

Roundtable

New Developments in Public International Law: Statehood, Self-determination, and Secession

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INTRODUCTION

The relationship between statehood and government has been an issue in whether to recognize the legitimacy of a regime or a country. In this roundtable about the development of public international law and statehood, we are very privileged to have Professor Brad Roth from Wayne University in Detroit, Michigan of the United States as our speaker. Professor Brad Roth who specializes in International Law, International Protection of Human Rights, International Prosecution of State Actors, and U.S. Foreign Relations Law, has published an article about Taiwan entitled, "The Entity That Dare Not Speak Its Name". His legal analysis on the international status of Taiwan is not only based on the recent developments in international law, but is combined with his previous work on the legal relationship between international and domestic authority, and in particular, the question of recognition. This roundtable today is unquestionably dedicated to the discourse of Taiwan from the perspective of legal status.

I. OPENING REMARKS

PROFESSOR WEN-CHEN CHANG

It is an honor to have Prof. Brad Roth for the roundtable discussion. Professor Brad Roth is currently a professor in the law school of Wayne State University in Detroit, Michigan of the United States. He also holds a concurrent appointment in the department of political science. He is specialized in international law, legal and political theory. Professor Brad Roth had published an article about Taiwan entitled, "The Entity That Dare Not Speak Its Name."¹ We were granted the right to translate this important piece in our local Taiwan Law Journal in Chinese, so that people in Taiwan may read his very important analysis on the legal status of Taiwan based upon the recent developments in international law.² Each year, my first year constitutional law students are always assigned to read that article even before they are introduced to the substance of Taiwan's constitutional law. Today, Professor Brad Roth will discuss some new developments in international law particularly regarding government and state recognition. Let us welcome Professor Roth.

1. Brad R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91 (2009).

2. Brad R. Roth, *Pukan Shuochu Tzuchi Mingtzu te Chengchih Shihti-Taiwan Tsowei Kuochifa Chihhsu shang chih Chuanli Chuti* [*The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-bearer in the International Legal Order*], 158 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 84 (2008).

II. SPEECH

NEW DEVELOPMENTS IN PUBLIC INTERNATIONAL LAW:
STATEHOOD, SELF-DETERMINATION, AND SECESSION

PROFESSOR BRAD R. ROTH

The reason why I am here in Taiwan on this occasion is because of the regional meeting of International Law Association that is taking place at the Regent Hotel. This morning it opened with a speech by President Ma Ying-Jeou. Some comments will be made later on about that speech, and some of the interesting contradictions lying, perhaps, within the framework that he set out for the cross-strait relationship.

My reason for attending this conference is that I am a member of the International Law Association Committee on Recognition and Non-Recognition in international law. We are trying in a course of a four-year period to assemble information about state practice and *opinio juris* in the international order. We are working on deriving a conclusion about the current state of international law with respect to the recognition of states and governments as well as the issues associated with the obligations of non-recognition in cases of illegal circumstances.

My own work in the past has been heavily focused on the legal relationship between international and domestic authority, but specifically on the question of recognition. I started with a book on recognition of governments, "Governmental Illegitimacy in International Law."³ Later I went on to deal with the issue of statehood. My most recent article, entitled "Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine,"⁴ is an effort to draw together the strands from these two very different areas of international law: recognition of states, on the one hand, and recognition of governments, on the other.

1. *Brief Introduction on Cross-Strait Relation*

I would like to talk a little about that relationship here, because I think it is specifically relevant to the discourse in Taiwan about the relationship between the ROC (Republic of China) and the PRC (People's Republic of China).

As I said earlier, I just came from a conference where the hosting organization made a great theme of the one-hundred year celebration of the

3. BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* (1999).

4. Brad R. Roth, *Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393 (2010).

ROC. That resonates with much of the literature that has been emanating from Taiwan. One thing that is very important to recognize is that international law is based upon a particular set of doctrinal categories developed over time. There are all sorts of politically expedient rhetoric that fit rather unevenly with the categories of international law. One of the problems is the relationship between what counts a state, on the one hand, and what counts a government, on the other hand. These are two terms that are inter-changeable in some areas of discourse, but absolutely not in international law doctrines due to their fundamental differences. States are the elemental units of the international order; they are, above all, the bearers of rights, obligations, powers and immunities in the international system, whereas governments are nothing but agents of states. The governments assert rights, incur obligations, exercise powers, and confer immunities on behalf of the underlying sovereign entities. So this is the fundamental conceptual difference.

The fact that the ROC celebrates its hundredth anniversary is very interesting, but the question of how that fits conceptually into the puzzle that we have about cross-strait relations comes to mind, since there is no government disconnected from a state. The concept of the ROC is really a concept of a constitutional order or legal regime rather than the notion of a state as such from the standpoint of international law. In contrast, China is a state. In the beginning, the major issue of the relationship between Taipei and Beijing was the question of which regime represents that state in the international order. There was no other issue between 1949 and 1993 or so. There was only one China in this concept, and the question would be “which is the government of the whole China?” Therefore, who has the authority to represent China internationally? You had two contestant governments and a civil war. Two belligerent entities were fighting with each other, first on the battlefields but then in a suspended way, struggling over the question of who could represent the whole. Obviously, over the period from 1949 to 1993 there were major changes, all adverse to the Republic of China.⁵

Nevertheless, things started to change in the early 1990s, as the Taipei Government came to articulate a more realistic conception of the extent of its authority with respect to actual territory. Now we see, in what President Ma was discussing today, an interesting statement where there is a notion of the “non-recognition” of the sovereignty of the PRC on the mainland, but also the “non-denial” of PRC’s authority to govern the mainland, together with the assertion of the authority of the Taipei government to govern Taiwan.⁶ That is interesting as a matter of political nuance. As a matter of

5. Roth, *supra* note 1, at 101-02.

6. See, e.g., Meg Chang, *President Ma Reaffirms 'Mutual Nondential' with Mainland China*, TAIWAN TODAY (May 31, 2011), <http://www.taiwantoday.tw/ct.asp?xItem=166170&ctNode=445>.

international law, however, it is not so interesting, but rather puzzling. Because ultimately one can only have a government of a state, and the state has to be asserted to have a certain territorial configuration. The question that arose in the early 1990s was whether Taiwan is actually a state. It is such a quintessential example that we can use Taiwan as the touchstone for asking, “What makes a state in international law?”

2. *Nature of Statehood*

If you read general texts about international law and statehood, what you read over and over again is the set of statements that I will argue, makes absolutely no sense. Those are statements about how statehood is an objective phenomenon that exists simply as a matter of fact-finding—states seen in this vision as having an existence that is empirical. Recognition of states on this theory is merely declaratory and not constitutive of statehood. Whether or not a state is recognized may be of some practical significance. But from the standpoint articulated by many lawyers and legal scholars, there is no legal significance to the recognition, which is merely declaratory of the underlying status and can be discerned objectively.

This view has been articulated recently in the memorials submitted to the International Court of Justice by the U.S. government in the Kosovo matter,⁷ the Advisory Opinion proceeding that led to the decision in 2010.⁸ I looked at this with surprise that there could be such a backward and unsophisticated understanding, at that high level, in the U.S. assertion to the ICJ. Part of my charge as being one of the three American Branch representatives to this Committee on Recognition in the International Law Association is to make a statement about the position of the U.S. government with respect to recognition. I have to start apologetically by saying that the U.S. Government’s position on recognition does not make any sense. Here is why it does not make any sense.

There is necessarily a doctrinal inquiry that takes place about the question of whether any unit can be characterized as a state. A state is not a matter of fact in the real sense. You cannot actually point at a state like a table. It is not a factual entity. It is the notional bearer, as I mentioned earlier, of rights, obligations, powers, and immunities. It is therefore a conceptual entity. What gives rise to a conceptual entity is the interaction of particular facts with a doctrinal framework that establishes a legal significance of those

7. See Written Statement of the United States of America, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. Pleadings (Apr. 17, 2009) [hereinafter Written Statement of the United States].

8. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. (July 22) [hereinafter Kosovo Advisory Opinion].

facts. We do not know what the outcome is unless we know what the legal framework is that applies to particular facts.

The legal framework typically applied to characterize statehood as a factual matter is the Montevideo Convention on Rights and Duties of States, an old treaty that someone found and dusted off from 1933, to which hardly anyone was a party.⁹ This is an interesting treaty from the standpoint of hemispheric relations in the Americas, since it came in the context of Latin America's self-assertion against North American imperialism. Part of the point of the treaty was thus to underline a new push for non-intervention in the internal affairs of states. The theme of the Montevideo Convention was to assert that statehood was an objective matter, basically expressing the view that the U.S. shall not be able to determine whether or not a Latin American entity is a state, nor shall the U.S. control the content of the entity's legal entitlements. The existence of a state and of its entitlements transcends any differences in interests and values in the international system.

Therefore, in this treaty you can find, among other things, assertions about what counts as a state. In particular, there are the four elements of a state that everyone can recite if they have ever read the international law texts: a permanent population, a defined territory, a government which effectively controls the territory, and the capacity to enter a relationship with other states.¹⁰

The capacity criterion is obscure on its face, but made clear from the context of Montevideo Convention. It refers not to recognition but to internal law. For example, my own state of Michigan has a permanent population, a territory and a government, but it does not have the capacity to enter into international relations because it is constitutionally subordinate to the federal government in Washington. So "capacity" is only a reference to internal law, and recognition, far from being requisite to capacity, is considered to be merely declaratory of the objective facts.

That this formula breaks down becomes clear when we start to consider the relationship between Taiwan and the PRC. If you seriously believe that statehood is objective, you would draw the conclusion that a state is such population and territory as are found under the effective control of an independent government. That is to say that these four criteria actually reduce to a single criterion.¹¹ Everywhere we see entities that fit the four criteria, we would see a state. And everywhere we do not see those criteria met, we would not see a state.

That would be fine, except that it is not true. It is so demonstrably untrue that it is not clear why we should even continue to have this

9. Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

10. *Id.* art. 1.

11. Roth, *supra* note 4, at 399.

conversation. Taiwan is a wonderful illustration: if you take seriously this objective theory, Taiwan would self-evidently be a state, since it fulfills all the criteria without any possible question. However, as everyone knows, there is great controversy about whether Taiwan is a state. It can thus be inferred that these criteria do not make any sense.

All around the world, there are units that exist autonomously, with de facto governments effectively exerting authority within those units, and yet they are not states. Somaliland is an example. It is located in the north-western part of Somalia.¹² Somalia has not had a government in 20 years, leaving a terrible mess. But in a little corner in Somalia, there is a peaceful and orderly-governed society that exists independently. Somaliland has a permanent population, defined territory, a government, and it can engage in international relations in a certain sense. But the reality is that it is not treated as a state internationally. We have an old line—you may be not familiar with—“If a tree falls in a forest and no one hears it, does it make a sound?” You could say it is a state, but no one acknowledges its statehood—its rights, obligations, powers, or immunities. You can even assert that those states are breaking the law by failing to acknowledge these, thereby violating Somaliland’s rights. You can say that, but that does not get you very far.

I have a colleague who asserts the same about Tibet. He believes that Tibet was a state, and then it was conquered, but he insists that it had full rights of statehood—you cannot lose these rights by being conquered—and it thus continues to be a state under foreign occupation.¹³ This assertion may be valid as an extrapolation of legal doctrine, but this is not very interesting, since at the end of the day, it does not have any real effect.

The flip side is that many states exist for international legal purposes, even though for long periods of time they have not possessed—in some cases, have never possessed—a government in control of the national territory. For example, Somalia continues to be on the map as a state even though it has not had a government in twenty years. Lebanon’s government disintegrated in 1975, and for about sixteen years, it had no government and was fragmented into different fiefdoms within the national territory; some parts of it were governed by a foreign army, while other parts were governed by rival militias. However, it maintained throughout that period its international personality.

12. For discussion on the international legal status of Somaliland, *see, e.g.*, Alison K. Eggers, *When Is a State a State? The Case for Recognition of Somaliland*, 30 B.C. INT’L & COMP. L. REV. 211 (2007); Benjamin R. Farley, *Calling a State a State: Somaliland and International Recognition*, 24 EMORY INT’L L. REV. 777 (2010).

13. *See* Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 131, 145 (2002).

There have been other circumstances in which states have emerged when they did not have a government that controlled the national territory at all. They have been deemed to emerge through international processes, as often exemplified in the course of decolonization. You can see the recognition of the Democratic Republic of Congo in 1960, by the operation of doctrine of self-determination. But the government in Leopoldville (Kinshasa) had very little efficacy at all and controlled very little territory outside the capital. Yet the territorial integrity of the Congo was seen as a matter of international legal entitlement.

Similarly, in 1975, Angola became independent while there were three different liberation movements that controlled different parts of the national territory. Yet it was one state that no one ever denied was a single unitary element of international legal order. Further, when Yugoslavia was said to have “dissolved”—a peculiar notion—in late 1991/early 1992, there was the recognition of Croatia and Bosnia-Herzegovina. Both became members of United Nations in 1992, even though there were large portions of their population and territory over which their governments had no control. In fact, the government of Bosnia controlled less than half of its national territory when the state was recognized.

Therefore, what we can conclude from the above examples is that the objective theory of statehood does not actually make sense. What you need to have is some decision making capacity of some actors, aggregately or collectively in the international order, that process this information, assessing a set of empirical facts according to a complex set of doctrines that bear on the question of whether a state has an international legal existence. What, then, are these qualifying doctrines, which are not simply a matter of effective control within the territory?

3. *Doctrines of Pertaining to Recognition*

First, there is the idea that forms the foundation of international legal order after World War II: the non-use of force against the territorial integrity or political independence of states. This idea had an antecedent in the inter-war period—though it collapsed in the lead-up to the war—that gave rise to what became known as the Stimson Doctrine.

(a) Stimson Doctrine

The Stimson Doctrine dates back to the time when Japan invaded northern China and established the supposed independent state named *Manchukuo* under its hegemony.¹⁴ The U.S. then led the boycott of

14. See generally, David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHINESE J. INT'L L. 105 (2003); Roth, *supra* note 4, at 400.

Manchukuo on the ground that it was the fruit of aggression and asserted that it could not be lawfully recognized by states in the international law. To this day, the Stimson Doctrine continues to play a very important role. We have a number of entities around the world that have existed for a long period of time. They possess considerable ability to operate their own governmental institutions and yet are not recognized as states because their creation was tainted by violation of article 2, paragraph 4 of the United Nations Charter, barring the use of force against the territorial integrity or political independence of states.¹⁵ The Turkish Republic of Northern Cyprus is an example of that.

Other examples are Abkhazia and South Ossetia, units within the former Soviet Union where Russia imposed itself upon newly independent neighboring states, the so-called “near-abroad”. Though situated within the Republic of Georgia, Abkhazia and South Ossetia certainly are not controlled by Georgia, but are under the umbrella of Russia. They were self-governing, but they were not states. I have a colleague, Christopher Waters, who teaches at the University of Windsor, across the border from Detroit in Canada. His specialty is what he calls “places that do not exist”. He is the leading authority on the law in Abkhazia, South Ossetia, Transdniestria (in Moldova), and Nagorno-Karabakh, the Armenian enclave inside of Azerbaijan. That is great field to become an expert in: the law of “non-state states”. These de facto entities do not have the status of states in the international order.¹⁶ But of course, on the ground, they look like states and operate like states. Therefore this is an important phenomenon.

(b) Rule Against Premature Recognition

The second doctrinal basis for withholding recognition is this peculiar notion of a rule against premature recognition, which is a corollary deducible from the norm against intervention in the internal affairs of states or intervention in civil strife within states. What this means is that secessionists within a state have the right to take their best shot at seeking to establish an independent state within a national territory of another larger state. This is not a violation of international law. This is where the U.S. government had it right in the brief to the ICJ. The U.S. said that the declaration by Kosovo of independence was not a violation of international law, since international law does not speak one way or the other to this question.¹⁷ It is a clear violation of the domestic law of any state from which you are trying to separate. It is typically a treasonous act. In most places you would probably be put on trial for this. But of course, if you win, you win.

15. U.N. Charter art. 2.

16. See Christopher Waters, *Law in Places That Don't Exist*, 34 DENV. J. INT'L L. & POL'Y 401 (2006).

17. Written Statement of the United States, *supra* note 7, at 50-52.

So the question from the standpoint of international law is: what does it take to win? The traditional answer to that in international law is that it really takes something like a total victory, to the point where the state from which you are seceding relinquishes the territory officially. Doctrinally, according to the rhetoric of the great publicist Hersch Lauterpacht, it is more objective than that. When it becomes clear that any further efforts to control the territory are futile, that should be the basis for secession being acknowledged. Yet in reality, states do not recognize breakaway entities absent the acquiescence of the state from which the entity has seceded. For example, Eritrea, which separated from Ethiopia, had established control over the territory for quite some time. But it was only at the moment when Ethiopia acknowledged this and let it go that states began to recognize Eritrea as an independent state.¹⁸

Hence, there is a very high threshold. This is what I refer to as “trial by ordeal”.¹⁹ No one really likes to talk about it bluntly because it is very ugly. We are talking about an international legal order that is not a “legal order of legal orders”, but a legal order of sovereign political communities that are governed according to whoever is the stronger within the boundaries of the territory. What we have is a kind of rule of law among states based upon a “free for all” within states. Traditionally international law acknowledged the winner of these internal struggles. The position of the international legal order, at least notionally, is non-intervention. We recognize the winner of the trial by ordeal. There is no demand on the part of international order for the international rule of law to be based upon relations with those who conform to the rule of law internally. Rather, the international rule of law is historically based upon whatever the outcome may be of these internal struggles. And as I have argued elsewhere, this is a defensible approach. It is very difficult to find a viable substitute, as unpleasant as it is.

But this rule against premature recognition is indeed the very rule that prohibits intervention in these cases of secession. The boundaries of statehood are said to be distinct from the boundaries of effective control, except to the extent that the latter boundaries “mature”. When the boundaries of effective control actually mature, through victory in a trial by ordeal, then you can establish an independent state.

(c) Self-determination of the Peoples

The third element to consider is the question of the self-determination of the peoples. We have seen through much of the world the creation of new states on the basis of self-determination as applied to the context of

18. See, e.g., Ruth Iyob, *The Ethiopian-Eritrean Conflict: Diasporic vs. Hegemonic States in the Horn of Africa*, 38 J. MOD. AFR. STUD. 659, 670 (2000) (the Transitional Government of Ethiopia recognized Eritrean 21 days before its independence).

19. See Roth, *supra* note 4, at 394, 401-02.

colonialism. In the United Nations Charter, there is a general statement about self-determination. If you read it carefully, you will find that statehood itself is founded upon the presumption that states manifest the self-determination of their territorial populations, with the recognition that there is something different about overseas colonies—"salt-water colonialism", one may say.

Thus, within the Charter, you can find these designations of Non-Self-Governing Territories as well as Trust Territories.²⁰ Trust Territories are related to those powers that lost in World War II, whereas Non-Self-Governing Territories are associated with those that won. There are also Mandatory territories that are related to those powers that lost in World War I. Since the Non-Self-Governing Territories were associated with the winners of World War II, no one wanted to say much about them. There is only one article in the Charter, Article 73, that refers to Non-Self-Governing Territories.²¹ When reading it, one is overcome by a sense of embarrassment, similar to the feelings associated with reading the U.S. Constitution's tellingly indirect references to slavery. Article 73 is all about colonialism, but does not call it that. It has the language of "white men's burden" in it. The relationship of the colonial states to these territories is essentially a fiduciary one. The rule of the colonial powers over these territories is justified by the former looking after the interests the inhabitants of these territories.

In short order, because of all of the revolutionary developments that took place in the first fifteen years after World War II, Article 73 became effectively superseded by a set of General Assembly resolutions, particularly Resolutions 1514 and 1541 of 1960.²² This supersession was further codified in other resolutions, most importantly, in the Friendly Relation Declaration of 1970, which summarized all the related developments up to that point.²³ 1514 and 1541 made clear that Non-Self-Governing and Trust Territories were entitled to independence without further delay. It was thus established that these territories were not to be interfered with in their quests for recognition.

Moreover, several interesting developments followed as this right to self-determination became understood. First, no sooner do you resolve the question of the independence of colonial territories than you have to deal with the question of the territorial integrity of those emergent states. For instance, Congo (Leopoldville) became independent in 1960s and faced its

20. U.N. Charter arts. 73-91.

21. U.N. Charter art. 73.

22. G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960); G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 29 (Dec. 15, 1960).

23. Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970).

own secession movement in the province of Katanga. It then became very clear that international system was going to acknowledge only those territorial entities as were drawn by colonial powers. It did not matter that the ethnic groups in the territory had no coherence. Nor does it matter if people do not subjectively think of themselves as being one nation. There is no such thing as being Congolese. This is a problem for the Democratic Republic of Congo even till this day. People have other ways of identifying themselves within the Congo. They identify across the boundary of the Congo with other members of their respective ethnic groups in other territories. So the idea of being Congolese is an imposition upon the situation.

However, it is made very clear in Resolution 1514 that the non-fragmentation of these territories is part of the idea of self-determination.²⁴ The self-determining populations and territories themselves are thus delimited by outsiders who did not have the best interests of the people inside these territories at heart at all. So you have self-determination based on these boundaries that are inviolable. People can take their best shot with regard to secession, but they obtain no help from the international order. In fact, in the case of Congo, the international order assisted the central government to suppress the secessionists, for various reasons.

The other issue is that colonialism is not just a problem of territories that are non-self-governing in themselves. You also have other kinds of arrangements that are products of colonialism. For example, Southern Rhodesia tried to avoid the problem of being a Non-Self-Governing Territory by unilaterally declaring independence. But it did not do so in furtherance of its population's self-determination, but to frustrate it. A settler regime withdrew itself from the control of the United Kingdom, when the latter had slated it for decolonization, and asserted local authority. But the local authority was unrepresentative of most of the population of Rhodesia. Thus, this situation required further development of the doctrine of self-determination. Another example was South Africa, which was a long-standing sovereign state. However, it had norms deeply embedded in its form of governance that systematically deprived, on a racial basis, the majority of the population of its self-determination.

So you have this language from Resolution 2625, the 1970 U.N. Declaration on Principles of International Law Concerning Friendly Relations, generally known as "Friendly Relation Declaration".²⁵ The resolution itself is actually rather tough-minded, despite its name. It is not

24. G.A. Res. 1514 (XV), *supra* note 22, ¶ 6.

25. G.A. Res. 2625 (XXV), *supra* note 23.

about human rights but about sovereignty and resistance to neo-colonialism. It is a document that seeks to guarantee the authority of governments of emerging states. Its critical language affirms that “each state has the inalienable right to choose its own political, economic, social and cultural systems, without interference.”

The provision on self-determination states that “by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development” We have seen this language before from common article 1 of Human Rights Covenants²⁶: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” “[S]ubjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.” But the problem with this language is that many people could think themselves as being subjected to all kinds of subjugation, domination and exploitation. Many states are in fact empires to some degree, where one particular group exercises disproportionate authority and often oppresses others within the territory. This would be seen to be an invitation for any group to claim that it is being deprived of the right to self-determination. Maybe tomorrow it would be Catalonia, Quebec, or anyone else.

Therefore, the Friendly Relations Declaration includes the so-called “safeguard clause”.²⁷ It says, “[n]othing in the foregoing paragraphs shall be construed as authorizing any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”²⁸ You might think that there would be a period right there, since that would then solve all the questions of non-fragmentation. We would then probably say that this clause meant only to cover Non-Self-Governing Territories. But since they needed to include South Rhodesia and South Africa, the sentence did not just stop there. It goes further to limit its protection to states “ . . . conducting themselves in compliance with the principle of equal rights and self-determination of peoples described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race,

26. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), Annex, U.N. Doc. A/RES/2200(XXI), at 52 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), Annex, U.N. Doc. A/RES/2200(XXI), at 49 (Dec. 16, 1966).

27. See also Alexander Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, in 12 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 14 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2008).

28. G.A. Res. 2625 (XXV), *supra* note 23.

creed or colour.”²⁹

So who failed this test? Rhodesia and South Africa.³⁰ Who passed? Everybody else—including the Soviet Union, Indonesia, and any number of other tyrannical states during this period—passed. But a violation of this right to self-determination, understood in a narrow way, had enormous legal consequences in the international order. The international order took very strong measures against both Southern Rhodesia and South Africa on this theory. And you see these reiterated in documents authoritatively. Eventually these documents delete the reference to “race, creed or color” and just speak of “the whole people belonging to the territory without distinction”.³¹ Therefore, these documents by the 1990s simply assert the point that territory must be possessed of a government representing the whole people belonging to it.

But what could that mean in a situation where there was ideological variation in the world? In the 1970s the majority of the states were not liberal-democratic states. One-party states that tolerated no organized opposition, such as the regime of the Kuomintang (Nationalist Party) here or that of the Communist Party on the Mainland, predominated in many parts of the world. These were all seen as having “representative” governments for these purposes. What is it exactly that fails this test?

We had, of course, a transition from the 1980s to the 1990s, where people started to take much more seriously the kinds of claims that connect to liberal-democratic values. And the open question which remains open to this day is: whether there is something that remains of this idea of self-determination that allows for what has become known as “remedial secession” on the part of oppressed territorial populations, that are clearly being governed systematically in such a way that no one could, with a straight face, say that the state as a whole manifests their self-determination on an equal basis.

A quintessential example of this is Kosovo. Within the former Yugoslavia, there started to be fragmentation after the death of Tito. There were six constitutional republics within the former Socialist Federal Republic of Yugoslavia (SFRY). One of them was Serbia. Serbia had two autonomous provinces, and one of them was Kosovo. Kosovo had at that point a ninety percent ethnic-Albanian population. But the Serbs regarded Kosovo as the cradle of Serb civilization. Similar to the Jews, Serbs had a mythological story with great significance to their viewpoint. Every Serb I know can tell you about the year 1389, which was the year that a critical

29. *See id.*

30. Roth, *supra* note 4, at 404-05.

31. *See, e.g.*, World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993).

battle took place. The Serbs lost that battle, but it is a great moment of Serb martyrdom. All of the Serb history is to some degree configured around the vindication of Prince Lazar, who was given the choice of victory or immortality, and chose the latter—though this is a confabulated story. Beyond that, there are Orthodox monasteries in Kosovo, and a community of Serbs continues to live there. Other Serbs left there over time, but still have ties to there.

During the period of democratization in Serbia in the late 1980s, Slobodan Milošević saw the grievances about Serbia losing its hold in Kosovo as a basis for establishing his political fortune. In Serbia, communism was becoming de-legitimated. As the head of the Communist Party, Milošević sided with people who wanted to avenge the loss of control over this territory. Untrue stories were told about how horrible things were done to Serbs by Albanians, but he was able to exploit those to justify not only withdrawing the constitutional autonomy that Kosovo had enjoyed under SFRY Constitution, but also imposing measures that turned Kosovar Albanians into enemy aliens in their own territory. In the beginning, Kosovar Albanians were actually remarkably patient about it. They did not turn to violence for many years. But by the mid-to-late 1990s, they did turn to violence. The Serb military was terribly ruthless in responding to the insurgency. In the meantime, Yugoslavia had started to break up. The Serbs had engaged systematically, within Serb-dominated territories in Croatia and Bosnia, in the practice known as ethnic cleansing, driving out other ethnic groups from the territory in order to create ethnically-pure territory that could be assimilated to a Greater Serbia. It became clear that such tactics were also part of the plan in Kosovo to maintain the Serb grip on this territory.

The response was the NATO war in 1999, a bombing campaign for seventy-nine days³², not approved by the UN Security Council. The Security Council had issued a number of Chapter VII resolutions against Serbia. However, when it came time to authorize the use of force against Serbia, China and Russia, the two with veto power, along with Namibia—three out of the fifteen states—refused to go along. Then NATO took upon itself to engage in the bombing campaign. Finally Serbia withdrew. At that point, the Security Council stepped into the breach and issued Resolution 1244, which will be discussed in a moment.³³ But most people looking at the situation of Kosovo tended to think that there might be something to the argument of “remedial secession”: How much are you supposed to take before you can assert your independence as a territory that is being systemically

32. See, e.g., Jeremy Kinsman, *Kosovo: After the Party, the Hangover*, POLICY OPTIONS, Mar. 2008, at 46-48.

33. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

discriminated against by the dominant force of the state of which you happen to be a part? Thus, once Kosovo is freed from Serb domination through the exercise of external force, leading to Kosovo being placed under international trusteeship by Resolution 1244, the question then arises: is this the prelude to Kosovo's statehood? Does Kosovo have a right to self-determination and therefore to exist as a state?

Resolution 1244 itself does not provide answers to any of these questions. It is a stopgap measure. Basically it authorizes an interim administration to allow Kosovo effective autonomy. But the critical language reaffirms the commitment of all member states to the territorial integrity of the Federal Republic of Yugoslavia. The idea was that everything being done by the international community had to be without prejudice to the ultimate status of Kosovo. This then created a real problem, since the U.N. came to sponsor negotiations that were bound to fail. The Serbs had as their bottom line that they were not willing to let Kosovo go entirely. The Kosovars also had their bottom line, which was to accept nothing less than independence. There was no common ground between the two sides in that negotiation. In the absence of an agreement, you could only have this indefinite temporary situation. I refer to this in the article as "the airplane that has clearance to take off but not to land"—which is not my own formulation—that was the sort of problem that the Kosovo case presented.³⁴

After a nine-year continuation of this situation and after a U.N. report that made it very clear that there was an impasse, the Provisional Institutions of Self-Government of Kosovo issued a declaration. This thus provided potentially a remarkable moment at which the ICJ might have sorted out the questions of what a state is and whether there is a right to self-determination on the part of peoples that are not colonized peoples, not the populations of Non-Self-Governing Territories. Might other "peoples" enjoy the right to self-determination, leading to a unilateral right to secession?

However, the question that the General Assembly presented to the ICJ, for complicated political reasons, was a very mushy question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" You might wonder who came up with that question. Nevertheless, the question was not as foolish as it looks. At the time it was formulated by the Serbs, they were seeking a General Assembly vote to authorize the ICJ to take up

34. Roland Tricot & Barrie Sander, *Recent Developments: The Broader Consequences of the International Court of Justice's Advisory Opinion on the Unilateral Declaration in Respect of Kosovo*, 49 COLUM. J. TRANSNAT'L L. 321, 336 (2011). For analysis prior to the delivery of the Court's opinion, see Mahasen M. Aljaghoub, *The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: Could It Be the Court's Second Non-liquet?*, 15 EUR. J. SOC. SCI. 86 (2010).

this question in an Advisory Opinion. But they needed not to offend the states that already recognized Kosovo as a state. And by this time, sixty-nine states had done so. Most of the European states, the U.S. and other powerful forces in the international community had recognized Kosovo. So there was certain skittishness about issuing a direct challenge to those states. In the end, a bare majority in the General Assembly voted yes on the request for an ICJ Advisory Opinion. There were quite a number of abstainers and very few voted no.³⁵ The case was accordingly given to the ICJ.³⁶

A number of colleagues of mine and I wondered aloud how the ICJ was going to handle this issue. It was truly an uneasy question for the ICJ to take up, for two reasons.

On the one hand, the institutional integrity of the ICJ depends upon its not being widely defied. If the Court had essentially announced that all of these powerful and important states in the international community were actually in breach of international law by recognizing Kosovo and that they were committing the act of premature recognition in violation of international law, it would not necessarily change the behavior of any of these states. Probably no major state was going to renounce its recognition even if the ICJ were to make such an announcement. At least, nobody believed that these core constituents of the international community would undo what they had done, and the upshot of that would be the weakening of the ICJ as an institution. It is bad enough to make demands on one state and have it defy you. The ICJ told the U.S. to stop aiding the counter-revolution insurgency in Nicaragua in the 1980s.³⁷ It spoke truth to power but received defiance. You can do that when you are censuring one state while having most of the international community behind you against that one state's policy. But when you had twenty-two out of twenty-seven European Union states and other important actors against you, that is not going to work too well. This was the first strong disincentive for ICJ to take up the question. The Court could not afford to uphold Serbia's position.

On the other side, the Court could not afford to establish the Friendly Relations Declaration safeguard clause as a ticket to secession. If Kosovo's position were upheld, every time a territorially concentrated minority had a grievance, it would invoke the safeguard clause. Currently, it is a live question in international law whether states have a right to recognize as an independent state a unit that has not won a civil war, nor done anything to establish itself as a state through a trial by ordeal. Indeed, an affirmative answer to this question can create perverse incentives for liberation

35. U.N. GAOR, 63th Sess., 22nd plen. mtg. at 10, U.N. Doc. A/63/PV.22 (Oct. 8, 2008).

36. G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

37. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

movements to start wars that they cannot win in order to attract international sympathy in the hope of receiving recognition. The ICJ certainly would not like to take that approach.

So how was it going to deal with this problem? What it might do is simply to take the question literally: "Is the unilateral declaration of independence in accordance with international law?" It is possible to answer that question in two paragraphs, because the unilateral declaration is neither here nor there from the standpoint of international law. International law purports neither to govern the question of whether a group within a state can declare independence unilaterally, nor to judge the merits of a fight for secession, though these are naturally violations of domestic law.

Many had speculated that the ICJ would not take an easy way out. In fact, however, it did. The Court held, ten to four, that the declaration did not violate international law.³⁸ But the Court managed to sidestep every significant issue on the ground that it fell outside the question posed. So the right to separate from a state is beyond the scope of the question. The question does not ask about the legal consequences of the declaration.³⁹ It does not ask about whether or not Kosovo achieved statehood. Nor does it ask about the political or legal effects of recognition of Kosovo by those states that had already recognized it as an independent state.

The ICJ decision, in a rather strange contradiction, construed the declarants, who were members of a UN-created body, not to be operating within a UN-created body. That was a way of avoiding the question of whether the UN-created institutions had violated the terms of Resolution 1244.

The ICJ's critical point is that the principle of territory integrity pertains to relations between states, not to developments within states. It is simply not a question of international law whether an attempted secession is lawful, or whether a unilateral declaration of independence is valid. The only times when the international legal order speaks to these questions are when the unilateral declaration of independence is intertwined with violations of other important norms of international law. That happened in the case of the Turkish Republic of Northern Cyprus, in the case of the Bosnian Serb Republic, and in the case of Southern Rhodesia, where other norms had been violated to make the declaration efficacious. In the first two cases, it was because foreign aggression established those units in the first place. And in the case of Southern Rhodesia, it was because of the violation of the self-determination norm in the colonial context.⁴⁰

38. Kosovo Advisory Opinion, *supra* note 8, ¶ 123.

39. *Id.* ¶ 51.

40. See e.g., Anne Peters, *Statehood After 1989: 'Effectivités' Between Legality and Virtuality*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW (James Crawford &

As to the critical issues, states express radically different views on all the questions about which we are concerned. First, “[w]hether, outside the context of non-self-governing territories...the international law of self-determination [of peoples] confers upon part of the population of an existing State a right to separate?” Second, “whether international law provides for a right of ‘remedial secession’, and if so, in what circumstances?” Third, “whether the circumstances [that] would give rise to a right of ‘remedial secession’ were actually present in Kosovo?” However, the ICJ failed to respond to all these questions and instead simply indicated that the international community’s members disagree about all these issues and thus that the Court cannot resolve them.⁴¹

That may have been in fact the most appropriate thing for the Court to do. After all, the Court is not like the Supreme Court of U.S., a court that has the authority to make law in many significant ways. Here the ICJ stands only in the position of finding law. The Court has to predicate its decision upon some demonstrable *opinio juris* in the international order. Yet in this current case, the *opinio juris* has no coherence, and there is division in the international system. The ICJ simply acknowledged that. This is known in the trade as a non liquet: the statement by the court that the law is not clear.⁴² Many people criticized this, but it seems to me that there is sufficient justification for invoking that kind of judicial non-determination.

That is where we stand at the moment on the question of secession and statehood. Would it have any implications for Taiwan? That may be a question that I shall put to all of you.

III. COMMENTARY

PROFESSOR WEN-CHEN CHANG

Thank you, Professor Roth. I introduced Professor Roth as a specialist in international law, and now I believe all of you clearly see the evidence. Professor Roth can speak for more than an hour on international law without any need to stop or to look into references, dates or places. He knows every corner of the world and all relevant events concerning international law. Now, I would like to invite Professor Hung Szu-Chu, Eric, from National Taiwan Ocean University, Institute of the Law of the Sea, to provide for us his immediate reflections on the talk of Professor Roth.

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41. Roth, *supra* note 4, at 420-21.

42. See, e.g., Tricot & Sander, *supra* note 34, at 336.

PROFESSOR SZU-CHU HUNG

Thank you. It is an honor and a pleasure to be here, listening to Professor Roth's speech about the recent development of succession and statehood in international in general. As Professor Roth mentioned, we are all interested in the question of Taiwan and how these apply to the recent developments of Taiwan. I think we all know that there were huge developments both before 2008 and after 2008. There are a few questions that I would like to bring into the discussion with Professor Roth and probably with the audience in this seminar.

First of all, we all know the criteria of the statehood. Many scholars said that Taiwan qualifies as a state under the Montevideo Convention. But after 2008, I think the criterion for Taiwan's capacity to enter into international relations has probably been under some doubts given recent practices. Professor Roth mentioned the speech by President Ma this morning regarding his policy, so-called "non-recognition and non-denial" at the same time.⁴³ But I wonder whether by "non-recognition and non-denial", President Ma is actually talking about the government, rather than the state. In terms of President Ma's policy orientation, we know that in 2008 President Ma, as a democratically-elected President of Taiwan, claimed that Taiwan accepted "one-China," but with different interpretations. This is an intriguing question that has bothered me for many years. If one democratically-elected President claims to accept "one China", does there exist any possibility that the "one China" refers to anything other than statehood. Is it possible that "different interpretations" are "different interpretations" in statehood? Or the "different interpretations" only concern governments rather than states? This is my question.

Further, Richard Bush, the former U.S. ambassador to Taiwan, claimed in May that US's position used to be "two Chinas".⁴⁴ So even US has "one-China" policy, but in terms of Richard Bush's speech, it seems that the "one-China" is different from the "two Chinas". And the US's position is actually on the question of the states, rather than governments. So the "one-China" is mentioned about the government, rather than the states. This is the US part.

In addition, I have some observations on Taiwan's practice. Two aspects. First of all, in 2001, when President Chen Shui-bian was in the office, we entered into WTO, an important international organization for

43. Chang, *supra* note 6.

44. See, e.g., I-Hsin Chen, *Richard Bush's 'Two Chinas' Theory Shows Insights*, WANT CHINA TIMES (May 31, 2011),

<http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1703&MainCatID=&id=20110531000034>.

Taiwan. At that time, Taiwan's practice actually tended to match up with China's demand, acknowledging that Taiwan is non-government. It is shown on the accession document.⁴⁵ After 2008 and 2009, we had a more interesting arrangement with China regarding the participation of WHO. I would like to ask Professor Roth, whether this kind of "state practice", if I may say so, would affect Taiwan's international legal status in any way, I mean in WTO and in WHO?

Finally, my last question is regarding the Turkish Republic of Northern Cyprus in the European politics. President Ma also talked about that his policy pursues the preservation of status quo. But in the case of Turkish Republic of Northern Cyprus, when the Cyprus and the Turkish were arguing about the recognition question, the European Union adopted many legal measures or instrument or unilateral declaration to actually legally preserve the status quo. On the contrary, in terms of Taiwan's "state practice", if I may say so, there is nothing to preserve status quo. In the same occasions, the democratically-elected government actually said that "one-China" can only be understood in the international law on the question of statehood, and has nothing to do with the government. This is also the issue that I would like to involve in the discussion.

IV. GENERAL DISCUSSIONS AND RESPONSE

Professor Chang:

Thank you, Professor Hung. Now, I would like to open the floor for one or two questions. Professor Roth would wrap up together later.

Question: I would like to ask Professor Roth why Kosovo was so special that the U.S. was willing to intervene in the matter? As you mentioned, there are many other places that have claimed independence. In contrast, most states did not make so much effort as they did for Kosovo. What makes Kosovo's case so extraordinary?

Question: I would like to ask Professor Roth that if we do take recognition as one constitutive element of statehood, then the new-emerging statehood would be decided by other existing states. Would this not render the new-emerging sovereignty to a lower-level than

45. See, e.g., Szu-Chu Hung, *Tsung Kuochifa Chiaotu Chienshih Taiwan Chiaju GATT/WTO Hsiangkuan Wenchien so Yensheng chih Wenti* [A Survey of Issues Arising from Documents Relating to Taiwan's Entry to GATT/WTO-From the Perspective of International Law], *TAIWAN KUOCHIFA CHIKAN* [TAIWAN INT'L. L.Q.], June, 2009, at 117 (June 2009).

the existing sovereignties?

Question: Professor Roth just mentioned that when a civil war or an internal armed-conflict happens in one country, the international community usually does not intervene until there is a winner. I think this non-intervention principle sometimes no longer prevails, when something horrible happens, such as genocide or massacre. To be more specific, such as the case of Libya, the international community justly intervened. It seems that the situation in Libya is becoming quieter right now, and both sides claim that they effectively control over part of the territory. And they are both supported by parts of the people. What happens when international community intervenes? Which side is the effective government now in Libya?

Professor Roth:

1. *Issue of Taiwan*

I would start with the question of “one China”. There is frequently a certain confusion that I see in discourse about the relationship between the government question and the state question. You can only be a government of a state. One of the problems one sees in reading the documents, particularly the official documents from the government in Taipei, is the assertion of sovereignty. You can assert sovereignty only in the name of particular state over which you are asserting your authority to govern. It is clear from these documents that the assertion of the authority to govern is only with respect to Taiwan and the neighboring islands. Therefore if you keep using language such as “sovereignty” and “the dignity of the Republic of China on Taiwan”, what else can you be referring to but that Taiwan is an independent state, since there is no other appropriate category.

There is, though, another way to think about “one China”, which is perhaps an alternative to thinking about it as a matter of the government or a matter of the state. That is, to think about this in terms of a nation. The idea of “nation” is an unclear one, and therefore can be used as a “weasel word.” I can give you a flip-side example of that.

2. *Issue of Quebec*

The Quebec question has plagued Canada now for quite some time. There was a referendum in 1995, in which 49.4 percent of the vote in

Quebec was for independence.⁴⁶ It was unclear what was going to happen if the majority actually voted for independence. Later there was a Canadian Supreme Court decision, which made hash of the whole question.⁴⁷ Then came a very strange resolution from the parliament, which recognized the Quebecois as a nation within the united Canada. The whole point of it was somehow to abstract from the political entity of Quebec and from the political character of nationhood, yet to concede to some degree that there is something special about being Quebecois.

One of the embarrassing questions about this is: who are the Quebecois? This is the question the Canadian Supreme Court failed to answer. Does the term refer to the territorial population of Quebec? To only Francophone Quebecers? To all Francophone Canadians, including those living outside Quebec? What about the indigenous people? Are the Quebecois the territorial population of Quebec minus the First Nations aboriginals? The answer given by some is that being a Quebecois is a state of mind. You could be a Francophone Quebecois, but you could also be an Anglophone Quebecois identifying yourself as Quebecois. The whole point of putting it in this way was to avoid saying that Quebec was a “distinct society” —a formulation that had been used unsuccessfully in a couple of proposed Constitutional reforms in Canada over the last couple of decades.

3. *Idea of “Nation” and Taiwan*

Regarding the issue between Taiwan and China, one could say that there is “one China” in the abstract, whereas there are in fact two Chinese states from the standpoint of international law. You can maintain a romantic notion that there is one greater entity and that one day “when the Messiah comes”, as those of us in the Judeo-Christian tradition would say, all would be united as “one China”.

When President Ma used the word “sovereignty” as he did this morning, it was in a way very different from the approach featured on the website of his Government’s Mainland Affairs Council. He spoke of non-recognition of the People’s Republic of China’s sovereign authority over the Mainland and non-denial of its authority to govern there. Sovereignty here could be construed as merely a matter of symbolic rhetoric. On the other hand, the question of the authority to govern, which he affirms as very distinctly in favor of the Taipei government on Taiwan and in favor of the Beijing government on the Mainland, is the serious topic for the purpose of international law.

46. 50.6% voted against it. See, e.g., *Separation Anxiety: The 1995 Quebec Referendum*, CBC DIGITAL ARCHIVES (Oct. 30, 1995), http://archives.cbc.ca/politics/federal_politics/topics/1891-12469/.

47. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

In the speech made by President Ma this morning, he mentioned the fifteen agreements concluded with the Mainland that were “binding,” but he did not make any reference to the body of laws that makes it binding. Indeed, he further stated in his speech that international law does not govern or is not applicable to the cross-strait relationship, which I think is an unfortunate concession on his part.

It is all well and good to talk about agreements if both sides actually have the political will to perform the agreements. The interesting legal question arises when one side does not have the will to fulfill its commitments. This could be the occasion for unfortunate consequences for President Ma’s rhetoric about international law. But I think that if one could assert the language on the Mainland Affairs Council website, as opposed to the President’s unfortunate language of this morning, one could square the circle and say that the Taipei Government continues to assert its sovereign authority over Taiwan as a matter of law, and that all of this other rhetoric is really political rather than legal. The argument being made on the website, directed against the President’s critics on the pan-Green side, insists that nothing about these agreements has done anything to weaken the claim of sovereignty. And the words about “sovereignty”, “dignity”, and “independence” are on the website of the Mainland Affairs Council. President Ma’s administration is trying to have it both ways.

4. *US’ Position on Cross-Strait Relations*

The U.S. position is, of course, one of strategic ambiguity. Sometimes even U.S., officials do not understand the U.S. position, which is a problem. It is easy enough to see why, since it is deliberately obscure. One interesting element is that the U.S. relationship with Taiwan is grounded in a statute, the Taiwan Relations Act.⁴⁸ In addition, the relationship between the Congress and the Executive in the U.S. is a very complicated one. But the Taiwan Relation Act is really a fascinating statute. It cannot be reconciled with the assertion of sovereignty by the Beijing government over Taiwan. It either authorizes the violation of international law—which would not be news in the U.S.—or it denies that Beijing is sovereign over Taiwan. The statute mandates the Executive to provide defensive military equipment to this entity. That is blatantly an intervention of internal affairs of a state, unless you deny that Taiwan’s status is an internal affair of the People’s Republic of China. If the entity is not part of PRC, the only thing it can be is the independent State of Taiwan. There is no third possibility. But of course the Executive Branch of the U.S. Government never says this. Because of this

48. Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (2006).

incoherence, statements from U.S. Government officials occasionally step over the tacit lines, often in an effort to avoid offending the PRC.

One of the big problems is that as the U.S. economic relationship with People's Republic of China becomes more and more important, greater and greater leverage shifts to Beijing. This entails developments that will not be good for Taiwan in the long term. As sympathetic as I was to what was being done here for eight years under the Democratic Progressive Party, I was always concerned that there was an assumption on the part of the government here that there would be patience for these efforts in Washington. I think that there is not. One of the questions you have to consider, in terms of politics inside the U.S., is who is going to stand up for Taiwan.

The kinds of people who should stand up for Taiwan in the U.S. are people on the left side of the political spectrum. But for historical reasons, they do not. Due to the peculiar internal politics regarding the U.S. relationship with Taiwan, it has always been a right-wing cause. Thus the people of the left do not have any patience for it. On the other hand, within the right wing, there is a real split between realists who want to accommodate the PRC and neoconservatives who are very pro-Taiwan, not because they care about Taiwan, but because they hate the PRC. Those are not people you would like to be banking on for support. In sum, I think it is crucial for Taiwanese people to realize that provocative acts in service of trying to be recognized as an independent state, while in some ways helpful for the case legally, are not necessarily going to be helpful practically. And being recognized does not mean a guarantee of inviolability, either.

5. *Bosnia and Recognition*

I made a promise to myself that every time I would speak in this country, I would give the "graveyards of Bosnia" speech. I bring students every year to Bosnia. The story of Bosnia is the story of a state being recognized in 1992, and yet not being protected from what happened to it when it declared independence. In fact, there was a massive violation of the supposed sovereign rights of Bosnia. Bosnia managed to be recognized as sovereign. Nevertheless, it was immediately descended upon by forces that were effectively the Republic of Serbia forces, only by another name. Nobody protected Bosnia. A hundred thousand people were killed. The UN even imposed an arm embargo equally on the Serbs and on the Bosnians while the Serbs had all the guns and the Bosnians had none. The Security Council—the same body that is supposed to guarantee the right to collective self-defense—used its Chapter VII power to undermine the right to collective self-defense. As one can infer from this case, obtaining

recognition is not always the ultimate solution.

6. *States Practice and Status of Taiwan*

In terms of the issues regarding WTO and WHO, I think that these issues are troubling. The problem is that clearly Taiwan is acting in this under some degree of threat. The argument I made against Crawford in the article is that one should not ascribe legal significance to language uttered under threat.⁴⁹

What I have been trying to motivate people to do here, which I think is a good research project, is to examine all the aspects of Taiwan's external relations in terms of circumstances in which foreign states are treating Taiwan in a way that they could not lawfully treat it unless their view implicitly was that Taiwan was a sovereign state. I think there are many different areas of inquiry that can be pursued here. I never tried to make a systematic study of it. I believe that you would end up with equivocal results if you start the research from the various aspects that I have seen. But it would be interesting to adduce every aspect of foreign practice toward Taiwan that indicates that these states must not think Taiwan is a renegade province of China, since they would be behaving illegally if that were the case. The Taiwan Relations Act is a very blatant example of that. But my guess is that you can find a fair number of examples elsewhere.

7. *Various Other Issues*

Now we come to various other kinds of questions. The first is on the non-intervention norm in Libya. There definitely has been deterioration in the non-intervention norm. But there is also the fact that the Security Council has always had the authority to trump it. It had the authority even before the "responsibility to protect" idea emerged. Consistently from the early 1990s onward, the Security Council engaged in intervention in internal affairs, but claimed that each case was *sui generis*. Yet, the Security Council is a place where you can obtain a consensus from a cross-section of opinion in the international community, reflected in a lack of a veto from any of the five Permanent Members. Therefore it seems to me that there is a basis in the international order for proceeding with these collective interventions. The problem comes when there is division in the international order, where there is the kind of cleavage that you see in the Kosovo case and in other cases.

By the way, it was not only the Russian and the Chinese who objected to the Kosovo intervention. It was just that they were the dissenters represented

49. Tricot & Sander, *supra* note 34.

in the Security Council. There were opponents of the intervention in other parts of the world—governments in South America, in Africa, and in India that opposed the Kosovo intervention.⁵⁰

So what are the background norms of international law with the respect to the question of intervention? I think at this point they are still pretty much in flux, but the burden is on those who are trying to say that new norms have emerged.

As for the constitutive conception of recognition, I would argue that recognition has always been constitutive. But what is constitutive is not the public declaration of recognition. It is a matter of the international community taking cognizance of the rights, obligations, powers and immunities that the entity has, which is really the only way that any entity can become a state in any meaningful way in the international order. Sovereignty is contingent upon being acknowledged by someone else; there is nothing to be achieved by saying the opposite. My colleague Robert Sloane says that Tibet is a sovereign state.⁵¹ He can say that over and over again as much as he wants. It does not create the needed conditions because even if you have these sovereign rights in principle, if no one yet treats you as though you have them, then it is useless to have them.

Thus, the key point is that public statements of recognition cannot be the criteria for whether the state exists. These statements are frequently determined by purely political considerations. For instance, states do not recognize the statehood of Taiwan, because that would offend the People's Republic of China, and that would have serious costs. But that is a separate problem from what I think is the truly proper area for legal inquiry, which is: do these states, notwithstanding their proclamations, really treat the entity as if it has sovereign rights, obligations, powers, and immunities? That is all that sovereignty ever has amounted to in international law.

Why do Americans care so much about Kosovo? Well, Americans were embarrassed by what happened in Bosnia. Part of this idea is that Kosovo is "in the heart of Europe". There is a certain special belief that Europe is different from other places in the world, which is not always a pleasant idea if you think about it. There are places in which we would not intervene, because they are not in Europe. But I think that the more wholesome explanation for all of this goes back to a deep sense of embarrassment for what happened between 1992 to 1995 in Bosnia. The U.S. had supported Bosnian independence and then sat back, letting Europe take the lead, while the Europeans did not want to intervene in Bosnia for various reasons.

I actually think the situation was truly complicated at that time. I was no

50. See Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 345 (2009).

51. Sloane, *supra* note 13, at 131.

hero in this, so I cannot be a harsh critic of the failure to intervene. I did not support the intervention back then, and I was wrong not to have supported it. At that time, in order to affect the situation positively on the ground, it was hard to see an alternative to cooperating with the aggressors. What happened was that all of the humanitarian operations were established by consent. You had the UNPROFOR forces that were introduced to create “safe areas,” but all of these were contingent upon agreements with the very people who were causing all of the problems. And it was a very difficult challenge to figure out how to change the status quo without making it worse. In my opinion, people did not have the courage of their convictions about the recognition of Bosnia in the first place. They had second thoughts about whether it had made sense to recognize Bosnia. I think that it probably did not make sense to do so. But once they had done it, they should have backed it up. This was a real blot on honor of the Western alliance. And I believe for that reason, people were not willing to see what happened in Bosnia happen again in Kosovo.

Professor Chang:

I have been intrigued for a kind of research question on this convergence of international law, particularly on international human rights, and constitutional law. Constitutional law has been changed significantly even to the extent of including some elements of international law into constitutions.⁵² In a way, the question that was posed to the ICJ discussed today was similar to the question raised before the Canadian Supreme Court. “[W]as the unilateral declaration of independence from Quebec would be inconsistent with constitutional law of Canada?”⁵³ To me, this recent trend of the convergence between international and constitutional laws should be seen as an invitation to all the students, future scholars of Taiwan and beyond to work with this body of very complex laws, governing externally or internally of all states. Due to our time constraint, I would like to conclude this wonderful roundtable discussion with this invitation to all of you and ask you to join me to give our most sincere thanks to Professor Roth.

52. See, e.g., Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT’L L. REV. 89, 94-95 (2008).

53. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), ¶ 88.

REFERENCES

- Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. ¶¶ 51, 123 (July 22).
- Aljaghoub, M. M. (2010). The International Court of Justice's advisory opinion on Kosovo's declaration of independence: Could it be the Court's second non-liquet? *European Journal of Social Sciences*, 15, 86-92.
- Chang, M. (2011, May 31). President Ma reaffirms 'mutual nondenial' with mainland China. *Taiwan Today*. Retrieved from <http://www.taiwantoday.tw/ct.asp?xItem=166170&ctNode=445>
- Chen, I.-H. (2011, May 31). Richard Bush's 'Two Chinas' theory shows insights. *Want China Times*. Retrieved from <http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1703&MainCatID=&id=20110531000034>
- CBC Digital Archives. (1995, October 30). Separation anxiety: The 1995 Quebec referendum. Retrieved from http://archives.cbc.ca/politics/federal_politics/topics/1891-12469/
- Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.
- Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970).
- Eggers, A. K. (2007). When is a State a State? The case for recognition of Somaliland. *Boston College International & Comparative Law Review*, 30, 211-222.
- Farley, B. R. (2010). Calling a State a State: Somaliland and international recognition. *Emory International Law Review*, 24, 777-820.
- G.A. Res. 1514 (XV), U.N. Doc.A/RES/1514(XV) (Dec. 14, 1960).
- G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 29 (Dec. 15, 1960).
- G.A. Res. 63/3, U.N. Doc A/RES/63/3 (Oct. 8, 2008).
- Hung, S.-C. (2009). Tsung kuochifa chiaotu chienshih Taiwan chiaju GATT/WTO hsiangkuan wenchien so yensheng chih wenti [A survey of issues arising from documents relating to Taiwan's entry to GATT/WTO-From the perspective of international law]. *Taiwan Kuochifa Chikan [Taiwan International Law Quarterly]*, 6(2), 117-155.

- International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), Annex, U.N. Doc. A/RES/2200(XXI), at 52 (Dec. 16, 1966).
- International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), Annex, U.N. Doc. A/RES/2200(XXI), at 49 (Dec. 16, 1966).
- Iyob, R. (2000). The Ethiopian-Eritrean conflict: Diasporic vs. Hegemonic States in the horn of Africa. *The Journal of Modern African Studies*, 38, 659-682.
- Kinsman, J. (2008, March). Kosovo: After the party, the hangover. *Policy Options*, 29(3), 46-49.
- Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
- Murphy, S. D. (2009). Criminalizing humanitarian intervention. *Case Western Reserve Journal of International Law*, 41, 341-378.
- Orakhelashvili, A. (2008). Statehood, recognition and the United Nations system: A unilateral Declaration of Independence in Kosovo. In A. v. Bogdandy, & R. Wolfrum (Eds.), *Max Planck yearbook of United Nations law* (pp. 1-44). Leiden, Netherlands: Martinus Nijhoff Publishers.
- Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).
- Peters, A. (in press). Statehood after 1989: 'Effectivités' between legality and virtuality. In J. Crawford (Series Ed.), *Select proceedings of the European society of international law: Vol. 3*. Retrieved from http://www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Peters_ESIL2010_Draft_Paper.pdf
- Roth, B. R. (1999). *Governmental illegitimacy in international law*. New York, NY: Oxford University Press.
- Roth, B. R. (2008). Pukan shuochu tzuchi mingtzu te chengchih shihti-Taiwan tsowei kuochifa chihhsu shang chih chuanli chuti [The entity that dare not speak its name: Unrecognized Taiwan as a right-bearer in the international legal order]. *Yuehtan Fahsueh Tsachih [Taiwan Law Review]*, 158, 84-103.
- Roth, B. R. (2009). The entity that dare not speak its name: Unrecognized Taiwan as a right-bearer in the international legal order. *East Asia Law Review*, 4, 91-124.
- Roth, B. R. (2010). Secession, coups and the international rule of law: Assessing the decline of the effective control doctrine. *Melbourne Journal of International Law*, 11, 393-440.
- S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

- Sloane, R. D. (2002). The changing face of recognition in international law: A case study of Tibet. *Emory International Law Review*, 16, 107-186.
- Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (2006).
- Tricot, R. & Sander, B. (2011). Recent Developments: The broader consequences of the International Court of Justice's advisory opinion on the unilateral declaration in respect of Kosovo. *Columbia Journal of Transnational Law*, 49, 321-336.
- Turns, D. (2003). The Stimson Doctrine of non-recognition: Its historical genesis and influence on contemporary international law. *Chinese Journal of International Law*, 2, 105-143.
- U.N. Charter arts. 2, 73-91.
- U.N. GAOR, 63th Sess., 22nd plen. mtg. at 10, U.N. Doc. A/63/PV.22 (Oct. 8, 2008).
- Waters, C. (2006). Law in places that don't exist. *Denver Journal of International Law and Policy*, 34, 401-423.
- Written Statement of the United States of America, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. Pleadings (Apr. 17, 2009).
- World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993).
- Yeh, J.-r. & Chang, W.-C. (2008). The emergence of transnational constitutionalism: Its features, challenges and solutions. *Penn State International Law Review*, 27, 89-124.

國際公法之新發展

——國家地位，自決與分裂

Brad R. Roth

摘 要

臺灣大學法律學院很榮幸能邀請到美國密西根州偉恩州立大學的Brad Roth教授參與此次座談。Roth教授同時任教於該校法學院及政治學系，專長為國際公法及政治理論。Roth教授曾以「不敢說出自己名字的政治主體——臺灣作為國際法秩序上之權力主體」一文深入探討臺灣在國際法上的地位。在本次座談會中，Roth教授將以國家地位、自決及分裂為題發表演說，帶我們一窺國際公法上關於政府及國家認同的最新發展。