

De Facto States in the International System

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Abstract

The *de facto* state is a secessionist entity that receives popular support and has achieved sufficient capacity to provide governmental services to a given population in a defined territorial area, over which it maintains effective control for an extended period of time. This paper examines the impact that *de facto* states have on international society and international law and assesses how they are dealt with by those two bodies through a focus on four case studies: Eritrea before it won its independence from Ethiopia; the Republic of Somaliland; Tamil Eelam and the Turkish Republic of Northern Cyprus. A fifth *de facto* state, Taiwan, is also considered in some detail to help illustrate potential alternatives to the three conventional means of dealing with these entities. The *de facto* state’s position under international law is also evaluated. In contrast to the generally negative attitudes surrounding secessionist entities, the paper concludes that the *de facto* state may indeed offer some positive benefits to international society.

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I. Introduction

If one takes 1960 as a convenient shorthand date for the ending of the vast majority of the decolonization process, then it can be argued that the three decades which followed that year were characterized by the greatest level of territorial stability ever seen in the history of international relations. With very few exceptions, the political map of the world's sovereign states remained unchanged during this period. James Mayall attributes this state of affairs to an ironic historical fate of the once-revolutionary principle of national self-determination which, in its post-1945 variant, has emphasized the sanctity of existing territorial borders and ended up "attempting to freeze the political map in a way which has never previously been attempted."¹

The delegitimization of territorial aggrandizement and the almost religious sanctity placed on existing borders marks a profound change in international relations. Whereas entities once had to demonstrate and maintain a certain level of military, economic, and governmental effectiveness in order to preserve their position in a competitive international system, the post-war era has witnessed the wholesale granting of statehood to large numbers of former colonies with few, if any, demonstrated empirical capabilities. Once acquired, sovereign statehood has become almost impossible to lose. Small and/or weak states which, in earlier eras, would have been carved up, colonized, or swallowed by larger powers, now have a guaranteed existence in international society. In the words of Robert Jackson, "once sovereignty is acquired by virtue of independence from colonial rule, then extensive civil strife or breakdown of order or governmental immobility or any other failures are not considered to detract from it."²

The result is an international system characterized by large numbers of what Jackson terms "quasi-states": states which are internationally recognized as full juridical equals, possessing the same rights and privileges as any other state, yet which manifestly lack all but the most rudimentary empirical capabilities. The quasi-state has a flag, an ambassador, a capital city and a seat at the United Nations General Assembly but it does not function positively as a viable governing entity. It is generally incapable of delivering services to its population and the scope of its governance often does not extend beyond the capital city, if even there.

The same normative logic in international society that serves to support existing quasi-states also denies the legitimacy of any would-be challengers regardless of how legitimate their grievances, how broad their popular support, or how effective their governance. It thus facilitates the creation of something that is more or less the inverse of the quasi-state: the *de facto* state. In essence, a *de facto* state exists where there is an organized political leadership which has risen to power through some degree of indigenous capability; receives popular support; and has achieved sufficient capacity to provide governmental services to a given population in a defined territorial area, over which effective control is maintained for an extended period of time. The *de facto* state views itself as capable of entering into relations with other states and it seeks full constitutional independence and widespread international recognition as a sovereign state. It is, however, unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society.

Whereas the quasi-state has recognized territorial borders and the ability to participate in intergovernmental organizations, in many cases it does not effectively control large swathes of its own countryside. Though it seeks recognition, the *de facto* state, on the other hand, has been denied its seat at the UN and its place at the international table. No matter how long or how effective its territorial control of a given area has been, that control is neither recognized nor is it considered legitimate. The quasi-state is legitimate no matter how ineffective it is. Conversely, the *de facto* state is illegitimate no matter how effective it is. The quasi-state's juridical equality is not contingent on any performance criteria. Even if

¹ James Mayall, *Nationalism and International Society* (Cambridge: Cambridge University Press, 1990), 56.

² Robert H. Jackson, "Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World," *International Organization* 41 (Autumn 1987), 531.

the entire state apparatus has collapsed, the quasi-state (à la Cambodia and Lebanon) will be supported and maintained through international efforts. At times, it may be more of an abstract idea than it is a hard reality. The *de facto* state, on the other hand, is a functioning reality with effective territorial control of a given area that is denied legitimacy by the rest of international society.

At various points in time, examples of *de facto* states might include Biafra; Rhodesia after its unilateral declaration of independence; Charles Taylor's "Greater Liberia"; the Karen and Shan states of Myanmar; Chechnya; Krajina; and the Bosnian Serb Republic. This working paper examines the impact that these entities have on international society and international law and how they are dealt with by those two bodies through a focus on four *de facto* states: Eritrea before it won its independence from Ethiopia; the Republic of Somaliland; Tamil Eelam; and the Turkish Republic of Northern Cyprus (TRNC). A fifth *de facto* state, Taiwan, is also assessed to illustrate alternatives to the conventional methods of dealing with such entities.

II. The *De Facto* State's Impact on International Society

The *de facto* state has had a substantive impact on international politics in two main areas: conflict and political economy. Of these two, its impact has clearly been the most apparent and readily quantifiable in the area of conflict and war. Limiting ourselves to just the four cases considered here, one finds that they have been implicated in somewhere between 160,000 to 275,000 fatalities and that they have produced somewhere between 2,345,000 - 2,795,000 refugees and internally displaced persons.³ While even approximate figures are unavailable for the number of those wounded or disabled, that figure must number in the hundreds of thousands. The number of land-mines deployed in these four areas certainly counts in the millions. As two of these cases—Somaliland and, especially, Tamil Eelam—continue to produce new fatalities and refugees today, these figures can be expected to rise. Were one to add other *de facto* states such as Biafra, Chechnya, and the Bosnian Serb Republic, they would clearly go much higher still. Additionally, the fact that *de facto* state situations are involved in three of the world's most serious conflicts today—Chechnya, Sri Lanka, and the former Yugoslavia—illustrates the contemporary relevance of this phenomenon to war in the international system.

Beyond the sheer numbers of those killed, wounded, and displaced, Zeev Maoz highlights another reason why the international community should be concerned with the *de facto* state. In a study of the ways in which state formation processes affect international conflict involvement, Maoz distinguishes between evolutionary and revolutionary types of state formation. He finds that

State formation processes affect patterns of post-independence involvement in interstate disputes. States that emerge out of a violent struggle for independence tend to be involved in a considerably larger number of interstate disputes than states that become independent as a result of an evolutionary process.⁴

There are two main problems in applying Maoz's findings to the *de facto* state. First, his work focuses on states that have actually won their independence or, in his phrase, "joined the club of nations." Most *de facto* states never reach this level. Second, the distinction between evolutionary and revolutionary state formation is not always clear in the case of *de facto* states. Where, for instance, would the TRNC fall in this dichotomized distinction? Additionally, Eritrea would have appeared to be a classic case of revolutionary state formation until its 1991-1993 transition period to independence brought it much closer to an evolutionary process. Indeed, one suspects that Maoz would be a strong supporter of

³ Note: These figures are composite calculations by the author based on a variety of sources. As many of these figures are themselves contested and/or best guess estimates, these numbers should be seen as illustrative approximations rather than as definitive facts.

⁴ Zeev Maoz, "Joining the Club of Nations: Political Development and International Conflict, 1816-1976," *International Studies Quarterly* 33 (June 1989), 226.

the type of extended transition process that Eritrea went through and which has been proposed for Chechnya.⁵ This is because of the two reasons why evolutionary state formation leads to reduced levels of subsequent involvement in interstate conflicts. First, evolutionary state formation is “characterized by stable expectations of the indigenous national elites regarding their acceptance into the system by other states.” Second, these same evolutionary processes also create “stable expectations by other states regarding the upcoming expansion of the club of nations.”⁶ While Maoz’s findings may not exactly translate to all *de facto* state situations, they do highlight one more reason these entities may have substantial impact upon international society.

The impact of *de facto* states on political economy is relatively modest. This can be explained by a combination of factors including their limited numbers, their generally small size, their often impoverished conditions due to the devastation of war, and their lack of juridical standing—which acts as a substantial deterrent to foreign investment and international economic integration. That qualification aside, however, these entities do affect the global political economy. Two main points need to be made in this regard. First, in spite of their lack of juridical status, business is done with *de facto* states and similar such entities and this business may produce negative consequences. When looking at this issue from the perspective of sovereign governments who lose control of resource-rich regions, Robert Jackson and Carl Rosberg argue that “international bodies, foreign powers, and even private firms are likely to respect their *de jure* claim to such regions....” As such, “non-sovereigns who are in *de facto* control of them may be prevented from benefiting fully from their material exploitation.”⁷ While the first part of this claim holds, the evidence is increasingly against the second part. In 1991, for example, Charles Taylor’s “Greater Liberia” was France’s third-largest source of tropical timber. Taylor earned an estimated US\$8-10 million a month from a consortium of North American, European, and Japanese companies interested in extracting diamonds, gold, iron ore, timber, and rubber from the areas he controlled. Taylor’s forces also allegedly reached an agreement with Firestone to cooperate in rubber production and marketing.⁸ The Khmer Rouge in Cambodia and UNITA in Angola are two other examples of non-sovereign groups exercising effective territorial control which have been able to finance their operations through the sale of mineral resources they control—diamonds in UNITA’s case and an assortment of gems and hardwood forest products for the Khmer Rouge.

In all three of these cases, no one challenged Angola, Cambodia, or Liberia’s *de jure* claim to the regions in question. And yet, millions of dollars in business is regularly conducted by an assortment of public and private firms from around the world with the non-sovereigns who are in *de facto* control of those regions. Indeed, one suspects, based on the long-standing ability of these groups to finance themselves, that Charles Taylor, UNITA, and the Khmer Rouge must all make fairly good and reliable business partners. This type of business can negatively impact upon international society in a number of ways. First, the respective sovereign governments lose millions of dollars of lucrative revenues—often from non-renewable resources. Second, this loss of revenues indirectly leads to increased demands on other members of international society for greater assistance and, perhaps, for some sort of interventionary force. Third, such groups are unlikely to be the best respecters of trade regulations or the best protectors of the environment. Finally, the very illegitimacy of such *de facto* groups encourages illegal activities. *The New York Times*, for example, refers to the Kurdish safe haven in northern Iraq as “the largest black market clearing house for cigarettes in the Middle East.”⁹

⁵ For more on the Chechens’ proposed five-year transition period to a referendum on independence, see “A Way Out of Chechnya,” *The Economist*, 31 August 1996.

⁶ Zeev Maoz, “Joining the Club of Nations,” 226.

⁷ Robert H. Jackson and Carl G. Rosberg, “Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis,” *Journal of Modern African Studies* 24 (March 1986), 15.

⁸ Martin Lowenkopf, “Liberia: Putting the State Back Together,” in I. William Zartman, ed., *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Boulder: Lynne Rienner Publishers, 1995), 94; and William Reno, “Reinvention of an African Patrimonial State: Charles Taylor’s Liberia,” *Third World Quarterly* 16 (March 1995), 113-115.

⁹ “Kurds Blow Smoke Rings Across Iraq,” *The New York Times*, 17 August 1994.

The second main point to be made, though, is that *de facto* political status does not necessarily produce bad economic outcomes. The classic example here is Taiwan. At a minimum, Taiwan shows that a lack of formal diplomatic relations with the vast majority of sovereign states in the world today does not preclude economic success. In 1996, Taiwan was the world's fifteenth largest trading power with a trade volume in excess of US\$218 billion. Its foreign reserves are the third largest in the world at more than US\$88 billion and its per capita GNP is in excess of US\$12,800.¹⁰

The Taiwan example is unique in terms of the magnitude of its economic success, but it is far from the only *de facto* state that can claim some degree of economic prowess. The Liberation Tigers of Tamil Eelam (LTTE) have, for example, been able to reach a number of mutually acceptable arrangements with local businessmen. Under the Somali National Movement's (SNM) leadership, livestock exports (the mainstay of the Somaliland economy) have more than tripled. This can be attributed both to the SNM's commitment to free market economics and to its comparative efficiency in providing governmental services and maintaining order. Though the per capita GNP in the TRNC is perhaps only one-third that of the Republic of Cyprus, even this case shows that *de facto* statehood does not rule out economic development. The TRNC's external trade volume has consistently risen and hit US\$447 million in 1990. Despite the consistent accusations of puppet statehood, only about 14 percent of Northern Cypriot exports go to Turkey. Approximately 78 percent of them are destined for the EU (primarily the UK). The TRNC currently has trade links with over 80 countries and it annually attracts more than double its population in tourist arrivals. From 1977 to 1990, the average annual growth rate was 6.5 percent. There is an automobile for every 2.5 persons—a level comparable to Greek Cyprus and higher than in some EU countries. Life expectancy is 71 years and the literacy rate stands at 97 percent.¹¹ Obviously, its lack of juridical standing has hindered the TRNC in a myriad of ways. Its economy also has serious structural problems (such as an over-dependence on tourist revenues and a specific over-dependence on Turkish tourists). Still, as the above examples show, *de facto* states and other related entities do impact the global political economy and they often manage to participate in it relatively successfully.

III. How Does International Society Deal With the *De facto* State?

Within the general context of its strong diplomatic and financial support for all existing sovereign states, international society has traditionally chosen to respond to the existence of *de facto* states in three main ways: actively opposing them through the use of embargoes and sanctions; generally ignoring them and having no dealings with them; and coming to some sort of limited acceptance and acknowledgment of their presence. Each of these three approaches has a different set of costs and benefits for the international community and for the *de facto* state itself.

The classic example of actively opposing the *de facto* state's existence through the use of international embargoes and sanctions comes from Northern Cyprus. The Greek Cypriot embargo campaign against the TRNC has been quite successful. A variety of international organizations including the Universal Postal Union, the International Civil Aviation Organization, and the International Air Transport Association have refused to recognize or deal with the Turkish Cypriots in their respective areas of competence. As such, Ercan airport is not recognized "as it operates unofficially and poses

¹⁰ Republic of China, *The Republic of China Yearbook, 1994* (Taipei: Government Information Office, 1993); John F. Copper, *Taiwan: Nation-State or Province?* (Boulder: Westview Press, 1990), 92; "Beware of Squirrels," *The Economist*, 11 January 1997; telephone interview with Ms. Cathy Shu, Taipei Economic and Cultural Office in Seattle, 17 December 1997.

¹¹ Mustafa Ergün Olgun, "Economic Overview," in C.H. Dodd, ed., *The Political Social and Economic Development of Northern Cyprus* (Huntingdon: The Eothen Press, 1993), 273-288; and Birol Ali Yesilada, "Social Progress and Political Development in the Turkish Republic of Northern Cyprus," *The Cyprus Review* 1 (Fall 1989), 99-100.

safety hazards” and TRNC postage stamps have been proclaimed “illegal and of no validity.”¹² The international embargo against Northern Cyprus was strengthened dramatically in 1994 when the European Court of Justice (ECJ, the judicial wing of the European Union) ruled that EU member-states could no longer accept movement and phyto-sanitary certificates¹³ from TRNC authorities. Under the 1972 association agreement between Cyprus and the then EC, Cypriot goods received preferential access to the EC marketplace. Until this 1994 ruling, the UK had been accepting certificates from TRNC authorities to ensure that the entire population of Cyprus benefited from the association agreement. In essence, the ECJ ruling held that movement and phyto-sanitary certificates could only be issued by authorities from the Republic of Cyprus. Produce and citrus exports from the TRNC are now banned from EU markets, although in practice many of them will probably be rerouted through Turkey.¹⁴

The international embargo campaign has hurt the TRNC economy. The fact that no country other than Turkey maintains direct air links with the TRNC substantially increases both the costs and the inconvenience of traveling to Northern Cyprus and is a serious impediment to the development of the tourist industry there. The impact of this measure alone on the TRNC’s fragile economy is enormous—in 1992 tourist receipts accounted for 30 percent of the TRNC’s entire GNP and were equivalent in value to more than 320 percent of its total exports.¹⁵ The overall effects of the embargo also show up in per capita income statistics. In 1995, Greek Cypriot per capita income stood at US\$12,500, while the comparable Turkish Cypriot figure was just US\$3,300.¹⁶

The isolate and embargo strategy obviously has substantial costs for the *de facto* state. It also, however, affects international society. Sticking with the TRNC example, in May 1993, Asil Nadir, the former head of Polly Peck International, fled from London to the TRNC in order to avoid serious fraud charges in the UK. Because the UK does not recognize the TRNC, there is no extradition treaty between them. As such, Nadir is effectively beyond the reach of British justice in the TRNC. In a related incident, Elizabeth Forsyth, one of Nadir’s aides who fled with him, asked to provide statements for her own trial from the TRNC. The British judge in the case would not allow as admissible any witness statements she made to a TRNC court because the UK did not recognize this entity. Nor would he allow evidence to be heard from the TRNC via a satellite television link.¹⁷ The TRNC’s status as a juridical black hole in the international system may also appeal to organized criminals. Its lack of taxation and extradition agreements with other countries led one member of the Russian mafia to describe it as a perfect setting because “[n]o one can touch you in the Turkish sector.”¹⁸

Far more typical than deliberate and active campaigns against the *de facto* state is the second option of generally ignoring its existence and refusing to engage it in any manner. An example here is the Organization of African Unity’s (OAU) refusal to allow the Provisional Government of Eritrea (PGE) observer status at its June 1992 summit meeting in Dakar, Senegal. The OAU did not call for actions to be taken against the PGE; it merely refused to grant it any status at its own deliberations. More costly to the *de facto* state is the general inability of most intergovernmental organizations and non-governmental aid agencies to deal with non-sovereign entities. As Alan James points out, it “deserves emphasis that the

¹² John Martin, “The History and Development of Tourism,” in C.H. Dodd, ed., *The Political Social and Economic Development of Northern Cyprus*, 362-363; Douglas Lockhart, “Tourism in Northern Cyprus: Patterns, Policies and Prospects,” *Tourism Management* 15 (1994), 371; and Robert McDonald, *The Problem of Cyprus*, Adelphi Papers, no. 234 (London: International Institute for Strategic Studies, Winter 1988/9), 22.

¹³ Movement certificates establish a good’s place of origin. Phyto-sanitary certificates guarantee plant health.

¹⁴ “Ruling on Cypriot Import Certificates,” *Financial Times*, 12 July 1994; and “Cyprus: As Divided As Ever,” *The Economist* 6 August 1994.

¹⁵ Douglas Lockhart, “Tourism in Northern Cyprus,” 374.

¹⁶ U.S. Department of State, “Cyprus Country Report on Human Rights Practices for 1996” (Washington, D.C., February 1997).

¹⁷ “PPI Case Judge Says No to Defence,” *The Times*, 6 March 1996; and “Asil Nadir’s Aide is Brought to Book,” *The Guardian*, 27 April 1996.

¹⁸ “Russian Syndicates Gain Hold in Israel; Political Influence Latest Crime Threat,” *The Washington Times*, 29 April 1996.

acquisition of sovereign status does, in itself, constitute a material, and not just a nominal, change in a territory's position. For this alteration in its status is not simply a matter of words but has some practical implications, which can be of considerable significance."¹⁹ Eritrea, for example, was unable to qualify for any bilateral aid or loans from the IMF or the World Bank until after the conclusion of its independence referendum. The Republic of Somaliland has also complained vociferously about the UN's refusal to provide it with any substantial assistance. One example that particularly embittered Somaliland President Mohamed Ibrahim Egal was the UN's refusal to assist Somaliland in rebuilding its legal infrastructure. In his words,

They were supposed to have repaired our courts and paid our justices. They were promising that for so long, and then... they came up with another brilliant excuse. They said 'You call yourselves "chief justices" and "supreme courts" and if we pay for them, it will be an act of recognition of Somaliland.' That's after six months of renegeing on their promises.²⁰

Besides the active embargo, the TRNC also suffers from this general neglect. Its diplomatic isolation prevents it from receiving nearly all non-Turkish external development assistance. One major problem here has been the growing salinization of its limited water supplies. This situation could have been avoided had the TRNC undertaken a large-scale irrigation program. Unfortunately, dams and irrigation systems require massive investments—which in the case of the (Greek) Republic of Cyprus were carried out only with major development funding from the World Bank, the EC, and other international institutions.²¹ Another revealing example comes from Chechnya. In February 1996, the IMF negotiated a US\$10.1 billion three-year loan agreement with the government of Russia. As it does not appear as an identifiable item in Russia's budget, the costs of the war in Chechnya have not been an issue between Russia and the IMF. Yet, under IMF pressure, the Russian government recently announced a series of spending cutbacks which included money earmarked for the rebuilding of Chechnya's devastated infrastructure. As *The Economist* put it, "[t]he perverse result is to leave the Russian government acknowledging a need to cut back on the cost of reconstructing Chechnya, but not on the cost of destroying it first."²²

For the *de facto* state, the costs of this second option are measured primarily in terms of potential aid and investment dollars lost. Looking at Eritrea from 1991 to 1993, David Pool observes that "[t]he costs of a smooth political transition to independence have been borne in the economic sphere, at least in the short run."²³ Unfortunately, for some extremely poor *de facto* states with slim margins of error such as Somaliland, these short run costs may make the difference between long-term survival or failure. For international society as a whole, however, the costs of this second option are only felt in the long run. After all, it costs nothing to ignore or neglect a *de facto* state today. If, however, to take one example, external assistance to develop Somaliland's legal infrastructure will show a positive long-term return on investment in terms of improved local (and hence regional) stability, then the short-term savings on not providing that assistance may be overwhelmed by the increased costs of future long-term instability. Similarly, not taking Chechnya into its calculations may benefit the IMF in terms of its short-term loan repayments schedule. One might suspect, however, that such neglect will come back to haunt international society in the not-too-distant future.

The third major option for international society in regard to *de facto* states is what might be termed the limited acceptance approach. This option is best exemplified by the international community's attitudes toward Eritrea in its 1991-1993 period and by its most recent attitudes toward

¹⁹ Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen & Unwin, 1986), 276.

²⁰ Matt Bryden, "Interview: President Mohamed Haji Ibrahim Egal," *Africa Report* 39 (November-December 1994), 42.

²¹ Behrooz Morvaridi, "Agriculture and the Environment," in C.H. Dodd, ed., *The Political Social and Economic Development of Northern Cyprus*, 246.

²² "Russia's Budget: Another Battle to Fight," *The Economist*, 24 August 1996.

²³ David Pool, "Eritrean Independence: The Legacy of the Derg and the Politics of Reconstruction," *African Affairs* 92 (July 1993), 392.

Somaliland. Though it was denied access to international organizations and many forms of external assistance, the UN did open a permanent representative's office in Eritrea in November 1991.²⁴ In February 1992, a US Agency for International Development (USAID) delegation visited Eritrea and held discussions with senior PGE officials. They ultimately promised to present proposals to the American government to give Eritrea US\$55 million worth of aid over a two-year period.²⁵ The PGE in some ways made their own situation more difficult by steadfastly refusing to deal with the outside world through Addis Ababa. They refused to receive officials from embassies in Addis Ababa and would not consent to their aid needs being considered as part of an Ethiopian country program. Still, Lionel Cliffe maintains that by 1992 "most governments had adjusted to the realities of Eritrea's *de facto* separation and to the inevitability of its eventual independence: external communications and most diplomatic relations had been normalized, and long-term aid was in the planning stage."²⁶ In the case of Somaliland, the evidence is somewhat more tentative. The US sent a fact-finding mission to Hargeisa in 1995 and the United Nations Development Program (UNDP) now maintains a representative office there. In June 1995, the UNDP representative, Earl Dyson, told the Somaliland government that UN agencies were prepared to work with it and that the government had the right to be informed about the budgets and projects of every agency. The US now deals with the Egal administration through the American embassy in Djibouti and, for aid projects, through the USAID office in Nairobi.²⁷

Another example of the limited acceptance approach comes from the TRNC. In this case, though most countries support the isolate and embargo strategy, they realize that there can be no overall settlement of the Cyprus problem without the Turkish Cypriots. For this reason, the TRNC is allowed to maintain non-diplomatic representative offices in such cities as Brussels, London, Washington, New York, Islamabad, and Abu Dhabi. The UN's recognition of the two Cypriot communities participating in negotiations on an "equal footing" also allows TRNC officials to have full, albeit non-diplomatic, access to the UN.²⁸ For some countries, contacts with TRNC officials are limited to resolving the Cyprus dispute. The US, for example, engages TRNC representatives on the issue of a negotiated settlement in a variety of locations. It will not, however, discuss with them any other matters. Should an American businessman have a commercial dispute or should an American tourist have a problem, there is no mechanism for US government involvement in such a manner. The political officer at the US embassy in Nicosia maintains a small office in the Turkish sector to facilitate contacts with the Turkish Cypriots on the overall settlement issue but this is not a US consulate and it does not offer other services.²⁹ The fact that the TRNC can be cited in all three of our scenarios shows that these categories are not necessarily mutually exclusive.

Obviously, of the three choices presented above, this last option of limited acceptance is the one that is most advantageous to the *de facto* state. While it might not contribute to success toward the ultimate goal of sovereignty as constitutional independence, this type of limited acceptance coupled with the provision of humanitarian assistance can potentially ease a number of pressing problems facing the *de facto* state. While greater international involvement will likely limit the *de facto* state leadership's autonomy through pressures to follow certain courses of action and avoid others, on balance the benefits

²⁴ "Horn of Africa in Brief; Eritrea UN Permanent Representative to Open Office in Asmera," *BBC Summary of World Broadcasts*, 15 November 1991.

²⁵ "Ethiopia; USAID Proposes Aid Worth 55m Dollars," *BBC Summary of World Broadcasts*, 18 February 1992.

²⁶ Lionel Cliffe, "Eritrea: Prospects for Self-Determination," in Peter Woodward and Murray Forsyth, eds., *Conflict and Peace in the Horn of Africa: Federalism and Its Alternatives* (Aldershot: Dartmouth Publishing Company, 1994), 63.

²⁷ "Somaliland; President Tells UN Officials Aid Agencies Doing More Harm Than Good," *BBC Summary of World Broadcasts*, 6 June 1995; "Somalia Breakthrough as Americans Visit Somaliland," *Africa News* (September 1995); telephone interview with Mr. Ken Shivers, US State Department desk officer for Djibouti and Somalia, 10 April 1997.

²⁸ Telephone interview with Dr. Sazil Korküt, TRNC representative in New York, 15 April 1997.

²⁹ Telephone interview with Ms. Siria Lopez, US State Department desk officer for Cyprus, 15 April 1997.

should outweigh the costs as far as these entities are concerned. For international society, the greatest potential cost to this approach is angering the sovereign state on whose territory the *de facto* leadership operates. There is also the potential problem of not wanting to be seen to be encouraging these types of rebellions in the future. Indeed, the members of international society may fear that even such a non-judicial accommodation of the *de facto* state will only serve to undermine their normative position against secession. In the short-term, the costs of this approach (in terms of aid expenditures and diplomatic time spent) will probably exceed those of doing nothing. In the long-term, international society must hope that the investment in dealing with pressing humanitarian problems today will reap dividends tomorrow in terms of improved stability and less threatened or isolated political leaderships.

IV. Three Potential Alternatives

Beyond these three main approaches, there are also a number of possible alternative methods for modeling future relations. We consider three here. The first is what might be called “the Ethiopian model” or “the Meles formula.” Essentially, this is a variant on the third “limited acceptance” model discussed above that seeks to reassure aid agencies, investors, and outside governments by proactively removing the existing sovereign state’s objections to contacts with the *de facto* entity. These objections are removed without affecting or determining the course of future events. In the Ethiopian case, in October 1991, President Meles Zenawi explicitly invited foreign governments to deal directly with the PGE on economic matters without granting it full diplomatic recognition. Meles acknowledged the complexities that such a situation might entail but maintained that these complexities need not hold up investment or relief assistance in Eritrea. He explained to diplomats that “[t]he future of Eritrea will be determined by a referendum within two years and relations which any country maintains with the provisional government of Eritrea should not be viewed as determining future events there.”³⁰ Though it was never explicitly stated (and probably never considered), the Meles formula has the advantage of being consistent with a number of UN resolutions on Northern Cyprus. UN General Assembly resolution 37/253 of 13 May 1983, for example, “stipulated that the *de facto* situation should not be allowed to influence or affect the solution of the problem.”³¹ In effect, the Meles formula removes the “solution of the problem” from the agenda and considerations of all other parties and allows them to deal freely with the *de facto* state leadership in the meantime. This model has the same advantages as the limited acceptance model, with the additional advantage that it does not risk angering the sovereign state on whose territory the *de facto* state exists. Its major disadvantage is the fact that few sovereign states are willing to consider, let alone implement, such a model. As such, it is likely to remain mostly in the realm of theory for some time.

The second alternative model is what might be called “the international economic organization membership model.” There are two main examples here: the Asia-Pacific Economic Cooperation (APEC) membership model and the General Agreement on Tariffs and Trade (GATT, now World Trade Organization, WTO) membership model. Unlike the UN and most other international organizations, these groupings do not base their membership requirements upon juridical statehood. In the case of APEC, members are not sovereign states, but rather “economies.” This formula was devised so that Hong Kong and Taiwan could participate in the organization’s activities along with the People’s Republic of China (PRC). As APEC has a much looser institutional structure than most international organizations, our primary focus here will be on the GATT/WTO. From its inception, GATT members have been

³⁰ “Ethiopia Agrees Foreign Contact With Separatist Eritrea,” *The Reuter Library Report*, 29 October 1991. See also “Ethiopia: Eritrean [incorrect heading] President Invites Foreign States to Deal With Provisional Government,” *African Business*, 1 December 1991.

³¹ Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (Oxford: Oxford University Press, 1989), 165. John Drysdale, *Somaliland: The Anatomy of a Secession* (Hove: Global-Stats Ltd., revised ed., 1992), 35 also advocates the use of such a model for Somaliland.

“contracting parties”—defined in article XXXIII of the General Agreement as “governments which are applying the provisions of the Agreement.” A drafting document of the General Agreement makes it clear that contracting parties were defined as “governments” and not as “states” or “nations” specifically so that “governments with less than complete sovereignty could be a contracting party to GATT.” Indeed, three of the original 22 contracting parties (Burma, Sri Lanka, and Southern Rhodesia) to the GATT were not sovereign states at the time the General Agreement was drafted. More recently, Hong Kong became a GATT contracting party in 1986. According to Ya Qin, there are essentially two main qualifications that a government must meet in order to qualify as a GATT contracting party. First, it must represent a customs territory that maintains its own tariffs, non-tariff barriers, and other trade restrictions. Second, that same government must be responsible for those tariff and non-tariff trade restrictions so that it is in the position to remove or reduce them in accordance with GATT obligations.³²

In essence, the hallmark of the GATT membership model is that it is based on functional competence rather than juridical standing. Applied to other international organizations, it would, for example, ask whether or not TRNC authorities were competent to run a safe airport or to meet postal obligations, not what their state’s juridical standing was. The main advantage of such a model is that it accords well with the complex contemporary reality of international politics which often goes beyond the simple dichotomy of sovereign statehood or nothing. Whatever one thinks of their current or ultimate status, there is no doubt that the governments of Hong Kong and Taiwan are eminently capable of meeting their obligations under the GATT or the WTO. Similarly, there is no doubt that the TRNC could meet whatever international obligations there are on operating maritime ports. The main disadvantage of such a system is that most sovereign governments are likely to resist any sign of movement away from international participation based on juridical standing to international participation based on functional competence. As with the Meles formula, this alternative is also likely to remain mostly in the theoretical realm for some time.

The third potential alternative is what might be called “the Taiwan model.” As relations between the Republic of China (ROC) and the 20-some countries which recognize it are conducted along standard diplomatic lines, our focus here is on what the Taiwanese term “substantive relations”—the economic, trade, technological and cultural ties that the ROC maintains with countries that do not have formal diplomatic relations with it.³³ In essence, the Taiwan model can be summarized in three main areas: 1) Taiwanese pragmatism, particularly in regard to nomenclature; 2) active cooperation from states that do not recognize the ROC; and 3) the “privatization” of official relations.

The first component of this model is a flexible pragmatism on the part of the Taiwanese in regard to nomenclature. Taiwan’s official name is the Republic of China. After the US switched recognition from Taipei to Beijing in 1979, however, the Beijing leadership formulated a policy that any Taiwanese presence in international affairs, be it official or unofficial, should be in the name of “Taiwan, China” or “Taipei, China” so that no one would be confused as to the existence of “two Chinas” or “one China, one Taiwan.” The name “Taipei, China” is sometimes referred to as the “Olympic formula” since it was first adopted by the International Olympic Committee in 1979. After some initial resistance to the use of this formula, Taiwan accepted it in 1981. This name is also now used by the Asian Development Bank (ADB). In February 1986, the board of governors of the ADB (of which Taiwan was a founding member under the name Republic of China) admitted the PRC as a member and voted to change Taiwan’s designation from ROC to “Taipei, China.” The Taiwanese boycotted the ADB’s annual meetings in 1986 and 1987 in protest, but retained their membership and returned to full cooperation with the organization in 1988. The ADB was the first intergovernmental organization in which Taiwan and the PRC have both participated in as equal members. APEC became the second such organization in 1991 when it simultaneously admitted Hong Kong, the PRC, and “Chinese Taipei” to its membership.³⁴ On January 1,

³² Ya Qin, “GATT Membership for Taiwan: An Analysis in International Law,” *New York University Journal of International Law and Politics* 24 (Spring 1992), 1074-1076.

³³ For more on this, see *Republic of China Yearbook*, 1994, 174.

³⁴ Ya Qin, “GATT Membership for Taiwan,” 1065-1067.

1990, Taiwan formally applied to join the GATT as “The Separate Customs Territory of Taiwan, P’enghu, Kinmen and Matsu” under Article XXXIII of the General Agreement. This name was chosen in the hopes “that by using the term ‘customs territory,’ the application would meet with fewer ‘unnecessary disturbances’.”³⁵ Many of the ROC’s overseas missions go by the name of “Taipei Economic and Cultural Office.” Though Taiwan has yet to be successful in its quest for GATT/WTO membership, its flexibility in nomenclature certainly eases its participation in international relations.

The second component in the Taiwan model is the active cooperation of its non-diplomatic partners. This cooperation has been most apparent in the case of the United States. In an attempt to minimize the consequences of derecognition, the US Congress passed the Taiwan Relations Act (TRA). Except for the use of diplomatic license plates and passports, under this act the US extends essentially the same privileges to Taiwanese representatives as it does to diplomats from officially recognized states. The TRA also provides for the capacity of Taiwan to sue and be sued in US courts. Typically, only a recognized government would have the capacity to sue in the courts of another state. Similarly, the act provides that the absence of diplomatic relations shall not affect the application of any US laws with respect to Taiwan and that US laws shall apply to Taiwan exactly as they did prior to derecognition on 1 January 1979. As President Carter explained in an official memorandum, “Whenever any law, regulation, or order of the United States refers to a foreign country, nation, state, government, or similar entity, departments and agencies shall construe those terms and apply those laws, regulations or orders to include Taiwan.”³⁶

The final component of the Taiwan model is the “privatization” of diplomatic relations. In the case of the US, the TRA provided for the establishment of a new body called the American Institute in Taiwan (AIT) to handle relations in the absence of diplomatic recognition. The AIT is a private non-profit corporation which has entered into a contract with the US State Department to provide certain services in return for the reimbursement of its costs within defined limits. In theory, all AIT personnel are not government employees during the course of their tenure—even though many of them are seconded from the State Department and other governmental agencies. Section 7 of the TRA authorizes AIT employees to perform the functions and services of US consular officials and, in practice, the AIT performs most of the same functions which were previously carried out by the US Embassy in Taipei. Funding for the AIT comes from the annual State Department appropriation. The Taiwanese equivalent of the AIT is called the Coordination Council for North American Affairs (CCNAA). Under the TRA, all dealings between Taiwan and the US are to be handled exclusively through these two bodies. Therefore, should the US Department of Agriculture wish to liaison with its counterparts in Taiwan for some reason, it cannot make direct contact as it could with, say, similar officials in Mexico. Rather, it must transmit its request through the AIT-CCNAA framework.³⁷ R. Sean Randolph concludes that “[u]nique in both form and function, the AIT is without precedent in United States diplomatic experience.”³⁸

³⁵ *Ibid.*, 1073. See also *The Republic of China Yearbook, 1994*, 178-179.

³⁶ The Carter quote is cited in Victor H. Li, “The Law of Non-Recognition: The Case of Taiwan,” *Northwestern Journal of International Law and Business* 1 (Spring 1979), 137. On the significance of the TRA, see Andrew M. Ling, “The Effects of Derecognition of Taiwan on United States Corporate Interests,” *Loyola of Los Angeles International and Comparative Law Journal* 6 (1983), 163-184; Michael E. Mangelson, “Taiwan Re-recognized: A Model for Taiwan’s Future Global Status,” *Brigham Young University Law Review* 1992 (#1), 231-251; R. Sean Randolph, “The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs,” *The International Lawyer* 15 (Spring 1981), 249-262; and Ahmed Sheikh, “The United States and Taiwan After Derecognition: Consequences and Legal Remedies,” *Washington and Lee Law Review* XXXVII (Spring 1980), 323-341.

³⁷ For more on the AIT, see Andrew M. Ling, “The Effects of Derecognition of Taiwan on United States Corporate Interests,” 173-174; R. Sean Randolph, “The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs,” 251-253; and Ahmed Sheikh, “The United States and Taiwan After Derecognition,” 339.

³⁸ R. Sean Randolph, “The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs,” 252.

In addition to the AIT-CCNAA framework, the Taiwanese have also worked out similar “non-governmental” arrangements with the PRC. The Taiwanese equivalent of the CCNAA is in this case called the Straits Exchange Foundation (SEF). The SEF was set up in 1991 because commercial contacts with the PRC had reached such a level that some type of regular forum was needed to handle such issues as fishing disputes, investment protection matters, litigation questions, and illegal PRC emigrants to Taiwan. The PRC’s equivalent body to the SEF is called the Taiwan Affairs Office.

Whatever else one may say about it, this “privatization” of official relations has certainly not appreciably hindered economic contacts between the parties concerned. In the case of the US, two-way trade between it and Taiwan has increased from US\$9 billion to over US\$35 billion since the enactment of the TRA. Taiwan is now the US’s fifth largest trading partner.³⁹ As for the PRC, Taiwan is now the second largest foreign investor in that country. According to the PRC’s own statistics, some 20,000 Taiwanese companies had invested or were committed to invest US\$22.6 billion in China by 1995. In 1994, two-way trade between Taiwan and the PRC was in excess of US\$14 billion.⁴⁰

At first glance, the Taiwan model would appear to be quite attractive to other *de facto* states. There is one major drawback, however. Most *de facto* states would probably be unwilling to show the same type of flexible pragmatism in terms of nomenclature that the Taiwanese have. Turkish Cypriots, for example, have often accused Greek Cypriots of blocking mutually beneficial joint economic projects over questions of recognition. The Greek Cypriots reply that the Turkish Cypriots use the bait of joint economic projects as part of a deliberate strategy to achieve *de facto* recognition and then accuse them of “backing off” when they do not agree to nomenclature that in their view implies a degree of recognition of the TRNC.⁴¹ The internal logic of most *de facto* states advances political considerations over economic ones. Thus, maintaining official TRNC nomenclature without a mutually beneficial economic project is preferable to securing that project at the cost of being called “Lefkosa, Cyprus” or some such name.⁴² When it comes to *de facto* statehood, the Taiwanese (at least in recent times) are thus somewhat exceptional in elevating the economic over the political.⁴³

The leading reason that this model is unlikely to see widespread application, however, is that most sovereign states lack the compelling economic incentive to cooperate with other *de facto* states that they have with Taiwan. Taiwan’s rapidly growing market of 20 million people with a per capita GNP of more than US\$12,800, its manufacturing prowess, and its leadership in a number of high-tech industries argue strongly for finding a way to accommodate it through ruses such as the “privatization” of official relations. Such incentives are simply not present in the case of the 170-some thousand Turkish Cypriots with a per capita GNP of around US\$3,000 in a tourism-based economy, or in the case of the three million residents of Somaliland with a per capita GNP of only a few hundred dollars a year in an economy based almost exclusively on agriculture and livestock production.

³⁹ Michael E. Mangelson, “Taiwan Re-recognized,” 236.

⁴⁰ “Taiwan Investors Unaffected by Chinese Sabre-Rattling,” *Financial Times*, 25 July 1995; and “Taiwan: The Outsider,” *The Economist*, 2 July 1994.

⁴¹ See François Lafrenière and Robert Mitchell, “Cyprus: Visions for the Future,” Working Paper 21 (Ottawa: Canadian Institute for International Peace and Security, March 1990), 83 for more on this.

⁴² Lefkosa (sometimes spelled with a cedilla on the s) is the Turkish name for Nicosia. As such, this formula would be the TRNC equivalent of “Taipei, China.” Dr. Sazil Korküt, the TRNC representative in New York, is somewhat dismissive of Taiwanese pragmatism in this regard. What good would it do, he asks, for the TRNC to change its name in order to be admitted to an international organization that deals with Latin America? Telephone interview, 15 April 1997.

⁴³ Initially, it can be argued that the Taiwanese did elevate political factors over economic ones in order to cement their security relationship with America. Once the American military umbrella was in place, however, the economic began to assert itself as the most important factor. At present, one can see signs that the political is beginning to reemerge and reassert itself in Taiwan. Taiwanese exceptionalism in this regard is thus somewhat historically bounded.

V. International Law and the *De Facto* State

By definition, the *de facto* state lacks juridical standing in the society of states. This fact, along with its less secure, imprecise, and more fluid status might at first glance be seen as presenting fundamental problems to international law. On closer inspection, however, the international legal system appears quite capable of dealing with the presence of these entities. The first point to be made here concerns the applicability of international law to unrecognized bodies such as the TRNC or the Republic of Somaliland. It might be thought, as James Crawford puts it, that “if international law withholds legal status from effective illegal entities, the result is a legal vacuum undesirable both in practice and principle.” However, this view is incorrect because it “assumes that international law does not apply to *de facto* illegal entities; and this is simply not so.” The example Crawford uses here is Taiwan, which “whether or not a State, is not free to act contrary to international law, nor does it claim such a liberty.”⁴⁴ What Taiwan is not free to act contrary to in this regard is *jus cogens*—defined by one scholar as “peremptory norms from which no derogation can be allowed by agreement or otherwise.”⁴⁵ This idea has been incorporated into Article 53 of the 1969 Vienna Convention on the Law of Treaties.⁴⁶ Though far from unanimous, modern legal opinion is also strongly in favor of the notion of *jus cogens*. Where the consensus on *jus cogens* falls apart is in identifying exactly which principles are and are not subsumed under it. The point to be made in regard to the *de facto* state, though, is a simple one: if one accepts that such things as the prohibition on genocide and the prohibition on the use of force except for self-defense have attained the status of *jus cogens*, then these norms apply to *de facto* states in the same way that they apply to sovereign states.

Beyond the realm of *jus cogens*, it can be shown both historically and in case law that unrecognized entities (of which the *de facto* state is merely one example) do have a juridically significant existence in international law. Historically, European states frequently entered into treaties with non-sovereign entities. Ian Brownlie, for example, points out that until about the middle of the nineteenth century,

it was perfectly possible to conclude treaties with various types of social structure which had a territorial base: but there had to be some definable and unified social structure. Basutos and Zulus qualified whilst Australian aboriginals and Fuegian Indians did not.⁴⁷

In regard to case law, both US and international court decisions hold that the actions of *de facto* states may be given legal recognition in spite of the lack of formal diplomatic relations. In the absence of specific enabling legislation such as the TRA, the lack of diplomatic relations prevents *de facto* states from bringing suits in US courts. It does not, however, deny them any juridical existence. In *Wulfsohn v. Russian Socialist Federated Soviet Republic* [1923], for example, a US court granted the unrecognized Soviet government sovereign immunity on the basis that, even if unrecognized by the US, the Soviet government did exist and hence was a foreign sovereign that could not be sued in an American court without its consent. In *M. Salimoff & Co. v. Standard Oil Co. of New York* [1933], another US court applied the act of state doctrine to a confiscatory decree of the still-unrecognized Soviet government. This doctrine, which holds in part that “the courts of one country will not sit in judgment of the acts of the government of another done within its territory” was applied because, in the court’s judgment,

⁴⁴ James Crawford, “The Criteria for Statehood in International Law,” *British Year Book of International Law* 48 (1976-77), 145.

⁴⁵ Andreas J. Jacovides, “Cyprus—The International Law Dimension,” *American University Journal of International Law and Policy* 10 (Summer 1995), 1221.

⁴⁶ Reproduced in James Crawford, “The Criteria for Statehood in International Law,” 146.

⁴⁷ Ian Brownlie, “The Expansion of International Society: The Consequences for the Law of Nations,” in Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press, 1984), 362.

We all know that it is a government. The State Department knows it, the courts, the nations, and the man in the street. If it is a government in fact, its decrees have force within its own borders and over its nationals.... The courts may not recognize the Soviet government as the *de jure* government until the State Department gives the word. They may, however, say that it is a government.⁴⁸

Another leading US court case in this regard involved East Germany. In *Upright v. Mercury Business Machines* [1961], the court allowed an American assignee of a corporation controlled by the unrecognized East German government to sue in US courts. In doing so, the court rejected the defendant's argument that the lack of *de jure* relations with the East German government should be determinative of whether or not transactions with it could be enforced in US courts. The court's ruling held that

A foreign government, although not recognized by the political arm of the United States government, may nevertheless have a *de facto* existence which is juridically cognizable.... The lack of jural status for such government or its creature corporation is not determinative of whether transactions with it will be denied enforcement in American courts, so long as the government is not the suitor.⁴⁹

Internationally, this idea that unrecognized governments may still be "juridically cognizable" had previously been put forth in the *Tinoco Claims Arbitration (Great Britain v. Costa Rica)* [1924]. In this case, it was the unrecognized Costa Rican government of Federico Tinoco whose *de facto* existence was deemed juridically cognizable.⁵⁰

Contemporary state practice also supports the idea that unrecognized *de facto* entities may conduct foreign relations with sovereign states which have not extended *de jure* recognition to them. Section 107 of the Restatement (Second) of Foreign Relations Law of the United States [1965], for example, specifies that

An entity not recognized as a state but meeting the requirements for recognition specified in § 100 [of controlling a territory and population and engaging in foreign relations], or an entity recognized as a state whose regime is not recognized as its government, has the rights of a state under international law in relation to a non-recognizing state....⁵¹

Based on this, Victor Li concludes that "[f]rom an *international law perspective*, a *de facto* entity may clearly conduct foreign relations with countries which have not extended *de jure* recognition to it."⁵² Such a conclusion is supported by Article 74 of the Vienna Convention on the Law of Treaties which states that "The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States."⁵³

One objection might be that most of the examples in the above three paragraphs deal with unrecognized *governments* (such as those in East Germany and the Soviet Union) and not with unrecognized *states* (which would be the case for Taiwan, Chechnya, and our four case studies) and that there is a distinction between these two phenomena. Yet, the first part of section 107 quoted above specifically deals with unrecognized states. Similarly, there is no logical reason that the privileges

⁴⁸ Cited on pages 257-258 of R. Sean Randolph, "The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs." See also Victor H. Li, "The Law of Non-Recognition," 143.

⁴⁹ Cited on page 258 of R. Sean Randolph, "The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs." See also Andrew M. Ling, "The Effects of Derecognition of Taiwan on United States Corporate Interests," 171-172.

⁵⁰ R. Sean Randolph, "The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs," 258.

⁵¹ Cited in footnote #16, page 139 of Victor H. Li, "The Law of Non-Recognition."

⁵² Victor H. Li, "The Law of Non-Recognition," 139.

⁵³ Cited in R. Sean Randolph, "The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs," 259.

extended to the unrecognized Soviet government in the *Wulfsohn* and *Salimoff* cases would not also apply to the governments of Taiwan, the TRNC, or Eritrea from 1991 to 1993. One might object that the LTTE's administration in Tamil Eelam could not meet the same "we all know that it is a government" test put forward in the *Salimoff* judgment, but this would only be a reason to argue that *de facto* states below a certain level are not "juridically cognizable." It would not be a compelling argument that all such entities are juridically unrecognizable.

In all of this, M. J. Peterson finds a serious decline in the importance of the distinction between recognition and non-recognition. Recognized and non-recognized governments were, in her view, treated in dramatically different ways in the nineteenth century. The extent of relations carried on between the US and the PRC from 1972 to 1979 would have baffled a nineteenth century statesman or lawyer accustomed to these strict distinctions. The end result of this blurring of status is

a situation in which nonrecognition is not unlike recognition in that it presupposes, but does not assure, relations of a certain character. Recognition always meant that extensive, formal and political relations could begin, but did not guarantee their establishment or continuation. Today, it may be argued, nonrecognition means, but does not guarantee, a lack of relations.⁵⁴

Another lens through which to view the *de facto* state and international law comes from Common Article 3 of the 1949 Geneva Conventions. The historical significance of Common Article 3 is that it was the first attempt to regulate civil wars through international law. The article itself defines its scope in terms of "armed conflict not of an international character." In essence, it attempts to ensure a certain minimum humanitarian code of conduct for internal conflicts irrespective of the legal status of the parties involved. According to paragraph two, the application of the article's provisions "shall not affect the legal status of the Parties to the conflict." Further, as the International Committee of the Red Cross (ICRC) emphasizes, "applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind."⁵⁵ While the protections granted to those involved in internal wars are less substantial than the corresponding provisions for international wars, Article 3 is still generally seen by legal scholars as a positive step in that it effectively internationalizes humanitarian protection for civil wars and thus provides the hope that a minimum standard of conduct will be observed by the combatants in those wars.⁵⁶

Sovereign governments, however, consistently refuse to acknowledge the applicability of Article 3 to conflicts which take place on their territory. Thomas Fleiner-Gerster and Michael Meyer point out that, in applying Article 3, the sovereign government "must accept that, notwithstanding the declaration that the application of that provision does not change the status of the parties, the revolutionary forces then take part in the conflict as a party with responsibilities under Article 3 of the Geneva Conventions of 1949 which are part of international law."⁵⁷ Sovereign governments would also have to accept allowing the ICRC to have access to the territory controlled by the rebels without their consent. At least implicitly, this acknowledges the sovereign's own lack of control over such territory. As such, there is little incentive to apply Article 3. Rebel groups, on the other hand, "which may be considered to be criminal

⁵⁴ M.J. Peterson, "Political Use of Recognition: The Influence of the International System," *World Politics* XXXIV (April 1982), 349-350.

⁵⁵ ICRC Commentary, cited on page 3 of Human Rights Watch/Asia, "Sri Lanka: Stop Killings of Civilians," *Human Rights Watch/Asia Newsletter* 7 (July 1995).

⁵⁶ For a variety of perspectives on both the significance of Common Article 3 and its limitations, see Thomas Fleiner-Gerster and Michael A. Meyer, "New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty," *International and Comparative Law Quarterly* 34 (April 1985), 269-271; Bert V.A. Røling, "The Legal Status of Rebels and Rebellions," *Journal of Peace Research* XIII (1976), 151; Rosalyn Higgins, "International Law and Civil Conflict," in Evan Luard, ed., *The International Regulation of Civil Wars* (New York: New York University Press, 1972), 182-183; Human Rights Watch/Asia, "Sri Lanka: Stop Killings of Civilians," 3-6; and Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988), 43-48.

⁵⁷ Thomas Fleiner-Gerster and Michael A. Meyer, "New Developments in Humanitarian Law," 274.

by a State's internal law and without any international status, will try very hard to get Article 3 applied because it can give them a quasi-international status."⁵⁸

Extrapolating from these contrasting positions, one might surmise that while sovereign states have reasons to exclude *de facto* states from the international legal system, those entities themselves do not create any insurmountable problems for international law. Indeed, far from being an unrepentant outlaw, the *de facto* state actively seeks its own further incorporation into the international legal system. Going back to the Article 3 example, one frequent complaint of sovereign states is that the responsibility to implement these minimum humanitarian provisions only falls on the legal government and not on the rebels. This lack of reciprocity, however, is much more of a theoretical concern than it is a practical problem. As Heather Wilson points out,

The liberation movement, desirous of international support and recognition, is eager to accept, or at least appear to accept, its obligations as an international person. Indeed, far from there being difficulty over obligations under Article 3, liberation movements have on occasion declared their intention to comply with the Conventions in their entirety.⁵⁹

Thus, international society can choose to keep Taiwan out of the WTO. The problem, though, is not that Taiwan cannot or will not meet its obligations under world trade law. The *de facto* state already has some recognizable international legal presence. It bears emphasis that its logic and motives do not pose any substantive problems to its further incorporation into the international legal system.

What of international law's ability to deal with the existence of *de facto* states? Theoretically, there is not a problem here. International law is by no means unfamiliar with non-sovereign entities. Historically, it has found room to accept a wide variety of designations such as associated states, mandates, trusteeships, colonies, protectorates, free cities, condominiums, and internationalized territories.⁶⁰ There is no compelling theoretical reason why international law could not accommodate the *de facto* state or other such territorially-based entities possessing varying degrees of international competence. The present system of sovereign states and nothing else could mutate into a system of sovereign states plus a number of other entities.⁶¹ As Alan James observes, "[s]uch a mixed system could not claim to be based on the equality of all its participants." Rather, its "organizing principle would therefore be that of accepted international competence."⁶² In such a system, *de facto* states would have certain rights and responsibilities and be excluded from others. One can even envision such a system evolving to the point where finer distinctions are made within the category of *de facto* statehood. The caveat to all such speculation, however, is that these theoretical possibilities do not equate with contemporary practical realities. As James puts it, "At the practical level, developments moved decisively, a long while ago, in the direction of an international system in which the regular territorial participants were all of the same kind."⁶³

While the practical prospects for such a mixed system are remote and states have shown a marked reluctance to apply the provisions of Article 3, there are a number of reasons why international society might wish to bring *de facto* states and other rebel movements under the authority of its legal system. As W. Michael Reisman and Eisuke Suzuki point out, "Groups which have not yet been formally recognized as states but whose activities may have significant impacts on the international system are subjected to

⁵⁸ *Ibid.*

⁵⁹ Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements*, 51.

⁶⁰ See Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978), 233; and Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 16-18 for more on this.

⁶¹ For an argument that international law needs to move in the direction of recognizing a range of different political statuses, see Allen Buchanan, *Secession: The Morality of Political Divorce* (Boulder: Westview Press, 1991), 20-21.

⁶² Alan James, *Sovereign Statehood*, 267.

⁶³ *Ibid.*, 268.

claims by others for conformity to critical international standards.”⁶⁴ Commonsense leads one to think that the best way to ensure compliance with such standards is not to cast the *de facto* state as far as possible into the juridical equivalent of outer darkness.

In addition to the interests of the states system as a whole, individual sovereign states will, for example, want to ensure that proper controls are placed on the transfer of dangerous substances such as agricultural pests or toxic wastes regardless of their foreign origin or destination. They may also want to ensure that *de facto* states and other such entities are incorporated into their own domestic legal systems. Looking at the matter from an American perspective, Victor Li argues that

the United States should be protected against certain harmful actions taken abroad whether or not they occur in *de jure* recognized countries.... Similarly, statutes that produce beneficial results for the United States or facilitate the operation of American activities abroad should be interpreted to apply to both *de jure* and *de facto* recognized entities.⁶⁵

De facto states already have some degree of “juridically cognizable” existence. There is no theoretical reason why they cannot be further incorporated into the international legal system. While there are some understandable political reasons for sovereign states to oppose such a move, there are also some strong practical reasons for them to support it.

VI. Does the *De Facto* State Have Utility for International Society?

Traditionally, the *de facto* state and other secessionist challengers to existing sovereign states have been viewed in extremely negative terms. They are often seen as problems to be solved or conflicts that need to be resolved. International society’s hostility to secession is based on a number of factors. Foremost among these is the domino theory and the fear of never-ending secession. While extreme versions of this theory should be rejected, the structural nature of the state-nation disjunction and the potential instability that would characterize any move away from the fixed territorial borders regime are legitimate concerns. International society’s general conservatism here manifests itself as a fear of the unknown and a presumption in favor of the devil you know (the existing system) as opposed to the devil you don’t (any new regime allowing for secession). Thus, the standard view that secession should only be seen as a remedy of last resort. As Charles Beitz puts it, since secession involves a redistribution of personal, political, and property rights, “it requires a justification against the general presumption that existing arrangements should not be interfered with without good reasons.”⁶⁶ The extent of economic and other issues to be worked out in any secession—including such things as the division of public assets and debts, treaty obligations, disentangling or maintaining monetary linkages, and the like—also counsels against secession.⁶⁷

A variety of other concerns also inform international society’s bias against secession. There is the question of mineral resources and the fear that allowing mineral-rich regions to secede may impoverish the remainder of the parent state. This argument was frequently employed against the

⁶⁴ W. Michael Reisman and Eisuke Suzuki, “Recognition and Social Change in International Law: A Prologue for Decisionmaking,” in W. Michael Reisman and Burns H. Weston, eds., *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal* (New York: The Free Press, 1976), 442.

⁶⁵ Victor H. Li, “The Law of Non-Recognition,” 140.

⁶⁶ Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 111-112. Similar sentiments are also expressed in the American Declaration of Independence; Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, 214-215; Morton H. Halperin and David J. Scheffer with Patricia L. Small, *Self-Determination in the New World Order* (Washington, D.C.: Carnegie Endowment for International Peace, 1992), 74; and I. William Zartman, “Putting Things Back Together,” in I. William Zartman, ed., *Collapsed States*, 268.

⁶⁷ See the discussion in Milica Zarkovic Bookman, *The Economics of Secession* (New York: St. Martin’s Press, 1992), 119-143 for more on these points.

Katangan and Biafran secession attempts. The inverse of this concern is the fear that the new states created by any secession will not be economically viable. In both of these arguments, secession is opposed because of the fear that it will produce a new group of mendicant states that drain the resources of the international community. The only difference is that, in the first case, it is the secessionists impoverishing the existing state while, in the second, it is the secessionists themselves ending up impoverished. Both arguments suffer from the confused notion of equating economic viability with economic self-sufficiency or autarky,⁶⁸ yet they do raise legitimate points. There is also the problem of “trapped minorities”—essentially the fear that secession will create new minorities. One recent example of this was Croatia’s secession creating the “trapped” Serb minority in Krajina. Secession is also opposed because it is seen as contrary to majority rule. How can majority rule work if minorities can opt out whenever they do not like something? Finally, secession is often seen as an inappropriate solution. The evidence from countries such as India and Pakistan indicates that separatist groups can successfully be reabsorbed into a larger pluralistic state. The logic of secession undermines this and therefore undermines the entire concept of the civic, multi-national state. Secession is often justified on the grounds of an inability to participate in political life. Yet, as Lea Brilmayer argues, participatory rights do not suggest secession as a remedy. Rather, “they suggest that the appropriate solution for dissatisfied groups rests in their full inclusion in the polity, with full participation in its decision-making processes.”⁶⁹

There are, thus, a number of reasons why international society is hostile to secession and, by extension, to the *de facto* state. In contrast to this prevailing hostility, we now consider the question of whether or not the *de facto* state may, in some cases, actually serve a useful purpose for international society. While the evidence presented is much more potentially illustrative than it is definitive, a good case can be made that the *de facto* state is indeed a useful entity for the society of states.

The first way in which the *de facto* state may have utility is as a messy solution to a messy problem. The classic example here is Northern Cyprus. While few would argue that the TRNC represents a just, fair, legal, or pareto-optimal settlement to the Cyprus dispute, its effectiveness in terms of reducing tension, violence, and human suffering is hard to question. It is noteworthy that Cyprus registered as a blip on the world’s media screens in 1996 when *two* Greek Cypriots were killed in incidents along the green line. The dramatic coverage given to these two unfortunate deaths only serves to highlight the fact that Cyprus has generally been an extremely stable place since 1974. A grand total of six people were killed along the green line from 1988 to 1994 and *The Economist* described the 900-some incidents noted by UN peacekeepers in one year as being “mostly footling.”⁷⁰ In 1992, Security Council Resolution 774 reaffirmed the UN’s view that the present *status quo* on Cyprus is unacceptable. While there is certainly some truth in that, the fact remains that the *status quo* on Cyprus has been quite viable for more than twenty years now. The Greek Cypriot economy has developed rapidly and the Turkish Cypriots are willing to trade the costs of economic embargo for the benefits of political security. The TRNC *de facto* state is a messy solution because it exists in defiance of numerous international legal norms and UN resolutions, but it is a solution nonetheless. While it is easy to envision potentially better scenarios for Cyprus without the TRNC, it is also easy to envision dramatically worse scenarios than the present *status quo*.

The work of Chaim Kaufmann on how ethnic wars end provides some theoretical context from which to view the TRNC’s “messy solution” option. Kaufmann distinguishes between ethnic wars and ideological wars and argues that “[s]table resolutions of ethnic civil wars are possible, but only when the opposing groups are demographically separated into defensible enclaves.” In making this point, he emphasizes the fact that “[s]overeignty is secondary: defensible ethnic enclaves reduce violence with or

⁶⁸ Gertrude E. Schroeder, “On the Economic Viability of New Nation-States,” *Journal of International Affairs* 45 (Winter 1992), 549.

⁶⁹ Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation,” *Yale University Journal of International Law* 16 (Winter 1991), 185.

⁷⁰ “Cyprus: As Divided as Ever,” *The Economist*, 6 August 1994.

without independent sovereignty.”⁷¹ Kaufmann bases his argument on two main insights. First, through hypernationalist mobilizations and real atrocities, ethnic wars lead to a hardening of identity which means that cross-ethnic political appeals are unlikely to succeed. Second, intermingled populations create real security dilemmas that escalate the incentives for offensive combat. Solutions that aim to avoid partition and population transfers through power-sharing or state re-building will not work because they do nothing to minimize the security dilemma created by the existence of intermingled populations. Kaufmann readily acknowledges the fact that population transfers and partition are considered anathema but paraphrases Winston Churchill to argue that “separation is the worst solution, except for all the others.”⁷² The choice for the international community may thus be quite stark: uphold international sovereignty norms at the cost of continued ethnic violence or save lives at the expense of ignoring the state-centric legal regime.

The potential utility of the *de facto* state as a messy solution is limited here for three main reasons. First, not all *de facto* states are ethnically-based, nor do all conflicts revolve around an ethnic axis. Second, partition along ethnic lines undermines the entire concept of the civic state and is therefore unlikely to garner widespread support. Another problem with partition, seen in both the Cypriot and Bosnian cases, is that it generally cannot produce ethnic homogeneity unless it is accompanied by massive population transfers. As Aaron Klieman observes, “the flaw of partition lies in the necessary process by which an abstract concept is converted into a specific concrete proposal.”⁷³ Third, the international community has a natural preference for solutions such as federalism or regional autonomy that fall far short of *de facto* statehood. The main problem with this preference, as Barbara Thomas-Woolley and Edmond Keller point out, is that “[t]he successful federation of deeply divided societies requires sincere political will and a determination to remain true to the terms establishing the new system of government and administration.”⁷⁴ Such determination and political will, though, have been manifestly lacking in each of our four case studies.

Still, Ted Robert Gurr sees modest prospects for negotiated regional autonomy as a solution to ethnonational wars of secession. Eight of the 27 ethnic civil wars that have concluded in his data-set were ended with a negotiated solution that did not involve partition. Yet, each of these cases involved a regionally concentrated minority whose ethnic role in politics was reinforced through some sort of autonomy arrangement. Additionally, the violence involved in these eight cases was of a much lower order of magnitude than in the other cases which ended in either outright military victory for one side; suppression by a third party; or *de jure* or *de facto* partition. Kaufmann concludes that “[t]here is not a single case where non-ethnic civil politics were created or restored by reconstruction of ethnic identities, power-sharing coalitions, or state-building.”⁷⁵

Thus, while one can always hope for and work toward a negotiated federal settlement, when push comes to shove, a *de facto* state solution may not be the worst option available to international society. Indeed, there are a few distinct advantages to using the *de facto* state in this way. First, because international society refuses to recognize the *de facto* state or grant it juridical legitimacy, aggression is not seen to be rewarded and future would-be secessionists are not provided with any encouragement. The rules and norms of existing sovereign legitimacy are thus upheld even though the *de facto* state functions as a sort of ad hoc and unacknowledged solution to the problem at hand. Second, because of their illegitimacy, *de facto* states are ineligible to make claims on the resources of international society. They

⁷¹ Chaim Kaufmann, “Possible and Impossible Solutions to Ethnic Civil Wars,” *International Security* 20 (Spring 1996), 137.

⁷² *Ibid.* The specific quote is on page 170, the general discussion comes from pages 136-175.

⁷³ Aaron S. Klieman, “The Resolution of Conflicts Through Territorial Partition: The Palestine Experience,” *Comparative Studies in Society and History* 22 (April 1980), 283.

⁷⁴ Barbara Thomas-Woolley and Edmond J. Keller, “Majority Rule and Minority Rights: American Federalism and African Experience,” *Journal of Modern African Studies* 32 (September 1994), 424.

⁷⁵ Chaim Kaufmann, “Possible and Impossible Solutions to Ethnic Civil Wars,” 161; and Ted Robert Gurr, “Peoples Against States: Ethnopolitical Conflict and the Changing World System,” *International Studies Quarterly* 38 (September 1994), 366.

are thus not likely to be extremely burdensome on the rest of the world. Third, and perhaps most importantly, the existence of *de facto* states does not preclude other future settlement possibilities. The TRNC's declaration of independence, for example, specifically prohibits it from uniting with any other state except the Republic of Cyprus to form a federal union and it explicitly reserves the right to form such a future federation with the Greek Cypriots. Similarly, there is no reason why the existence of the Republic of Somaliland need preclude any future union, federation, confederation, or specific cooperative agreements with southern Somalia should the political will and popular support exist on both sides to enter into such arrangements. In regard to Taiwan, Victor Li points out that the "*de facto* entity concept deals with present political realities and does not require or preclude eventual reunification."⁷⁶ The extensive cooperation which took place between the PGE and Ethiopia is also illustrative here. One of the main concerns with granting Eritrea independence was that Ethiopia would become landlocked. As such, it is quite significant that one of the first official acts of the PGE was to enter into an agreement which declared Assab a free port of Ethiopia. A further agreement was signed giving Massawa the same status a few months later. Additionally, the two governments agreed to share a common currency and to provide for the free movement of citizens and trade across their borders.⁷⁷

Another major way in which the *de facto* state may be seen as having utility is as a pragmatic and ad hoc way of reconciling irreconcilable principles. While there may be other examples, our consideration here is limited to two areas: self-determination short of full independence and the attempt to formulate criteria for just secessions. The phrase "self-determination short of full independence" is essentially shorthand for the belief that self-determination should embody a greater variety of choices than just sovereign statehood. In and of itself this idea is not controversial. Indeed, the International Court of Justice's advisory opinion in the *Western Sahara* case as well as General Assembly Resolutions 1541 (15 December 1960) and 2625 (the Declaration on Friendly Relations, 24 October 1970) all acknowledge that an act of self-determination need not result in sovereign independence. Free association or integration with an independent state are also deemed to be "acceptable" forms of self-determination.⁷⁸ Yet, in spite of this, actual UN practice has narrowly interpreted self-determination through a dichotomous lens that presents only two choices: sovereign statehood for the chosen few and absolutely nothing for the rest. As Michla Pomerance puts it, in the UN's vision of self-determination, the 'all-or-nothing' principle obtains, and it revolves around the 'colonial-racist' appellation. Those groups subjected to 'colonialism' and 'racism' are accorded plenary rights—*full* 'external' self-determination in the form of independence; but other groups may be accorded *no* rights, the sovereign gates barring secession from within and intervention from without...⁷⁹

The UN's all-or-nothing conception of self-determination reflects the near-universal triumph of the sovereign state over all other forms of political organization. F.H. Hinsley dates the complete victory of sovereignty from the Concert of Europe period in the 1820s. As he sees it, sovereignty at that time was adopted as a "fundamental idea" and, as such, "the solution of all problems and the adjustment to all new developments were made to conform to it."⁸⁰ One of the examples Hinsley cites here is the fact that the

⁷⁶ Victor H. Li, "The Law of Non-Recognition," 138.

⁷⁷ Kidane Mengisteab, "Ethio-Eritrean Cooperation in National Reconstruction and Development," in Amare Tekle, ed., *Eritrea and Ethiopia: From Conflict to Cooperation* (Lawrenceville: The Red Sea Press, 1994), 73; Roy Pateman, "Eritrea Takes the World Stage," *Current History* 93 (May 1994), 231; Araia Tsegai, "A New Perspective of Ethio-Eritrean Partnership," in Amare Tekle, ed., *Eritrea and Ethiopia*, footnote #8, page 66; and Tekie Fessehazion, "Prospects for Regional Economic Cooperation Between Eritrea and Its Neighbors," in Amare Tekle, ed., *Eritrea and Ethiopia*, 42 and 50.

⁷⁸ For more on this, see Rupert Emerson, "Self-Determination," *American Journal of International Law* 65 (July 1971), 470; Michla Pomerance, "Self-Determination Today: The Metamorphosis of an Ideal," *Israel Law Review* 19 (Summer-Autumn 1984), 327; Robin C. A. White, "Self-Determination: Time for a Re-Assessment?" *Netherlands International Law Review* XXVIII (1981/82), 149; and Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, 11.

⁷⁹ Michla Pomerance, "Self-Determination Today," 333, italics in original.

⁸⁰ F.H. Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 1986), 204-205.

international status of the Holy See could not be settled without resorting to the device of establishing a sovereign Vatican city-state. Such rigidity affects our political choices today. Stephen Krasner points out in this regard that it would probably be easier to find a solution to the problem of the West Bank if there were additional legitimate options available besides either full sovereignty for the Palestinians or continued military occupation by the Israelis. Yet, “no such possibility is acceptable, not simply because of the utilitarian calculus of the actors involved but also because the sovereign state is the only universally recognized way of organizing political life in the contemporary international system. It is now difficult to even conceive of alternatives.”⁸¹

The argument here is not that the *de facto* state is an ideal solution to the need for more alternatives than just sovereignty or, from the perspective of the affected groups themselves, the vastly inferior concept of minority rights within existing states. Rather, the argument is that in some cases the *de facto* state may serve as a functional “non-solution” to this problem. The international community might, for example, determine that the people of Somaliland deserve better than forced incorporation into Somalia’s warlord-based politics and that the consociational rule of the Egal administration is far from the worst option available. At the same time, however, there is no desire to encourage other would-be secessionists or to “unfreeze” the existing territorial map. As such, a strategy of either benignly ignoring the Somaliland *de facto* state (option two above) or reaching some sort of limited accommodation with it (option three) may be in the best interests of all parties. Such a solution is not ideal, but it does have the important advantages of leaving future options open; preserving existing international norms; and requiring little in the way of monetary or diplomatic expenditures from international society.

Another major area where the *de facto* state may be seen as an ad hoc or pragmatic method of resolving irreconcilable principles concerns the whole question of establishing criteria to distinguish legitimate from illegitimate secession attempts. There are a number of potential benefits to establishing criteria for “legitimate” or “just” secessions. Such criteria could conceivably help the international community balance its concerns for order between states and order within states. The existence of established criteria might also encourage moderation, both on the part of secessionists themselves and on the part of sovereign governments. Established criteria would also bring some degree of order and rationality to an area that has to date been ruled by inconsistency, hypocrisy and unpredictability. As Lee Buchheit argues, “[s]urely it is wiser, and in the end safer, to raise secessionist claims above the present ‘force of arms’ test into a sphere in which rational discussion can illuminate the legitimate interests of all concerned.”⁸²

Along these lines, a number of attempts have been made at devising criteria for secession. Still, nothing even beginning to approach a consensus on the “standards of legitimacy” for secession has been reached. In part, this is due to the difficulties in reconciling incompatible principles—how to balance self-determination with territorial integrity, for example. In part, this is also due to the unavoidable subjectivity involved in ascertaining such things as the degree of popular support for a secessionist movement or the existence of a separate nation. Finally, much of the problem results from the inability to translate vague theoretical premises into clear and concise guidelines. Eisuke Suzuki, for example, bases his criteria on the need “to approximate a public order of human dignity.” Along these lines, “the test of reasonableness is the determining factor in deciding how to respond to the claim of self-determination.”⁸³ How such a vague notion as “the test of reasonableness” can be any guide to achieving the equally vague goal of “a public order of human dignity” is not mentioned. Similarly, Lung-Chu Chen also focuses on the “goal values of human dignity.” As such, the critical test in assessing a claim of self-determination “is to evaluate the aggregate value consequences of honoring or rejecting the claim for all affected

⁸¹ Stephen D. Krasner, “Sovereignty: An Institutional Perspective,” *Comparative Political Studies* 21 (April 1988), 90.

⁸² Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, 245.

⁸³ Eisuke Suzuki, “Self-Determination and World Public Order: Community Response to Territorial Separation,” *Virginia Journal of International Law* 16 (Spring 1976), 784.

communities, potential as well as existing.”⁸⁴ Needless to say, one Turkish Cypriot’s “human dignity” is another Greek Cypriot’s “ethnic cleansing.” Also, one’s perception of the “aggregate value consequences” of honoring the TRNC’s claim to self-determination varies dramatically depending on which side of the green line one stands upon.

As was the case with self-determination short of full independence, the *de facto* state may be an adequate (if not ideal) non-solution to this inability to reach consensus on the criteria for legitimate secession. Following this logic, one might argue that there will never be any commonly-accepted criteria for determining the legitimacy of secession because international society can never accept the prospect of secession as legitimate. As such, preserving the existing norms against secession and territorial revision is of paramount importance. Yet, forcing highly-mobilized populations with legitimate grievances and responsible leaderships to remain yoked to the likes of a Mengistu or a Siad Barre is extremely difficult to justify, even on the basis of international order. As Conor Cruise O’Brien observes, “[s]ecession is an unpopular idea, and naturally so since it threatens public order and the very life of a state. Yet hardly anyone would claim that there is *no* such thing as a right to secede under any circumstances at all.”⁸⁵ International society can ignore or accept a *de facto* state on a limited basis without compromising its norms on fixed territorial borders or preserving the juridical existence of all current states. In this scenario, the secessionists are not offered any support or encouragement to reach the level of *de facto* statehood. Once there, however, they are allowed, more or less, to go about their business—with the one huge caveat that they must nominally remain a part of the state which they are trying so hard to leave.

A final way in which to view the question of the *de facto* state’s utility is to compare it to Robert Jackson’s arguments on the utility of the quasi-state. Jackson finds three main reasons why “the negative sovereignty game” will likely have continued utility in the future.⁸⁶ The first reason is instrumental—essentially a powerful conservatism that is part inertia, part lack of imagination, and part fear that the costs of alternative arrangements may exceed their benefits. In the words of Alan James, the international community continues to recognize quasi-states and collapsed states because of its fear “that abandoning what is little more than a pretense may open up a far more alarming prospect than continuing to connive at an unreality.”⁸⁷ This first reason poses no problem for the *de facto* state in that conniving at the unreality that Northern Cyprus does not exist allows international society to maintain the pretense that a unified Republic of Cyprus does exist. Jackson’s second reason is normative—international relations cannot be based on power and interest alone and must include not only law, but also respect, consideration, decorum, and courtesy. Again, this does not pose a problem for the utility of *de facto* states. Somalia’s ambassador to the UN can be treated with sympathy, wined, dined, and fêted with the best of them, all the while Somaliland continues to collect its tax revenues on the export of livestock to the Gulf states. Jackson’s third reason is institutional—once the negative sovereignty regime was adopted, other options were precluded and set institutional arrangements are highly impervious to change. Nothing about the *de facto* state necessitates fundamental or even moderate institutional change in the present international system. As such, the potential utility of these entities to international society is in no way incompatible with the benefits of the negative sovereignty regime.

VII. Conclusion

This working paper has analyzed the impact of *de facto* states on both international law and international society. While the limited numbers of these entities relegates the *de facto* state to a

⁸⁴ Lung-Chu Chen, “Self-Determination and World Public Order,” *Notre Dame Law Review* 66 (1991), 1294 and 1296.

⁸⁵ Conor Cruise O’Brien, “On the Rights of Minorities,” *Commentary* 55 (June 1973), 47.

⁸⁶ Jackson’s argument is made on pages 189-202 of Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).

⁸⁷ Alan James, *Sovereign Statehood*, 117.

somewhat peripheral role in international relations, their impact on such things as conflict and political economy is far from negligible. International society has traditionally chosen to deal with them in one of three main ways—actively trying to undermine them; more or less ignoring them; and reaching some sort of limited working accommodation with them. Each of these various methods has a different set of costs and benefits both for the *de facto* state and for the society of states as a whole. An implicit theme running throughout this paper is that these entities matter and that the members of international society need to devote more attention to the question of how best to cope with their existence.

In terms of international law, the *de facto* state's lack of sovereignty does not prevent it from having a juridically cognizable existence. Perhaps surprisingly, international law is revealed to be quite capable of accommodating the *de facto* state—at least theoretically. There are obvious political reasons why existing sovereign states will likely continue to resist such an accommodation within the international legal system. Yet, there are also compelling practical reasons why sovereign states should want to see these entities further incorporated both into international law and into their own national legal systems. Intuitively, barring the legal gates and denying the *de facto* state even an extremely limited legal competence does not seem to be the way to encourage compliance with the fundamental norms, let alone the *desiderata* of international law.

Finally, in contrast to the prevailing negativity and disparaging judgments usually leveled against such entities, the argument put forth here is that the *de facto* state may, in some cases and in some regards, actually serve beneficial purposes. It is not claimed that the members of international society have consciously turned to these entities in an attempt to find the proverbial “lesser of two evils” when faced with particularly difficult choices. Nor is it argued that these entities provide ideal solutions or pareto-optimal outcomes. Rather, the much more limited claim is that the existence of *de facto* states produces not only costs, but also benefits for the society of states. The evidence presented for the *de facto* state's utility is more speculative than it is conclusive but it does suggest that the prevailing view of these entities in solely negative terms obscures as much as it reveals. By its very nature, the *de facto* state is well suited to situations where the international community needs to be seen to be upholding cherished norms, while at the same time it finds creative or ad hoc ways to get around those very same norms. Its inherently nebulous status has the additional benefit of not precluding any other future settlement arrangements. If the *de facto* state did not exist, it might not need to be invented. Its very existence does, however, potentially offer a number of benefits to the society of sovereign states.

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