Volume 14
Number 1 *Fall 1979*

*pp.*123-156

Fall 1979

The Impact of Constitutive Recognition on the Right to Self-Determination: An Analysis of United States Recognition Practices Utilizing the Chines Question as a Guide

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NOTE

THE IMPACT OF CONSTITUTIVE RECOGNITION ON THE RIGHT TO SELF-DETERMINATION: AN ANALYSIS OF UNITED STATES RECOGNITION PRACTICES UTILIZING THE CHINESE QUESTION AS A GUIDE

INTRODUCTION

On December 15, 1978, President Carter stunned the nation by announcing the United States intention to extend long denied formal recognition[1] to the People's Republic of China.[2] With the extension of recognition President Carter shattered a thirty year old wall of formal diplomatic silence between the United States and the PRC. The United States previous protracted policy of non-recognition of the PRC derived from a traditionally subjective interpretation of international legal principles.[3] In an effort to utilize recognition to impede the extension of communist dominion,[4] the United States had inconsistently applied fundamental principles of international law.

Specifically, only superficial consistency exists between American and international delineation of the prerequisites for recognition. Simply stated, in order to warrant recognition, both the

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1. "Recognition" refers to either the formal act or the continuing relationship established by the act of recognition between the recognizing state and the entity or regime recognized. The logistics of recognition usually entail receipt of a formal communication from the new state or government requesting recognition. Recognition may then be accorded by either an issuance of a written or oral proclamation or by implication. *See generally* H. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES 99-193 (2d ed. 1952) [hereinafter cited as BRIGGS]; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 89-108 (2d ed. 1973) [hereinafter cited as BROWNLIE]; 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 161-387 (1944) [hereinafter cited as HACKWORTH]; H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947) [hereinafter cited as LAUTERPACHT]; 1 J. MOORE, DIGEST OF INTERNATIONAL LAW 67-248 (1906) [hereinafter cited as MOORE]; M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 266-90 (1968) [hereinafter cited as SORENSEN]; 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-753 (1963) [hereinafter cited as WHITEMAN]; RESTATEMENT (SECOND) OF FOREIGN RELATONS LAW OF THE UNITED STATES § 94-114 (1965).

2. Hereinafter referred to as PRC. *See* N.Y. Times, December 16, 1978, at 1, cols. 4 and 5, and at 8 col. 5.

3. *See* notes 42-67 *infra* and accompanying text.

4. *See* note 136 *infra* and accompanying text.

United States[5] and traditional international law[6] require that an entity must have an effective government in control of a defined territory and population as well as an ability and willingness to carry out its international obligations.[7] Under the declaratory[8] interpretation of these prerequisites, the decision to extend recognition is objectively evaluated. If the requirements are in fact fulfilled, formal recognition is extended by operation of international law. Under the competing constitutive view, utilized primarily by the United States,[9] the extension of recognition is a completely discretionary act. The decision to extend recognition could therefore be based on additional political considerations. Realistic fulfillment of the requirements for statehood[10] is not in itself sufficient to compel recognition. Utilizing the constitutive position, the United States effectively imposed the additional requirement of constitutional legitimacy on any change in the governmental administration or form of government.[11] Constitutional legitimacy assured that a new government had acquired power through the state's existing constitutional processes. A successful revolutionary regime therefore definitively failed the test of constitutional legitimacy, whereas under the declaratory view the government's origins were inconsequential given the general acquiesence of the people concerned. Although superficially in keeping with internationally recognized requirements, American interpretation of the international law of recognition is substantively antithetical to international interpretation.

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5. *See* RESTATEMENT, *supra* note 1, at § 101-02.

6. *See* notes 27-32 *infra* and accompanying text.

7. These requirements are commonly referred to as the prerequisites for statehood. *See* note 28 *infra* and accompanying text.

8. Under the declaratory theory of recognition the recognizing state declares that the entity in question has in reality achieved the status of statehood. The declaratory view of recognition is opposed to the constitutive view. Under the constitutive theory the state in question does not exist as a legal entity until recognition is extended. *See* notes 23-38 *infra* and accompanying text.

9. The United States and Great Britain are the only major powers which utilize the constitutive theory of recognition. *See* LAUTERPACHT, *supra* note 1, at 12-24.

10. *See* note 28 *infra* and accompanying text.

11. For example Section 94 of the RESTATEMENT, *supra* note 1, states that:

> When a change of governmental administration or a change in form of government takes place in a state as a result of constitutional processes or with the consent of the predecessor government, there is not occasion for an act of recognition. Such occasion is, however, presented if the recognized government is displaced by illegal or unconstitutional means.

Id. at Comment d.

For a discussion of the origins of the concept of constitutional legitimacy, *see* notes 54-59 *infra* and accompanying text.

American recognition practices are not only at variance with international consensus, but are additionally irreconcilable with domestic policy on human rights and self-determination.[12] The United States has traditionally been a conscientious proponent for the observance of fundamental human rights;[13] one of the elementary components of human rights is the right to self-determination.[14] Yet revolution resulting in the succession of a power with a competing ideology, but in furtherance of the right to self-determination, has been systematically excluded from American recognition practices.[15] Thus United States recognition policy has been irreconcilable with domestic as well as international law.

One of the most pronounced manifestations of these conflicting platforms was the China policy. The United States had refused to recognize the People's Republic of China because the Chinese government had emanated from a communist revolution.[16] Since a communist revolution failed the test of constitutional legitimacy, the United States withheld recognition, hoping to impede communist expansion.[17] Not only was the non-recognition of the PRC in opposition to the right of self-determination, but the attendant recognition of the stagnant Nationalist government on Taiwan impeded the native Taiwanese[18] right to self-government.[19] Continuing formal recognition of the repressive Kuomintang[20] provided a legitimating factor for the maintenance of martial law and the concommitant suspension of the Nationalist Constitution.[21] Under a continuing state of KMT siege, the Taiwanese have been deprived of general elections[22] and therefore of their right to self-determination. Hence, the United

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12. Self-determination refers to the right of a people to choose their form of government. *See* notes 90-113 *infra* and accompanying text.

13. *See* notes 114-21 *infra* and accompanying text.

14. *See, e.g.*, Barcelona Traction, Light and Power Co., Ltd. (Second Phase), [1970] I.C.J. 304.

15. *See generally* L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES (1978) [hereinafter cited as GALLOWAY].

16. *See* note 136 *infra* and accompanying text.

17. 39 DEP'T STATE BULL., No. 385 (Aug. 11, 1958).

18. The native Taiwanese must be distinguished from the Nationalists on Taiwan. The Nationalists are exiled mainlanders, whereas the native Taiwanese are descendants of Chinese who emigrated from the mainland more than three hundred years ago. *See* note 162 *infra* and accompanying text.

19. *See* notes 145-53 *infra* and accompanying text.

20. Hereinafter referred to as KMT. The KMT are party members of the Nationalist government on Taiwan, exiled from the mainland in 1949 after the successful communist revolution. *See* note 145 *infra* and accompanying text.

21. *See* notes 145-51 *infra* and accompanying text.

22. *See* notes 152-53 *infra* and accompanying text.

States preoccupation with the non-legal consideration of a competing communist ideology overrode the right of self-determination for both the People's Republic of China and Taiwan.

This note serves to bring this previously ignored interrelationship of self-determination and the international law of recognition into sharper focus. The discussion necessarily begins with a close examination of the international legal nature and effect of recognition, since it is within the parameters of this analysis that the United States found legal license for its injection of non-legal considerations into its recognition practices. The subsequent discussion of international and American acceptance of self-determination as a fundamental legal right provides further foundation for the concept of human rights as a governing principle of foreign relations law. In the final examination of United States-China policy it then becomes evident that the previous politically motivated recognition of the Republic of China, to the exclusion of the People's Republic of China, resulted in a subversion of both the native Taiwanese and the Communists' right to self-determination.

United States foreign relations law has proven to be at variance with both international consensus as to the legal nature of recognition as well as domestic and international law on self-determination. The policy of non-recognition of a government with a competing ideology and the undeniable right of a people to choose their form of government has been squarely in opposition under American practice. It is only in President Carter's recognition of the PRC that American interpretation of the law of recognition and self-determination has inadvertently found consistent application. In view of United States recogniton of the PRC, it is now time to re-examine explicitly American interpretations of the international law of recognition and self-determination, utilizing the Chinese question as a guide. This re-examination necessarily begins with the international analysis of the legal nature of recognition since United States analysis was the first source of error leading to inconsistency in American interpretation of international legal principles.

RECOGNITION IN INTERNATIONAL AND DOMESTIC PERSPECTIVE

There are two seemingly mutually exclusive views[23] on the in-

23. The two views on recognition constitute a major dispute. The general focus of this dispute is whether recognition is a legal obligation under international law. This problem arises because international law is not necessarily statutory in origin. As outlined in Article 38 of the Statute of the International Court of Justice, the sources of international law include:

ternational legal nature and effect of recognition: the constitutive[24] and the declaratory[25] views. Under the declaratory view, the legal personality of a state is conferred upon completion of an objective evaluation of the fulfillment of the requirements for statehood.[26] Under the competing constitutive view, recognition may be withheld for purely subjective reasons despite objective fulfillment of these requirements. United States adherence to the constitutive practice has been largely responsible for considerable confusion in American foreign policy. A comparative examination of these two theories of recognition reveals the necessity for this conclusion.

The International Law of Recognition

The declaratory view of recognition is acknowledged under general and traditional interpretations of international law.[27] Under the declaratory view, the legal personality of a state is conferred by operation of law. If an objective evaluation results in a determination that the entity fulfills the requirements for statehood, [28] the ex-

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a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice as accepted as law;
c. the general principles of law recognized by civilized nations;
d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1).

24. *See generally* BROWNLIE, *supra* note 1, at 92-93; J. OPPENHEIM, INTERNATIONAL LAW 126 (8th ed. 1955). *Cf.* Polish Upper Silesia Case, [1926] P.C.I.J., ser. A, No. 7, at 28. (The holding that unrecognized Poland could not invoke a treaty against Germany was largely based on the determination that the two nations had no contractual nexus.)

25. The number of international law scholars who adhere to this view of recognition has increased in recent years. *See* J. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 139 (6th ed. 1963); BRIGGS, *supra* note 1, at 116; Kunz, *Editorial Comment: Legal Aspects of the Situation in Korea*, 44 AM. J. INT'L L. 709, 713 (1950). *See also* ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 39, 175-255, 300-05.

26. *See* note 28 *infra.*

27. For an historical view of recognition under traditional international law, *see* V. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 4-6 (1977).

28. Statehood refers to the factual existence of a state. The factual existence of a state and the recognition of a state are often perceived as two distinct concepts. There is considerably more agreement as to the factual prerequisites for statehood. Under international law the political existence of a state is independent of the recognition of that state. For example Article 1 of the Montevideo Convention delineated the requisites for statehood: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) govern-

isting state of law and fact is acknowledged by the extension of recognition.[29] For example, the internationally acclaimed Montevideo

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ment; and d) capacity to enter into relations with other States." Convention on Rights and Duties of States, Montevideo, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 [hereinafter cited as Montevideo Convention]. As indicated the United States is a party to the Montevideo Convention. *See also* RESTATEMENT, *supra* note 1, at § 100.

The distinction between recognized states and unrecognized entities which nevertheless fulfill the above requirements for statehood is crucial. International law applies only to states since states are considered the "persons" of international law. W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 300 (3d ed. 1971) [hereinafter cited as BISHOP]. For example the United Nations International Court of Justice is open only to states. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 35. The United Nations Charter also provides that only states may be members. U.N. CHARTER art. 4. Therefore if an entity fulfills the requirements for political existence as a state under international law, it acquires certain rights and duties under international law. The conditions for statehood under the Montevideo Convention, *supra*, are flexible. It has been held that even if the borders of a new state have not been definitely drawn, statehood can be accorded. Deutsche Kontinental Gas-Gesellschaft v. Polish State, Annual Digest 5c (German-Polish Mixed Arb. Trib. 1929-30). *See* LAUTERPACHT, *supra* note 1, at 30; RESTATEMENT, *supra* note 1, at § 100. The requirement that an entity possess a government is usually interpreted to mean an independent government that exercises effective authority within a defined area. *See* LAUTERPACHT, *supra* note 1, at 26-30. The interpretation of this requirement usually arises in connection with a new government effectuated by a revolution. For example the RESTATEMENT provides that:

> Before recognizing a revolutionary regime as a government of a state, the recognizing state is required to make a determination, reasonably based upon fact, that the regime
>
> (a) is in control of the territory and population of the state; or
>
> (b) is in control of a substantial part of the territory and population of the state and shows reasonable promise that it will succeed in displacing the previous government in the territory of the state.

RESTATEMENT, *supra* note 1, at § 101. In the case of revolutionary regimes the government must be independent of the parent state. This independence need not be expressly recognized by the parent state. The parent state's refusal to extend recognition is not conclusive. In the event of refusal, the independence of the new government must be separately evaluated. In addition an independent government must exercise effective authority over the territory which it claims as evidenced by the habitual obedience of the bulk of the population. *See* LAUTERPACHT, *supra* note 1, at 115-40. In summary the various requirements for statehood as provided for in the Montevideo Convention are inextricably intertwined. The existence of a permanent population and a defined territory connote the existence of a stable community and therefore an effective government. Consequently many states exist which have unusual legal status, such as the British Empire. *See* Report of Inter-Imperial Relations Committee of Imperial Conference of 1926, Cmd. No. 2768, at 13-15 (1927). If these states are able to carry out their international obligations, the fourth and most important requirement of statehood under the Montevideo Convention, their idiosyncrasies do not deprive the entity of statehood. *See generally* BISHOP, *supra* note 24, at 313-33.

29. In contrast declarativists have understandably never termed recognition as an entitlement, nor has any aspiring state asserted refusal of recognition as a cause

Convention on the Rights and Duties of States[30] essentially expounds the declaratory view:

> The political existence of a state is independent of recognition of other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation, prosperity and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define its competence and jurisdiction of its courts. *The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.*[31]

Accordingly, declarativists view the act of recognition as an objective acknowledgment that a given entity fulfills the requirements for statehood. Given the existence of statehood, recognition is duly accorded.[32]

Since the extension of recognition is simply an objective acknowledgment of reality, declarativists assert that the decision to recognize should be completely divorced from any moral or ethical judgments on the part of the recognizing state.[33] Since the legal personality of the state has already arisen by operation of law,[34] the subsequent declarativist extension of formal recognition is simply a statement of legal fact. Declarativist reasoning is replete throughout international court decisions and boasts substantial state practice.[35] For example, in the landmark *Tinoco Claims*

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of action in either an international or domestic forum. This may reflect less on the extension of recognition as a legal duty than as an implicit realization that forced recognition would result in hollow compliance with the formalities of extending recognition. The blow of non-recognition is also softened by the knowledge that if the entity fulfills the requirements of statehood, basic international legal rights inevitably accrue. *See also* notes 36-39 *infra* and accompanying text.

30. Montevideo Convention, *supra* note 28.

31. *Id.* at T.S. No. 882 (emphasis added).

32. *See* BRIERLY, *supra* note 25.

33. Borchard, *Recognition and Non-Recognition*, 36 AM. J. INT'L L. 108, 108-10 (1942); Williams, *Some Thoughts on the Doctrine of Recognition in International Law*, 47 HARV. L. REV. 776, 793 (1934). *See* H. KELSEN, DAS PROBLEM DER SOUVERANITAT 224-41 (1921). *Cf.* Kelsen, *Recognition in International Law, Theoretical Observations*, 35 AM. J. INT'L L. 605, 607-09 (1941) (Professor Kelsen distinguished between *legal* recognition, which is a declaratory act, and *political* recognition, which is a purely discretionary act.)

34. *See* notes 27-31 *supra* and accompanying text. *See generally* BROWNLIE, *supra* note 1, at 90-93.

35. *See* Standard Vacuum Oil Co. Claim, I.L.R. 30, 168 (United States Foreign

Arbitration,[36] Chief Justice Taft, sitting as arbitrator, warned that recognition withheld on the basis of considerations other than an objective evaluation of the fulfillment of the requirements for statehood had little bearing on the de facto[37] existence of the government.[38] Thus, international decisions provide definitive support for the declarativist proposition that non-legal considerations are misplaced in the international law of recognition.

Despite this showing of substantial international consensus regarding the nature of recognition, the competing constitutive theory commands equally compelling support in light of the realities of international relations. There is no explicit duty to recognize any state under international law.[39] From this premise constitutivists assert that the extension of recognition is a discretionary act. Since

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Claims Settlement Commission 1959); BISHOP, *supra* note 24, at 386; BRIGGS, *supra* note 1, at 197. *But see* J. FALK, THE VIETNAM WAR AND INTERNATIONAL LAW 583 (1968). *See also* Clerget v. Representation Commerciale de la Republique democratique du Viet Nam, 96 J.D.I. 894, 898 (1969); Deutsche Kontinental Gas-Gesellschaft v. Polish State, Annual Digest 5c (German-Polish Mixed Arb. Trib. 1929-30).

36. Tinoco Claims Arbitration (Great Britian v. Costa Rica) 1 U.N. Rep. Int'l Awards 369 (1924).

37. Apart from the two *theories* of recognition (declarative and constitutive) there are also two *types* of recognition utilized under both theories: de jure and de facto. One of the primary occasions for the distinction occurs when a state first appears as an independent entity under the control of a provisional government. Recognition is usually extended on a de facto basis until the recognizing state feels assured that the new entity will maintain power. If in the judgment of the recognizing state the new entity fulfills the requirements of statehood, recognition is usually extended on a de jure basis. *See* BRIGGS, *supra* note 1, at 103; HACKWORTH, *supra* note 1, at 199-222. For example, on May 14, 1948 the Provisional Government of Israel proclaimed itself an independent republic. President Truman immediately recognized the provisional government as the de facto authority of the new State of Israel. 18 DEP'T STATE BULL., No. 464 at 673 (May 23, 1948). On October 24, President Truman explained that de jure recognition would be extended when a permanent government was elected. 19 DEP'T STATE BULL., No. 488 at 582 (Oct. 24, 1948). After elections were held on January 25, the United States government extended de jure recognition to the government of Israel effective January 31, 1949. 20 DEP'T STATE BULL., No. 502 at 205 (Feb. 13, 1949).

38. Tinoco Claims Arbitration, 1 U.N. Rep. Int'l Awards at 384.

39. Since the formal extension of recognition has never been asserted as a legal right, it is necessarily a discretionary act. *See* note 29 *supra*. The legal rights that accrue by virtue of recognition must be distinguished from the legal rights acquired by virtue of de facto fulfillment of the requirements of statehood. *See* note 28 *supra*. For example although only states may be members of the United Nations many entities not yet recognized by the United States are members of the United Nations. Such a situation results when the United States refuses to formally recognize a state which has objectively fulfilled the requirements for statehood under the Montevideo Convention. Therefore the state acquires a right to membership in the United Nations although it may not have the rights of a state in United States forums due to its unrecognized status. *See* notes 60-66 *infra* and accompanying text.

the decision to extend recognition is discretionary, constitutive adherents feel free to withhold recognition regardless of whether the prospective state fulfills the requirements for statehood. Indeed, under the constitutive view, a state does not even legally exist without formal recognition.[40] The very personality of a state thereby depends upon the political decision of other states to extend recognition.[41]

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40. *See* BROWNLIE, *supra* note 1, at 93.

41. But many conceptual difficulties arise with adherence to the constitutive doctrine. Certainly the existence of a state in the international community should not be subject to purely political determination by other states. The existence of a state in the international community must be subject to determination utilizing principles of international law. *See* BROWNLIE, *supra* note 1, at 93. A third and eclectic view has arisen out of this quagmire of interpretive debate. It has been suggested that although recognition is constitutive there is a legal duty to recognize:

> In essence [recognition] is a discretion determined by international law. In granting or refusing recognition the state administers international law. It does not perform a legally indifferent act of national policy. *Although states enjoy freedom of decision in ascertaining the facts and in assessing their significance with regard to recognition, they are not free to assert the liberty to disregard the facts or to act in defiance of them.* There is little substance in the assertion that a state commences its international existence with the concommitant rights and duties as soon as it exists. To the contrary, recognition when given in fulfillment of a legal duty as an act of application of international law is momentous, decisive, and an indispensable function of ascertaining and declaring the existence of the requisite elements of statehood with the constitutive effect for the commencement of international rights and duties in question. Once we have assimilated the idea that recognition is not primarily a manifestation of national policy but the fulfillment of an international duty we shall remove the principle objection to the acceptance of the view that recognition marks the rise of international rights and duties of a state.

LAUTERPACHT, *supra* note 1, at 61-63 (emphasis added). This view is similar to the declaratory view in that it dismisses the discretionary factor in according recognition. But it additionally acknowledges the constitutive effect of the act of recognition. *See* WHITEMAN, *supra* note 1, at 15-17. *Contra*, Kunz, *supra* note 25, at 713-19. As a resolution it has been suggested that there simply is a legal duty to recognize the state for certain purposes without forcing the recognizing state to make a public or formal declaration of recognition:

> [T]here is a legal duty to "recognize" for certain purposes at least, but no duty to make an express, public, and political determination of the question or to declare readiness to enter into diplomatic relations by means of recognition. This latter type of recognition remains political and discretionary. Even recognition is not determinant of diplomatic relations, and absence of diplomatic relations is not in itself non-recognition of the state.

BROWNLIE, *supra* note 1, at 95.

United States Utilization of the Constitutive Theory of Recognition

Despite general international support for the declarative position, the United States steadfastly utilizes the constitutive doctrine of recogniton.[42] Under United States practice, a state has discretionary power to recognize a new regime which has displaced a formerly recognized government[43] by revolutionary and therefore unconstitutional means. Consequently, the United States has traditionally utilized recognition as a political tool.[44] George Washington used formal recognition to support anti-monarchical governments;[45] Theodore Roosevelt used it to advance economic imperialism;[46] Woodrow Wilson used it to promote constitutional governments;[47]

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42. Accordingly the United States does not subscribe to Lauterpacht's admonishment that there is a legal duty to recognize. *See* note 41 *supra* and accompanying text. Evidence of this peculiarly American interpretation of international law may be found in the RESTATEMENT, *supra* note 1, at § 99: "A state is not required by international law to recognize an entity as a state, or regime as a government of the state." *Id. See also* Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, U.N. Doc. No. A/CN. 4/2 at 192-94 (1948).

43. Since recognition may be accorded either a government or a state, the two must be distinguished. A government may change but the state remains. Conversely a new state may arise thereby instituting a new government. Therefore, recognition of a government and a state may be closely related but they are not necessarily identical. A government is simply one component of a state. When there is a change only in the governmental administration there is usually no occasion for the act of recognition. RESTATEMENT, *supra* note 11. But if there is a drastic change in political ideologies, the recognition of the previous state does not necessarily continue to apply to the new regime. This distinction between the government of a state and the state is closely related to the principle of continuity of states. The concept of continuity of states simply acknowledges the instance where the administrative machinery of the state changes but the basic structure and physical boundaries of the state remain unchanged. *See* BRIGGS, *supra* note 1, at 209-13; H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 383-87 (1959); WHITEMAN, *supra* note 1, at 754-99.

44. GALLOWAY, *supra* note 15, at 1. In an attempt to explain this phenomenon, Galloway suggests:

> The importance attached to recognition derives in part from the weight of tradition and in part from the sense of legitimacy recognition confers. And because states granting or receiving recognition perceive the act as important, they have made it a precondition for other actions that do have inherent significance, such as the continuance of aid or the resumption of diplomatic relations.

Id. at 11.

45. *Id.* at 1.

46. *See* T. COLE, THE RECOGNITION POLICY OF THE UNITED STATES SINCE 1901 43 (1928).

47. Within a few days after his inauguration, President Wilson declared:

> Cooperation is possible only when supported at every turn by the orderly processes of just government based upon law, not upon arbitrary or ir-

and Dwight D. Eisenhower used it in an attempt to inhibit the spread of communism.[48] This varied use of formal recognition readily evidences the United States historical adherence to the subjectively oriented constitutive view.

In contrast early United States policy closely resembled the declarative view. The initial statement of United States policy can be traced to the correspondence of Thomas Jefferson. In a letter to Governeur Morris, the American Minister at Paris, Jefferson delineated three prerequisites for recognition.[49] First, there must have been governmental control of the administrative machinery of the state.[50] Secondly, the new government must have demonstrated "general acquiesence of the people."[51] Finally, the new government must have had the ability and willingness to discharge its international obligations.[52] Today's declaratory practice substantially mirrors Jefferson's articulation of United States recognition policy.[53]

The Jeffersonian concept of recognition survived until the beginning of the twentieth century. In the early 1900's, however, a series of revolutions in Central and South America provoked a visi-

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> regular force. We hold, as I am sure all thoughtful leaders of republic governments everywhere hold, that just government rests always upon the consent of the governed, and that there can be no freedom without order based upon law and upon the public conscience and approval. We shall look to make these principles the basis of mutual intercourse, respect, and helpfulness between out sister republics and ourselves. We shall lend our influence of every kind to the realization of these principles in fact and practice, knowing that disorder, personal intrigues, and defiance of constitutional rights weaken and discredit government and injure none so much as the people who are unfortunate enough to have their common life and their common affairs so tainted and disturbed. We can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambitions.

HACKWORTH, *supra* note 1, at 181.

48. For example in 1956 the United States recognized a military junta which overthrew the elected president of Honduras because the junta was friendly to the United States and was anti-Communist. DEPARTMENT OF STATE, U.S. POLICY TOWARD LATIN AMERICA: RECOGNITION AND NON-RECOGNITION OF GOVERNMENTS AND INTERRUPTIONS IN DIPLOMATIC RELATIONS, 1933-1974 58-59 (1975).

49. Correspondence of Thomas Jefferson, Secretary of State, with Governeur Morris, American Minister at Paris, November 7, 1792 and March 12, 1793, as reprinted in MOORE, *supra* note 1, at 119.

50. *Id.*

51. *Id.*

52. Most importantly neither the form of government nor the means employed to effect the change in government were articulated as conditions for recognition. *Id. See also* RESTATEMENT, *supra* note 1, at § 103.

53. Indeed it was a succinct articulation of the declaratory view. *See* notes 27-32 *supra* and accompanying text.

ble shift in the American approach.[54] By withholding recognition President Wilson manifested disapproval of a new regime, effectively isolating the new government and placing it at a disadvantage in its international relations.[55] With the advent of President Wilson's recognition policy, the United States began to evaluate subjectively the requirement that a state have the support of the people. These increasingly subjective evaluations evolved into an explicit requirement that the new government attain power in accordance with the foreign states' constitutional processes,[56] effectively excluding any revolutionary regime from formal recognition.[57] Under the American view a revolutionary regime prima facie lacked the support of the people. Whether the revolutionary government exhibited firm control did not seem to affect American decisions to extend or withhold recognition.[58] Since the United States did not approve of the means utilized to attain power, it would superciliously withhold recognition on the alleged basis that the new government had not fulfilled recognition requirements.[59] President Wilson's practices transformed the once objective Jeffersonian concept of recognition into a tool demonstrative of political disapproval.

These increasingly subjective judgments converted recognition into a powerful political weapon with far-reaching legal consequences.[60] In particular, domestic court decisions are obliged to

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54. For a more extensive analysis, see GALLOWAY, *supra* note 15, at 27-29 and accompanying text.

55. *See* notes 61-64 *infra* and accompanying text.

56. *See* RESTATEMENT, *supra* note 1, at § 101, Comment a.

57. This legitimacy requirement is surprising given the revolutionary origin of the United States government. *See* note 92 *infra* and accompanying text. When Jefferson first elaborated on the conditions for extension of recognition, he noted:

> We surely can not deny to any nation that right whereon our own Government is founded—that every one govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether King, convention, assembly, committee, President, or anything else that it may choose. *The will of the nation is the only thing essential to be regarded.*

U.S. DEPARTMENT OF STATE, THE PROBLEM OF RECOGNITION IN AMERICAN FOREIGN POLICY 7 (1950) (emphasis added).

58. V. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 6 (1977).

59. *Id.*

60. It is generally agreed that recognition does give rise to rights and duties under international law. *Compare* RESTATEMENT, *supra* note 1, at § 107 *with* RESTATEMENT, *supra* note 1, at § 112. There are instances where rights do not accrue to an unrecognized state. *Id.* at § 107. Even the government of a state which has lost control over the major portion of the states' territory may exercise the states' rights and is obliged to perform its obligations under international law. RESTATEMENT, *supra* note 1, at § 111.

reflect American recognition policies.[61] A United States court will not acknowledge the existence of a foreign sovereign unless formally recognized by the executive branch.[62] If a foreign government is not formally recognized, the state lacks comity privileges and can not bring an action in American courts as a matter of right.[63] Consequently many court decisions have held that an unrecognized regime has no legal rights in United States forums.[64] The only exception

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Recognition may, however, be conditionally granted. Any agreements incident to recognition have a binding effect and may vary the rights and duties of the states involved. RESTATEMENT, *supra* note 1, at § 112.

61. United States v. Pink, 315 U.S. 203, 229 (1942). In *Pink* the United States Supreme Court denied the right of New York State to refuse enforcement of the Litvinov Assignment. Under the Litvinov Assignment the United States exchanged formal recognition of the Russian Government for the assumption of Russian nationalized assets. Mr. Justice Douglas concluded:

> It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.

Id. at 320. Since recognition is a political executive function, agreements incident to recognition must be given effect in domestic forums. *See also* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Belmont, 301 U.S. 324 (1937); Santovincenzo V. Egan, 284 U.S. 30 (1931).

In contrast if a decree enacted by a government is contrary to United States public opinion it need not be enforced in American courts. In such an instance, nonrecognition of the government has no effect and the internal policy of the United States prevails. This is in accord with the policy that foreign acts of state are to be given effect in United States courts only if they are consistent with United States internal policy. United States v. Belmont, 301 U.S. 324 (1937) (Recogniton of the Soviet government by the President of the United States in conjunction with the establishment of normal diplomatic relations validated all acts of Soviet government with respect to the nationalization of a Russian corporation having a deposit in an American bank.); Vladikavkassky Co. Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934) (Decree by Russian government dissolving a railroad corporation was not sufficient to destroy its legal right under New York law to sue for funds deposited in an American bank as the dissolution and confiscation was against the public policy of the State.)

62. Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, *cert. denied*, 342 U.S. 816 (D.C. Cir. 1951) (A Latvian corporation could not bring an action in United States courts in view of deliberate non-recognition of the incorporation of Latvia into the Union of Soviet Socialist Republics.)

63. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923) (The Russian Soviet government was not permitted to maintain a suit in a New York court absent recognition of that government by the United States.)

64. *See* The Maret, 145 F.2d 431 (3d Cir. 1944) (American non-recognition of Estonia precluded recovery by Estonian Steamship Company of claim brought under Merchant Marine Act.) *See also* Latvian State Cargo & Passenger S.S. Line v.

arises when an unrecognized foreign government has affected domestic private rights. In that instance American courts acknowledge the government's de facto existence in an effort to gain redress for American grievances.[65] Despite this sole exception, unrecognized governments are at a distinct disadvantage in foreign relations with the United States by virtue of their unrecognized status.[66]

There are apparent major defects in the American constitutivist approach. Initially, as evidenced by *Tinoco Claims Arbitration*, [67] non-legal considerations of competing ideologies are irrelevant in the international law of recognition. More importantly, however, even assuming the existence of legal license to consider non-legal factors, a state should not utilize recognition to deny the overriding international legal right to self-determination.[68] International law theoretically does not refuse recognition to aspiring governments which employ revolution in furtherance of the right to self-determination given the general acquiesence of the people.[69] In this vein an international legal scholar has observed that:

McGrath, 188 F.2d 1000, *cert. denied*, 342 U.S. 816 (D.C. Cir. 1951); Estonian S.S. Line v. United States, 116 F. Supp. 477 (Ct. Cl. 1953); Latvian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 717 (Ct. Cl. 1953); A/S Merilaid & Co. v. Chase National Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947).

65. In this vein Secretary of State John Foster Dulles observed that the distinction between de jure and de facto recognition involves a play on words to some extent. Those governments that are not de jure recognized are not necessarily viewed as legally incompetent or nonexistent. 39 DEP'T STATE BULL., No. 1011 at 733 (Nov. 10, 1958).

66. It is important to note at this juncture that recognition is not synonymous with diplomatic relations. Informal relations may be, and often are, conducted with the officials of a state or government without implying recognition. HACKWORTH, *supra* note 1, at 327. *See, e.g., id.* at 281 (informal relations with unrecognized Albania); *Id.* at 332-33 (consular officers stationed in unrecognized Manchukuo).

67. Tinoco Claims Arbitration (Great Britain v. Costa Rica), 1 U.N. Int'l Arb. Awards 369 (1924).

68. *See* notes 81-83 *infra* and accompanying text.

69. 12 WHITEMAN, *supra* note 1, at 1-311. *Accord*, R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 211-13. In examining the propriety of an invitation to a foreign government to assist in suppressing an internal revolt, Higgins cautions:

> The further proviso is needed that the insurgents represent the majority of the people. This is in keeping with the principle of self-determination, which has, over the last fifteen years, led to widespread view that there may now be a legal right of revolution. . . . [T]hat is to say, that under the principle of self-determination the peoples of a territory must be allowed—if absolutely necessary by forceful means—to replace the government by one of their own choice.

Id. (citations omitted). *See* 70 *infra* and accompanying text.

> There is no rule of international law forbidding revolutions within a state, and the United Nations Charter favors the "self-determination of peoples." Self-determination may take the forms of rebellion to oust an unpopular government, of colonial revolt, of an irredentist movement to transfer territory, or of a movement for the unification or federation of independent states. There is nothing in the Charter to prevent the latter, even if it destroys the independence of the participating states after their union. Such a union occurred in the formation of the United States in the 18th century, the formation of Italy and Germany in the 19th century, and the formation of the United Arab Republic in the 20th century. If divisions of a state or unions of states are formed primarily in accordance with the will of the peoples concerned, even if accompanied by some violence, neither international law nor the United Nations offers opposition. If, on the other hand, such changes are effected primarily by conquest, the case would be one of aggression, forbidden both by the Charter and by contemporary international law.[70]

Yet the United States has traditionally withheld recognition from a revolutionary government with a competing ideology. Therefore a fundamental defect in the constitutive approach is the creation of an opportunity to deny recognition in contravention of the right to self-determination. This fundamental conflict becomes apparent given the status of self-determination as a basic principle of international law.

INTERNATIONAL AND DOMESTIC LAW ON HUMAN RIGHTS AND SELF-DETERMINATION OF PEOPLES

An examination of the development of human rights in international law provides a conclusive foundation for the assertion that self-determination is an overriding principle of international law. In addition the United States wholehearted subscription to self-determination as a fundamental legal right raises genuine confusion when superimposed on the American practice of denying formal recognition to a revolutionary government which nevertheless has the irrefutable support of the people governed.

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70. Wright, *United States Intervention in Lebanon*, 53 AM. J. INT'L L. 112, 121 (1959).

Development of Human Rights as International Law

General principles of law[71] acquire their legal effect by their nature as fundamental, inalienable or inherent rights.[72] Extensive judicial and philosophical recognition of the existence of fundamental principles resulted in the formation of a body of *jus cogens.*[73] In the enumeration of *jus cogens*, philosophers and scholars typically included the prohibition of aggressive war,[74] genocide,[75] racial inequality,[76] crimes against humanity,[77] trade in slaves, and piracy.[78] Due to the fundamental nature of these prohibitions, eminent opin-

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71. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(c). *See also* note 23 *supra*; BROWNLIE, *supra* note 1, at 15-18.

72. *See generally* VanDijk, *International Law and the Promotion and Protection of Human Rights*, 24 WAYNE L. REV. 1529 (1978). The concept of human rights can be traced to the philosophies of ancient Greece. Greek philosophers laid the foundation for the school of natural law, which recognized certain inviolate human rights implied from the consistency observed in human nature. The concept of natural law found later support in Stoa, a philosophic school that greatly influenced Roman legal philosophy. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 80-84 (1950). Additionally the Catholic doctrine of natural law, developed in the Middle Ages, proposed the law of God as having higher rank than secular rules. In this Catholic doctrine are the seeds of self-determination. Since secular rules derived their power from the consent of those they governed, the Church concluded that peoples may rise "against tyranny and invoke their God given rights and freedoms against their rulers." VanDijk, *supra*, at 1530. During the Reformation and Enlightenment, John Locke promoted fundamental and inviolate individual rights which must be guaranteed by governments and which could be invoked against oppressive rulers. In the eighteenth century, the American Revolution was founded upon the belief in the right to rebel against repressive governments as articulated in the Declaration of Independence. And in the twentieth century, Marxist criticisms of capitalistic society stressed the importance of social and economic rights as well as civil and political freedoms. A. ROBERTSON, HUMAN RIGHTS IN THE WORLD 8-10 (1972). *See also* LAUTERPACHT, *supra*, at 89-91. The belief in the existence of a set of fundamental and inalienable rights has a long and formidable history.

73. For clarity *jus cogens* may be viewed as synonymous with public policy. For a critical and somewhat pessimistic analysis, see Schwarzenberger, *International* Jus Cogens?, 43 TEX. L. REV. 455 (1965).

74. L. MCNAIR, LAW OF TREATIES 214-15 (1961).

75. Barcelona Traction, Light and Power Co., Ltd. (Second Phase) (Belgium v. Spain), [1970] I.C.J. Rep. 3, 32. A concise analysis and thorough background for *Barcelona Traction* may be found at *Annals of Finance: Privateer I*, The New Yorker 42, May 21, 1979, and *Annals of Finance: Privateer II*, The New Yorker 42, May 28, 1979.

76. The United Nations Charter prohibits discrimination based on race, sex, language or religion in articles 1(3), 13(1), 55, 56, 62(2) and 76. *E.g.*, Barcelona Traction, [1970] I.C.J. Rep. at 304 (Ammoun, J., separate opinion); South West Africa Case (Second Phase), [1966] I.C.J. Rep. 1, 298 (Tanaka, J., dissenting). *See also* BROWNLIE, *supra* note 1, at 578-81.

77. South West Africa Case, [1966] I.C.J. Rep. at 298.

78. *Id.*

ions have recently acknowledged the imperative force of *jus cogens* as principles of international law. For example, in *Barcelona Traction, Light and Power Co., Limited, (Second Phase)*[79], the International Court of Justice commented that: "[O]bligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[80] Furthermore *jus cogens* acquired the status of overriding principles of law.[81] In this sense they can be waived or contravened only by the formation of a subsequent overriding customary rule of law.[82] The body of *jus cogens* therefore withstands both mutual and unilateral decisions to suspend its operation in international relations.[83]

The concept of *jus cogens* has recently found worldwide articulation in the concern for human rights. Spurred into action by World War II atrocities,[84] the United Nations promulgated the initial

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79. [1970] I.C.J. Rep. 3.

80. *Id.* at 32.

81. Article 53 of the 1969 Vienna Convention on the Law of Treaties provides for *jus cogens* as a paramount consideration:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

U.N. Conference on the Law of Treaties, Doc. A/CONF. 39/27 (1969). *Accord*, N. BRIERLY, LAW OF NATIONS 293 (6th ed. 1963); L. EZEJIOFOR, PROTECTION OF HUMAN RIGHTS UNDER THE LAW 60 (1964); A. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 113-15 (1962); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 119 (1963); F. JESSUP, A MODERN LAW OF NATIONS 91 (1949); U. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 52-53 (1972); H. WALDOCK, HUMAN RIGHTS IN CONTEMPORARY INTERNATIONAL LAW 9-10 (1969).

82. U.N. Conference on the Law of Treaties, Doc. A/CONF. 39/27 (1969) at art. 53.

83. *Id.* By way of illustration:

> An agreement by a state to allow another state to stop and search its ships on the high seas is valid, but an agreement with a neighbouring state to carry out a joint operation as against a racial group straddling the frontier which would constitute genocide, if carried out, is void since the prohibition with which the treaty conflicts is a rule of *jus cogens*.

BROWNLIE, *supra* note 1, at 500-01.

84. World War II and the concommitant Fascist genocide policies provoked not only United Nations actions but individual attempts to effectuate human rights guarantees. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), 78 U.N.T.S. 277 (1948); H. LAUTERPACHT, AN INTERNA-

codification of human rights in the United Nations Charter.[85] The principal purposes of these human rights mandates were a global guarantee of humane living conditions and the protection of basic rights and freedoms from the misuse of governmental power.[86] Thus it was from the United Nations Charter that the international legal basis for human rights evolved.

Initially the major impediment to worldwide acceptance of Charter principles as binding rules of law stemmed from the general nature of the language employed to articulate the concept of human rights.[87] Reluctant governments sought refuge in the Charter's lack of specificity.[88] Although the language of the Charter is undeniably

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TIONAL BILL OF RIGHTS OF MAN (1945); McDougal, Lasswell & Lung-Chu Chen, *Human Rights & World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1968).

85. U.N. CHARTER art. 1 para. 3; art. 55 para. c; art. 56; art. 62 para. 2; art. 68; art. 76 para. c.

86. *Id.*

87. For example, Article 1 broadly defines a purpose of the United Nations as developing "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." U.N. CHARTER art. 1 para. 2. Similarly Article 55 provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> . . .
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id. at art. 55 para. c.

88. *See* notes 99-100 *supra* and accompanying text. Articles 55 and 1(2) have been the principal source of reliance for actions brought against oppressive governments. Two primary questions arise in adjudicating such a suit: first, whether the Charter provides sufficient basis for holding that a violation of international law has occurred, and secondly whether there is a standing to sue. Addressing the first question in light of the history of human rights, it becomes obvious that:

> The relevant provisions of the Charter were not creative of a new rule of law. All they did was to confirm and lay down in writing a principle which had long been growing and maturing in international society until it gained general recognition. By including and laying it down as one of the principles of the new-born organization, the Charter gave expression to one of the elements of international law of the time.

LACHS, *The Law in and of the United Nations*, 1 IND. J. INT'L L. 429, 432 (1961). Additionally article 55 must be read in conjunction with article 56 which provides that all states agree to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in article 55. Nevertheless attempts made by *private individuals* to invoke the provisions of articles 55 and 56 have been denied

general, subsequent resolutions by the United Nations General Assembly have authoriatively elaborated the scope and meaning of the concept of human rights.[89] With the added force from General Assembly passage of these specific resolutions, contumacious governments may no longer find refuge in the broadness of Charter principles.

Self-Determination

One of the most significant Charter provisions is the right of self-determination of peoples.[90] Exercise and assertion of the right to self-determination, however, occurred long before the Charter's promulgation.[91] The French and American Revolutions are notable historical instances of the exercise of the right to self-determination.[92] But the principle as a current doctrine of international law found its initial proponent in Woodrow Wilson.[93] Although

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on the rationalization that the Charter, while binding on the United States as a treaty, was not self-executing. Oyama v. State of California, 332 U.S. 633 (1948); Comacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961); Fuji v. State, 28 Cal. 2d 718, 242 P.2d 617 (1952); Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (1953). On the other hand, if a *state* brings a claim against another state based upon an alleged infringement of Charter human rights provisions, that state is not acting in its own personal interest but as a representative of humankind. The violation does not concern an obligation toward one or more states but an *obligatio erga omnes*—an obligation towards everyone. Barcelona Traction, [1970] I.C.J. Rep. at 32. Thus standing is attained by virtue of a violation of an *obligatio erga omnes*, and a violation of law occurs because political and judicial organs of the United Nations have interpreted Articles 55 and 56 as delineating legal obligations. Adv. Op. on Namibia [1971] I.C.J. Rep. 56; Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 351 (1972).

89. Declaration on the Granting of Independence to Colonial Countries and Peoples, *adopted* March 4, 1960, G.A. Res. 1514 XV, 15 U.N. GAOR, Supp. (No. 16), U.N. Doc. A/4684 (1960); International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6318 (1966); Universal Declaration of Human Rights, *adopted* Dec. 6, 1948, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/810 (1948).

90. See U.N. CHARTER art. 1, para. 2.

91. For example the English Bill of Rights of 1689, the American Declaration of Independence of 1776, and the French Declaration des Droits de L'Homme et du Citoyen of 1789 are just a few well-known declarations and implementations of the right to self-determination. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 89-91 (1950); VanDijk, *International Law and the Promotion and Protection of Human Rights*, 24 WAYNE L. REV. 1529 (1978).

92. *See* A. COBBAN, NATIONAL SELF-DETERMINATION (1944); Nawaz, *The Meaning and the Range of the Principle of Self-Determination*, 1965 DUKE L.J. 82.

93. Curiously enough Woodrow Wilson was also the instigator for the constitutional legitimacy prerequisite to recognition. *See* notes 54-59 *supra* and accompany-

Wilson never specifically defined the principle of self-determination, he insisted that: "National aspirations must be respected; peoples may now be dominated and governed only by their consent. 'Self-determination' is not a mere phrase, it is an imperative principle of action."[94] In an effort to further this conviction, Wilson believed that an international organization was necessary to transform the principle of self-determination into reality.[95] In Wilson's view this was one of the essential functions of the League of Nations.[96] Although the League did not maintain any specific provision for self-determination,[97] the League's successor, the United Nations, utilized

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ing text. Had early American leaders sought constitutional avenues in asserting self-determination, the United States might have long remained just another British colony. Perhaps less confusion arises when Wilson's recognition practices are viewed in light of well-meaning but traditional American ethnocentricity. In recognizing the inherent contradiction in Wilson's "constitutionally legitimatized self-determination," American recognition practices become saliently schizophrenic.

94. 1 THE PUBLIC PAPERS OF WOODROW WILSON, WAR AND PEACE 180 (R. Baker & W. Dodd eds. 1927).

95. Jessup, *Self-Determination Today in Principle and Practice*, 33 VA. Q. 174, 177 (1957).

96. "If the desire for self-determination of any peoples in the world is likely to affect the peace of the world or the good understanding between nations, it becomes the business of the League . . . ." 1 THE PUBLIC PAPERS OF WOODROW WILSON, WAR AND PEACE 180 (R. Baker & W. Dodd eds. 1927). *See* A. COBBAN, *supra* note 91, at 44.

97. Article 3 of the original draft for the League of Nations Covenant contained provision for the principle of self-determination:

> The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates, be demanded by the welfare and manifest interest of the peoples concerned, may be effected if agreeable to those peoples . . . .

M. LANSING, THE PEACE NEGOTIATIONS – A PERSONAL NARRATIVE 93 (1921). The draft article was eliminated at the Paris Peace Conference, however, due to strong opposition from the British Empire's representatives. *Id.* at 94-95. For the current British position, *see* WHITEMAN, *supra* note 1, at 110-13, 131-32. In spite of this deletion, the League's International Committee of Jurists did have occasion to address the principle of self-determination. In the *Aaland Islands* case the court was faced with Finnish opposition to a Swedish self-determination claim. The Committee of Jurists cautiously commented that:

> [I]n the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.

self-determination as a guilding principle.[98] Charter recognition of the right to self-determination was, therefore, deeply rooted in historic pronouncements.

The right to self-determination appears in two articles of the United Nations Charter: Article 1(2) and Article 55. Under Article 1, one of the purposes of the United Nations is the development of friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples."[99] Article 55 additionally urges United Nations members to promote certain goals "with a view to the creation of conditions of stability and well being which are necessary to the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ."[100] However, the United Nations General Assembly found it necessary and fruitful to expound upon these articles in an effort to establish the right to self-determination as an obligatory principle of international law.

United Nations efforts to define the scope of self-determination culminated in the passage of numerous resolutions.[101] For example, the Declaration Concerning the Granting of Independence to Colonial Countries[102] declared that self-determination included the right to determine political status and to pursue economic, social and cultural development.[103] Incidental to the Colonial Resolution, a member of the General Assembly noted that it applied to "all peoples in whatever land and in whatever cir-

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LEAGUE OF NATIONS O.J., Spec. Supp. 1, at 22 (1920). More importantly given the absence of any specific provision for self-determination in the Covenant, the Committee elaborated:

> Under such circumstances [war and revolution] the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.
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> The principle of recognizing the rights of peoples to determine their political fate may be applied in various ways; the most important of these are, on the one hand the formation of an independent State, and on the other hand the right of choice between two existing States.

LEAGUE OF NATIONS O.J., Spec. Supp. 3, at 6 (1920).

98. *See* notes 99-100 *infra* and accompanying text.

99. U.N. CHARTER art. 1, para. 2.

100. *Id.* at art. 55.

101. *See* note 88 *supra*.

102. *Adopted* March 4, 1960, G.A. Res. 1514 XV, 15 U.N. GAOR, Supp. (No. 16), U.N. Doc. A/4684 (1960).

103. *Id.* at 195.

cumstances they are dominated and by whatever means they are deprived of their right of self-determination and freedom."[104] With the passage of these resolutions, the United Nations had definitively countered arguments centering on the scope of self determination.

The principle of self-determination is, therefore, one of universal applicability. Self-determination reappears in the Universal Declaration of Human Rights.[105] The International Covenant on Civil and Political Rights[106] is more specific with regard to self-determination than any of the preceding documents.[107] This last covenant is also much stronger in its position on the obligation of states to respect political rights.[108] The foregoing series of resolutions and proposed covenants were not simply recommendations but were authoritative interpretations of the Charter.[109] Therefore it can be conclusively stated that self-determination is a legal principle. Since these resolutions attained passage by majority vote,[110] they have become evidence of custom and thereby constitute general principles of international law,[111] binding on the United States as a member of the United Nations and the international community.

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104. U.N. GAOR 1256, U.N. Doc. A/945 (1960).

105. *Adopted* Dec. 6, 1948, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/811 (1948).

106. *Adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

107. Article 1 states: "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." *Id.*

108. Article 2 states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. But see also Article 1, paragraph 2 which provides that States become parties based on a promise to bring their legislation into line with the Covenant.

109. H. WALDOCK, 106 Hague RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 33 (1962); 1961 Annual Report of the Secretary General 2 (1961). *See* note 111 *infra* and accompanying text.

110. U.N. CHARTER art. 18.

111. The principle of self-determination certainly qualifies as *opinio juris sive necessitatis*. A forceful argument is put forth by Professor Van Dijk of the University of Utrecht in The Netherlands:

> When states act as a collectivity, such as in the framework of the General Assembly of the United Nations, and formulate their opinion with regard to the international recognition of human rights in a declaration or resolution such an action forms an important indication of that group's *opinio juris* provided that this declaration or resolution rests upon a sufficient

United States Human Rights Policies

In recent years the growing body of authority for the recognition of inviolate rights as part of the international legal order has brought human rights issues into international focus. Particularly with the advent of the Carter administration, the human rights movement became a cause celebre for American foreign policy. Carter's presidential campaign focused heavily on international human rights. Reiterating this concern in his inaugural address,[112] Carter urged that the United States had "a responsibility and a legal right to express its dissapproval of violations of human rights."[113] This was not simply campaign rhetoric;[114] in 1977 President Carter signed the International Covenant on Economic, Social and Cultural Rights,[115] and the International Covenant on Civil and Political Rights,[116] submitting them to the United States Senate for ratification.[117] With the signing of the convenants and the beginning of the Carter administration, the United States became a visible leader in the human rights campaign.

The United States Congress has also devoted serious attention to human rights. Preceding the Carter administration, a series of congressional hearings in 1973 concentrated on international pro-

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> amount of consensus. On that basis one could argue, for instance, that the Universal Declaration of Human Rights, although it is not a treaty, has become binding law as an international custom, due to the general support it has found at the moment of its adoption combined with the subsequent practice in the United Nations in its respect.

Van Dijk, *supra* note 91, at 1543. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. b.

112. 76 DEP'T STATE BULL. 122 (1977).

113. President Carter's News Conference, 13 WEEKLY COMP. OF PRES. DOC. 242 (Feb. 23, 1977); *See also* Address by President Carter to the United Nations General Assembly, 76 DEP'T STATE BULL. 332 (1977).

114. *See* Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978). *See also* note 115 *infra* and accompanying text.

115. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967). *See* Weissbrodt, *supra* note 114, at 35-37.

116. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, 52, U.N. Doc. A/6316 (1967). *See* Weissbrodt, *supra* note 114, at 35-37.

117. The two Covenants were submitted to the Senate for ratification on October 5, 1977. On February 23, 1978 President Carter dispatched a letter to the Senate proposing several reservations to the Covenants. In effect the proposed reservations would subvert the Covenants to the Constitution and laws of the United States, rendering the Covenants virtually ineffectual. For an excellent discussion of the proposed reservations, *see* Weissbrodt, *supra* note 114, at 48-78.

tection of human rights.[118] In sharp contrast to executive activity, the United States legislature as well as domestic courts have been reluctant to endorse the proposed human rights agreements as legally binding.[119] In particular, United States courts have been reticent in interpreting the provisions of the United Nations Charter as legal obligations.[120] Instead the government preferred to treat Articles 1(2), 55 and 56 simply as statements of purpose and therefore not obligatory.[121] This indiscriminate interpretation of the Charter provisions stemmed less from genuine concern over legitimacy of the provisions than from the fear of international interference in domestic affairs.[122] Fear of interference also prompted considerable congressional opposition to the signing and ratification of the two human rights covenants.[123] The reserved domain of domestic jurisdiction was allegedly in jeopardy.[124] Consequently the fear of international scrutiny butressed by the scholarly debate centering on the vagueness of Articles 1(2) and 55 provided a formidible barrier to the ratification and implementation of the human rights covenants.

These barriers to the recognition of human rights provisions have finally begun to deteriorate. President Carter's political exhortations have aided in substantially changing American foreign policy on human rights as legal obligations and not simply a subject for international moralizing. Therefore, even unratified, the human rights covenants provide substantial basis in international law for the

118. INTERNATIONAL PROTECTION OF HUMAN RIGHTS: HEARINGS BEFORE THE SUBCOMM. ON INTERNATIONAL ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93d Cong., 1st Sess. (1973); House Subcomm. on International Organizations and Movements, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP 9-11, 93d Cong., 2d Sess. (Comm. Print 1974).

119. *See* Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543, 544-46 (1950).

120. McDougal & Leighton, *The Rights of Man in the World Community*, 59 YALE L.J. 60 (1949); Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643 (1951).

121. U.S. DEP'T OF STATE, Pub. No. 2349, REPORT OF THE SECRETARY OF STATE TO THE PRESIDENT ON THE SAN FRANCISCO CONFERENCE 116 (1945). *See also* Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543, 546 (1950).

122. *See* Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L.S.L. REV. 63, 67 (1978).

123. In 1976 the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights came into effect and are legally binding on those nations which have ratified them. See Human Rights International Instruments 12 (1978), U.N. Doc. ST/HR/4; Weissbrodt, *supra* note 114, at 40.

124. *Id.*

obligatory force of the Charter's human rights provisions. The United States government now acknowledges the obligatory character of the human rights articles and has concluded that states are accountable for the observance of human rights.[125]

Despite the established obligatory character of the human rights provisions, the search for appropriate and effective modes of disapproval for violations constitutes another formidable barrier to implementation of human rights. Some of the many difficulties presented are due to the universal applicability of the human rights decrees and the subsequent difficulty in ascertaining violations, as well as the possibly serious diplomatic ramifications of public condemnation of a neighboring state.[126] In a conscious effort to provide a workable solution, the United States Congress in the Foreign Assistance Act[127] authorized the termination and reduction of economic and military aid to "any government which engages in a consistent pattern of gross violations of internationally recognized human rights."[128] Deprivation of economic aid has furnished a powerful means for exhibition of United States commitment to respect for fundamental international legal principles.

Although the Foreign Assistance Act provides an effective deterrent, surely the United States may develop more efficacious solutions. Recognition policies provide a unique and compelling opportunity for the United States to assert its belief in the principle of self-determination.[129] Historical reluctance to recognize communism and/or revolutionary governments has ignored the attendant opportunity to advance human rights and the self-determination of peoples. As suggested by Professor Weissbrodt:[130]

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125. Address by President Carter to the United Nations General Assembly, 76 DEP'T STATE BULL. 332 (1977); Vance, 76 DEP'T STATE BULL. 505 (1977).

126. Weissbrodt, *Human Rights Legislation and United States Foreign Policy*, 7 GA. J. OF INT'L & COMP. L. 231, 283-84 (1977).

127. 22 U.S.C. § 278 (1976).

128. *Id.* at § 262d.

129. Indeed they are obliged to do so under U.N. CHARTER art. 56 and 22 U.S.C. § 2304 (1976), which reads:

> It is the policy of the United States in accordance with its international obligations as set forth in the Charter of the United Nations . . . to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction . . . . To this end, a principal goal of the foreign policy of the United States is to promote the increased observance of international human rights by all countries.

Id.

130. Weissbrodt, *supra* note 126.

> Administration strategists may have decided that the United States must have a positive international rallying call rather than the tired negative imperative of anti-communism. In this view the United States will talk about human rights just as the Soviets and the third world raise exploitation and imperialism as their issues. In other words, human rights can be used as a legitimating theory for other American foreign rights policies.[131]

In this regard the denial of recognition to a successful and popularly supported revolutionary government is refusal of the universal right to self-determination;[132] recognition of an oppressive and stagnant government is a denial of a peoples' fundamental right to self-government. More specifically, as will be seen, the withholding of recognition from the People's Republic of China refused the communists' right to self-determination; recognizing the repressive and minority Kuomintang denied the Taiwanese their fundamental right to self-government. Recognition did indeed prove to be a powerful political tool.

RECOGNITION OF THE PEOPLE'S REPUBLIC OF CHINA AND THE RIGHT TO SELF-DETERMINATION

United States policy on recognition of the People's Republic of China [PRC] has been devastatingly complex. Despite formal policy to the contrary, United States practice did not deny the reality of the PRC's existence.[133] Even during the decades of non-recognition, an international legal scholar suggested that mainland China was a de facto government in the same sense used in *Tinoco Claims Arbitration*.[134] Moreover there was no doubt that the United States de facto recognized Communist China.[135] The confusing policy of withholding de jure recognition proceeded solely from the conviction

131. *Id.* at 283-84.

132. *See* note 91 *infra* and accompanying text.

133. During an interview Secretary of State Dulles revealed:

> The question of recognition involves to some extent a play on words. There is no doubt we recognize Communist China as a fact, as we deal with Communist China. Indeed, I suspect that the United States has had more continuous serious dealings with Communist China than any other free-world country over the last 10 years. . . . It's a fact and we deal with it as a fact, and whenever it is advantageous to the world or for peace to do business with it, we don't hesitate to do business with it.

39 DEP'T. STATE BULL. No. 1011 at 733 (Nov. 10, 1958).

134. (Great Britain v. Costa Rica), 1 U.N. Int'l Arb. Awards 369 (1924).

135. *See* note 133 *supra*.

that formal recognition would have "been of material assistance to attempts to extend communist dominion."[136] Accordingly, in a countermove to impede communist expansion, the United States de jure recognized the Nationalist government fortressed on Taiwan.[137] The United States admitted communist reality on the mainland, but reserved legal recognition for the Nationalists.

Reality of the PRC's Existence

A brief examination of China's political history will reveal the unreality of the United States prolonged recognition of the Republic of China [ROC] as the de jure government of Taiwan and the mainland. Although the Chinese established a settlement in Taiwan in the sixth century, a formal Chinese government was not established until the island was captured from the Dutch in 1661. After an attempt to restore the Ming Dynasty, Taiwan was surrendered to the Ch'ing Empire which administered the island as part of the mainland's Fukien Province. In 1895, nine years after the establishment of Taiwan as a separate province, the island was ceded through the Treaty of Shimonoseki[138] as a result of China's defeat in the First Sino-Japanese War. With China's declaration of war against Japan in 1941, the ROC government, still on the mainland, repudiated the Treaty with Japan. In 1945 Japan signed the Instrument of Surrender thereby accepting the Potsdam Proclamation which demanded the return of Taiwan to the ROC. The transfer was incomplete, however, since international law requires a treaty or a unilateral renunciation and subsequent de facto control by the transferee to effect a change in territorial sovereignty.[139] This requirement was not

136. 39 DEP'T STATE BULL. 385 (Aug. 11, 1958). Secretary of State John Foster Dulles elaborated:

> Basically the United States policy of not extending diplomatic recognition to the Communist regime in China proceeds from the conviction that such recognition would produce no tangible benefits to the United States or to the free world as a whole and would be of material assistance to Chinese Communist attempts to extend Communist dominion . . . .
>
> The extension of diplomatic recognition by a greater power normally carries with it not only increased access to international councils but enhanced international standing and prestige as well. Denial of recognition on the other hand is a positive handicap to the regime affected and one which makes it that much the more difficult for it to pursue its foreign policies with success.

Id.

137. *Id.*

138. The Treaty of Shimonoseki has been reproduced at 3 WHITEMAN, *supra* note 1, at 565-66.

139. *See* HACKWORTH, *supra* note 1, at 421; WHITEMAN, *supra* note 1 at 1088-89.

met until Japan signed the San Francisco peace treaty in 1951, which provided for Japanese renunciation of sovereignty over Taiwan. In 1949, however, a successful communist rebellion on the mainland forced the ROC retreat to Taiwan. Since the convening parties in San Francisco could not agree on the de jure government of China, neither the ROC nor the PRC was invited to participate at the Conference. Since there was technically no transferee, Taiwan had been abandoned, not surrendered. At that point neither the ROC nor the PRC acquired de jure title to Taiwan.[140]

A candid evaluation of the ROC's status would have revealed that the ROC had not fulfilled the requirements for de jure recognition[141] since 1949. Nonetheless the ROC claimed not only de jure title to Taiwan but de jure title to mainland China. Even after success of the communist revolution, the Nationalist government on Taiwan unwaiveringly claimed to be the de jure government of mainland China. They had in reality failed to fulfill the requirement of territorial control, since Chiang Kai-chek was in de facto control of only Taiwan and the Pescadores. Furthermore the PRC, not the ROC, was undebatably in firm de facto control of a substantial portion of the disputed territory.[142] The Nationalists lacked any juridical basis for assertion of de jure control over Taiwan or mainland China.

Although the ROC had obviously lost all hope of control over the mainland, the United States joined in the brutally illogical persistence that the Nationalists still de jure governed mainland China. As previously noted the United States withheld recognition from Communist China in a fruitless attempt to champion democracy.[143] This stubborn adherence to Wilson's recognition politics[144] was substantially responsible for the prolonged confusion over Taiwan's international legal status. If the United States had adopted the declaratory view of recognition, it would have recognized the PRC as the de jure government of mainland China when the success of the communist revolution and the subsequent acquiesence of the Chinese people were obvious. Recognition of the Kuomintang [KMT]

140. *See* Chiu, *Normalization and Some Practical and Legal Problems Concerning Taiwan*, 2 OCCASIONAL PAPERS: REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES 51 (H. CHIU, ed. 1978) (available from School of Law, University of Maryland).

141. By way of review, the minimum requirements for recognition are a defined territory and population, a regime which is in control of the territory, and a capacity to engage in foreign relations. *See* note 7 *supra* and accompanying text.

142. *See id.* For the British view see WHITEMAN, *supra* note 1, at 641.

143. *See* note 136 *supra* and accompanying text.

144. *See* notes 54-59 *supra* and accompanying text.

as the de jure government of mainland China as well as Taiwan and the Pescadores succeeded only in providing a sense of legitimatization sufficient to encourage ROC's impractical aspirations.

Contravention of the Right to Self-Determination

With the continuing support of de jure recognition the KMT persisted in their claim to the Chinese "throne." Ludicrous persistence in de jure title to mainland China has provided a sense of legitimacy for repression of the Taiwanese right to self-determination. The Nationalist Kuomintang government retreated from the mainland in 1949, treating the Taiwanese as a conquered people and imposing martial law.[145] The KMT suspended operation of the ROC constitution on the pretense of emergency measures in view of the continuing state of war with Communist China.[146] All constitutional guarantees of civil liberty have been abrogated since the state of seige proclaimed in 1949.[147] Under the declared "Temporary Provisions Effective During the Period of Communist Rebellion"[148] the KMT has suspended indefinitely the constitutional rights to personal freedom, freedom of speech, freedom of residence, freedom of privacy, freedom of religious beliefs, freedom of assembly and association, and freedom of petition.[149] The "Temporary Provisions" also confer the right of authorities to control the press, censor mail, prohibit strikes, conduct warrantless searches, register property, and prohibit meetings.[150] Any views expressed contrary to the authorities' claim to represent all China or supporting independence for Taiwan are considered seditious and punishable under martial law.[151] Additionally, there have been no general elections for the two ruling bodies, the National Assembly and the Legislative Yuan, since 1948.[152] The KMT further proclaims that general elections cannot be held until they regain control over the mainland.[153] The Taiwanese

145. *See Taiwan (Republic of China)*, 6 AMNESTY INTERNATIONAL BRIEFING PAPER (October 1976), *reprinted in* TAIWAN: HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS: ON S. 245, A BILL TO PROMOTE THE FOREIGN POLICY OF THE UNITED STATES THROUGH THE MAINTENANCE OF COMMERCIAL, CULTURAL, AND OTHER RELATIONS WITH THE PEOPLE ON TAIWAN ON AN UNOFFICIAL BASIS, AND FOR OTHER PURPOSES, 96th Cong., 1st Sess. 554 (1979) [Hereinafter cited as TAIWAN HEARINGS].

146. TAIWAN HEARINGS, *supra* note 145, at 557 (statement of Wilbur Chen).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 552, 560.

152. *Id.* at 557.

153. *Id.*

are therefore suspended in a state of continuing oppression by an effectively defunct regime.

The major impediment to self-determination of the peoples on Taiwan stems from the ludicrous persistence on the part of the KMT that it is the sole government of all of China—including the mainland. The stalemated civil conflict between the Communists on the mainland and the KMT on Taiwan has in reality produced two independent states. The seemingly logical solution would be to formally recognize the ROC as an independent entity. This is impossible, however, since the ROC, as well as the PRC, refuse such a solution.[154] As long as the KMT found international support for their assertion of legal government over mainland China and the island of Taiwan, the native Taiwanese were forced to accept Nationalist rule.

Early United States policy certainly did not help to resolve the situation. Since the United States utilized the constitutive doctrine of recognition, it felt free to withhold de jure recognition from a communist government with revolutionary origins.[155] Accordingly the United States obstinately held that the ROC was the de jure government of mainland China although admittedly only the de facto government of Taiwan and the Pescadores. During that period the United States reluctantly acknowledged that the PRC was the de facto government of mainland China but not the de jure government.[156] Taiwan's confused status has persisted for over three full decades.

Change in Recognition Philosophy

Renunciation of the unwieldy and unrealistic China policy began with the promulgation of the United States-PRC Communique[157] in 1972. In the so called "Shanghai Communique," President Nixon and Premier Chou En-lai reviewed the longstanding dispute over the status of Taiwan. Recognizing that the Taiwan question was a "crucial obstruction"[158] for normalization of relations between the PRC and the United States, President Nixon equivocally "ac-

154. *Id.*

155. *See* notes 39-40 *supra* and accompanying text.

156. V. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 9-10 (1977).

157. UNITED STATES DEPARTMENT OF STATE, U.S. POLICY TOWARD CHINA JULY 15, 1971—JANUARY 15, 1979 8 (Selected Documents No. 9, 1979). The Shanghai Communique states in part: "The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position." *Id.*

158. *Id.*

knowledge[d] that all Chinese on either side of the Taiwan Strait maintain that there is but one China and that Taiwan is a part of China."[159] Nevertheless the Shanghai Communique was a monumental step toward recognizing international reality.

United States acceptance of international reality culminated in President Carter's extension of de jure recognition to the PRC as the sole legal government of China.[160] De jure recognition has finally brought American practice into line with international consensus. In recognizing the reality of the PRC's existence, the United States has, at least temporarily, abandoned the non-legal consideration of competing ideologies as a basis for denial of de jure recognition. The United States is essentially subscribing to the mature and realistic declaratory view.

Both the Shanghai Communique and the formal recognition of the PRC, however, fall crucially short of the desired goal. The principal fallacy is the assumption that all Chinese, including the native Taiwanese, are seeking control over all of China. Only the PRC and the Nationalists on Taiwan maintain that "there is only one China and Taiwan is part of China."[161] The Taiwanese people have not considered themselves Chinese since their move from the mainland to the island of Taiwan more than three centuries ago.[162] The 17,000,000 Taiwanese, who comprise 86% of the Taiwan population,[163] would have welcomed the opportunity to assert their independence and right to self-determination.[164] The ill-conceived Shanghai Communique and the joint communique on recognition of the PRC explicitly acknowledge either the stagnant KMT or the distant communists' right to govern the wholly separate island population.

Even given this deficiency, Nationalist stalwarts in both Taiwan and the United States inevitably and vehemently object to any change in recognition philosophy.[165] Objection to de jure recogni-

159. *Id.* at 7.

160. *Id.* at 48. In announcing the establishment of diplomatic relations with the People's Republic of China, President Carter explained: "We do not undertake this important step for transient tactical or expedient reasons. In recognizing the People's Republic of China, we are recognizing simple reality." *Id.* at 46.

161. *Id.* at 8.

162. TAIWAN HEARINGS, *supra* note 145, at 437-38 (statement of Ralph N. Clough).

163. TAIWAN HEARINGS, *supra* note 145, at 557 (statement of Wilbur Chen).

164. *Id.* at 549, 573-74.

165. Another problem raised by President Carter's de jure recognition of the PRC centered on the power of the President to cancel the Mutual Defense Treaty of 1954 with the ROC. The termination had been a prerequisite to recognition of the PRC. Senator Barry Goldwater brought a class action suit against President Carter

tion of the PRC stems from the mistaken assumption that democratic rule on Taiwan is in jeopardy. De jure recognition in fact renders democratic rule on Taiwan a possibility. It is the Taiwanese people and not the repressive KMT who wish to establish an independent and democratic Taiwan.[166] With the withdrawal of the international legal support of de jure recognition, the prolonged state of martial law has been stripped of its thin facade of legitimacy. United States recognition of the PRC and attendant withdrawal[167] of recognition from the ROC has, perhaps inadvertently, complied with the

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challenging the validity of treaty termination without consent of the Senate. After determining that Congress as a whole did not evidence an intent to formally act on the question, the United States District Court for the District of Columbia dismissed the action for lack of standing. Goldwater v. Carter, 47 U.S.L.W. 2816 (1979). Reversing the district court, the Court of Appeals for the District of Columbia held that the deprivation of an opportunity to cast a vote on treaty termination was sufficient to constitute standing. Goldwater v. Carter, 48 U.S.L.W. 2388 (1979). Without defining the parameters of presidential power to unilaterally terminate treaties, the court of appeals went on to hold that the power to terminate the specific treaty in issue rested on the President's full and undisputed authority to recognize the People's Republic of China. *Id.* at 2389. After granting certiorari but without briefing or oral argument, the United States Supreme Court vacated the judgment of the court of appeals, and remanded to the district court with directions to dismiss the complaint. Goldwater v. Carter, 48 U.S.L.W. 3402 (1979). However, the only judicial consensus was on the decision to dismiss. The major substantive dispute centered on the characterization of the issue as a political question. Chief Justice Burger, and Justices Rehnquist, Stewart, and Stevens concluded that the presidential action involved affairs totally external to the United States and therefore comprised a political question. *Id.* at 3403. Justice Powell rejected the applicability of the political question doctrine, defining the issue as one concerning the constitutional division of power between the executive and legislative branches. *Id.* at 3402. Justice Brennan also rejected the political question characterization and based dismissal on a determination of the President's sole power to terminate the treaty as dependent on the Executive's power to recognize the PRC and to derecognize the ROC. *Id.* at 3404. For a discussion of the legal issues the Court chose to shun, see TAIWAN HEARINGS, *supra* note 145, at 189-233 (Memorandum for the Secretary of State on the President's Power to Give Notice of Termination of US-ROC Mutual Defense Treaty). *Compare* Kennedy, *Normal Relations with China: Good Law, Good Policy*, 65 A.B.A.J. 194 (1979), *with* Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A.J. 198 (1979).

166. TAIWAN HEARINGS, *supra* note 145, at 549 (statement of Wilbur Chen).

167. The China question deals extensively not only with the recognition of the PRC but with the withdrawal of recognition from the ROC. This is a novel problem in international law. Ordinarily the non-recognition of a state is the closest situation to the withdrawal of recognition that has ever occurred in international relations. Non-recognition by the United States has always had the connotations that the regime was an unfriendly government or that the status of the state was questionable. This is not the problem presented in the current issue. Taiwan is a friendly state. Therefore, some scholars conclude that de jure recognition cannot be withdrawn under the circumstances. *See* LAUTERPACHT, *supra* note 1, at 349-57; RESTATEMENT, *supra* note 1, at § 96. Even those that proclaim recognition as a purely political matter agree that once

mature and realistic declaratory view of recognition by recognizing the reality of the PRC's statehood under international law.[168] In undermining the legitimacy of the Kuomintang, recognition of the PRC has additionally, albeit inadvertently, resulted in the promotion of the fundamental international legal right to self-determination for the people on Taiwan.

CONCLUSION

In persistent adherence to the constitutive theory of recognition, the United States had been in contravention of fundamental principles of international law. During the protracted period of nonrecognition of the PRC, the United States provided a sense of legitimacy to the repressive Kuomintang. Formal recognition of the Nationalist government on Taiwan only succeeded in butressing that government's claim of legal title to mainland China. In maintenance of that claim, the Kuomintang insisted on suppressing the self-determination of the Taiwanese through denial of their right to general elections. Additionally United States refusal to recognize the PRC centered solely on the existence of a government with an opposing ideology regardless of popular support. American recognition policy thereby impeded the overriding right to self-determination for both the communist mainlanders and the Taiwanese.

With the change in recognition policy, the United States has in effect subscribed to the mature and realistic declaratory view. More importantly, however, the withdrawal of recognition has left the Kuomintang virtually without any major international support for their insistence on legal title to the mainland. In such a position, it is doubtful that the Nationalists can maintain the suspension of the ROC constitution for any prolonged period. The Taiwanese are now in a better position than ever before to assert their right to self-determination through elections. Perhaps those elections will ulti-

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recognition is extended, the rule of *pacta sunt servanda* prohibits its withdrawal. LAUTERPACHT, *supra* note 1, at 349. The rationale for this policy is the interest in maintaining stability in international relations. *Id.* Therefore it is generally proposed that recognition can only be withdrawn if the state recognized no longer fulfills the minimum requirements for recognition. Withdrawal of governmental recognition is also usually implied from the recognition of a revolutionary regime. *Id.* at 352. But since the status of the ROC has undergone a material change in that the Kuomintang government is no longer in control of the mainland, the prohibition against withdrawal of recognition is not applicable. International law allows a state to deal with the de jure government and the de facto government of a state if they are separate entities. *Id.* at 11.

168. *See* notes 27-38 *supra* and accompanying text.

mately result in independence—an independence from not only the PRC but from their own oppressive government as well.

Pamela P. Price