission was usually conducted collectively. Conceivably, with the expanding international community, collective recognition turned out to be impossible. Under this situation, constitutive theory has been clumsily changed from collective recognition into unilateral recognition. Lauterpacht’s following comment explains this reluctant adapting:

[T]he full international personality of rising communities . . . cannot be automatic. . . . [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing.”<sup>49</sup>

Lauterpacht’s comment also suggests that once there is a better solution, recognition by individual states should be thrown away.

The UN is one such better solution. As we discussed above, the concept of statehood has fundamentally changed because of the sweeping and profound influence of the UN. Today it is impossible for a state to claim that it is not a subject of international law. Globalization further makes it unpractical for a “state” to stay outside of the international community. This has been demonstrated by state practices since the creation of the UN. According to James Crawford, of states in existence in 1945, only Switzerland and the Vatican City are not UN members. Of the more than 140 states which have come into existence since 1945, only Kiribati, Nauru, Tonga and Tuvalu have not sought UN admission.<sup>50</sup> However, when it came to the end of 20th century, Kiribati, Nauru, Tonga and Tuvalu all joined the UN, and in 2002, Switzerland also became a full member.<sup>51</sup> Today, it is fair to say an entity can claim to be a state only after it has become a member of the UN.

When a state applies to join the UN, according to the UN Charter, the UN should decide whether the applicant is able and willing to carry out the obligations stated in the Charter. Such decision is

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<sup>48</sup> International law was defined in 1859 by the British Law Lords as “the law existing between civilized nations . . . as it has been hitherto recognized and now subsists by the common consent of Christian nations. See H.A. SMITH, *GREAT BRITAIN AND THE LAW OF NATIONS: A SELECTION OF DOCUMENTS ILLUSTRATING THE VIEWS OF THE GOVERNMENT OF THE UNITED KINGDOM UPON MATTERS OF INTERNATIONAL LAW* (London: P.S. King 1932).

<sup>49</sup> LAUTERPACHT, *supra* note 22, at 55.

<sup>50</sup> See CRAWFORD, *supra* note 40, at 35.

<sup>51</sup> See UNITED NATIONS, *supra* note 25.

made by the General Assembly upon the recommendation of the Security Council.<sup>52</sup> Once an entity has been admitted as a member of the UN, it conclusively becomes a state. Nobody can challenge its statehood. Therefore, the UN in effect has undertaken the task suggested by Lauterpacht. Although it is far from impartial, the UN provides a collective recognition mechanism for new states.

Constitutive theory based on collective recognition by the UN best describes international practice since the creation of the UN. With the deepening of globalization, the UN has been playing an increasingly important role in meeting the challenges people all over the world are commonly facing. In this context, new constitutive theory has gained wide acceptance. Taiwan's relentless pursuit of UN membership might be the best indication of this fact.

#### IV. CONCLUSION

As one of the greatest human achievements in the 20th century, the UN has fundamentally reshaped the structure of international relations. Its universal accessibility and sweeping impact, together with ever-increasing globalization, means no state can stay outside of the UN. It is fair to say the UN membership has become the synonym of statehood. The only way to become a state is to follow the collective recognition procedure and to be admitted to the UN. Satisfaction of the four criteria stated in the Montevideo Convention does not alone grant statehood.

In the case of Taiwan, despite the *de facto* separation, China perceives Taiwan as still a part of China. The new constitutive theory based on collective recognition by the UN well accounts for such a perception, and should constitute the grounds for the Anti-Secession Law. Therefore, all anti-secession efforts should be focused on preventing Taiwan from getting UN membership.

To be admitted to the UN, Taiwan first has to get the recommendation of the UN Security Council, of which China is a permanent member. According to Article 27 of the UN Charter, the Security Council's decisions on all substantive matters require the affirmative votes of nine members. A veto by a permanent member would prevent the adoption of a proposal, even if it has received the required number of affirmative votes. Therefore, without the consent of the Chinese government, it is impossible for Taiwan to be admitted to the UN. Taiwan's application for UN membership or declaration of independence might be politically provocative, but it

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<sup>52</sup> U.N. Charter art. 4.



does not amount to secession. The Chinese government has plentiful means to fight against such provocation. There is no need to resort to the non-peaceful means as stipulated in the Anti-Secession Law.

The only way for Taiwan to succeed in participating in the UN might be following the example of Palestine. Palestine, having been recognized by around one hundred states,<sup>53</sup> could not become a member of the UN due to the United States' veto. However, with wide support from the international community, Palestine was granted observer status in 1974 by the UN General Assembly,<sup>54</sup> and in 1998, the Assembly broadened Palestine's rights as observer.<sup>55</sup> Palestine has also successfully become a full member of the United Nations Economic and Social Commission for Western Asia.<sup>56</sup>

Palestine's achievement is grounded on wide support from the international community. In what circumstance can Taiwan win the same support as Palestine? The answer is clear: only when China's international influence and reputation has been severely damaged. In the predictable future, the most conceivable event that could trigger such drastic deterioration in China's international influence and reputation is an unwise and unnecessary war against Taiwan.

When we arrive at this conclusion, it is not hard to agree that, deploying missiles against the island is not necessary. The battle is better fought in the international arena. The best policy to prevent Taiwan's secession is to continue China's peaceful development strategy and keep an active role in the international community.

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<sup>53</sup> See Institute for Middle East Understanding, *How Many Countries Recognize Palestine as a State?*, <http://imeu.net/news/article0065.shtml>.

<sup>54</sup> G.A. Res. 3237 (XXIX), U.N. Doc. A/9631 (Nov. 22, 1974).

<sup>55</sup> G.A. Res. 52/250, U.N. Doc. A/RES/52/50 (July 13, 1998).

<sup>56</sup> See United Nations Economic and Social Commission for Western Asia, <http://www.escwa.org.lb/index.asp>.