ICJ Opinion on Kosovo Independence and Its Implications for Taiwan's Self-Determination*

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Abstract

On 22 July 2010, in response to a request by the United Nations General Assembly, the International Court of Justice (ICJ) issued an opinion on the Kosovo case, stating that Kosovo's unilateral declaration of independence is not in violation of international law. In contrast to the extravagant political and legal controversies concerning Kosovo's independence before the ICJ opinion was issued, both supporters and opponents of Kosovo's independence have revealed remarkable self-restraint in their reaction to the opinion. This paper will argue that the ICJ's actual application of an innovative principle of international law concerning national self-determination, the "democratic remedial secession" principle, effectively resolves the political and legal problems surrounding national self-determination that have wrecked havoc to international political stability for centuries. If applied to China-Taiwan relations, the ICJ opinion would restrain both Taiwan independence and China-unification claims, while endorsing mutually accommodating alternatives, such as a quasi-European Union arrangement.

Keywords

Taiwan independence, China unification, International Court of Justice, democratic remedial secession

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I. Introduction

Set out in American President Woodrow Wilson's "Fourteen Points" in 1918, and promulgated by the three pillars of UN human rights institutions in 1966,[1] the right of national self-determination was heralded as a new basic human right in the twentieth century. It encouraged the establishment of more than 100 new states from 1945 to 1980, and continued to do so after the breakdown of the communist world in 1989, adding another 30-40 states to the UN roster. However, it also encouraged independence movements within or across the territory of both new and old states, causing bloody and enduring civil wars and international wars.[2] Among the hot issues of national self-determination is the relation between China and Taiwan across the Taiwan Strait.

In 1949, the Republic of China (ROC) government led by the Kuomintang (KMT, the Nationalist Party) took refuge in Taiwan after it was driven out of mainland China by the Chinese Communist Party (CCP), which immediately established the People's Republic of China (PRC). The political and legal relationships between Taiwan and China have been debated not only between the PRC and the ROC but also within the two countries as well as among other concerned nations. Is there one China? If so, then why have the ROC and PRC continued to co-exist for the past 64 years? If not, then why do both the ROC and PRC insist that there is only one China? What about Taiwan? Is it a state or a province? Does it belong to the ROC or PRC, or is it a new state different from both?

In the 1970s during the democratization process, the rise of the Taiwan independence movement on the island rapidly gained momentum. Unfortunately, it also brought China and Taiwan to the brink of war in 1996, 2000 and 2004, when the incumbent ruling parties in Taiwan planned to declare Taiwan independent. Trapped by the contradictory principles of national sovereignty and national self-determination, the international legal community has not been able to reach a minimum consensus on a solution to this contradiction. Without a minimum legal consensus, war became the dominant solution to national self-determination. The Chinese

1 The three UN human rights institutions are the UN Declaration of Human Rights, International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

2 For the active independence movements, see "Lists of Active Separatist Movement," http://en.wikipedia.org/wiki/List_of_active_autonomist_and_secessionist_movements, accessed 10/03/13.

government has tenuously retained the principle of national sovereignty, while the Taiwanese government has promoted the principle of national self-determination. The threat of war loomed large across the Taiwan Strait. Fortunately, envisaging the possibility of war in 1996, 2000 and 2004, both sides have earnestly explored alternatives to war. But which alternatives may resolve the contradiction between national sovereignty and national self-determination? This paper argues that the ICJ opinion on Kosovo's independence may provide guidelines for such an alternative.

The next section discusses the historical, political and legal factors that have led to the current China-Taiwan predicament. The third section will elaborate the historical, political and legal background of the ICJ opinion. The fourth section examines the applicability of the ICJ opinion to China-Taiwan relations. The last section concludes the paper with the suggestion of a quasi-European Union framework to resolve the conflict between China's unification claim and Taiwan's self-determination.

II. The Legal and Political Predicament of Taiwan Independence

According to the common definition of a state, the ROC is probably more qualified to be a state than one third of the UN's member states. A state consists of a territory, people, government and sovereignty. The territory of the ROC includes Taiwan, Penghu, Jinmen, Mazu, and nearby small islands, with a total geographic size of 36,000 square kilometers, and is ranked 137th in the world in terms of land area. The ROC has a population of 23 million, and is ranked 51st in the world in terms of population.[3] It has had a functioning government since 1949 and a consolidated democracy since 1987. The government exercises exclusive sovereignty over its people on the said territory. But so far, only 23 members of the UN recognize the ROC to be a state, and the ROC is not a member state of the UN.

In 1912 the ROC was established in China and recognized immediately by the majority of the world's states. Unfortunately, the ROC could be classified as a "failed state"[4] from 1912 to 1949 due to a civil war and a Japanese invasion. The Chinese Communist Party unified the whole country in 1949, except for Taiwan and its nearby islands, and established the People's Republic

3 http://en.wikipedia.org/wiki/Taiwan, accessed 10/11/13.

4 See Patrick (2007) for the definition of a "failed state."

of China. The Nationalist Party brought the ROC government and about two million Chinese with it to Taiwan. Both sides have since claimed sovereignty over the other's people and territory, but neither side has effectively exercised the said sovereignty. There was no significant communication between the ROC and the PRC from 1949 to 1987. But from 1987 onward, intensive cooperation in trade, travel, criminal justice, cultural exchange, and humanitarian rescue work has intensified across the Taiwan Strait.[5]

In the midst of intensified cooperation in "low-politics" issues, the Taiwan independence movement also reached its zenith and pushed China and Taiwan to the brink of war. The Taiwan independence movement could be traced back to the 2/28 Massacre of the Taiwanese elite in 1947. The Taiwanese elite had a high expectation of local autonomy when the KMT government sent representatives to take over Taiwan from Japan in 1945. However, the KMT-appointed Governor, Chen Yi and his mainlander factional members had no intention of sharing power with the local elite. Corruption and abuse of power soon plagued the authoritarian bureaucracy. Adding insult to injury was the civil war between the KMT and the CCP in mainland China, which vastly drained Taiwan's human and financial resources in supporting the civil war. Mass demonstrations organized by the local elite broke out in the major cities across the island on February 29, 1947. Governor Chen secretly requested Generalissimo Jiang Jieshi to send in troops and started a massacre of the local elite, killing about 2,000 persons. The 2/28 Massacre destroyed the confidence of the Taiwanese elite in the KMT government. They realized that they would never become equal citizens under KMT rule. The imposition of martial law from 1949 to 1987 by the renegade KMT government on the island further embittered ethnic relations between the immigrant mainlanders and the Taiwanese.[6]

The ruthless martial law regime plus its intensive effort at assimilation was able to maintain, for a while, a façade of national identity in support of unification between Taiwan and China. But Cold War politics took a dramatic turn in 1972 that awoke the Taiwanese elite to the political reality. In 1972, the ROC was expelled from the UN and American President Richard Nixon announced his plan to visit China. Fearful of an impending Chinese invasion of the island, the Taiwanese elite began to call for the lifting of martial law

5 For the classic works on China-Taiwan relations, see Copper (2009), Hughes (1997) and Tucker (2009).

6 For the political history of Taiwan, see Roy (2003).

and democratization of the government. At the same time arguments for Taiwan independence were adopted by the opposition movement.[7] In 1987 the KMT lifted martial law; the next year, a native Taiwanese Vice President Lee Denghui succeeded the deceased Jiang Jingguo as President of the ROC. During his term of office from 1988 to 2000, President Lee gradually transformed the government's mainland policy from being pro-unification toward being in favor of *de facto* Taiwan independence. This resulted in a missile crisis across the Strait in 1996. In 2000, the DPP won the presidential election, which energized the Taiwan independence movement but pushed the two sides of the Taiwan Strait even closer to war in 2004 and 2008. In response, the Chinese government passed the Anti-secession Law in 2005, which mandated the adoption of all necessary measures to prevent Taiwan's independence. (Lin, 2008)

The Taiwan independence movement raises a major legal claim dubbed the "indeterminacy of Taiwan's status" (Taiwan *diweiweidinglun*) to counter the unification claims of both the CCP and the KMT. The major proponent is an expert on international law, Dr. Chen Lung-chu. (Chen and Lasswell, 1967) He argues that the "indeterminacy of Taiwan's status" is a consequence of at least 11 political and legal disputes when Taiwan was taken over by the KMT government in 1949 and afterwards. (1) The Cairo Declaration in 1943 that allegedly returned Taiwan to China was only a declaration, not a formal treaty between the winner and the loser of the war; and it did not specify Taiwan's legal status as to who should own it. (2) The Potsdam Declaration in 1945 that reiterated the Cairo Declaration concerning Taiwan had similar legal flaws; not to mention that Jiang Jieshi was not even invited to the meeting. (3) On October 25, 1945 when the Japanese colonial government transferred the governing authority over Taiwan to the representatives of the KMT government, the KMT government received it only as a transitional governing authority on behalf of the Allies, not as representing the Chinese government. The status of Taiwan was yet decided. (4) The CCP government has never exercised any sovereignty over Taiwan. (5) In 1950, US President Truman declared that Taiwan's future status should be determined by treaties with Japan or by the UN. (6) In the San Francisco Peace Treaty of 1951, Japan only gave up sovereignty over Taiwan and did not say who would take it over. No representative of the KMT government was even there to sign the Treaty. (7)

7 See Rigger (2001) for the development of Taiwan's opposition movement.

Similarly, the Peace Treaty between Japan and China (Taiwan) reiterated the San Francisco Treaty but did not specify who would own Taiwan. (8) In 1954, when the US Senate passed the Joint Defense Treaty between the US and China (Taiwan), a clarification was made in the Treaty that this approval was not meant to change the "indeterminate status of Taiwan and Penghu." (9) The principle of national self-determination enlisted in the UN Charter (Articles 1 and 55) should be applicable to Taiwan since Taiwan was a former colony of Japan. (10) National sovereignty is based on the people's consent; the martial law regime of Jiang Jieshi was not based on the consent of the Taiwanese people. (11) Finally, the UN Charter allows Taiwan to become a member state if it applies as a new state (e.g., as the Republic of Taiwan).

Most of these "indeterminate status of Taiwan" arguments have been refuted by legal scholars and political scientists in both China and Taiwan. They claim that both the Cairo Declaration and the Potsdam Declaration had legal power as formal treaties did; and the intention of the signatories to return Taiwan to the Chinese government was indisputable. With regard to the other treaties and the official US statements, the question was about who (the PRC or ROC) represented China rather than a question as to whether Taiwan should belong to China. The fact that the ROC government has continuously exercised exclusive sovereignty over the people and territory of Taiwan substantiates the ROC's legitimacy on Taiwan. Even if there was once a question concerning government by consent, the ROC government has been democratic since 1987. Finally, a declaration of Taiwan independence would immediately cause a war in the Taiwan Strait. Neither the US nor the UN could do anything to prevent the overwhelming, determined Chinese military from taking over the island in just a few weeks.

The international community is divided on the status of the ROC. In 1945, the ROC was welcomed by the United Nations as a member state. Not only was the ROC a member state of the UN, but also a permanent member of the UN Security Council. In 1972, the UN General Assembly passed a resolution replacing the ROC's UN representatives with ones from the PRC. Most of the nations in the world immediately withdrew their recognition of the ROC and established diplomatic ties with the PRC. Interesting enough, PRC has not requested a change of country name from ROC to PRC in the UN Charter, only stating that PRC thus succeeded ROC. The implicit linkage between ROC and PRC is maintained probably for the sake of future unification.

As the Chinese economy expanded majestically after 1979, even more countries jumped on the bandwagon to recognize PRC. Currently, ROC holds diplomatic relations only with 23 states among the 190 states in the world. The number could have been fewer if President Ma Ying-jeou had not reached an understanding with the PRC government about a "diplomatic truce" in 2008. Apart from those (about 40) states which explicitly recognize "One China" (the PRC includes Taiwan as a province of China) and those states which still hold diplomatic relations with the ROC, there are about 40 states which recognize the PRC without mentioning Taiwan in their diplomatic treaties, and about 15 states which only "take note of" or "acknowledge" that the PRC is the only legitimate government of China. (Wu, 2009: 149-157; Lin, 2010: 105-131) These diplomatic ambiguities, however, should not be regarded as being in favor of an independent Taiwan, but only a reflection of the enduring fact that "One China" is divided by two governments. The international community seems to expect that the future content of "One China" is to be negotiated by these two governments in a peaceful manner. The next section will argue that the ICJ opinion on Kosovo's independence may strengthen the peaceful negotiation approach and restrain the Taiwan independence movement.

III. The ICJ Opinion on Kosovo's Independence

On July 22, 2010 the International Court of Justice (ICJ) issued an opinion on the Kosovo case, stating that Kosovo's unilateral declaration of independence is not in violation of international law. The ICJ opinion is a significant legal precedent in international law concerning national self-determination not only because the ICJ, the highest international court, was involved for the first time in a non-former-colony independence dispute but also because the ICJ delivered the opinion in the midst of an emerging new legal principle of national self-determination, i.e., the remedial secession principle. (Buchanan, 2004; Jaber, 2010; Sterio, 2010; Roth, 2011; Muharremi, 2008; Murphy, 2006: 37) On the surface, the ICJ opinion seems to support the century-long liberal principle of self-determination and will encourage national separatist movements around the world. However, a closer reading of the content and the politics of the ICJ opinion reveals the contrary and lends support to the emerging anti-separatist principle of remedial secession. Hence, after initial excitement, not many separatist movements, including the Taiwan independence movement, have persistently taken advantage of the ICJ opinion

in their public relations campaigns.[8]

The unique historical, legal and political process of Kosovan independence justifies the ICJ's tacit application of the remedial secession principle. The collapse of the Soviet empire in 1989 sent separatist waves to the former Federal Republic of Yugoslavia. In June 1991, Croatia and Slovenia declared independence, followed by Macedonia three months later. In April 1992, the Federation of Bosnia and Herzegovina was recognized by most European countries. Even Montenegro parted way with their Serbian friends in 2006 and became an independent state. Located in southern Serbia, Albanian-dominant Kosovo also sought independence after the Serbian Milosevic regime brutally suppressed a peaceful separatist movement as it had in other parts of the former Yugoslavia. NATO intervened for humanitarian reasons, while the UN Security Council passed Resolution 1244 and established an interim government, the United Nations Interim Administration Mission in Kosovo (UNMIK), in order to protect Kosovo's people. UNMIK would also facilitate "a political process designed to determine Kosovo's future status."[9] UNMIK constructed a Constitutional Framework for Provisional Self-Government on May 15, 2001, which defined the relationships between UNMIK and the Provisional Institutions of Self-Government of Kosovo. UNMIK sponsored several rounds of negotiations between delegations of Serbia and Kosovo, but all failed. After the final round of negotiations failed, it was the UN Special Envoy who recommended Kosovo's independence and this was endorsed by the UN Secretary-General. According to the recommendation, democratic elections were held in Kosovo in November 2007 and the Assembly of Kosovo was inaugurated in January 2008.

The Assembly of Kosovo unilaterally declared independence on February 17, 2008, and the new State was immediately recognized by 82 States, including the United States, the United Kingdom, Germany, France, Canada, and most EU countries; but not Serbia, Russia or China.[10] Eight months later,

8 Only a few separatist movements, those in Spain (Basque, Catalonia), Russia (Tatar), Szekely (Hungary), Texas (US), and Scotland (UK), have welcomed the ICJ Opinion. See http://en.wikipedia.org/wiki/Reactions_to_the_International_Court_of_Justice_advisory_opinion_on_Kosovo's_declaration_of_independence#cite_note-aljaz2-7. Accessed 09/11/11.

9 United National Security Council. S/RES/1244 (1999), 10 June 1999, p.4. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement. Accessed 09/07/11.

10 For an updated list of states recognizing the state of Kosovo, see http://www.kosovothanksyou.com/?order=a#recognitions. Accessed 09/12/11.

in an attempt to stall more nations from recognizing Kosovo's independence, Serbia initiated a draft resolution, which was passed by the General Assembly, a "request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of the independence of Kosovo is in accordance with international law."[11] The resolution was regarded by most UN member states as a diplomatic victory on the Serbian side. In July 2010, the ICJ delivered the opinion that "the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law."[12] Both the legal and political aspects of the ICJ opinion are much more intriguing than the opinion's summary conclusion conveys.

On the legal side, the ICJ adopted "judicial passivism" to narrow down the controversy. The ICJ opinion ostensibly seems to favor separatist movements but, in reality, it incorporates "judicial activism" and begins to move toward the anti-separatist remedial secession principle concerning national self-determination. To simplify the arguments of the 44-page opinion, I set out its major arguments as follows:

1. At the request of the UN General Assembly, the ICJ has no compelling reasons not to give an advisory opinion.
2. The ICJ will provide an opinion only on the question as originally formulated by the General Assembly, and will not address other questions like the legal consequences of that declaration, whether or not Kosovo has achieved statehood, or the legal effects of the recognition of Kosovo by other states.[13]
3. The ICJ will provide an advisory opinion based on general international law, Security Council Resolution 1244, and the Constitutional Framework

11 United Nations General Assembly. "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law." 63rd session, 22nd plenary meeting, 8 October 2008, UN Doc A/63/PV.22. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/541/01/PDF/N0854101.pdf?OpenElement. Accessed 09/07/11.

12 International Court of Justice. "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo." General List No. 141, 22 July 2010, p. 43. http://www.icj-cij.org/docket/files/141/15987.pdf. Accessed 09/07/11.

13 ICJ Opinion, p.19.

for Provisional Self-Government established by Resolution 1244.

4. The authors of the declaration (the Assembly of Kosovo) are representatives of the Kosovo people.
5. The Kosovo unilateral declaration of independence did not violate any of these laws.

While the first argument is not very controversial, the second one sets up a comfortable firewall for the ICJ from political accusations by contesting parties. The ICJ claims that "The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second." In plain language, Kosovo's declaration may be legal, but this opinion has nothing to do with whether Kosovo is a state or whether it has a right to be a state. It is not the ICJ's business to answer the latter questions in this controversy. Neither the supporting states nor the states opposed to GA Resolution 1244 would get the political answer they had expected or feared.

The third argument is the hardcore of the ICJ opinion. The ICJ makes its case in three steps. First, it meticulously separates the question of declaring independence from the question of factual independence. International law may oppose the fact of independence, but never opposes the declaration of independence. Secondly, the principle of territorial integrity applies to relations between states, not between the government and its own people, even less to the "declaration" of independence.

Thirdly, the ICJ sneaks the remedial secession principle into its opinion when opponents of Kosovo independence cite past Security Council resolutions condemning some declarations of independence, such as those of southern Rhodesia, northern Cyprus, and the Republic of Srpska. The ICJ explains that these resolutions do not condemn the declarations *per se*, but the illegal behavior associated with independence movements such as an unlawful use of violence and egregious violations of other international laws

and norms. Since the Assembly of Kosovo has not engaged in any of these abhorrent acts, these Security Council resolutions do not apply to the Kosovo case. Thus, the ICJ implicitly accepts the assumption of remedial secession according to which secession may be justified only if the secession does not involve unlawful use of violence or blatant violations of international laws and norms.

Furthermore, the ICJ sneaks remedial secession into its opinion by broadening the legal frame of reference which the GA Resolution originally formulated. When they formulated the question "whether the unilateral declaration of independence of Kosovo is in accordance with *international law*," Serbia and other supporters of the GA Resolution probably thought that hitherto international law would favor national sovereignty and territorial integrity over national self-determination. The ICJ quickly dismisses this presumption by the legal techniques mentioned above. In addition, the ICJ takes the liberty to expand the legal frame of reference by incorporating Security Council Resolution 1244 and the Constitutional Framework for Provisional Self-Government established by Resolution 1244. In the last decade, Security Council Resolutions dealing with the breakup of the former Yugoslavia and elsewhere have tilted toward the remedial secession principle in order to stop ethnic cleansing.

However, the ICJ has no intention of stepping into a political landmine after it meticulously sets up a comfortable firewall against political accusations. The remedial secession principle is a huge political landmine that it has to defuse in order to protect its prestige. The remedial secession principle received growing support in the international legal community in the late 1980s in order to keep a balance between the principles of national sovereignty and national self-determination.[14] After 1989, it was implicitly applied to the cases of Yugoslavia, the Baltic States and Ethiopia without explicitly referring to the right of national self-determination. (Dilk, 2010: 302-307)

But the ICJ adamantly rejected the application of the national self-determination principle to cases other than those of former colonies, including Kosovo. (Vashakmadze and Lippold, 2010: 621, 646; Röben, 2010: 1071-1072)

14 Some scholars regard the remedial secession principle as too restrictive of national self-determination and propose a more liberal interpretation to encourage self-determination. (Vogel, 2006; Tamir, 1993) But some scholars prefer even more stringent conditions than the remedial principle for self-determination. (Miller, 1995: 116-117)

Therefore, the ICJ opinion states clearly that the right of remedial secession has no relevance here. It deals only with the action of declaration, not the right of independence.[15] Again, it is not the ICJ's business to deal with the latter issue in this controversy.

The ICJ's fourth argument about the representativeness of the authors of the declaration raises some concerns. But ICJ quickly and effectively rebukes the challenges by a simple logical deduction. The authors (Assembly of Kosovo) are democratically elected by the Kosovo people. They are legally sponsored by UNMIK, which is legally appointed by the UN Security Council and Secretary-General. Therefore, there is nothing illegal in the delegation of power to the Assembly of Kosovo. The final argument is a logical conclusion derived from the first to the fourth arguments.

However, international legal scholars have not let the ICJ off the hook easily and have interpreted the ICJ opinion as a "missed opportunity" or a "misplaced boldness" in creating an important legal precedent in support of remedial secession. (Waters, 2013) Cismas argues that Kosovo independence is justified by remedial secession because, first, the Serbian government systemically slaughtered and abused Kosovo Albanians. Secondly, most Kosovo people were Kosovo Albanians. And finally, independence was declared only after all peaceful negotiations failed. (Cismas, 2010)

On the political side, the ICJ opinion ran contrary to the political goals of both the supporting and opposing states of the 2008 General Assembly Resolution. In addition to Serbia, the 77 supporting states included major countries plagued by separatist movements, such as China, Greece, India, Mexico, Nigeria, Russia, the Philippines, Spain, and Sri Lanka. (Borgen, 2010: 1002-1003) In fact, five months before the General Assembly Resolution was adopted, the Foreign Ministers of China, India, and Russia [had] issued a joint statement on Kosovo and categorically opposed its unilateral declaration of independence. China reiterated its respect for the sovereignty and territorial integrity of Serbia in various diplomatic venues. Most of the supporting states had expected the General Assembly would override the pro-Kosovo Security Council and Western countries, nullify Kosovo's declaration of independence, and delegitimize domestic separatist movements. The long tradition of the General Assembly in respecting national sovereignty and territorial integrity

15 ICJ Opinion, p31.

provided a hospitable atmosphere to pass the Resolution in favor of Serbia; and it did with 77 votes in favor and only 6 votes against. When he addressed the General Assembly on behalf of the Resolution, a Serbian diplomat to the UN warned those countries haunted by separatist movements: "The Republic of Serbia believes that sending this question to the Court would prevent the Kosovo crisis from serving as a deeply problematic precedent in any part of the globe where secessionist ambitions are harbored."[16]

The ICJ's opinion caught Serbia and these supporting states by surprise. But they did not directly challenge the ICJ; after all, it was they who had asked the ICJ to advise in the first place. The new Serbian President shrewdly commented that although the opinion did not say the unilateral declaration was in violation of international law, nor did it say Kosovo thus became an independent state. The political question of independence would go back to the General Assembly.[17] Greece, India, Indonesia, Russia, Spain and other countries that have refused to recognize Kosovo have maintained that they respect the ICJ opinion, but that, since it was not binding, they continue to refuse to recognize Kosovo.[18]

Those states opposing the General Assembly Resolution included not only the 6 countries which voted against (Albania, the Marshall Islands, Micronesia, Nauru, Palau, and the US) but also many of the 74 states which abstained. For the United States, Great Britain, France, and other EU member states which had immediately recognized Kosovo as an independent state in early 2008, the General Assembly Resolution and an ICJ opinion would have been redundant at their best and a prolonged devastation to Kosovo people at their worst. These opposing states feared that the ICJ would side with the General Assembly. Interestingly enough, an American diplomat to the UN argued against the Resolution by using similar arguments to those proposed by the supporting states: "We do not think it appropriate or fair to the Court to ask it to opine on what is essentially a matter that is reserved to the judgment of Member States. We ask members to consider the potential consequences if other Members or separatist movements within their countries were to seize upon language, in any opinion the Court might render, to bolster their own

16 UN General Assembly, A/63/PV.22, p.1.

17 http://english.aljazeera.net/news/europe/2010/07/201072355537730152.html. Accessed 09/12/11.

18 http://en.wikipedia.org/wiki/Reactions_to_the_International_Court_of_Justice_advisory_opinion_on_Kosovo's_declaration_of_independence#cite_note-aljaz2-7. Accessed 09/12/11.

claims for or against independence."[19]

These opposing states and abstaining states were probably pleasantly surprised by the ICJ's opinion. But they were diplomatically wise enough not to capitalize on it. After all, the long-term peaceful resolution of the Kosovo controversy would require close cooperation among the major powers. Even before the opinion was delivered, the US, the EU and Kosovo itself had claimed that Kosovo was a special case and not a precedent for any other similar cases. (Cismas, 2010: 584-585) After the opinion was delivered, the US Assistant Secretary of the State Department, Philip H. Gordon, underscored that the court's opinion was closely tailored to the unique circumstances of Kosovo: "This was about Kosovo. It was not about other regions or states. It doesn't set any precedent for other regions or states."[20] The Kosovan Foreign Minister reiterated the government's position that "Kosovo is, and has always been, a special case." The Canadian Foreign Affairs Minister said that although its government was very happy with the decision, it could not serve as a precedent for Quebec. The Italian Foreign Minister supported the opinion but warned that "Kosovo must remain a unique case and that it cannot cause a domino effect, since such an event would lead to a crisis of international relations." The British Foreign Secretary concurred: "Kosovo is a unique case and does not set a precedent."[21]

Indeed, the Kosovo controversy reveals several characteristics concerning the international politics of national self-determination. First, national independence is possible only when there is at least a lukewarm consensus among the major powers. The EU and the US resolutely supported Kosovo's independence, while Russia and China supported Serbia only half-heartedly. Secondly, the political role of the ICJ is quite limited. It cannot initiate an opinion on an international controversy. Its legal opinions are restricted by the parameters set by the requesting states, unless the question is ambiguous. The opinion is only "advisory," not an adjudication or prescription for further action. It is up to the General Assembly or the disputing parties to

19 UN General Assembly, A/63/PV.22, p.5.

20 US Department of State, "International Court of Justice Advisory Opinion on Kosovo's Declaration of Independence," http://www.state.gov/p/eur/rls/rm/2010/145104.htm. Accessed 09/12/11.

21 For international reactions to the ICJ Opinion, see http://en.wikipedia.org/wiki/Reactions_to_the_International_Court_of_Justice_advisory_opinion_on_Kosovo's_declaration_of_independence. Accessed 09/12/11.

decide whether they want to pursue further political action according to the opinion.[22] The ICJ tries to be as politically ambiguous as possible in order to appease both disputing parties. And its decision is not necessarily applicable to other similar cases. After the ICJ opinion, "the international community has raised the threshold of necessary injustices to claim independence to considerably higher levels." (Wolff and Rodt, 2013: 807)

Thirdly, the legal principle of remedial secession cannot function without the consensus of the major powers. The consensus of the major powers consists of two parts. (1) A consensus on the recognition of territorial boundaries of states as they existed or were defined after World War II. Historical, racial, cultural, or religious claims to a territory larger or smaller than the existing state boundary are in general not recognized by the major powers. (2) A consensus which is legally institutionalized in the Security Council of the United Nations. The admission of new states and the mediation of nationalist conflicts require the unanimous support of the permanent members of the Security Council, which are China, France, Russia, United Kingdom, and United States.

IV. The ICJ Opinion and PRC-ROC Relations

Despite its disclaimer, the ICJ opinion on Kosovo independence sets stringent legal and political parameters for democratic remedial secession: a history of democratic governance by an independence movement, a proof of ethnic cleansing by the home state, the home state's rejection of negotiation on political autonomy, and the UN Security Council's support for independence. Even though the ICJ opinion has no direct bearing on any other independence controversy, it reflects a growing consensus in the international legal community concerning national self-determination. Therefore, in other similar cases, both a home state and an independence movement will have to re-examine their current policies in light of the opinion. Briefly speaking, a home state will have to restrain its use of military forces cracking down on an independence movement and be more flexible in granting political autonomy to the independence movement. Similarly, an independence movement will have to restrain its use of military forces as well, establish a democratic government, and engage in negotiations with its home state on various

22 "The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps." ICJ Opinion, p.17.

arrangements for political autonomy before it proclaims independence. (Borgen, 2010: 1004-1005; Seshagiri, 2010) Finally, there should be a consensus among UN Security Council members on how to resolve the controversy.

What are the implications of these legal and political principles for PRC-ROC relations? On the Chinese side, reaction to the opinion was relatively mild. Its Foreign Ministry spokesman commented: "The Chinese side always maintains that respect for sovereignty and territorial integrity of states is one of the fundamental principles of contemporary international law and serves as the cornerstone of the international legal order. China respects the sovereignty and territorial integrity of Serbia. Regarding the issue of Kosovo, we always stand for seeking a solution acceptable to both sides through dialogue among the parties involved within the framework of the relevant UN Security Council resolution."[23] Do these words smell like the remedial secession principle? Yes and no. They should be interpreted in the light of Chinese experiences in dealing with border disputes since 1949.

The answer could be 'yes', because the Chinese government persistently favors political negotiations over military solutions. Part of the above statement by the Chinese Foreign Ministry, "Regarding the issue of Kosovo, we always stand for seeking a solution acceptable to both sides through dialogue among the parties involved within the framework of the relevant UN Security Council resolution," reflects this tradition and is consistent with the remedial secession principle. In its border disputes with India (1962), the Soviet Union (1969), Vietnam (1979), and its Asian neighbors in Southeast Asia, the Chinese government adopted strong military measures only because its neighbors refused to negotiate with China and took provocative measures to unilaterally claim their sovereignty. The Chinese government then took strong military measures to force its neighbors to back down and return to the negotiation table.

The answer could be 'no', because these border disputes are territorial disputes between two sovereign states. By contrast, the Chinese government has persistently insisted that the controversies over Taiwan (Xinjiang, and Tibet) are domestic issues to which the principles of national sovereignty

23 PRC Ministry of Foreign Affairs, "Foreign Ministry Spokesperson Qin Gang's Response to the International Court of Justice's Advisory Opinion on the Kosovo Case," http://www.mfa.gov.cn/eng/xwfw/s2510/t719113.htm. Accessed 09/12/11.

and territorial integrity should apply. Foreign countries or international organizations have no business in these domestic problems. International legal scholars find that the Chinese government has developed four principles in dealing with domestic and border disputes: (1) maintenance of the status quo, (2) honoring the KMT government's equal treaties with its neighbors, (3) rejection of unequal treaties imposed by colonial powers, and (4) no separatist movement within the Chinese territory. Principles (1), (2), (4) are derived from the principle of "*de facto* continuity," which has been a major principle in the international law of territorial disputes. It originated in the Latin phrase, *Utipossidetis*, meaning "you own what you have owned."[24] In practice, a territory belongs to whoever controls the territory after an international war, unless specified by other international treaties. Principle (3) is derived from another important international legal principle, *de jure* discontinuity, which nullifies unequal treaties imposed by invaders or under military threats. (Kaikobad, 2007:30-41). Given these principles that the Chinese government and the international legal community adhere to, the Taiwan independence movement is not likely to find a friendly voice outside Taiwan by resorting to the remedial secession principle.

On the Taiwanese side, although the Taiwan independence claim meets the democracy test and the military test, other principles of remedial secession firmly stand in the way of Taiwan independence. First of all, the PRC and ROC have not engaged in formal political negotiations about their relationship. Secondly, under the remedial secession principle, Taiwan independence supporters have to demonstrate that Taiwanese people are suffering from systemic and horrific human-right violations by the Chinese government. After 1945, the "Chinese" KMT government took over the Japanese colonial government and caused hardship to Taiwanese people due to the ongoing civil war in China. In 1947, the KMT government in China, fearful of Taiwan independence, sent troops to massacre the Taiwanese elite. But it is the same government that has ruled Taiwan since, not the Chinese communist government. Similarly, the "Chinese" government which imposed martial law on the Taiwanese people from 1949 to 1987 was the ROC government, not the PRC government. The PRC army attacked Quemoy (Jinmen) in 1958. But the

24 "Utipossidetis Law & Legal Definition," http://definitions.uslegal.com/u/uti-possidetis/ accessed 09/07/13. Similar to this principle is the principle of critical date, which means that before a critical date, all major events concerning a dispute have been settled. (Zhang 2012: 68)

war lasted for only about six months and did not extend to the main island of Taiwan. Similarly, in 1996, the PRC army fired two missiles across Taiwan's territorial space. But these two missiles were dumb-headed and did not even kill a bird before they fell into the Pacific Ocean. It can be argued that the 1000-plus Chinese missiles aimed at Taiwan are a significant potential threat to the Taiwanese people. But they constitute only a "potential" threat; no real missile has been fired upon any Taiwanese. From 1949 to 1987, the two sides had very little interaction with each other. Since 1987, the two sides have both benefited from growing trade and investment relations. Except for the skirmishes of 1958 and 1996, it is hard to prove that the PRC government has seriously violated the human rights of the Taiwanese people as demanded by the high standards of remedial secession.

Even if Taiwan independence meets the legal principle of remedial secession, it can hardly pass the political principle of the consensus of the major powers. As a founding member of the United Nations, the Republic of China was a permanent member of the UN Security Council from 1950 to 1972 when it was expelled by a General Assembly resolution and replaced by the PRC government. Since 1987, the ROC government has attempted in numerous ways to re-enter the UN and its affiliated international organizations but all have failed.

In all these trials, the PRC government has effectively flexed its political muscles over other member states to stop the ROC's applications at the gate. It has not even bothered to exercise its critical veto in the Security Council. No wonder the former UN Secretary-General, Boutros Boutros-Gali, once told a Taiwanese diplomat that the shortest distance between Taipei and UN is to go through Beijing.[25] Ironically, all the "successful" attempts to enter or re-enter other international organizations that require state membership have repeatedly re-confirmed the PRC's legal claims over Taiwan. In the Olympic Games, the Taiwanese team is called "Chinese Taipei," which is also the name used in APEC and the World Health Organization. At the Asian Development Bank, Taiwan is given the title "Taipei, China." At the WTO, Taiwan is called the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)." Interpol imposes "Taiwan, China" on Taiwan's representative group. All of these titles imply that Taiwan is a part of "China."

25 Interview with former Ambassador Fu Qian. Accessed 11/12/08.

however it is defined.

These are probably the reasons why the Taiwan independence movement has not capitalized on the Kosovo controversy in the public relations rhetoric. First, none of the major powers would support Taiwan independence. The US, the UK, France, Russia, and not to mention China, all oppose Taiwan independence. Second, there is no way Taiwan can propose a resolution at the General Assembly to request an ICJ opinion, or directly raise the issue at the ICJ. Taiwan is not a member state of the United Nations and therefore has no right to propose a UN resolution as Serbia had. The UN Secretariat is not even authorized to process any official letter from the Taiwan government other than an acknowledgement of receipt of the letter. Sometimes, the UN Secretariat has simply returned a letter to the Taiwanese sender. Taiwan had, in the past, asked those UN member states which had diplomatic relations with Taiwan to raise the issue for General Assembly discussion. But all attempts were blocked by China and its allies in preparatory committees. Even if the ICJ was requested to deliver an opinion, the parameters would very likely be set by China and its allies. Although an ICJ opinion might surprise everyone, as it did in the Kosovo case, the benefit of the watered-down conclusion to the cause of Taiwan independence would likely be very limited. Finally, Taiwan has no right to unilaterally raise the issue before the ICJ without the approval of the other disputing party - China. Even if China agrees to submit the case to the ICJ, which is very unlikely due to China's insistence that the Taiwan issue is a domestic issue, and if the ICJ delivers a judgment in favor of Taiwan independence, China could simply ignore it and immediately take things into its own hands, not excluding the use of force, before things get out of control in Taiwan, Xinjiang or Tibet.

In sum, the ICJ opinion on Kosovo independence seems to encourage a home state and an independence movement to explore various forms of political autonomy short of full independence. It will probably also contribute to political negotiations between China and Taiwan, and help stabilize cross-Strait relations.

V. The Prospects for China-Taiwan Relations: One China, Two Republics, Democratic Union

The peaceful solutions to China-Taiwan relations have evolved from "One" and "Two" models to various "Three" models. (Wang, 2004) The

PRC government has insisted on the "One Country, Two Systems" model, which has fallen on the deaf ears of the Taiwanese people. The model of "One Country, Two Systems" was hastily composed by the Chinese government in preparation for the handover of Hong Kong from Great Britain to China in 1997. The Chinese government thought that sustained prosperity in Hong Kong after the handover would persuade the Taiwanese to accept the model. However, since then, economic stagnation, undemocratic elections, violations of human rights, and the deterioration of the judiciary in Hong Kong have only served to drive Taiwan further away from China. The Taiwanese Presidents, Lee Denghui and Chen Shui-bian, had toyed with "Two Countries" ideas but met with stern responses from the PRC government: Chinese missiles fired across the Taiwan Strait in 1996, more than 1,000 missiles aimed at Taiwan, and the passage of an Anti-secession Law in 2005. More and more scholars in both China and Taiwan now converge on a "Three" formula: an abstract "One China" whose content is to be determined jointly by both sides in the distant future. Both sides give some *de facto* recognition of the co-existence of the PRC and ROC, and continue to strengthen economic, cultural, legislative, judicial, and administrative ties across the Taiwan Strait. (Kuo, 2007) In the long run, these bilateral relationships will hopefully fill in the content of the "One China."

The "Three" models are not new ideas; they have co-existed with the "One" and "Two" models for three decades. In 1983, DPP legislator Fei Xiping proposed a "Greater China Confederation" to include both the PRC and ROC. In 1992, the Chinese scholar, Yan Jiaqi, suggested a "Federation of China." In the same year, Taiwan's Presidential Advisor, Tao Baichuan, raised the flag of "Duo Cooperative Federalism." In 1994, scholars from China, Taiwan and Hong Kong met in Hawaii and drafted a "Constitution of Chinese Federal Republics." In the same year, the ROC prime minister, Lien Chan, announced that the ROC would consider a relationship of federalism or confederation with China.

There are also other types of the "Three" models. The German model would suggest that both PRC and ROC, as independent states, sign a "Basic Law" to sketch a future unified state. In 1991 President Lee Denghui publicly endorsed the German model. President Ma Ying-jeou's "One Chinese Constitution" also echoes this German model. In addition to the German model, more and more scholars from both China and Taiwan now propose quasi-European

Union models. It is an EU model in the sense that the PRC and ROC have reached numerous economic, cultural, legislative, judicial, and administrative agreements since 1987, which are similar to the "functional spillovers" of the European Community of Coal and Steel (1951) and the European Economic Community (1957), which finally led to the establishment of the European Union (1992). It is a "quasi-EU" model in the sense that the PRC and ROC negotiators have refrained from discussing the sovereignty issue in all these negotiations. "One China" is not defined; it is not even discussed. The closest definition of "One China" is the "1992 consensus" by which both sides agreed to the "One China" but also agreed to disagree as to who represents "One China." But the DPP even rejects this ambiguous definition outright, saying that it was never shown on a formal document, let alone in a formal treaty. However, as long as the CCP, the KMT and the DPP continue to negotiate on all these "functional" issues, they are in fact conducting "political negotiations" from bottom up. Chinese scholar Lin Gang's proposal for cross-Strait relations also belongs to this genre. He suggests that the two sides should maintain "One China, Two Governances," and "Shared Sovereignty, Separated Governance." The latter phrase is adapted directly from the EU principles of shared sovereignty and subsidiarity. (McCormick, 2005: 111-114; Wallace, 1999; Carrera and Parkin, 2010) Taiwanese scholar Zhang Yazhong's "One China, Three Constitutions" further lays out detailed steps toward "community-style integration" via the EU integration scenario. (Zhang, 2011) His proposal has been well received by the PRC government. Even during the DPP regime, there was a similar proposal of "democratic union" as an alternative to their independence platform. (Chen, 2008)

There are new sings of optimism that these "functional spillovers" are bearing fruit in political negotiations in the near future. On December 9-12, 2012, the KMT, DPP, and CCP sent their top scholar advisors on cross-Strait relations (more than 100 in total) to the Taipei Forum to conduct semi-official political negotiations. Both the number and political importance of these participants were unprecedented. Although the debate was heated, all three sides expressed interest in similar conferences of the same format in the future. (Liangan Tonghe Xuehui, 2012) At least three similar conferences with a similar scale were held in 2013 in China and Hong Kong. In the annual meeting of APEC leaders in November 2013, Taiwan's Minister of Mainland Affairs and China's Director of the Taiwan Affairs Office met. For the first time in cross-Strait history, they called each other by their official

titles. Hitherto, the PRC had forbidden its officials to call Taiwanese officials by their titles, which would have implied that it recognized the ROC. But this APEC precedent, which was probably made jointly in prior private negotiations, removes a critical ritualistic barrier to political negotiation in the future. From now on, ministerial-level officials can visit each other and engage in direct political negotiations. To reward this friendly gesture from China, President Ma also proclaimed that "the cross-Strait relation is not a relation between states" in his speech on October 10, 2013, the independence holiday of the ROC.[26] In a subsequent Taipei-Forum-like conference held in Beijing, Chinese scholars openly mentioned the ROC and acknowledged the fact of "divided governance in China" in their papers, sending Taiwan a new signal that China was ready to accept the ROC government if the ROC agrees to "One China" however vaguely it is defined.[27] In February 2014, Taiwan's Minister of Mainland Affairs visited China in his official capacity and solidified this mutual understanding of "One China, Two Republics."

This is not to say that the PRC and ROC will conduct formal political negotiations in the next year or so. After all, in the 2008 presidential inaugural address, President Ma announced that he would not engage in political negotiations with the PRC during his term, and he re-iterated the statement in 2012. But formal political negotiations are likely after the 2016 presidential election, whether the KMT or the DPP wins the election. The KMT has engaged in political communication with the CCP through the "Forum of the KMT and CCP" since 2005. So a new KMT president would be free to conduct such negotiations if he/she wishes to. Why would a new DPP president to the same? After the DPP lost the 2012 presidential election—during which the KMT criticized the DPP for its independence agenda—a significant part of the DPP began to challenge the party's "independence platform." Instead, they favored a pragmatic approach and political negotiations with the PRC. Therefore, if the DPP modifies its "independence platform" and wins the 2016 presidential election, the new president will take it as its mandate to conduct political negotiations with the PRC.

However, this most optimistic scenario does not imply that anything substantial will come out of political negotiations in the near future. The

26 United Daily News, 2013, "Cross-Strait Relations are not State-to-State Relations," http://udn.com/. Accessed 10/11/13.

27 Central Daily News, 2013, "Taiwan Peace Forum," http://cdnews.com.tw. Accessed 10/19/13.

domestic politics on both sides may not favor a quick political solution to cross-Strait relations. There are substantial political forces in Taiwan that vehemently oppose any political linkage with China, while the CCP leaders are worried that the democratic achievement in Taiwan would spillover to China and challenge the CCP's legitimacy. It seems that the PRC's priority is to get the ROC to the negotiating table first and talk the talk later.(Li, 2007; Zhou, 2009) After all, the major obstacle to a comprehensive solution is the difference in the two political regimes: the PRC remains a one-party totalitarian state while the ROC has become a consolidated democracy. Even a substantial number of liberal Chinese scholars would agree that a unified China should be one based on democracy. That is the reason why this paper proposes "One China, Two Republics, Democratic Union" as a blueprint for political negotiations across the Taiwan Strait.

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臺灣獨立與國際法庭關於科索夫獨立的意見書

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摘要

2010 年 7 月 22 日，國際法庭回覆聯合國大會對科索夫獨立的提問，認為科索夫單方面宣告獨立並沒有違反國際法。相對於該意見書發佈之前在政治和法律上引起的劇烈爭議，支持與反對科索夫獨立的雙方，在意見書發佈之後，都展現了相當的自制。本文主張，由於國際法庭在這個民族自決議題上，採取了一個創新的國際法原則，也就是「民主化補救分離原則」，因此有效解決過去幾世紀以來造成國際政治動亂的民族自決議題。若是應用在臺海兩岸關係上，國際法庭這個意見書可能會同時限制臺灣獨立以及中國統一的意圖，而支持相互包容的折衷方案，例如類似歐盟的制度。

關鍵字

臺灣獨立、中國統一、國際法庭、民主化補救分離