

2002

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Recommended Citation

Robert Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 Emory International Law Review 107 (2002).

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THE CHANGING FACE OF RECOGNITION IN INTERNATIONAL LAW: A CASE STUDY OF TIBET

Robert D. Sloane*

The United States recognizes the Tibet Autonomous Region (TAR)—hereinafter referred to as “Tibet”—to be part of the People’s Republic of China. The preservation and development of Tibet’s unique religious, cultural, and linguistic heritage and protection of its people’s fundamental human rights continue to be of concern.

—U.S. Department of State¹

INTRODUCTION

The above quotation appears in the chapter of the U.S. Department of State’s annual *Country Reports on Human Rights Practices* that reviews the People’s Republic of China (PRC). Its two sentences stand in a strange relationship to one another: the first affirms that Tibet is a “part of” China;² the second, however, acknowledges that Tibetans

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¹ U.S. Dep’t of State, *2000 Country Reports on Human Rights Practices* (U.S. Gov’t Printing Office, Feb. 25, 2001).

² It also corroborates China’s official position that the Tibet Autonomous Region (TAR), the central region of the geographic Tibetan plateau that corresponds roughly to the former Tibetan provinces of “Ü” and “Tsang” is Tibet. See INTERNATIONAL COMMISSION OF JURISTS, *TIBET: HUMAN RIGHTS AND THE RULE OF LAW 49* (1997) [hereinafter INT’L COMM’N OF JURISTS]. China incorporated the eastern regions of Tibet, the former Tibetan provinces of Amdo and Kham, into the present Chinese provinces of Qinghai, Gansu, Yunnan, and Sichuan. *Id.* See also TIBET INFORMATION NETWORK & HUMAN RIGHTS WATCH/ASIA, *CUTTING OFF THE SERPENT’S HEAD, TIGHTENING CONTROL IN TIBET 1994-1995 1 & n.1* (1996) (noting that Hugh Richardson, the last British representative to Tibet, described

are not Chinese. Put differently, while the U.S. State Department recognizes Tibet as part of the Chinese state (the PRC), it at the same time recognizes that Tibetans are not now—and never have been—a subset of the Chinese people. This difference is critical. At least since World War II, the decline of imperial empires, and decolonization, the theoretical bedrock of governmental legitimacy has resided in the self-determination of peoples.³ Yet governmental practices of recognition have not always followed suit. In principle, states should recognize exclusively legitimate governments, those that exercise authority on the basis of democratic institutions that effectuate their peoples right to self-determination; in practice, states more often recognize governments as a matter of political expedience or to further their diplomatic and economic agenda.

But recognition no longer remains the exclusive province of sovereign states. Today, the international stage includes a number of non-state, quasi-state, and transnational actors that exert varying degrees of influence over

“ethnographic Tibet” as encompassing all of the TAR, as well as the Tibetan-inhabited regions of the neighboring Chinese provinces of Qinghai, Sichuan, Gansu, and Yunnan).

³ International Covenant on Civil and Political Rights, *adopted by the General Assembly* Dec. 16, 1966, art. 1, 993 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *adopted by the General Assembly* Dec. 16, 1976, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970) (“[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the [U.N.] Charter.”). The meaning of the “self-determination of peoples” forms the subject of long-standing debate. *E.g.*, Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT’L L. 733, 736-56 (1995) (reviewing competing conceptions of the “self” entitled to determination); *see also* Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT’L L. 257 (1981); Lung-chu Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Michael Reisman & Burns H. Weston eds., 1976).

recognition practices; for example, international institutions and organizations, such as the European Parliament and the Organization of American States; non-governmental organizations, such as Human Rights Watch, the Unrepresented Peoples and Nations Organization, and the International Commission of Jurists; and, not least, the United Nations, which is not a single actor but a blanket label subsuming multiple organs and institutions, many of which issue judgments, resolutions, and declarations of recognition. Moreover, because most modern democracies manifest a separation of powers—dispensing legislative, executive, and judicial authority—these institutions, too, do not always agree with one another. Conflicting recognition judgments therefore can sometimes arise *within* a state. Tibet is a case in point. The State Department recognizes Tibet as “part of” China.⁴ Congress disagrees: Tibet is a sovereign state under illegal foreign occupation. Its “true representatives . . . continue to be His Holiness the Dalai Lama and the Tibetan Government-in-Exile.”⁵

Inevitably, non-state decisions (and conflicting decisions within a state) to recognize, or withhold recognition from, another putative state or government do not always conform to the more expedient determinations of sovereigns. Broadly speaking, for analytic purposes, we might distinguish three forms of recognition: first, *political* recognition, the formal acts by which one sovereign recognizes another’s claim to statehood or legitimate governance;⁶ second, *legal* recognition, a judgment of

⁴ U.S. Dep’t of State, *supra* note 1.

⁵ S. Res.169, 104th Cong. (1995). *See also* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, Title V, § 536, 108 Stat. 481 (1994) (“Congress has determined that Tibet is an occupied sovereign country under international law.”); Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, Title III, §355, 105 Stat. 647 (1991) (expressing the view of Congress that “Tibet, including those areas incorporated into the Chinese provinces of Sichuan, Yunnan, Gansu and Qinghai, is an occupied country under the established principles of international law”).

⁶ While some dispute its utility, it is commonplace to draw a distinction between the recognition of states and that of governments. I intend both here, though I

recognition based on some set of reasonably objective legal criteria;⁷ and third, *civil* recognition, the force of popular moral opinion, as expressed by civil society through its representative institutions, both governmental and non-governmental. An unjustly denied claim to legal recognition often, but not always, animates civil recognition.

These forms of recognition can, and frequently do, overlap, but sometimes they do not. The resulting conflict need not present a problem. Realistically, a sovereign's conduct of foreign relations at times demands political recognition absent either or both legal and civil recognition. Few today, for example, seriously advocate withdrawing recognition from the present Chinese government, even though its one-party dictatorship makes an ongoing mockery of the right of China's 1.3 billion citizens to any genuine form of democracy or self-determination. But it remains desirable, to the extent practicable, for sovereigns to conform political judgments of recognition to principled judgments of legitimacy. This encourages the gradual internalization of democratic norms of governance and respect for international human rights.⁸ The problem with failing to distinguish political recognition from recognition based on legal and civil legitimacy is that, over time, the former begins to obscure the latter. Political recognition

distinguish the traditional criteria for each below. See Part I. *infra*.

⁷ See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 45 (1987). Thomas D. Grant suggests that in modern international law the distinction between "recognition conceived as a legal act and recognition conceived as a political act" is one of two critical "axes" along which the "critical tension in recognition law is concentrated . . ." THOMAS D. GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION*, at xx (1999).

⁸ See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2603 (1997) (arguing that nations *obey*, not merely conform their behavior to, international law in large measure because of a gradual evolutionary process "of interaction, interpretation, and internalization of international norms") (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

confers a venire of legitimacy on governments and states. To be sure, foreign relations may always require acts that imply sovereign recognition of illegitimate governments and states. But in the long term, formal political recognition tends to reinforce civil—and ultimately even legal—perceptions of legitimacy. To conflate these forms of recognition can therefore perpetuate manifest injustices.

This Article explores this phenomenon through the case of Tibet, a paradigmatic example. Tibet possesses legitimate claims to both statehood and a government based upon an act of self-determination by the Tibetan people. The international community's practices toward Tibet exemplify certain nascent changes in recognition practices, but at the same time, they also concededly underscore the extent to which recognition remains a quintessential political act.⁹ Tibet's history, however, shows that the failure to distinguish different forms of recognition can at times generate injustices *greater* than the needs of political expedience.

Part I reviews the theory of recognition relative to states and governments. It points out ambiguities in these debates and concludes by emphasizing the importance of distinguishing the normative from the descriptive aspects of recognition practices—of separating political, legal, and civil recognition. Part II appraises Tibet's statehood from the perspective of each of these forms of recognition; in particular, it examines the historical and legal sources of the present tensions surrounding Tibet's international status. Part III then analyzes the concomitant question of recognition practices toward the Tibetan government-in-exile, arguably the most resilient government-in-exile in history—again distinguishing between political, legal, and civil recognition. I conclude by indicating how the failure to distinguish these different forms of recognition contributes to the atrophy of Tibet's rightful claim to statehood, self-

⁹ Guar. Trust Co. v. United States, 304 U.S. 126, 137-38 (1938).

determination, and democratic governance; and by advocating efforts to distinguish political from legal and civil recognition in future discourse. The latter two should continue to promote evolving, even if still aspirational, norms of democracy¹⁰ and the right of peoples to self-determination.¹¹ A change in state practice along the lines sketched here would represent a small but critical step toward vindicating Tibet's legitimate claim to national sovereignty and a freely determined government. More generally, it may prevent the "self-determination of peoples" from disintegrating into an empty relic of the era of decolonization.¹²

I. RECOGNITION: LEGAL CRITERIA, POLITICAL DISCRETION, AND CIVIL LEGITIMACY

The concept of recognition in international law is notoriously murky.¹³ Arguments about recognition typically distinguish between the recognition of states and governments. Failure to separate the two analytically, according to many commentators, contributes to confusion

¹⁰ See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); see also *Letter dated 17 December 1996 from the Secretary General addressed to the President of the General Assembly*, Dec. 20, 1996, U.N. Doc. A/51/761 (1996) (expressing support for democratization and setting forth an agenda to promote the restoration of democracy).

¹¹ See generally DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000). Self-determination and democratic governance are distinct, but intimately related, modern norms, for "[s]elf-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement." Franck, *supra* note 10, at 52.

¹² See Franck, *supra* note 10, at 52-60 (surveying the evolution of the principle of self-determination of peoples and its principal application to "colonies," as distinct from "ethnic, religious or linguistic minorities"). This distinction is critical because, as I emphasize below, it makes legal rights depend, as they often do, on a factual characterization, namely, whether we describe the relevant people as a "colony" or a "minority." See text accompanying notes 74 to 76 *infra*.

¹³ See STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 21 (1998).

about what criteria, if any, truly circumscribe the practice of recognition in international law.¹⁴ But at the same time, other scholars fault this view because, in practice, it is virtually impossible *not* to conflate them: “[T]he existence of an effective and independent government,” Brownlie writes, “is the essence of statehood, and, significantly, recognition of states may take the form of recognition of a government.”¹⁵ This view may be overstated. Certainly, criteria of recognition traditionally determinative of statehood include some form of government; and conversely, recognition of a government (usually) implies a corresponding territory and population that it governs.

But as Roth argues, the oft-repeated maxim that “just as there is no government without a state, there is no state without a government” fails to acknowledge that “statehood is a *normative* and not an empirical fact.”¹⁶ A state does not necessarily cease if its government descends into chaos or an invading army conquers its territory.¹⁷ To date, for example, states continue to recognize the state of Somalia despite the complete collapse of its government. But they adamantly refuse to recognize Somaliland, the putative state comprised of a relatively stable region of Somalia—despite the fact that it arguably enjoys a functioning, effective government. In Afghanistan, by contrast, even though the Taliban’s government exercised effective control

¹⁴ *E.g.*, DUGARD, *supra* note 7, at 6 (“[B]oth writers and courts have failed to distinguish adequately between the recognition of States and of governments—a confusion that has contributed substantially to the prevailing uncertainty in the law of recognition.”). Compare GRANT, *supra* note 7, with M.J. PETERSON, RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995 (1997).

¹⁵ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 91 (5th ed. 1998); see also P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW 36, 106 (1994) (suggesting that a decision not to afford a government recognition is futile and equating recognition of a state with recognition of its government). Some scholars, in fact, treat state and governmental recognition “as a single legal process.” PETERSON, *supra* note 14, at 2.

¹⁶ BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 130 (1999) (emphasis added).

¹⁷ *Id.* at 130-31.

over the vast majority of its territory, most governments refused recognition to its extremist regime. No one claimed, however, that the State of Afghanistan had vanished from the map. Both states *and* governments, then, depend to a significant degree on normative judgments by international actors. Neither is purely descriptive. This does not mean that practices of recognition toward both are not—or ought not to be—governed by criteria more principled than *realpolitik*. It does mean, however, that legal and moral criteria will only shape and perhaps circumscribe practices of recognition; it will rarely, if ever, dictate them.

Moreover, to shift from consideration of *what* criteria govern recognition to *who* today employs these criteria reveals a potential for civil society to bring state practices of recognition into greater conformity with principles of legitimacy, defined broadly by norms of democratic governance and self-determination. States will remain for the foreseeable future the paramount actors whose judgments of recognition relative to other putative governments and states matter.¹⁸ But the views of civil society have tangible effects. First, they exert a not insignificant influence on states directly; and second, by their judgments, they help to shape the normative criteria of recognition employed by states. This section analyzes the traditional debates surrounding the international legal criteria of recognition as applied to states and governments. It also takes brief note of developments in recognition practices toward governments that occupy and colonize territory by military force—evinced not only by hortatory scholarship but by state practice, judicial decisions, and transnational processes. In general, these developments give greater primacy to considerations of democratic legitimacy and respect for international human rights. It would be counterproductive to ignore the constraints of

¹⁸ See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 25 (2d. ed. 2000).

politics and international diplomacy. But these developments in the law of recognition—and the principles that animate them—should not be dismissed; they constitute paramount long-term objectives of recognition practices in relation to both states and governments.

A. *Recognition of States*

Recognition of states revolves around the somewhat hackneyed debate between the “declaratory” and “constitutivist” schools,¹⁹ loosely associated with legal idealism and legal positivism, respectively.²⁰ The declaratory model typically begins with the criteria enunciated in the Montevideo Convention on the Rights and Duties of States.²¹ Article 1 of the Montevideo Convention stipulates that a state’s international legal personality requires “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”²² These criteria imply, respectively, a stable community, occupying a reasonably well-defined territory, administered by a competent government, which is capable of entering into relations with

¹⁹ For the canon on this debate, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979); PHILIP C. JESSUP, *THE BIRTH OF NATIONS* (1974); H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947); Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 *AM. J. INT’L L.* 605 (1941).

²⁰ DUGARD, *supra* note 7, at 7-8. *But see* ROTH, *supra* note 16, at 124 (associating the constitutive view with the “positivist” conception that law among nations arises exclusively from sovereign consent). This inconsistency results from the different meanings each author ascribes to “positivism.” The former appears to refer to positivism in the superficial sense that some legal rules or criteria govern the practice of recognition. The latter means by “positivism” that all law—national and international—emanates from a sovereign source; and the constitutivist position appears to comport better with this view because the germane “sovereign” consists of the group of nations that extend recognition to a putative state. *See* ROTH, *supra* note 16, at 124.

²¹ Convention on Rights and Duties of States, Dec. 26, 1933, 165 *L.N.T.S.* 19, *reprinted in* 28 *AM. J. INT’L L. Supp.* 75 (1934) [hereinafter *Montevideo Convention*].

²² *Id.* art. 1.

other states.²³ Possession of each criterion may not be indispensable; nor, by the same token, does possession of all, *ipso facto*, establish statehood.²⁴ Under the Montevideo Convention, however, their existence creates a presumption in favor of statehood. The declaratory model therefore regards recognition as a “declaration” of a legal matter of *fact*, i.e., the existence of an entity that meets the criteria that define statehood.²⁵

The competing view, the constitutivist model, regards statehood as entirely contingent on recognition by preexisting states.²⁶ Forcefully stated, “A State is, and becomes, an International Person through recognition only and exclusively.”²⁷ The virtues of this view are twofold: First, it appears to comport better with the traditional conception of international law as “*jus gentium voluntarium*—nothing more than voluntary or consensual behavior, manifest in the practice of states.”²⁸ And to the extent that recognition is an issue of customary international law—which axiomatically requires state practice and *opinio juris*—it is unclear how any plausible theory of recognition *could* ignore trends in state practice, regardless of whether these trends “declare” or “constitute” putative states. Second, an entity that lacks recognition by other states remains, in practice, a non-entity.²⁹ This is because the inquiry into statehood reduces in practice to questions about whether an entity does or should enjoy the *incidents* of statehood; and these questions, in turn, depend on whether existing states choose to extend these

²³ See BROWNLIE, *supra* note 15, at 71.

²⁴ *Id.* at 70.

²⁵ See, e.g., GRANT, *supra* note 7, at 4-6; Charter of the Organization of American States, Apr. 30, 1948, art. 12, 2 U.S.T. 2394 (“The political existence of the State is independent of recognition by other States.”).

²⁶ See GRANT, *supra* note 7, at 2-4.

²⁷ L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 71, at 125 (8th ed. 1955). See also Kelsen, *supra* note 19, at 608.

²⁸ GRANT, *supra* note 7, at 3.

²⁹ Biafra’s unsuccessful secession is a case in point. See David Ijalaye, *Was “Biafra” at Any Time a State in International Law?*, 65 AM. J. INT’L L. 551 (1971).

privileges. For this reason, the constitutivist model may at first blush appear more pragmatic than the declaratory model.³⁰

Despite this, the “predominant view of recognition among international law scholars, officials and courts today is the declaratory view,”³¹ a state of affairs that Roth ascribes to the declaratory model’s greater amenability to international adjudication and scholarship.³² Many scholars also fault constitutivism as unduly political; it relegates recognition to the “unfettered political will” of existing states—pure *realpolitik*.³³ Moreover, as a legal matter, the constitutive model begs a host of difficult theoretical questions. To assert that “recognition is a precondition of the existence of legal rights” raises questions about (i) how many states must recognize a putative state before it becomes a “real” state; (ii) whether it then exists only for states that have expressed recognition, formally or informally (e.g., by engaging in diplomatic relations); and (iii) whether recognition must be based on “adequate knowledge of the facts” or is instead purely discretionary.³⁴ The constitutivist view also appears to conflict with state practice in at least two respects: First, while unrecognized territorial communities are not states, neither are they *terra nullius*; as a community, they enjoy some rights associated with international legal personality. Second, courts tend to give legal effect to acts of recognized states that *antedate* recognition, a trend in tension with the notion that the entity lacked statehood prior to its recognition by other states.³⁵ At the theoretical level, finally, to reduce the

³⁰ See PETERSON, *supra* note 14, at 20 (noting that states are “abstract entities” that must act through agents, namely, governments, which “retain [a] legal monopoly on speaking and acting for their state”).

³¹ ROTH, *supra* note 16, at 126; PETERSON, *supra* note 14, at 23 (“By 1975, the vast majority of specialists accepted the declaratory theory.”).

³² ROTH, *supra* note 16, at 127; PETERSON, *supra* note 14, at 25 (noting the adoption of the declaratory model by national courts).

³³ GRANT, *supra* note 7, at 19.

³⁴ BROWNLIE, *supra* note 15, at 89.

³⁵ See GRANT, *supra* note 7, at 20-22.

international law of recognition to a pure matter of political will eviscerates its status as *law*. Roth therefore rightly emphasizes that “some concession to the *realpolitik* of international relations is essential if international law is to be taken seriously as a framework for actual state behavior;” but at the same time, “establishment of a meaningful international law of peace and security requires the collective denial of recognition of the fruits of illegal acts; otherwise, violations of international law are permitted to create rights in international law.”³⁶

Resolution of the declaratory-constitutivist debate is not the focus of this Article. For present purposes, however, despite the novel issues raised by international incidents since its publication a half-century ago, the views expressed by Sir Hersch Lauterpacht in his seminal work³⁷ continue to capture, broadly speaking, the need for a balance between, on the one hand, acknowledging the role of politics in state practices of recognition, and on the other, maintaining the premise that recognition is partly a legal—and not *solely* a political—act. Lauterpacht wrote:

[R]ecognition consists in the application of a rule of international law by way of ascertaining the existence of the requisite conditions of statehood; and (b) . . . fulfilment of that function in the affirmative sense—and nothing else—brings into being the plenitude of the normal rights and duties which international law attaches to statehood.³⁸

This view also has the virtue—today, as in the immediate post-War era—of “approximating most closely to the practice of States and to a working juridical principle . . .”³⁹ The Restatement (Third) of Foreign Relations Law adopts a

³⁶ ROTH, *supra* note 16, at 125.

³⁷ LAUTERPACHT, *supra* note 17.

³⁸ *Id.* at 73; *see also* CHEN, *supra* note 16, at 40-41.

³⁹ LAUTERPACHT, *supra* note 17, at 73.

similar compromise, noting that a state need not extend *formal* recognition to any state but is “required” to *treat* as a state any entity that fulfills the conventional Montevideo criteria.⁴⁰

Tellingly, however, when jurists address recognition, often it is not the existence of a state that is at issue, but rather the specific *incidents* of statehood—for example, the capacity to enter into agreements with other states. Yet the incidents of statehood are relevant principally in relation to *governmental* recognition.⁴¹ While scholars often cite the famous *Tinoco Arbitration*⁴² as juridical support for the declaratory model of statehood,⁴³ former Chief Justice William Howard Taft’s opinion was not about the existence of Costa Rica (a state); it addressed the validity of the Tinoco regime (a government)—more precisely, that government’s capacity to enter into agreements that could bind successive governments of Costa Rica. This again underscores the practical difficulty in efforts to delink state from governmental recognition. For analytic and normative purposes, however, this should not dissuade efforts to avoid simple conflation of the two. For clearly, just as some states are not properly so-called despite fulfilling the

⁴⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 202 (1987).

⁴¹ See CHEN, *supra* note 18, at 40 (noting that the “great majority of recognition problems involve recognition of regimes as the governments of already recognized states without affecting the continuity of legal identity of the states”). The incidents of statehood need not exist in an all-or-nothing state. Taiwan remains perhaps the best example of a territory that enjoys many, but not all, of the incidents of statehood. Indeed, it is precisely those incidents that appear to China to constitute a “declaration” of independent statehood that threatens to spark cross-strait tensions. See generally Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. INT’L L. 453 (2000).

⁴² *Tinoco Concessions* (Gr. Brit. v. Costa Rico), 1 R.I.A.A. 369 (1923) (recognizing the governmental legitimacy of—and, consequently, the continuity of the duties and obligations assumed by—a coup-based government in Costa Rica that subsisted for several years, on the ground that during this time it satisfied the “effective control” test then prevailing as the standard by which to assess the legitimacy of governments).

⁴³ See GRANT, *supra* note 7, at 47. *But see* *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 (May 25) (implying support for the constitutive theory of state recognition).

conventional criteria for statehood, some governments, appraised by contemporary international norms of legitimacy, are not properly so-called despite the existence of a state they purport to govern and the effective control they exercise—often by virtue of the military—over that state’s population.

B. Recognition of Governments

To specify legal criteria for governmental recognition proves even more theoretically difficult, for two principal reasons: the debate over whether governmental recognition is indeed a legal question at all (or whether, by contrast, it is properly understood as purely political); and second, the question of the meaning of “recognition.” Recognition generally lies within the discretion of sovereigns. Most scholars and statesman agree that international law does not provide unequivocal criteria that establish a duty of recognition under certain circumstances. The conventional view is that “[r]ecognition, *as a public act of state*, is an optional and political act and there is no legal duty in this regard.”⁴⁴ Decisions to recognize or refuse recognition to governments remain sovereign prerogatives, exercised “in accordance with [each state’s] policy objectives and ideologies.”⁴⁵ The Supreme Court adopted this principle expressly in *Guaranty Trust Co. v. United States*, in which it held that

[w]hat government is to be regarded here as representative of a foreign sovereign state is a political

⁴⁴ BROWNLIE, *supra* note 15, at 90 (emphasis in original).

⁴⁵ Yossi Shain, *Governments-in-Exile and International Legitimation*, in *GOVERNMENTS-IN-EXILE* 219, 223 (Yossi Shain ed., 1991); *see also* PETERSON, *supra* note 14, at 72 (noting that, while some governments have employed the “optional criteria” consistently, for the most part “optional criteria have been asserted on an ad hoc basis appearing more to tailor decisions to the ideological or material interests of the recognizing state”).

rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts.”⁴⁶

While evolving principles of international human rights, the U.N. Charter’s codification of the principle of non-aggression,⁴⁷ and other norms suggest guidelines for recognition, it remains true that recognition of governments is a quintessential political act, largely unconstrained by legal criteria.⁴⁸

The second issue is the meaning of recognition as applied to governments. Talmon’s recent study identifies two broad potential definitions: first, “willingness or unwillingness on the part of the recognizing government to establish or maintain official, but not necessarily intimate, relations with the government in question”;⁴⁹ and second, “manifestation of the recognizing government’s [subjective] opinion on the legal status of the government in question.”⁵⁰

⁴⁶ *Guaranty Trust Co.*, 304 U.S. 126, 137-38 (1938); *see also* *Pfizer v. Gov’t of India*, 434 U.S. 308, 319-20 (1978); *but see* *Nat’l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1998) (“[T]he absence of formal recognition cannot serve as the touchstone for determining whether the Executive Branch has ‘recognized’ a foreign nation for the purpose of granting that government access to United States courts.”).

⁴⁷ U.N. CHARTER art. 2, para. 4.

⁴⁸ At the same time, international organizations have increasingly brokered disputes where two putative governments, each claiming to represent the legitimate government of a recognized state, seek international recognition. For example, in 1997, two parties sought accreditation to represent Cambodia in the General Assembly’s fifty-second session, and that body, after receiving a report from its credentials committee, ultimately resolved the dispute on the basis of a majority vote. *See* U.N. GAOR, 52d Sess., Agenda Item 3, ¶ 4, U.N. Doc. A/52/719 (1997). For a review of this incident and a discussion of the above phenomenon generally, *see* Suellen Ratliff, Comment, *U.N. Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century*, 87 CAL. L. REV. 1207 (1999).

⁴⁹ TALMON, *supra* note 13, at 23.

⁵⁰ *Id.* at 29.

These meanings often, but not invariably, coincide.⁵¹ In a rough way, they correspond to the distinction sometimes drawn between *de facto* and *de jure* recognition.⁵² Confusion about these and related issues has led some statesmen and scholars to advocate abolishing governmental recognition on the grounds that it creates more difficulties in international law than it solves.⁵³

These qualifications aside, however, governments have historically tended to invoke one of three legal theories about governmental recognition.⁵⁴ First, the traditional (and probably still the most widely accepted) approach recognizes governments that satisfy the “effective control” test set forth in *Tinoco*: They exercise effective control over the territory they purport to govern and possess the concomitant ability to fulfill international obligations on its behalf.⁵⁵ In fact, some theorists assert that effective control is the sole necessary and legally binding criterion for the recognition of governments. “Reduced to essentials, legal scholars’ views and governments’ actions show that there has been only one binding rule regarding recognition decisions since 1815: control of all or most of the state is the necessary, but not sufficient condition for recognition as its

⁵¹ See *id.* at 33-43 (expounding three prominent situations in which recognition in each of these two senses did *not* coincide—Great Britain’s position with respect to the Tinoco regime of Costa Rica; the U.S. government’s treatment of the Bolshevik regime in the Soviet Union; and the U.S. and South African governments’ long-standing refusal to recognize the Popular Movement for the Liberation of Angola, which seized power in 1975 shortly after gaining independence from Portugal).

⁵² For a comprehensive overview, see *id.* at 44-111.

⁵³ See M.J. Peterson, *Recognition of Governments Should not be Abolished*, 77 AM. J. INT’L L. 31 (1983).

⁵⁴ See Shain, *supra* note 45, at 223.

⁵⁵ See *supra* note 42; HANS KELSEN, GENERAL THEORY OF LAW AND STATE 220 (1945) (arguing that a national legal order “begins to be valid . . . as soon as it has become—on the whole—efficacious; and it ceases to be valid as soon as it loses this efficacy”); cf. Michael Reisman, *Governments-in-Exile: Notes Toward a Theory of Formation and Operation*, in GOVERNMENTS-IN-EXILE, *supra* note 45, at 238 (arguing that the “term ‘government-in-exile’ is an oxymoron, for the *soi-distant* government-in-exile does not control territory and, without that . . . cannot discharge those international obligations expected of governments”).

government.”⁵⁶ Second, the Estrada Doctrine, promulgated by the Mexican government in 1931, refuses as a matter of principle to recognize (or not recognize) governments *per se*. According to this view, only states should be accorded recognition in international law because governmental recognition wrongfully interferes in the domestic affairs of sovereign nations.⁵⁷ In the post-World War II era, many governments have adopted a policy that declines formally to recognize states.⁵⁸ But in fact “a ‘recognize only states’ policy looks much like the more widely shared practice of employing only tacit forms of recognition.”⁵⁹ Finally, the

⁵⁶ PETERSON, *supra* note 14, at 49; Peterson, *supra* note 53, at 37 (noting that this rule “forbids recognizing before control is shown or continuing to recognize after control is lost”); *but see* Shain, *supra* note 45, at 224 (noting the continued recognition of deposed governments of the Allied Powers, despite their lack of “effective control” over their territory during World War II).

⁵⁷ The Estrada doctrine originated in the 1930 statement of Mexican Foreign Minister Genaro Estrada that “the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which . . . implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments.” Press Statement of Sept. 27, 1930, *translated in* 25 AM. J. INT’L L. 203 (Supp. 1931). *See generally* Phillip C. Jessup, Editorial Comment, *The Estrada Doctrine*, 25 AM. J. INT’L L. 719, 723 (1931) (arguing that the “practice of extending recognition to or withholding it from *de facto* governments for reasons other than those governments’ factual control of their countries is not conducive to the smooth workings of international affairs”).

⁵⁸ *See* TALMON, *supra* note 13, at 3 (“A study on the recognition of governments in international law may, at first sight, seem rather outdated at a time when more and more States declare that their policy is to recognize States, not governments.”); *see, e.g.*, Letter from the Swiss Embassy in London to Stefan Talmon, May 12, 1993, *reprinted in* TALMON, *supra*, at 284-85, Appendix I (affirming that Switzerland’s general policy is to recognize States only).

⁵⁹ PETERSON, *supra* note 14, at 181; *see also* TALMON, *supra* note 13, at 3 (stating that the adoption of this policy “signifies only a change in the method of according recognition, not the abolition of the recognition of governments as such”). Moreover, even governments that purport to have abolished governmental recognition *per se* generally make exceptions that permit them to decline recognition to unacceptable regimes or to regimes declared illegitimate by the U.N. Security Council acting under its Chapter VII powers. *See* PETERSON, *supra* note 14, at 35. To date, the three principal instances of U.N. mandated “non-recognition” have been toward South Africa’s regime in Namibia, Ian Smith’s regime in Rhodesia, and General Cedras’ regime in Haiti. *See id.* at 177.

Tobar Approach⁶⁰ stipulates that governmental recognition should be conditioned on democratic legitimacy: Only governments that assume power by means of a free and fair electoral process merit recognition. Again, it is important to emphasize that these three theories may be mutually incompatible. None must be adopted as a matter of international law. States employ one or more of these approaches to justify decisions to recognize governments. But these decisions remain discretionary, often influenced if not dictated by foreign policy objectives.⁶¹

In addition, certain “optional criteria,”⁶² which to varying degrees overlap with the above theories, often appear in recognition discourse. These include (i) *popular support*, which means, at a minimum, “acquiescence in the new regime’s rule,” and, at the other extreme, affirmative endorsement;⁶³ (ii) *legitimacy*, which means, at a minimum, that the regime assumed power by prescribed legal methods, whether constitutional procedures, custom, or otherwise, and, in its strong form, that the governmental regime is legitimate by reference to contemporary democratic norms of “consent by the governed;”⁶⁴ and finally, (iii) *competence*, the ability and willingness to fulfill international obligations.

⁶⁰ This approach originated in “Carlos R. Tobar’s proposal that legality of origin be a criterion for recognition among the American republics.” PETERSON, *supra* note 14, at 58.

⁶¹ See Shain, *supra* note 45, at 223. See also PETERSON, *supra* note 14, at 74 (“[G]overnments still insist on the right to select and use certain optional criteria even though they are now exercising that right less frequently and in favour of fewer criteria.”).

⁶² See generally PETERSON, *supra* note 14, at 51-76 (detailing the main trends in criteria for governmental recognition beyond the widely-accepted necessity that the putative government exercise “effective control.”).

⁶³ See *id.* at 52.

⁶⁴ See *id.* at 57; see also Peterson, *supra* note 53, at 37 (describing the rise of monarchical and democratic legitimacy as a basis for recognition decisions in, respectively, Europe during the Quadruple alliance era, 1815-1830, and the Americas in the early 1900s).

Of these “optional” criteria, (iii) is actually just a variant on effective control. It suggests that *volition*, not just ability, to carry out international obligations merits consideration. Popular support, by contrast, is properly understood as coterminous with legitimacy; it only makes sense to include popular support as a criterion if regimes without it are “illegitimate.” For example, if dynastic transfers of power are legitimate, then why extend or withhold recognition to a dynastic government based on whether its population happens to favor the current monarch? A similar reduction applies to the remaining optional criteria that appear in recognition discourse.⁶⁵ a government’s military independence, the degree of violence it employs to seize power, whether it originates by procedures in conformity with international law, and the degree to which it respects international human rights—all of these considerations depend in the main on normative postulates about *legitimacy*.

Governmental recognition, reduced to its skeletal features, therefore appears to be a two-part inquiry: first, does the regime exercise effective control over the territory it aspires to govern (and perhaps also the volition to fulfill international obligations on its behalf); and second, is it legitimate? The latter criterion invites many questions, foremost, the *meaning* of legitimacy. But note that, while the effective-control prong of governmental recognition speaks to the pragmatics of foreign relations, the legitimacy prong need not. A government could coherently recognize a regime’s effective control over some territory—and therefore deal with that regime as its *de facto* government—but at the same time not extend the regime *formal* recognition—and therefore refuse to validate its *de jure* claim to

⁶⁵ See PETERSON, *supra* note 14, at 68. Other less prominent “proposed criteria” include independence from foreign military support; respect for other states’ rights; the absence of extreme violence in the seizure of power; genesis in accord with international law; and respect for human rights. See *id.* at 77-85. Yet all of these “have not been invoked by governments very often, and have received only occasional attention from legal scholars.” *Id.* at 84.

legitimacy.⁶⁶ This idea in part animates the debate over the spectrum between so-called *de facto* and *de jure* recognition.⁶⁷

Scholarly discourse on recognition evinces frustration with the nebulous criteria for both state and governmental recognition. But the fact that governments use recognition for political purposes, rather than extend it solely to entities that fulfill clear legal criteria, need not count against recognition or counsel its “abolition,” an unlikely development in any case. It does mean, however, that international law must pay attention to the normative *effects* of recognition and non-recognition. International law should seek to shape state practice so that the political discretion that inevitably will continue to form a major component of recognition reinforces, rather than erodes, emerging norms of legitimacy—in particular, respect for the right of peoples to political self-determination and democratic governance.

C. *Recognition’s Two Faces: Separating the Normative from the Descriptive*

The concept of recognition, like many issues in international law, suffers from a chronic failure to distinguish the normative from the descriptive. The two do not, of course, invariably converge, and they serve distinct functions in international law. It is axiomatic that state practice and *opinio juris* comprise the bases for ascertaining customary international law.⁶⁸ But in the context of the law

⁶⁶ See, e.g., Peterson, *supra* note 53, at 49 (observing that non-recognition, in a international framework that ordinarily “recognizes” governments based on the *Tinoco* criterion of “effective control,” can express severe disapproval with symbolic efficacy).

⁶⁷ See TALMON, *supra* note 13, at 107 (“The granting of express *de facto* recognition ‘only’ to an effective government has been used by States in order to indicate that in their opinion the regime in power does not qualify as the State’s government or that they are unwilling to treat with it as such.”).

⁶⁸ Statute of the International Court of Justice, June 6, 1945, U.S.T.S. 993, 59

of recognition—assuming that recognition is at least *in part* a matter of law and not exclusively *realpolitik*—commentators tend to focus on the former requirement. This is understandable: Day-to-day international relations concern state practice far more than the multiplicity of opinions of jurists, politicians, international institutions, and, to a lesser extent in the modern world order, non-governmental organizations—in short, those materials that scholars frequently consult to ascertain *opinio juris*.

But a parochial focus on the political aspects of recognition, which I loosely identify with the descriptive element of recognition practices, often fails to acknowledge that its legal and civil analogues—roughly speaking, the normative elements of recognition practices—*have* in fact changed since World War II. For example, with the possible exception of some rogue states (or “states of concern,” in former Secretary of State Albright’s memorable phrase) most governments now acknowledge that the acquisition of territory by military force, a method previously deemed valid under international law, will no longer be tolerated;⁶⁹ *ex injuria jus non oritur* (a right cannot originate in an illegal act).⁷⁰ Second, popular sovereignty, once a concept foreign to all but a few Western nation-states, now constitutes a paramount normative basis for recognition of governmental legitimacy.⁷¹ Finally,

Stat. 1031, art.38 (1945).

⁶⁹ See SHARON D. KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 218-34 (1996); see also BROWNLIE, *supra* note 15, at 78.

⁷⁰ *E.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 202(2) (1987) (“A State has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.”).

⁷¹ See, *e.g.*, W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990); *cf.* Franck, *supra* note 10. Recent commentators note “a growing tendency on the part of the international community to take actions aimed at restoring democratically elected governments that [have] been overthrown or suspended.” Morton H. Halperin & Kristen Lomasney, *Guaranteeing Democracy: A Review of the Record*, 9 J. DEMOCRACY 134 (No. 2) (April 1998). The authors note that, since 1993, in Albania,

colonization, another predominant and largely accepted feature of the pre-World War II era, is clearly no longer valid practice under international law.⁷²

“[A]s the cliché has it, . . . ‘we are all [legal] realists now’⁷³ in a colloquial sense. We acknowledge that fact-characterization by decision-makers frequently determines “what the law is.” But we must be careful not to draw the wrong conclusion from this observation. Particularly in the context of international law—where determining “what the law is” often requires resorting to how state actors construe it and, moreover, to what they *believe* it to be—legal realism does *not* counsel cynicism or apathy. Rather, it requires principled lawyers and statesmen to ascertain, after considering those factors that determine “what the law *is*,” how, given an understanding of the influence these factors exert, they can shape law into what it *ought to be*. As Christine M. Chinkin recently wrote:

“[L]aw is an instrument of civil society” that does not belong to governments, whether acting alone or in institutional arenas. Accordingly, when states fail to exercise their obligations to ensure justice, civil society can and should step in. To ignore violative conduct is to invite its repetition⁷⁴

Civil society must not be discounted simply because the topic under consideration is an issue of international law in

Guatemala, Haiti, Paraguay, and Serbia, the international community intervened to restore democracy; that in Burundi, Niger, and Sierra Leone, similar efforts resulted in some progress; and that in Belarus, Burma, Cambodia, and Nigeria, such efforts failed—at least for the time being. *See id.* at 136-45.

⁷² *E.g.*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1971).

⁷³ Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997).

⁷⁴ Christine M. Chinkin, Editorial Comment, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT’L L. 335, 339 (2001) (quoting Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in THE RIGHTS OF PEOPLES 17, 29 (James Crawford ed., 1988)).

which states—and by extension their political elites—exercise predominant influence. When governments violate the norms embraced by civil society and professed with growing frequency in judicial and academic opinions, it is critical to ensure that state political elites remain accountable for those violations. Indeed, one of the central objectives of the right to freedom of expression is to ensure that, in a democratic society, these violations do not remain obscured by the veil of political expediency. With this objective in mind, Part II examines the status of Tibet under international law and the influence of recognition practices—political, legal, and civil—on this status.⁷⁵

II. THE STATUS OF THE STATE OF TIBET: POLITICAL, LEGAL, AND CIVIL DIMENSIONS

The U.S. State Department, as noted at the outset of this Article, recognizes Tibet as “part of” the People’s Republic of China. But it then emphasizes that “[p]reservation and development of Tibet’s unique religious, cultural, and linguistic heritage and protection of its people’s fundamental human rights continue to be of concern.”⁷⁶ This phrasing is not accidental. As Franck observed in his seminal article, *The Emerging Right to Democratic Governance*, “the [ICCPR] makes an important distinction between the right of each nation’s collective polis and the rights of minorities within each state”⁷⁷ The former

⁷⁵ Recent manifestations of “regimes of non-recognition” include state practices toward the State Law and Order Council’s government in Myanmar (Burma), the Taliban’s government in Afghanistan, and General Raoul Cedras’ government in Haiti. These cases prove less analogous to Tibet’s circumstances, however, because they involve *internal* changes in government, rather than invasion and occupation by foreign military forces. They therefore raise questions about governmental legitimacy, but do not serve to illustrate the response of the international community to recognition questions that arise when one state purports to “incorporate” another; as, for example, in the cases of Indonesia’s invasion of East Timor and Iraq’s invasion of Kuwait.

⁷⁶ U.S. Dep’t of State, *supra* note 1.

⁷⁷ Franck, *supra* note 10, at 58.

enjoy the right to democratic governance; the latter, only the “right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”⁷⁸—that is, to the preservation of their “religious, cultural and linguistic heritage” The decision factually to characterize the Tibetan people as an “ethnic minority” rather than a “national polis” therefore determines their theoretical *rights* under international law. Like the Clinton Administration’s deliberate decision to refer to the decimation of the Tutsis in Rwanda as a “civil war” rather than a “genocide,”⁷⁹ the State Department’s characterization of Tibet reflects an understanding of the legal consequences that might follow from calling a spade a spade.

Military conquest, at least prior to the twentieth century, could confer sovereignty over foreign states. But today, few dispute that “illegal occupation cannot of itself terminate statehood.”⁸⁰ For this reason, the international community rightly objected to Iraq’s attempt to annex Kuwait in 1990,⁸¹ to the Soviet Union’s invasion of Afghanistan in 1979,⁸² and

⁷⁸ ICCPR, *supra* note 3, art. 27.

⁷⁹ See PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 149-54 (1998).

⁸⁰ BROWNLIE, *supra* note 15, at 78; see generally IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

⁸¹ See S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990) (condemning the Iraqi invasion and calling for the immediate withdrawal of Iraq’s troops from Kuwait); S.C. Res. 661, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990) (noting that Iraq “has usurped the authority of the legitimate Government of Kuwait” and calling upon member states, *inter alia*, to refuse to recognize any regime established by Iraq); S.C. Res. 662, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990) (calling upon states and international organizations “not to recognize [Iraq’s] annexation, and to refrain from any action or dealing that might be interpreted as an indirection recognition of the annexation”); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991) (welcoming “the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government” and reiterating the illegality of Iraq’s “unlawful invasion and occupation of Kuwait”). For an analysis of the U.N. resolutions passed during the Gulf War, see generally Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L L. 452 (1991).

⁸² See G.A. Res. 37, U.N. GAOR, 35th Sess., Supp. No. 48, 70th plen. mtg. at 17,

to Indonesia's purported annexation of East Timor in 1975.⁸³ Why then does every state continue to validate China's sovereignty over Tibet, when its only conceivable claim, as shown repeatedly by historical and international law scholarship, is military annexation?

The answer is not, as some appear to believe, that Tibet's legal status is "debatable."⁸⁴ To my knowledge, without exception, every independent scholar who has examined this question concluded that Tibet qualified under international law as a sovereign state in 1950, the year during which the People's Liberation Army (PLA) invaded and colonized Tibet.⁸⁵ Nor can the answer be that time's passage extinguished Tibet's once valid claim to statehood—no more than the passage of twenty-five years of Indonesian rule extinguished East Timor's right to statehood. The unsurprising reason that no state recognizes the State of Tibet is that it had the misfortune to be invaded by a powerful state and at a time when the international community's attention was diverted

U.N. Doc. A/35/48 (1980). As a member of the Security Council, the Soviet Union vetoed that organ's resolution condemning its invasion. See U.N. SCOR, 35th Sess., 2190th mtg. at 57, U.N. Doc. S/PV.2190 (1980).

⁸³ See sources cited *infra* note 256.

⁸⁴ See, e.g., Charney & Prescott, *supra* note 41, at 456 ("[E]ven if China's sovereignty over Outer Mongolia or Tibet is considered debatable, there does not seem to be any basis for arguing that China's sovereignty over Taiwan in 1894 was less than complete.").

⁸⁵ See, e.g., WARREN SMITH, *TIBETAN NATION* (1996); MELVYN GOLDSTEIN, *A HISTORY OF MODERN TIBET, 1913-1951* (1989); MICHAEL C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS AND PROSPECTS IN INTERNATIONAL LAW* (1987); Dawa Norbu, *Selfdetermination [sic] in the Post-Soviet Era: A Case Study of Tibet*, 34 *J. INT'L L. STUD.* 237 (1997). To assert that Tibet qualified as an independent state in 1950 does not imply that Tibet was always an independent state; nor, however, does it confirm that Tibet was always a part of China. In fact, in a strong sense, both sides of this argument suffer from a categorical mistake. The distinctly modern Western conception of the nation-state, with precise borders and a single centralized government, is probably inapposite to pre-twentieth century China and Tibet alike. See VAN WALT VAN PRAAG, *supra*, at xviii ("The student of Tibet's past legal status inevitably confronts the problem of finding legal categories and terms appropriate to describe and define the position of this Central Asian country in relation to its neighbors.").

elsewhere, notably to Korea. Today, China is a nuclear power; it exercises a veto as a permanent member of the U.N. Security Council; and economically, it has become, since the government's de facto abandonment of socialism,⁸⁶ a tremendous potential market that states feel they cannot afford to neglect by antagonizing China's political elite. Political realism and economic self-interest, in short, motivate states' formal recognition practices toward China's assertion of sovereignty over Tibet. It would be foolish to deny the influence of these factors. But in terms of legal and civil recognition, Tibet is no more a "part of" China than Kuwait was a "part of" Iraq or East Timor a "part of" Indonesia. By reference to legal and civil recognition criteria, Tibet remains a sovereign state, at least and until China permits the Tibetan people to exercise their right to determine freely their political status.

Today, as the United States struggles to figure out exactly what its "one China" policy means,⁸⁷ one matter should be clear: Tibet has no place in it. The United States, other members of the United Nations, regional organizations, and the United Nations itself, should abandon the fiction that Tibet is "part of" China. This practice lends unnecessary moral authority to the ongoing colonial exploitation of Tibet's land and people. International policy must recognize political reality. To ignore it accomplishes nothing and often proves counterproductive. No one at present can or should seriously advocate military action to vindicate Tibet's right to statehood. But this same reality does not necessarily

⁸⁶ See generally JASPER BECKER, *THE CHINESE* (2000) (detailing within each strata of Chinese society the gradual transformation of China's economy to a quasi-capitalist system since the reforms initiated by Deng Xiaoping).

⁸⁷ E.g., *Taiwan Stands Up*, *ECONOMIST*, Mar. 25, 2000, at 23 (noting that while the Clinton Administration "sees no reason to change the 'one China' policy that has guided America's relations with China for nearly three decades," Senator Jesse Helms and House Representative Tom DeLay, among many others in the Congress, reject the notion that this policy dictates appeasement toward China's threats in response to calls for Taiwanese independence).

counsel diplomatic appeasement of China's political elite by indulging the fiction that Tibet is "part of" China in every national and international fora.

At the outset of the Cold War, the handful of states with knowledge of Tibet's legal status—Great Britain, India, and the United States—were led, largely for ephemeral reasons, to indulge this fiction. But the combination of circumstances that precluded genuine consideration of Tibet's right to statehood during the Cold War should not, at present, obscure a clear fact: In an era of decolonization, Tibet remains the world's largest colony,⁸⁸ a state under illegal foreign occupation. The Tibetan people are not one of China's purported fifty-five "national minorities"; they are a national polis. To recognize this fact constitutes an essential predicate to enabling the Tibetan people to exercise the same right that all colonized peoples have—in theory, if not always in practice—enjoyed in the post-War era: self-determination.

The next Part of this Article reviews Tibet's efforts to achieve formal recognition prior to China's invasion, the historical and legal bases that established Tibet's statehood at that time, and the absence of a plausible theory under which Tibet lost this status. My intention here is not to attempt an exhaustive analysis of Tibet's right to independence, for the scholarship on this issue is already voluminous and, for the most part, unambiguous in its conclusions. Instead, I hope to place the facts demonstrative of Tibet's legal status within a context that enables examination of their implications for Tibet's formal recognition in the contemporary world order. The increasing complexity of recognition practices provides international actors—both governmental and non-governmental—with an opportunity gradually to influence

⁸⁸ See UNREPRESENTED NATIONS AND PEOPLES ORGANIZATIONS, TIBET SUPPORT GROEP NEDERLAND, & INTERNATIONAL CAMPAIGN FOR TIBET, CHINA'S TIBET: THE WORLD'S LARGEST REMAINING COLONY (1997).

state practice in an effort to bring political declarations of recognition into greater conformity with principled judgments of legitimacy. In the case of Tibet, political machinations at the outset of the Cold War precluded its formal recognition by state elites. Tibet failed to secure recognition at the United Nations, and this left its government with little choice but to negotiate with Beijing. Negotiations culminated in a coercive and fraudulent treaty that nominally extinguished Tibet's statehood. But under international law, neither China's 1950 invasion nor Tibet's alleged accession to this treaty accomplished this. Tibet, no less than—indeed, far *more* than—the former colonies of Western Europe, possessed a legitimate claim to statehood in 1950. That claim remains valid today. It perpetuates a discord between, on the one hand, Tibet's legal and civil recognition, and on the other, its political recognition.

The political machinations that led state elites formally to recognize China's sovereignty over Tibet during the Cold War, however, no longer justify this disconnect. By continuing to denominate Tibet a "part of" China, the international community and its constituent states validate China's military conquest, annexation, and colonization of Tibet.⁸⁹ By contrast, to recognize the existence of the State of Tibet would be a—perhaps small, but symbolically important and politically realistic—step toward restoring to the Tibetan people their fundamental right to self-determination.

⁸⁹ See generally *id.* See also TIBET INFORMATION NETWORK, CHINA'S GREAT LEAP WEST (2000) (reviewing exhaustively the colonial activities that China recently established as a matter of national policy in its recent proclamation of the "Western Development" campaign in Tibet and East Turkestan (Xinjiang)).

A. *Tibet at the United Nations: The Struggle to Secure Political Recognition*

“Tibet’s story,” wrote journalist John Avedon in 1979, “is that of an ancient nation hurled into the twentieth century by the loss of its sovereignty.”⁹⁰ Prior to the early twentieth-century, Tibet’s geographic isolation, coupled with the religious aristocracy’s parochial resistance to social reform,⁹¹ led naturally to political isolation.⁹² Indeed, until threatened by the military momentum of the PLA, which defeated Chiang Kai-Shek’s KMT in 1949, Tibet’s foreign relations were limited largely to Great Britain, India (itself a British colony until August 15, 1947), Russia, and China.⁹³ Between 1913 and 1947⁹⁴ Tibet had a unique opportunity to emerge definitively as a modern nation-state, but its “elite chose to remain oblivious to what was going on around them,” reflecting their resistance to any political change

⁹⁰ JOHN F. AVEDON, *IN EXILE FROM THE LAND OF SNOWS*, at xiii (1979).

⁹¹ See TSERING SHAKYA, *DRAGON IN THE LAND OF SNOWS* 5 (1999).

⁹² See AVEDON, *supra* note 90, at 19; VAN WALT VAN PRAAG, *supra* note 85, at 26-46 (explaining Tibet’s attempts to remain closed to foreign trade and exchanges in the late colonial period). The Dalai Lama wrote that “deliberate isolation” best describes pre-twentieth century Tibet. TENZIN GYATSO, *MY LAND AND MY PEOPLE* 38 (1962).

⁹³ Tibet’s relationship with China stretches back to the ninth century, when the Tibetan Empire (first unified by Songtsen Gampo in the seventh century) signed a treaty with the Tang dynasty. See Sino-Tibet Treaty of 821/823 A.D., *reprinted in* VAN WALT VAN PRAAG, *supra* note 85, at 287. The academic debate over Tibet’s historical independence from China, however, focuses largely on the *cho-yun* (“priest-patron”) relationship that Tibet established with the Mongol (Yuan) dynasty in the thirteenth century. This relationship reemerged during China’s prolonged domination by the Manchu Ch’ing dynasty (1611-1911).

⁹⁴ This period, in which Tibet enjoyed *de facto* (and arguably *de jure*) independence as a nation-state, extends roughly from the signing of the Simla Convention of 1914 to the date upon which India gained independence, thus extinguishing Great Britain’s interest in maintaining Tibet as a region unvarnished by Chinese sovereignty. See Convention Between Great Britain, China, and Tibet (Simla Convention), July 3, 1914, Gr. Brit.-China-Tibet, art. 2, *reprinted in* VAN WALT VAN PRAAG, *supra* note 85, at 322-25, 323 (recognizing Tibet’s “territorial integrity,” the legitimate administration of Tibet by the Dalai Lama’s government in Lhasa, and stating that both Great Britain and China, respectively, undertake “not to convert Tibet into a Chinese province” and “not to annex Tibet or any portion of it”).

perceived to threaten their traditional sociopolitical predominance.⁹⁵ Consequently, in 1949, after the PLA emerged victorious from China's civil war, "Tibet was not equipped to oppose China either militarily or socially."⁹⁶ Ironically, the isolation Tibet's government had self-consciously cultivated to shield Tibet from foreign domination proved the principal reason that Tibet found itself unable to achieve political recognition as a modern nation-state—and thus powerless to resist foreign domination by communist China.

In 1950, most constituents of the nascent United Nations remained entirely ignorant of Tibet's status. To the extent that Tibet's status occupied them at all, they remained content to defer to the views of India, Britain, and the United States, the sole states able to speak authoritatively on the status of Tibet—with the obvious exception of China, which, needless to say, maintained, then as now, that Tibet is its internal affair,⁹⁷ solely within its domestic jurisdiction.⁹⁸ But India, Britain, and the United States refused, for ephemeral diplomatic reasons, to support formal consideration of Tibet's status at the United Nations directly. Nor would they corroborate publicly what they acknowledged privately: Tibet was a sovereign state threatened imminently by communist Chinese aggression.

In a pattern that became familiar in retrospect, the United States government, though internally supportive of Tibet, deferred to Great Britain, which, "[a]part from India, who for historical and geo-political reasons was most

⁹⁵ SHAKYA, *supra* note 91, at 5.

⁹⁶ *Id.*

⁹⁷ While Mao Zedong's government was the first twentieth-century Chinese regime capable of asserting this claim militarily, China had, since independence from the Manchus in 1911, asserted historical "ownership" of Tibet. See Sun Yat-Sen, Lecture (Jan. 27, 1924), in SUN YAT-SEN: HIS POLITICAL AND SOCIAL IDEALS 163 (Lenoard Shihlien Hsü trans. & ed. 1933); see also CHIANG KAI-SHEK, CHINA'S DESTINY 11 (1947) (asserting that Tibet's "allegiance to China dates back to the Sui and Tang Dynasties").

⁹⁸ See U.N. CHART., art. 2, para. 7.

directly affected by the Chinese invasion, . . . was the only nation [that] had substantial knowledge and historical contact with Tibet.”⁹⁹ Britain, in turn, deferred to the newly independent government of India, which it viewed as the inheritor of any strategic interests in may once have maintained in Tibet. But India declined to take a firm stance on Tibet because it feared to provoke China with any act that might exacerbate their already tenuous relationship. This pattern emerged before the Korean War, but that conflict reinforced and entrenched it. India, in particular, found itself involved in mediation efforts in Korea and feared complicating these delicate negotiations by antagonizing China with forthright support for Tibet. Consequently, at a critical juncture, “there were no major powers prepared to support Tibet’s appeal to the UN;” and the State of Tibet “faded into obscurity.”¹⁰⁰

1. *The Attempt to Secure International Support for Formal Recognition*

In 1949, Tibet’s government struggled desperately to modernize, a process hampered by internal political struggles.¹⁰¹ At this stage, however, it finally realized that, without a modern military, only international recognition could protect its sovereignty. It therefore sought to secure recognition by the United Nations.¹⁰² By then, the imminence of the Chinese threat had become clear to the *Kashag* (the Tibetan cabinet), and as the Dalai Lama recalled in his autobiography, “Tibet had neither the material resources nor the arms or men to defend its

⁹⁹ SHAKYA, *supra* note 91, at 54.

¹⁰⁰ *Id.* at 61.

¹⁰¹ See generally GOLDSTEIN, *supra* note 85 (providing a detailed historical analysis of Tibetan political crises in the pre-War era).

¹⁰² While the Thirteenth Dalai Lama, who struggled to modernize Tibet in the 1920s, “had contemplated joining the League of Nations, . . . fear of having to open the country to outsiders had prevented [Tibet’s rulers] from seeking membership.” SHAKYA, *supra* note 91, at 53.

integrity against serious attack”¹⁰³ In December of 1949, the *Kashag* solicited Great Britain, the sole Western state with whom it had maintained significant formal relations in the past, to support Tibet’s bid for U.N. membership. A telegram to the British Foreign Office stated:

As all the world knows that Tibet and Communist China cannot have any common sympathy by reason of religion and principles of life which are just the opposite, therefore in order to defend our country against impending threat of Communist invasion and also to preserve our future independence and freedom, we consider it most essential for Tibet to secure admission of her membership in the United Nations General Assembly.¹⁰⁴

The Foreign Office, however, refused to consider this. It recognized that the proposal would face a veto from Russia and China.¹⁰⁵ More critically, Britain’s “interest in Tibet in the past had been the result of the need to secure its position in India. Now that strategic considerations had devolved to the GOI [Government of India], there were relatively few British economic interests in the country.”¹⁰⁶ Britain therefore referred Tibet’s solicitation to K.P.S. Menon, India’s Foreign Secretary. Menon, in turn, took to heart the advice of Sardar Pannikar, India’s Ambassador to China, who had remarked that India should “wash her

¹⁰³ GYATSO, *supra* note 92, at 60. Avedon notes that, following the Thirteenth Dalai Lama’s death, the Tibetan government virtually ignored the army and, at the time of China’s invasion, Tibet’s formal military forces amounted to “little more than a glorified border patrol” AVEDON, *supra* note 90, at 27.

¹⁰⁴ Telegram from the *Kashag* to the British Foreign Secretary, Ernest Bevin, Dec. 3, 1949, *reprinted in* SHAKYA, *supra* note 91, at 18.

¹⁰⁵ Bevin’s telegram in reply noted in part that “the *Kashag* [should realize] that admission to the UNO [United Nations Organization] is subject to the approval not merely of the UNO Assembly but also of the Security Council where the veto is operative, and for obvious reasons it would be quite unrealistic in present circumstances to hope to secure Tibet’s admission” *See id.*

¹⁰⁶ *Id.* at 19.

hands completely of Tibet.”¹⁰⁷ Menon feared that any action on Tibet’s behalf would appear to confirm China’s allegations of an Anglo-Indian conspiracy in Tibet. At a minimum, such action threatened to exacerbate Sino-Indian relations at a time when India could not afford this risk.¹⁰⁸ India’s apprehensions increased when the Chinese government warned India that “receiving ‘an illegal [Tibetan] delegation’ would be considered ‘entertaining hostile intentions against the Chinese People’s Republic.’”¹⁰⁹ (It is no coincidence that today the Chinese government employs virtually identical threats and language to dissuade nations from receiving governmental delegations from the Republic of China (Taiwan) or from receiving the Dalai Lama “officially.”)¹¹⁰

Similar requests communicated directly by the *Kashag* to India, Nepal, and the United States generated virtually identical “polite but negative” replies.¹¹¹ All three governments agreed that supporting Tibet’s bid would “provoke” China; that “it was politically and logistically impossible”; and—in retrospect, naïvely—that “if unprovoked, [China] might be content to maintain Tibet’s traditional autonomy.”¹¹² The United States, the nation in which the *Kashag* placed its greatest hope after Britain’s *laissez-faire* attitude became clear, therefore refused to take the lead in supporting Tibet’s plea to the United Nations. United States Ambassador Lloyd Henderson informed the Tibetan government’s representative in New Delhi that Tibet’s request for admission to the United Nations would certainly be vetoed by China and Russia. And it might

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ AVEDON, *supra* note 90, at 27.

¹¹⁰ The Chinese government therefore viewed President Bush’s formal meeting with the Dalai Lama in May 2001 as a hostile act. *E.g.*, Feng Qihua, *Dalai’s U.S. Tour Strains Ties*, CHINA DAILY, May 25, 2001, available at 2001 WL 7482427. Had it not been for China’s anxiety about U.S. support for Beijing’s 2008 Olympics bid, this may well have provoked a more serious response from the Chinese government.

¹¹¹ See AVEDON, *supra* note 90, at 27.

¹¹² INT’L COMM’N OF JURISTS, *supra* note 2, at 44.

“serve to precipitate Chinese Communist action to gain control [of] Tibet.”¹¹³ India, finally, not only refused to champion Tibet’s cause at the United Nations, but also made clear that, should China carry out its threatened invasion, the Tibetan government should expect no military assistance.¹¹⁴

India’s position, above all, proved dispositive of Tibet’s early efforts to secure political recognition. Both the United States and Britain remained sympathetic to Tibet. After China did invade, each expressed willingness to support Tibet’s appeal to the General Assembly. But both nations continued to feel obliged to defer to India, which they viewed as the nation with the most at stake in any resolution of Tibet’s legal status. And India suffered from the naïve belief that “support for China over other issues,” coupled with refusal to formally recognize Tibet, would “prevent[] China from directly antagonising India by invading Tibet.”¹¹⁵ The Korean War exacerbated this pattern, and it continued after China invaded Tibet in 1950. In effect, these events precluded any meaningful discourse on Tibet’s legal status at the United Nations.

2. *Appeal to the United Nations*

The victory of Mao Zedong’s PLA over the KMT initiated a resurgence of Chinese nationalism, manifest in a fervor to “liberate” China from “foreign elements” by annexing the diverse territories and peoples that had, to varying degrees, been loosely incorporated into some ancient “Chinese”¹¹⁶ empires (most recently, that of the Manchu Dynasty). China scholar John King Fairbank notes that, ironically, “the [communist] revolution, which brought a sort of self-

¹¹³ IX FOREIGN RELATIONS OF THE UNITED STATES: THE FAR EAST; CHINA 1096.

¹¹⁴ See GYATSO, *supra* note 92, at 61.

¹¹⁵ SHAKYA, *supra* note 91, at 26.

¹¹⁶ It is worth noting that these empires—the Mongol and Manchu dynasties—were not, in fact, Chinese at all.

determination to the Chinese people, kept them in a colonialist-imperialist posture toward the adjoining peoples of Tibet, Sinkiang [East Turkestan], and Mongolia.”¹¹⁷ On October 25, 1950, China announced its intention to “liberate” Tibet from “imperialist oppression.”¹¹⁸ Twelve days later, the Tibetan government cabled its final appeal as a sovereign state to the United Nations:

The attention of the world is riveted on Korea, where aggression is being resisted by an international force. Similar happenings in remote Tibet are passing without notice. . . . We can assure you, Mr. Secretary-General, that Tibet will not go down without a fight, though there is little hope that a nation dedicated to peace will be able to resist the brutal effort of men trained to war, but we understand that the United Nations has decided to stop aggression whenever it takes place. The armed invasion of Tibet for the incorporation of Tibet in Communist China through sheer physical force is a clear case of aggression. . . . The problem is simple. The Chinese claim Tibet as a part of China. Tibetans feel that racially, culturally, and geographically they are far apart from the Chinese. If the Chinese find the reactions of the Tibetans to their unnatural claim not acceptable, there are other civilized methods by which they could ascertain the views of the people of Tibet; or, should the issue be surely juridical, they are open to seek redress in an international court of law. . . .¹¹⁹

¹¹⁷ JOHN KING FAIRBANK, *THE GREAT CHINESE REVOLUTION 1800-1985*, at 10 (1986).

¹¹⁸ AVEDON, *supra* note 90, at 32 (quoting Radio Peking, Oct. 25, 1950). In response to India’s protestation, China maintained that “the problem of Tibet is entirely the domestic problem of China. No foreign interference will be tolerated.” *Id.*

¹¹⁹ Cablegram from the Kashag and the National Assembly of Tibet to the United Nations, Nov. 11, 1950, U.N. Doc. A/1549 (1950), *reprinted in* VAN WALT VAN PRAAG, *supra* note 85, at 334.

The *Kashag's* cable attempted to impress upon the United Nations three critical points. First, by linking Tibet's circumstances to those in Korea, the Tibetan government sought to indicate that Tibet, like Korea, constituted an independent state threatened by foreign invasion.¹²⁰ Second, by emphasizing the racial, cultural, and geographic differences between the Chinese and Tibetan peoples—and by recounting a series of historical divides between China and Tibet (omitted from the excerpt above)—the *Kashag* invoked the “self-determination of peoples,” a diplomatic legacy of former President Wilson,¹²¹ which would subsequently be codified¹²² and applied to virtually every colony *except* Tibet. Third, the Tibetan government appealed to the newly established provision barring the threat or use of force in international relations. The *Kashag's* cable thus represents one of the first attempts to invoke the principle of non-aggression codified in article 2(4) of the U.N. Charter.¹²³ The latter two principles now constitute axioms of international law, even if neither receives consistent respect in practice. But in 1950, at the outset of the Cold War, political expediency carried far greater force than either principle. Tibet's appeal was promptly tabled.

Above all, Tibet faced problems generated by its isolationist history: Few government officials knew of Tibet's *existence*, let alone its legal status.¹²⁴ In fact, officials at the U.N. Secretariat thought the *Kashag's* appeal came from a non-governmental organization. Absent

¹²⁰ See SHAKYA, *supra* note 91, at 52.

¹²¹ *E.g.*, Speech of Woodrow Wilson, (Feb. 11, 1918), in 1 WOODROW WILSON, PRESIDENTIAL MESSAGES, ADDRESSES, & PUBLIC PAPERS, 1917-1924, at 117 (R.S. Baker & W.E. Dodd eds., 1927); Michla Pmerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 2 (1976); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 27 (1990).

¹²² ICCPR, *supra* note 3, art. 1; ICESCR, *supra* note 3, art. 1.

¹²³ U.N. CHARTER, art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”).

¹²⁴ SHAKYA, *supra* note 91, at 53.

intervention by the British delegate, who explained Tibet's circumstances in general terms, the Secretariat would have recorded the appeal "on the routine list of communications from non-governmental organisations" and dismissed it.¹²⁵ But Britain thereafter refused to seize the initiative. It chose to continue its post-colonial policy of deference to India on all matters concerning Tibet.¹²⁶ And the U.S. State Department followed suit. Secretary of State Dean Acheson informed Indian Prime Minister Nehru that the United States would support India's position on Tibet, and he instructed the U.S. delegation not to raise the "Tibet issue" on its own initiative.¹²⁷ India then fell back upon its customary position. Its U.N. delegate explained that

[i]n the latest note received by his Government, the Peking Government had declared that it had not abandoned its intention to settle those difficulties [i.e., China's occupation of Tibet] by peaceful means. . . . [S]uch a settlement could safeguard the autonomy which Tibet had enjoyed for several decades while maintaining its historical association with China.¹²⁸

But by this time, the Indian delegate's implication that "Tibet and China were willing to settle the dispute peacefully" was simply false. The Indian delegate knew full well that the *Kashag* had not decided to negotiate with China.¹²⁹ India's motivation, as before, was to avoid

¹²⁵ *Id.*

¹²⁶ *See id.* at 54. Sir Gladwyn Jebb of the British Delegation wrote candidly, "What we want to do is to create a situation which does not oblige us in practice to do anything about the Communist invasion of Tibet." *Id.* at 55.

¹²⁷ *Id.*

¹²⁸ U.N. GAOR General Committee, 5th Sess., 73d mtg., (1950) (statement of the delegate of India), *reprinted in* INT'L COMM'N OF JURISTS, *supra* note 2, at 46 (quoting U.N. GAOR, 14th Sess., 812th mtg, U.N. Doc. A/PV.812, para. 124) (1959).

¹²⁹ SHAKYA, *supra* note 91, at 58.

antagonizing China. Any action it took on Tibet could jeopardize its role in mediating the Korean conflict.¹³⁰

El Salvador ultimately proved the unlikely but sole proponent of Tibet's appeal. Hecto David Castro, the Salvadoran delegate, noted that Tibet had enjoyed genuine independence since at least 1912. China's actions therefore constituted unprovoked aggression against a sovereign state in violation of the U.N. Charter. Castro submitted a resolution to this effect for immediate action.¹³¹ But several factors prevented its consideration. First, the Korean War dominated the General Assembly's agenda.¹³² Second, Russian delegate K.J. Malik urged adjournment of the debate because in his view Tibet remained exclusively within China's "domestic jurisdiction." Third, and again dispositively, the governments of Britain and the United States deferred to the Indian delegate's (false) representation that peaceful settlement negotiations were in progress, which might obviate the need to consider the Sino-Tibetan conflict. The "General Committee [therefore] unanimously decided to postpone *sine die* consideration of [Castro's] draft resolution to the General Assembly."¹³³

After learning this, the disheartened Tibetan government immediately transmitted a second cable to the Secretary General inviting the United Nations to send a fact-finding mission to Tibet to investigate for itself, but to no avail.¹³⁴

¹³⁰ See *id.* at 60 (quoting a communication from the Government of India [GOI] stating that "if GOI should press the Tibetan case just now in the U.N., Communist China would be alienated to such an extent [that] GOI would lose all ameliorating influence on Peiping [Beijing] re: Korea and related problems").

¹³¹ See VAN WALT VAN PRAAG, *supra* note 85, at 145; see also SHAKYA, *supra* note 88, at 56.

¹³² The General Assembly had recently "confirmed that Chinese forces had intervened in Korea," and on the day Tibet's appeal arrived, General MacArthur launched a massive offensive in Korea. VAN WALT VAN PRAAG, *supra* note 85, at 145. See also SHAKYA, *supra* note 91, at 56.

¹³³ SHAKYA, *supra* note 91, at 57.

¹³⁴ See VAN WALT VAN PRAAG, *supra* note 85, at 146 (citing Note by Secretary General Communicating Text of Cablegram, dated Dec. 8, 1950, from the Tibetan Delegation, G.A. Doc. A/1658 (1950)).

The United States, whose interest in Tibet at that time remained largely a product of its then-prevailing national neurosis about the spread of communism, later struggled to find a way to raise the issue. But it continued to decline to seize the initiative itself. And before it could mobilize alternative support for Tibet, a delegation that the Dalai Lama had reluctantly sent to Beijing to negotiate with China signed the so-called 17-Point Agreement, which purported to “reunite” Tibet with the Chinese “Motherland.”¹³⁵

B. Tibet’s Status: An Analysis of Tibet’s Right to Legal Recognition

“On the basis of the 17-Point Agreement,”¹³⁶ Avedon wrote, “Tibet lost its identity as a nation-state.”¹³⁷ Undoubtedly, Tibet did lose its *de facto* independence after the invasion. Under international law, however, neither China’s military conquest nor the 17-Point Agreement could deprive Tibet of *de jure* statehood. The legal criteria reviewed in Part I support the inference that Tibet was—and remains—independent. If the series of events by which Tibet allegedly lost its independence occurred today, we would be hard pressed to distinguish them from Iraq’s invasion of Kuwait or Indonesia’s annexation of East Timor. While military action against China on this basis would clearly be destructive, neither is it constructive to continue to indulge the fiction that Tibet’s post-War history renders

¹³⁵ See Agreement of the Central People’s Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, May 23, 1951, P.R.C.-Tibet, para. 1 [hereinafter 17-Point Agreement], reprinted in VAN WALT VAN PRAAG, *supra* note 85, at 337.

¹³⁶ The 17-Point Agreement purports to leave Tibet’s existing political system intact and to preserve the “established status, functions, and powers of the Dalai Lama.” See *id.* para. 4. But paragraph 14 surrenders foreign affairs control to China; and, in practice, internal affairs, as the Dalai Lama recalled shortly after arriving in exile, remained, at best, under the Tibetan government’s nominal authority. See GYATSO, *supra* note 92, at 95-96.

¹³⁷ AVEDON, *supra* note 90, at 36.

it a “part of” China. Indeed, in Tibet’s case, among others, such an ongoing act of formal recognition enables a “violation[] of international law . . . to create rights in international law.”¹³⁸

1. *Tibet’s Status at the Time of the China’s Invasion*

The precise nature of Tibet’s *historical* relationship with China remains contentious and complicated.¹³⁹ But all politically independent analysts agree that from 1913 to 1950 Tibet enjoyed *de facto* independence and statehood.¹⁴⁰ The International Commission of Jurists carried out extensive investigations of Tibet’s legal status and human rights conditions in 1959, 1960, and 1997. It concluded that before the invasion “Tibet had achieved *de facto* independence and all of the requirements of *de jure* independence except formal international recognition.”¹⁴¹ Tsering Shakya notes that on “the eve of the Chinese invasion in October 1950, the Tibetan Government exercised internal and external freedom, which clearly demonstrated the country’s independence.”¹⁴² Michael C. van Walt van Praag, whose 1987 study provides an exhaustive, hermetic analysis of Tibet’s international legal status, concludes that the existence of the Tibetan State was “largely uninterrupted” throughout history and indisputably established between 1911 and October 1950.¹⁴³ Historian Melvyn C. Goldstein, criticized in some circles as *too* sympathetic to China’s occupation of Tibet, nonetheless affirms, after noting the odd structure of the traditional

¹³⁸ ROTH, *supra* note 16, at 125.

¹³⁹ For a comprehensive historical treatment of Tibet’s political and legal status, see sources cited *infra* note 143.

¹⁴⁰ See VAN WALT VAN PRAAG, *supra* note 85, at 140 (“Few scholars seriously challenge the notion that Tibet possessed actual independence *at least* between 1911 and 1950.”) (emphasis added).

¹⁴¹ INT’L COMM’N OF JURISTS, *supra* note 2, at 43.

¹⁴² SHAKYA, *supra* note 91, at xxiv.

¹⁴³ VAN WALT VAN PRAAG, *supra* note 85, at 141.

Tibetan government, that “[t]his, however, does not imply that the central government [i.e., the Dalai Lama, the *Kashag*, and the National Assembly] did not exercise authority over the entire country; it did.”¹⁴⁴

Without unnecessarily reiterating the analyses of these and other scholars, it is worth noting that their observations find support in the traditional legal principles for determining the existence of statehood enunciated above in Part I:

Tibet demonstrated from 1913 to 1950 the conditions of statehood as generally accepted under international law. In 1950 there was a people and a territory, and a government which functioned in that territory, conducting its own domestic affairs free from any outside authority. From 1913-1950 foreign relations of Tibet were conducted exclusively by the Government of Tibet and countries with whom Tibet had foreign relations are shown by official documents to have treated Tibet in practice as an independent state.¹⁴⁵

The sole factor evincing statehood that Tibet lacked during this period was “formal international recognition,”¹⁴⁶

¹⁴⁴ GOLDSTEIN, *supra* note 85, at 6. *See also* LEE FEIGON, DEMISTIFYING TIBET (1998); WARREN SMITH, TIBETAN NATION (1996); CONFERENCE OF INTERNATIONAL LAWYERS ON ISSUES RELATING TO SELF-DETERMINATION AND INDEPENDENCE FOR TIBET, TIBET: THE POSITION OF INTERNATIONAL LAW (1993); Dawa Norbu, *Selfdetermination in the Post-Soviet Era: A Case Study of Tibet*, 34 J. INT’L L. STUD. 237 (1997) (all reaching the same general conclusion—that Tibet constituted an independent state at a minimum from 1913 to 1950). *But see* INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, TIBET—ITS OWNERSHIP AND HUMAN RIGHTS SITUATION (Sept. 1992), *available at* <http://english.peopledaily.com.cn/whitepaper/6.html> (explaining China’s official position, which, to my knowledge, no independent historical or legal scholar shares).

¹⁴⁵ LEGAL INQUIRY COMMITTEE ON TIBET, INTERNATIONAL COMMISSION OF JURISTS, TIBET & THE CHINESE PEOPLE’S REPUBLIC 5-6 (1960). It is also worth noting that Tibet possessed a unique legal system, independent from that of China. *See* REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET (1999).

¹⁴⁶ INT’L COMM’N OF JURISTS, *supra* note 2, at 43.

meaning *political* recognition. As an initial matter, recall that the declaratory model of statehood does not recognize this as a relevant factor at all; and under the constitutivist model, political recognition, while crucial, remains a highly ambiguous criterion.

Even under the constitutivist model, however, the State of Tibet probably received enough political recognition to satisfy this criterion. Despite the paucity of formal acts of recognition it received, Tibet had the capacity to, and did, enter into foreign relations with other states, as evinced by treaties that it concluded with them.¹⁴⁷ And despite reluctance to raise the Tibet issue publicly at the General Assembly, both Great Britain and the United States

¹⁴⁷ *E.g.*, Convention Between Great Britain, China, and Tibet, arts. 1-2, July 3, 1914, arts. 1-2, reprinted in VAN WALT VAN PRAAG, *supra* note 85, at App. 19 (Simla Convention) (recognizing that Tibet remains under the “suzerainty” of China in Tibet, but affirming that it shall “remain in the hands of the Tibetan Government at Lhasa” and that “[t]he Government of China engages not to convert Tibet into a Chinese province”); Treaty of Friendship and Alliance Between the Government of Mongolia and Tibet, Dec. 29, 1912, Mong.-Tibet, arts. 1-3, reprinted in VAN WALT VAN PRAAG, *supra* note 85, at App. 17 (1987) (mutually recognizing each other’s formal independence and resolving to cooperate in matter of defense and the preservation of the Buddhist faith); Convention Between Great Britain and Thibet, Sept. 7, 1904, Gr. Brit.-Tibet, reprinted in VAN WALT VAN PRAAG, *supra* note 85, at App. 10 (1987) (resolving trade disputes between Great Britain and Tibet, albeit in a characteristically colonial “treaty”); Treaty Between Nepal and Tibet, Mar. 1856, Nepal-Tibet, reprinted in VAN WALT VAN PRAAG, *supra* note 85, at App. 5 (1987); Peace Treaty Between Ladakh and Tibet at Tingmosgang (1684). Most troubling for China’s claim that Tibet always has been a part of China is the Sino-Tibetan treaty of 821/823 A.D., which states that:

Both Tibet and China shall keep the country and frontiers of which they are now in possession. The whole region to the east of that being the *country* of Great Tibet, from either side of that frontier there shall be no warfare, no hostile invasions, and no seizure of territory And in order that this agreement establishing a great era when Tibetans shall be happy in Tibet and Chinese shall be happy in China shall never be changed, the Three Jewels, the body of saints, the sun and moon, planets and stars have been invoked as witnesses

Sino-Tibetan Treaty, 821/823 A.D., China-Tibet, reprinted in VAN WALT VAN PRAAG, *supra* note 85, at App. 2 (1987) (emphasis added). Ironically, a pillar memorializing the Sino-Tibetan treaty and containing this precise inscription remains standing in the Barkhor Square in central Lhasa, Tibet’s capital. The foregoing treaties are also available at <http://www.tibetjustice.org/materials/index/treaties>.

privately affirmed Tibet's statehood. A 1950 communication from the British Foreign Office, deliberately kept confidential at the time, concluded that "since Tibet has from 1913 not only enjoyed full control over her internal affairs but also has maintained direct relations on her own account with other States, she must be regarded as a State to which Article 35(2) of the U.N. Charter applies"¹⁴⁸ The U.S. State Department, in a similar confidential communication to Britain, wrote:

The United States, which was one of the early supporters of the principle of self-determination of peoples, believes that the Tibetan people has the same inherent right as any other to have the determining voice in its political destiny [S]hould developments warrant, consideration could be given to recognition of Tibet as an independent State.¹⁴⁹

In fact, while U.S. Ambassador Lloyd W. Henderson complied with the official American policy of deference to India, he asked then Secretary of State Dean Acheson, "Is it logical for [the] U.N. which gave Indonesia which was under Dutch sovereignty, [a] hearing to ignore Tibet?"¹⁵⁰

Finally, Tibet's lack of significant political recognition prior to 1950 is not a function of any inherent deficiency as a nation-state. Rather, it resulted from the misguided isolationist policies pursued by the Tibetan government during the pre-War era. For this reason, most states never had occasion to consider Tibet's status. It is therefore neither conclusive nor even particularly informative to note that few declared formal views on the matter. If they *had*

¹⁴⁸ British Foreign Office, 371-84454 (1950), *reprinted in* SHAKYA, *supra* note 91, at 54.

¹⁴⁹ Aide-Memoire from the U.S. Department of State to the British Embassy (Dec. 30, 1950), *reprinted in* 6 FOREIGN RELATIONS OF THE UNITED STATES 613 (1950).

¹⁵⁰ Letter from Lloyd W. Henderson, U.S. Ambassador to the Secretary of State (Dec. 30, 1950), *reprinted in* 6 FOREIGN RELATIONS OF THE UNITED STATES 612 (1950).

had occasion to consider Tibet's status, it would have been apparent that Tibet—one of the few Asian nations never to be colonized by a European imperial power¹⁵¹—maintained as much, if not more, of a legitimate claim to statehood than those territories that, in the post-War era of decolonization, began to receive formal recognition as states. Given the critical role of state practice on the international law of recognition vis-à-vis former colonies and non-self-governing territories, it bears emphasizing that few, if any, states maintained, at that time, that putative states—for example, the Belgian Congo, the Dutch East Indies, or the colonies of French equatorial-Africa—did not merit statehood because they lacked statehood or formal recognition in the past. Indeed, whereas many states born in the post-War era share little more than a common history of colonial exploitation, Tibet's national polis shares religious, linguistic, racial, cultural, historical, and political bonds dating back *millennia*, the very factors traditionally constitutive of a “people”¹⁵² with a distinct national identity.¹⁵³ Ironically, at the very time in history when

¹⁵¹ Great Britain enjoyed considerable trading privileges in Tibet during the turn of the century, but it never colonized Tibet, as it did neighboring India, nor did it purport to supplant Tibet's government.

¹⁵² In 1990, the United Nations Economic and Social Cooperation Organization (UNESCO) defined a “people” in terms of the following “objective” factors:

1. (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) a common economic life. 2. The group must be of a certain number which need not be large (e.g., the people of micro states), but which must be more than a mere association of individuals within a state . . . 4. The group must have institutions or other means of expressing its common characteristics and will for identity.”

International Meeting of Experts on Further Study of the Rights of Peoples, UNESCO, Paris, SHS. 89/ CONF. 602/7 (1990). The Tibetan people satisfy each of these criteria. Norbu, *supra* note 85, at 254-63.

¹⁵³ The salience of these factors is apparent to Tibetans. Tsering Shakya, in the introduction to the autobiography of former Tibetan political prisoner Palden Gyatso, captures this point well:

Academics and lawyers can produce persuasive arguments to demonstrate that Tibet was always independent or that it was always a part of China, but for people like Palden and for hundreds of ordinary Tibetans, the finer points of international diplomacy and the canons of international law have

Europe began to promote decolonization and extend the right to self-determination to formerly subjugated peoples, these same states declined to consider the appeal of an extant state *being* colonized.

2. *The Effect of China's Military Occupation of Tibet*

A state established under international law continues to exist “unless and until the source or validity of [its] government has indisputably been transferred . . . to the government of another State.”¹⁵⁴ Before the mid-nineteenth century, military conquest remained a valid method of acquiring territory and transferring its sovereignty to the conquering government.¹⁵⁵ But the propriety of this method has now been decisively repudiated.¹⁵⁶ Article 2(4) of the U.N. Charter establishes that member states shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”¹⁵⁷ On October 24, 1970, the General Assembly adopted Resolution 2625, which proclaims that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.”¹⁵⁸ In his most recent treatise, Brownlie states without qualification that “illegal occupation cannot of itself

never been particularly relevant. Palden is convinced of Tibet's separateness and independence because that is his common experience.

The two countries are separated by tradition, culture, language and history.

For him, that is a fact as clear as the difference between milk and water.

Tsering Shakya, *Preface to* PALDEN GYATSO, *THE AUTOBIOGRAPHY OF A TIBETAN MONK* (1997); *see also* SMITH, *supra* note 85, at 360-61 (noting that “Tibet was unique among the frontier territories the CCP attempted to integrate into the Chinese state . . . Tibetans were united by a cultural and religious identity and a primarily latent but autochthonous nationalist consciousness”).

¹⁵⁴ BROWNLIE, *supra* note 15, at 177.

¹⁵⁵ *See id.* at 178.

¹⁵⁶ *See generally* KORMAN, *supra* note 69, at 218-34.

¹⁵⁷ U.N. CHARTER art. 2, para. 4.

¹⁵⁸ G.A. Res. (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970).

terminate statehood.”¹⁵⁹ Finally, even assuming that military conquest remains, under exigent circumstances, a legitimate means of acquiring sovereignty over a formerly independent state, China itself does not acknowledge the validity of this method; nor does it invoke this theory in support of its “ownership” of Tibet.¹⁶⁰ If Tibet lost its right to recognition as a state in 1950, it was thus not because of the Chinese invasion. The other possibility is the 17-Point Agreement.

3. *The Status of the 17-Point Agreement Under International Law*

After its failure to secure consideration by the United Nations and under growing military pressure, the Tibetan government sent delegates to Beijing to negotiate. The delegates repudiated then Prime Minister Zhou Enlai’s initial proposal because it described Tibet as an integral part of China. But under duress that included threats of “both personal violence and large-scale military retaliation against Tibet,”¹⁶¹ the twenty-three delegates, acting without the authority or approval of the Tibetan government, signed the 17-Point Agreement. This treaty purported to “reunite” Tibet with the Chinese “Motherland.” To date, China “does not itself recognize conquest, annexation, or prescription as modes of valid territorial acquisition and, furthermore, . . . has never claimed to have acquired title to Tibet through any of these modes.”¹⁶² But in view of Tibet’s statehood in 1950, neither could China have acquired sovereignty by

¹⁵⁹ BROWNLIE, *supra* note 15, at 78. For this same reason, “[i]t is not correct to describe governments-in-exile as states without people or territory when the displacement is caused by a belligerent occupation.” *Id.* at 78 n.56.

¹⁶⁰ See VAN WALT VAN PRAAG, *supra* note 85, at 188 (noting that the Chinese government has never claimed title to Tibet in virtue of its military occupation but has instead advanced as justification its “prior possession of a legal title,” based on a highly questionable history of Sino-Tibetan political relations).

¹⁶¹ AVEDON, *supra* note 90, at 35.

¹⁶² VAN WALT VAN PRAAG, *supra* note 85, at 188.

means of the 17-Point Agreement. A review of the customary international law of treaties belies this contention.

As a preliminary matter, it is revealing to note that China felt the need to enter into a treaty—a state-to-state “contract”—with an entity that it claims was never an independent state with the *capacity* to contract. In any event the 17-Point Agreement does not represent a valid transfer of Tibet’s sovereignty to China. The Vienna Convention on the Law of Treaties provides that expressions of state consent “procured by the coercion of its representative through acts or threats directed against him” or “by the threat or use of force” shall be void and “without any legal effect.”¹⁶³ The Convention was not in force when the Chinese government coerced the Tibetan delegates in Beijing to sign the 17-Point Agreement. But its terms represent a codification of the customary international law of treaties.¹⁶⁴ The threats directed against Tibet’s delegates to compel them to sign the 17-Point Agreement therefore render it void and without legal effect. The Tibetan government arguably acceded to the treaty by subsequently abiding by its terms. But van Walt van Praag clarifies that:

the state of coercion by which the treaty was imposed continued [until the Dalai Lama’s exile in 1959]. . . . [T]he Dalai Lama and his government were at no time in a position to freely express their acceptance or rejection of the terms of the 17-Point Agreement.¹⁶⁵

¹⁶³ Vienna Convention on the Law of Treaties, May 23, 1969, arts. 51-52, reprinted at 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

¹⁶⁴ See *id.* at preamble (observing that “principles of free consent and of good faith . . . are universally recognized,” and describing the Vienna Convention as a “codification . . . of the law of treaties”).

¹⁶⁵ VAN WALT VAN PRAAG, *supra* note 85, at 165.

Furthermore, de facto enforcement of a treaty does not validate its de jure illegality.¹⁶⁶ Moreover, during the Dalai Lama's flight into exile in March 1959, while still in Tibetan territory, he formally repudiated the 17-Point Agreement.¹⁶⁷

Absent a specific provision relating to withdrawal, international law does not generally permit unilateral denunciation to nullify treaty obligations.¹⁶⁸ But the Tibetan government's repudiation proves justified here because of breach.¹⁶⁹ By 1959, China had abrogated the 17-Point Agreement by, *inter alia*, undermining the integrity of the local government, restricting religious freedom, altering the status and powers of the Dalai Lama, and, most egregiously, bombarding Lhasa and massacring the Tibetan people on March 10, 1959. In view of these violations, "the Government of Tibet was entitled to repudiate the agreement as it did in 1959."¹⁷⁰ The 17-Point Agreement of 1951 was therefore "null and void *ab initio*, leaving the legal independence of Tibet intact at the time of its conclusion"¹⁷¹ and abrogated by China, precluding its present invocation to establish Chinese sovereignty over Tibet.

In sum, neither Tibet's military conquest by China nor the 17-Point Agreement altered Tibet's legal status as of 1950. Tibet remains, according to the international legal criteria for recognition, a nation-state under illegal foreign occupation. And "Tibetans are a 'people under alien

¹⁶⁶ See FAIRBORZ NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 286 (1971).

¹⁶⁷ TENZIN GYATSO, *FREEDOM IN EXILE* 141 (1990).

¹⁶⁸ See BROWNLIE, *supra* note 15, at 621.

¹⁶⁹ See *id.* at 622 (observing that "material breach by one party entitles the other party or parties to a treaty to invoke the breach as the ground of termination or suspension"). See also Vienna Convention, art. 60(1), *supra* note 162, reprinted at 8 I.L.M. 679 (1969) ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.").

¹⁷⁰ INT'L COMM'N OF JURISTS, *supra* note 2, at 21.

¹⁷¹ VAN WALT VAN PRAAG, *supra* note 85, at 165.

subjugation,' entitled under international law to the right of self-determination, by which they freely determine their political status."¹⁷²

C. The Force of Popular Moral Opinion: Manifestations of Civil Recognition

One commentator has noted that "[o]nce history's stage was peopled with kings and princes. Now it seems that almost anyone with letterhead stationary and a tax identification number can crowd on as well."¹⁷³ Civil recognition practices embrace a vast array of international actors. These include nongovernmental organizations, scholars, popular media, and individually elected government officials whose actions and views, though not binding state practice, still serve as a powerful mouthpiece for their constituency's popular moral opinion. The dramatic increase in these practices invites inquiry into what influence, if any, they can or should exert on the evolution of international norms of recognition in the modern world order.

Non-sovereign actors, particularly nongovernmental and transnational institutions, can help to resolve difficulties that states alone possess neither the resources nor the political will to tackle.¹⁷⁴ But hortatory proclamations, academic writing, and advisory roles in international institutions do not effect direct changes in international law. On the whole, these actors can effect change only by influencing governments.¹⁷⁵ Even transnational bodies, which often prove more efficacious because they enjoy a foundation in treaty law and influential relations with their

¹⁷² INT'L COMM'N OF JURISTS, *supra* note 2, at 21.

¹⁷³ Paul Lewis, *Not Just Governments Make War or Peace*, N.Y. TIMES, Nov. 28, 1998, at B9.

¹⁷⁴ *See id.* (noting the success of the International Campaign to Ban Landmines, initiated by Nobel Peace Prize-winner Jodi Williams).

¹⁷⁵ *See id.* (quoting Owen Harris).

constituent sovereigns, can only enact change to the extent that the states that comprise them genuinely pursue the policies they promote or—in rare cases—prescribe.

But precisely because their influence on states has increased in the post-War era, civil recognition practices merit appraisal in the context of the complex and multifaceted nature of the modern international law of recognition. Today, “[m]ultilateral organizations, transgovernmental channels between agencies charged with similar tasks, contacts with state-owned enterprises or trade bodies, and various sorts of informal envoys all provide alternatives to diplomatic missions, as do the services of third parties.”¹⁷⁶ Tibet provides insight into the growing influence of civil recognition. For many reasons—some admirable, some superficial—scholars, transnational institutions, NGOs, popular media, and individually elected governmental representatives have been attracted to the “Tibet issue” in recent years; and their influence has not been negligible.

1. *Non-governmental Organizations (NGOs)*

In 1987 and 1989, the Chinese military brutally suppressed a series of peaceful pro-independence demonstrations in Lhasa.¹⁷⁷ Shortly thereafter, the NGO community of Tibet Support Groups (TSGs) proliferated rapidly. In May 2000, more than 300 delegates from fifty-two countries worldwide established the International Tibet Support Network (ITSN). ITSN comprises more than “100 organizational members from all Asia, Europe, the Americas and Africa.”¹⁷⁸ Some of its members support full

¹⁷⁶ Peterson, *supra* note 53, at 48.

¹⁷⁷ For an account of these events and their aftermath, see generally TIBET INFORMATION NETWORK & LAW ASIA ASSOCIATION FOR ASIA AND THE PACIFIC, *DEFYING THE DRAGON: CHINA AND HUMAN RIGHTS IN TIBET* (1991).

¹⁷⁸ International Tibet Support Network, *About ITSN*, at <http://www.tibet.org/itsn/about/> (last visited Apr. 1, 2002).

independence for Tibet; others focus specifically on human rights, environmental exploitation, education, healthcare, or other humanitarian concerns. To be sure, the TSG community does not speak with one voice.¹⁷⁹ But they share a common conviction: China's occupation of Tibet fails to respect the Tibetan people's right to self-determination and causes severe human rights and environmental abuses, as well as social, economic, and cultural decay.¹⁸⁰ For this reason, many TSGs increasingly express a growing consensus that unless and until China permits the Tibetan people to exercise their right to self-determination, the negative consequences of its occupation of Tibet will continue.¹⁸¹

NGOs not specifically devoted to Tibet also do not speak univocally. The Unrepresented Nations and People's Organization (UNPO), not surprisingly, shares the TSG view that Tibet is a state under colonial occupation by China.¹⁸² Human Rights Watch, by contrast, refuses—as a matter of its corporate mandate and concerns about its institutional integrity—to take *any* stand on the issue of

¹⁷⁹ For example, compare the position of Students for a Free Tibet, which tends to take a more hard-line, pro-independence stance, with that of the International Campaign for Tibet, which tends to focus on initiating negotiations between Beijing and the Tibetan government-in-exile to promote some kind of “genuine autonomy” arrangement for Tibet. See Students for a Free Tibet, *Why Tibet?*, at <http://www.tibet.org/sft/tibet.htm> (last visited Apr. 1, 2002); International Campaign for Tibet, *About ICT: Mission*, at <http://www.savetibet.org/About/AboutList.cfm?c=2> (last visited Apr. 1, 2002).

¹⁸⁰ *E.g.*, INT'L COMM'N OF JURISTS, *supra* note 2, at 14 (noting that economic issues, assaults on Tibetan culture, human rights abuses, and political difficulties all “flow from the denial of the Tibetan people's most fundamental right—to exercise self-determination”).

¹⁸¹ *E.g.*, INTERNATIONAL COMMITTEE OF LAWYERS FOR TIBET, *A GENERATION IN PERIL: THE LIVES OF TIBETAN CHILDREN UNDER CHINESE RULE* 111 (2001) (concluding that violations of Tibetan children's rights in the areas of political rights, education, healthcare, and nutrition, while amenable to improvement by specific recommendations, are “unlikely to cease until the Chinese government returns responsibility for the welfare of Tibetan children to their parents—and to a government based upon an act of self-determination by the Tibetan people”).

¹⁸² See UNREPRESENTED NATIONS & PEOPLE'S ORGANIZATION: YEARBOOK 1997, “CHINA'S TIBET”: THE WORLD'S LARGEST REMAINING COLONY 40-48 (1997).

Tibet's status or the legitimacy of its government-in-exile.¹⁸³ This is a "political" issue, not a "human rights" issue. Amnesty International, similarly, avoids taking an express stance on this issue. It, too, fears being perceived as, not an impartial human rights advocate, but an NGO with a "political persuasion."¹⁸⁴ The irony—indeed, hypocrisy—of this position is that self-determination *is* a human right.¹⁸⁵ Institutional reluctance to acknowledge this may be understandable, first, because the meaning of self-determination remains highly contentious;¹⁸⁶ and second, because the efficacy of NGOs—their ability to carry out their essential activities (monitoring and advocacy)—depends to an appreciable degree on their international perception as apolitical. But recognition that China continues to violate the Tibetan people's human right to self-determination need not imply a particular stance on Tibet's right to recognition as a state under international law. It may counsel a more moderate position, such as encouraging China to permit the Tibetan people to participate in an internationally-supervised referendum on their political status, as the International Commission of Jurists in fact recommended.¹⁸⁷ Indeed, at the recent U.N. World Conference Against Racism, the first U.N. conference at which Tibetan NGOs and government-in-exile representatives succeeded—over China's vehement objection—in obtaining accreditation, the NGO forum denounced the "colonial occupation of Tibet" and called for an internationally monitored referendum in Tibet.¹⁸⁸

¹⁸³ See, e.g., Mickey Spiegel, *China and Tibet: Profiles of Tibetan Exiles*, 11 HUMAN RIGHTS WATCH, 2 n.1 (1999); HUMAN RIGHTS WATCH/ASIA & TIBET INFORMATION NETWORK, *supra* note 2, at 1 n.1.

¹⁸⁴ See Amnesty International, *About Amnesty*, at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited Jan. 24, 2002); Statute of Amnesty International (as amended, 23d Int'l Council Meeting, Cape Town, South Africa, Dec. 19, 1997), available at <http://www.web.amnesty.org/web/aboutai.nsf/>.

¹⁸⁵ ICCPR, *supra* note 3, art. 1; ICESCR, *supra* note 3, art. 1.

¹⁸⁶ See generally Fox, *supra* note 3.

¹⁸⁷ See INT'L COMM'N OF JURISTS, *supra* note 2, at 24.

¹⁸⁸ See NGO Declaration and Programme of Action, World Conference Against

2. *Legal and Historical Scholarship*

Politically independent legal and historical scholars agree at a minimum that Tibet indisputably established its statehood between 1913 and 1950; and that events after this period did not alter this status validly. But scholars have not called on governments to extend Tibet the formal recognition that their writings suggest it merits; indeed, one commentator specifically disavowed this position.¹⁸⁹ The historian Lee Feigon writes only that understanding Tibet's status may serve to "demolish myths not only about Tibet but also about China, especially the notion that China has always been the *zhongguo* or "Central Kingdom" to the various cultures and peoples in the region," particularly "[b]efore the emergence of the modern nation states . . ."¹⁹⁰ Like NGOs outside the TSG community, the failure of legal and historical scholars to take an explicit stance on Tibet's

Racism, ¶¶ 101-03 & 65-66, Sept. 2, 2001.

¹⁸⁹ See W. Gary Vause, *Tibet to Tienamen: Chinese Human Rights and the United States Foreign Policy*, 42 VAND. L. REV. 1575, 1611-12 (1989) (describing congressional activity indicating support for Tibet's formal recognition as an "attempted usurpation of presidential powers" that "directly contravened all other congressional and executive acts in the continuous pattern of recognition of China for more than a decade."). Vause argues that "[i]nvolvement in the separatist movement . . . and the political programs advocated by the Dalai Lama, are not legitimate roles for Congress." *Id.* at 1613. Characterizing Tibet's independence movement as "separatist," as does China, reflects an odd position in view of the uniform view of scholars that Tibet remains an independent state under illegal foreign occupation.

¹⁹⁰ LEE FEIGON, *Foreword*, DEMISTIFYING TIBET, at x-xi (1996). The roots of this misconception date to the early twentieth century, when Sun Yat-Sen elaborated the *Min Ts'u* doctrine ("doctrine of the national group"). *E.g.*, Sun Yat-Sen, Lecture (Jan. 27, 1924), in SUN YAT-SEN: HIS POLITICAL AND SOCIAL IDEALS 163 (Leonard Shihlien Hsü trans. & ed. 1933). Chiang Kai-Shek, Sun's successor, perpetuated and expanded this doctrine in *China's Destiny*, in which he argued that Tibetans, Mongols, Manchus, and other "national minorities" constituted racial "stocks" within the Chinese national group. See CHIANG KAI-SHEK, CHINA'S DESTINY 10-14 (1947). Mao, in turn, co-opted this stance within his communist vision of a unified proletariat; he conceived of "minority" nationalism as yet another manifestation of Marxist "false consciousness." *E.g.*, Mao Tse-Tung, *The Relationship Between the Han Nationality and the Minority Nationality*, in V SELECTED WORKS OF MAO TSE-TUNG 38-40 (Pergamon Press trans. & ed. 1977); see generally SMITH, *supra* note 85, at 332-39 (discussing the genesis of Mao's conception of nationalism).

right to recognition as a state reflects awareness of their institutional role and perhaps also concern about its integrity: Scholarship, generally speaking, should avoid polemics. Despite this reluctance, insofar as scholarship reflects civil recognition, its implications for Tibet's right to recognition are largely uniform. Like NGOs, the academic community agrees, at a minimum, that Tibetans are a "people" and that China has failed to extend them the right to self-determination.

3. *Civil Society*

Expressions of civil society's popular sentiments take diverse forms: demonstrations, films, fiction, and editorials, to name a few of the most visible. For Tibet, these forms of popular support have proved one of the most remarkable, unique, and efficacious factors that animate calls for the Tibetan people's right to self-determination. Annual "Tibetan Freedom Concerts," featuring popular musicians such as Pearl Jam, the Beastie Boys, and David Bowie, enjoy huge audiences in Washington, D.C., and major European capitals; novelists select Tibet as a setting for fictional narratives in order to call attention to its plight;¹⁹¹ Hollywood produces films, such as *Kundun* and *Seven Years in Tibet*, which, while superficially apolitical, often provoke serious and hostile responses from Beijing.¹⁹² Indeed, a growing number of actors, most prominently, Richard Gere, Harrison Ford, Steven Seagal and Pierce Brosnan, have become powerful advocates of Tibetan independence and human rights. In August 2001, in fact, Richard Gere

¹⁹¹ *E.g.*, JAMYANG NORBU, *THE MANDALA OF SHERLOCK HOLMES* (2000); HERGE, *TINTIN IN TIBET* (1998).

¹⁹² *See, e.g.*, Xinhua Eng. Newsletter, *Article Blasts U.S. Backing Dalai's Separatist Activities*, May 25, 2001 (summarizing Xinhua News Agency, China's Official Press) ("The anti-China forces with the American film industry have played up the so-called Tibetan issues in recent years by producing such films as 'Kundun' and 'Seven Years in Tibet,' which distort facts and confuse right and wrong, the article says."), available at 2001 WL 21401458.

agreed to appear in the popular cartoon series *The Simpsons* on condition that the “episode include a scene calling for the freedom of Tibet.”¹⁹³

The plethora of “Tibet chic” that pervades Western society recently led journalist and China scholar Orville Schell, Jr. to describe a “virtual Tibet,” as manifest in popular media, and as distinct from the “real” Tibet.¹⁹⁴ Popular support for the Tibetan people frequently takes the form of express civil advocacy for Tibetan independence, a phenomenon that Schell views as remarkable. He notes that “Free Tibet” bumper stickers, for example, are ubiquitous, whereas “Free Kosovo” stickers (prior to the U.N. transitional administration that assumed power after the 1999 NATO campaign) remained rare.¹⁹⁵ China perceives a genuine threat in these manifestations of civil recognition. After the release of *Kundun*, for example, the government sponsored its own counter-*Kundun* to describe the “real history of the Dalai and the Panchen Lama and Tibet.”¹⁹⁶ Popular support for Tibet emboldens calls for its recognition and helps to ensure that the world does not neglect the isolated “Shangri-la” that U.N. officials once mistook for a non-governmental organization.

4. *Support From Individual Elected Representatives*

In a democratic society, civil recognition manifests itself not only in popular media but also through individual expressions of support from elected representatives. These officials do not, of course, dictate state practice

¹⁹³ *Richard Gere to Appear in the Simpsons*, ANANOVA (Aug. 11, 2001), available at http://www.tibet.ca/wtnarchive/2001/8/14_4.html.

¹⁹⁴ See ORVILLE SCHELL, *VIRTUAL TIBET: SEARCHING FOR SHANGRI-LA FROM THE HIMALAYAS TO HOLLYWOOD 11* (2000).

¹⁹⁵ *See id.*

¹⁹⁶ Interview with Chime Tsomo, former Tibetan tour-guide and U.S. asylee who witnessed the film’s production and suffered persecution for refusing to translate information about this film to a group of Western tourists, New York, NY (Mar. 12, 2001) (on file with author).

independently. But their advocacy and interests often prove to be powerful forces of civil recognition that can, over time, influence state practice. In August 1997, for example, Congressman Frank Wolf visited Tibet covertly to see for himself its human rights and environmental conditions.¹⁹⁷ Wolf is now one of more than one-hundred House cosponsors of the Tibetan Policy Act of 2001, which, *inter alia*, “reaffirms that Tibet, including those Tibetan areas incorporated into the Chinese provinces of Sichuan, Yunnan, Gansu, and Qinghai, is an occupied country under the established principles of international law.”¹⁹⁸ In July 1999, Bob Brown, an Australian Senator from Tasmania, undertook a similar covert fact-finding trip to Tibet.¹⁹⁹ He has become one of the foremost proponents of Tibetan independence.²⁰⁰ Here again, China perceives a serious threat in these expressions of support for Tibet from individually elected representatives, who, after all, do not dictate state practice.²⁰¹ Free from the executive branch’s

¹⁹⁷ Representative Wolf’s trip report is available on line at <http://www.house.gov/wolf/199789Tibet.htm>.

¹⁹⁸ Tibetan Policy Act of 2001 (TPA), § 4(1), H.R. Bill No. 1779, 107th Cong., May 9, 2001; S. Bill No. 852, § 4(1), 107th Cong., 1st Sess., May 9, 2001.

¹⁹⁹ See *Australian Politician Sneaks Into Tibet*, AGENCE FRANCE-PRESSE., July 29, 1999. Shortly after Senator Brown’s covert visit, another Australian politician, Deputy Speaker of the House of Representatives Garry Nehl, visited Tibet but this time under the aegis of the Chinese authorities. Not surprisingly, he concluded that Brown had been mistaken. “There were absolutely no signs of Tibet being a police state nor of the people being oppressed.” Brendan Nicholson, *Tibet Better Off Under China: MP*, THE AGE, Sept. 21, 1999, at 10 (quoting Representative Nehl). These conflicting reports caused considerable controversy. See Michael Zekulich, *MP’s Tibet Comments ‘Outrageous’*, WEST AUSTRALIAN, Sept. 21, 1999.

²⁰⁰ E.g., Senator Bob Brown, *The Shame of Tibet Will Not Go Away*, SYDNEY MORNING HERALD, Dec. 12, 1999.

²⁰¹ For China’s reaction to Congressman Wolf’s visit, see, for example, Joe McDonald, *China Angry Over U.S. Lawmaker’s Criticism of Tibet*, AP, Aug. 24, 1997; *Beijing Blasts U.S. Congressman’s Tibet Remarks as ‘Wanton Slander’*, AGENCE FRANCE-PRESSE, Aug. 25, 1997. Shortly after Wolf’s clandestine visit, Xinhua issued an English newswire “refuting” Wolf’s claims based on the claims of alleged “Tibetologists.” *Overseas Tibetologists Refute Wolf’s Remarks*, XINHUA ENG. NEWSWIRE, Sept. 2, 1997. For China’s reaction to Senator Brown’s visit, see, for example, *Chinese Anger Over Brown’s Visit to Tibet*, AUSTR. BROADCAST NEWS, July 29, 1999 (quoting Chinese Ambassador to Australia Zhang’s hostile response in the aftermath of Brown’s visit); *China to ‘Check’ How Australian Politician Got Into*

need to preserve the delicate state of diplomatic relations with China, however, these representatives often find themselves in a position to express more candidly their views on Tibet's right to recognition.

The Conference of World Parliamentarians, convened at New Delhi on March 20, 1994, issued a statement asserting that "[t]he Chinese invasion . . . reduced Tibet, in effect, to the status of a Chinese colony and an occupied country."²⁰² The U.S. Congress has passed numerous resolutions validating Tibet's claim to statehood and declaring it an independent state under illegal foreign occupation.²⁰³ And recently, the Polish assembly, the *Sejm*, issued a declaration regarding "Solidarity of the *Sejm* of the Republic of Poland with the Tibetan Nation," which refers repeatedly to Tibet as a "nation" and a "country" oppressed by China.²⁰⁴

Tibet, AGENCE FRANCE-PRESSE, July 30, 1999.

²⁰² World Parliamentarians Convention on Tibet, *New Delhi Statement on Tibetan Freedom*, ¶ 2, New Delhi, Mar. 20, 1994.

²⁰³ See, for example, S. Res.169, Sep. 8, 1995; see also Pub. L. No. 103-236, Title V, § 536, 108 Stat. 481 (1994) ("Reporting Requirements on Occupied Tibet") ("Congress has determined that Tibet is an occupied sovereign country under international law."); Pub. L. 102-138, Title III, § 355, 108 Stat. 481 ("China's Illegal Control of Tibet"), Oct. 28, 1991 (expressing the sense of Congress that "Tibet, including those areas incorporated into the Chinese provinces of Sichuan, Yunnan, Gansu and Qinghai, is an occupied country under the established principles of international law").

²⁰⁴ Declaration of the *Sejm* of the Republic of Poland regarding Solidarity of the *Sejm* of the Republic of Poland with the Tibetan Nation, Aug. 24, 2001, at <http://www.hfhrpol.waw.pl/Tybet/declarationfin.html> (last visited May 1, 2002); see also Canada Tibet Comm., *World Tibet Network News: German Parliament Adopts Tibet Resolution* (Apr. 20, 2002), at <http://www.tibet.ca/english/index.html> (citing Declaration of the Bundestag of Germany regarding Human Rights and Development in Tibet, Apr. 19, 2002); Canada Tibet Comm., *World Tibet Network News: Italian Parliamentary Group for Tibet Established* (May 9, 2002), at <http://www.tibet.ca/english/index.html> (legislative group for Tibet charged with preparing and submitting a draft resolution calling for "[r]ecognition of the Tibetan Government in Exile as the real representative of the Tibetan people by governments in the European Union, if Beijing does not grant full autonomy for Tibet within three years").

5. *Transnational Institutions*

Transnational institutions and organizations, such as those of the United Nations, the Organization of American States, and the European Union, also at times reflect popular moral sentiment. Their capacity to do this varies depending on how much independence they enjoy from constituent states. U.N. bodies have therefore, with one exception, been unwilling to consider Tibet since 1965, when the General Assembly last issued a resolution on Tibet.²⁰⁵ Member states remain largely beholden to China's economic and political influence. By contrast, the European Parliament, the sole *directly elected* representative body in the European Union framework, consistently passes resolutions condemning China's occupation and human rights violations in Tibet. Recently, these culminated in an extraordinary resolution in which the Parliament, recalling Tibet's illegal invasion by China, proclaimed that if, within three years, China continues to refuse to negotiate a genuine autonomous status for Tibet with the Tibetan government-in-exile, the constituent states of the European Union should extend formal recognition to the Tibetan government-in-exile.²⁰⁶ On the date of the China-European Union Summit in Brussels, Per Gahrton, Chairman of the European Parliament's Delegation for Relations with the People's Republic of China, issued a statement to the Council of Europe and the European Commission, urging these institutions to communicate to China that "if no solution to the Tibet issue has been implemented by June

²⁰⁵ G.A. Res. 2079, GAOR, 20th Sess., Supp. No. 14 at 3, U.N. Doc. A/Res/2079 (1965). See U.N. ESCOR, 48th Sess., at 71, U.N. Doc. E/CN.4/1992/37 (1992); G.A. Res. 1353, GAOR, 14th Sess., Supp. No. 16, at 61, U.N. Doc. A/Res/1353 (1959); G.A. Res. 1723, GAOR, 16th Sess., Supp. No. 17, at 66, U.N. Doc. A/Res/1723 (1961).

²⁰⁶ *European Parliament Resolution on the Western China Poverty Reduction and the Future of Tibet*, ¶ 2, Tibet B5-0608, 0610, 0617, 0621 and 0641/2000, available at <http://www.tibet.ca/english/index.html> (last visited Feb. 14, 2002).

2004 at the latest, the EU countries will consider recognizing the Tibetan government in exile.”²⁰⁷

6. *Conclusion: The Impact of Civil Recognition*

It would be easy to dismiss these manifestations of civil recognition as merely hortatory or quixotic—to note that, in the context of international relations, they remain largely ineffectual. But this understates their growing impact on state practice. Absent civil recognition, for example, it is unlikely that President Bush would have been inclined to receive the Dalai Lama formally, a movement that generated serious friction with China’s political elite precisely because it implied his recognition as a head of state. In May 2001, the House of Representatives and the Senate concurrently introduced the Tibetan Policy Act of 2001 (TPA). This legislation, *inter alia*, (1) declares Tibet an “occupied country under the established principles of international law”; (2) institutionalizes within the State Department the position of Special Coordinator for Tibet; (3) mandates a reporting requirement on Tibet “whenever a report is transmitted to the Congress on a *country-by-country* basis”; and (4) instructs the executive branch to oppose all efforts to block discussion of Tibet’s status at the United Nations and to support the appointment of a special rapporteur on Tibet.²⁰⁸

Responses to the July 6 resolution of the European Parliament remain to be seen. It is unlikely that most national governments will abide by its suggestion in the near future. On the other hand, civil recognition, even if

²⁰⁷ Letter from Per Gahrton, Chairman, European Parliament Delegation for Relations with the People’s Republic of China, to the Council of Europe and the European Commission, Sept. 7, 2001.

²⁰⁸ TPA, S.852.IS, 107th Cong. § 4(1), 7, 6, 16 (2001). China’s response was immediate and predictable. Its state press described the TPA as “another U.S. maneuver to poke its nose into China’s internal affairs.” Xin Zhiming, *Ignorant or Just Arrogant*, CHINA DAILY, May 14, 2001.

incapable of producing immediate changes in state practice, ensures that China's continuing occupation of Tibet does not become obscured by the passage of time. It keeps the issue alive, such that, should internal political dynamics within China change in the future, which is *not* unlikely,²⁰⁹ the factual predicate for recognizing Tibet's statehood and right to self-determination does not disappear behind a veil of government rhetoric. The Chinese government is not unaware of this danger. It responded vehemently to the European Parliament's Resolution, which according to its state press, "deliberately called the Chinese territory [of] Tibet a 'country,' slandering that China 'occupied' Tibet."²¹⁰

Civil recognition practices not only manifest popular moral sentiment; they also animate over time real actions that influence states to change their recognition practices, or at least, to render them somewhat more ambiguous than they might otherwise become. It remains unlikely in the near future that any state will formally recognize Tibet. But civil recognition practices ensure that China's insistence that Tibet is part of China does not obscure Tibet's true legal status and its people's right to self-determination. Without it, China's ongoing struggle to convince the world that Tibet has always been a part of China would be far easier. Ensuring that Tibet remains, in the perception of civil society, a state under illegal occupation, not an "internal affair" of China, is an essential predicate to vindicating Tibet's claim to statehood in the future.

III. THE TIBETAN GOVERNMENT-IN-EXILE: RECOGNITION AND CIVIL LEGITIMACY

Distinguishing recognition of governments from that of states proves difficult because, to reiterate, "the existence of

²⁰⁹ See GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* (2001).

²¹⁰ *PRC Opposes European Parliament's Resolution on Tibet*, XINHUA, July 14, 2000, available at 2000 WL 24051363.

an effective and independent government is the essence of statehood, and, significantly, recognition of states may take the form of recognition of a government.”²¹¹ But states without recognized governments exist (e.g., Somalia and Burma), and similarly, governments without recognized corresponding states—i.e., governments-in-exile—emerge under some circumstances. Broadly speaking, governments-in-exile are “opposition groups that struggle from outside their territory to overthrow and replace the regime in their independent, occupied, or claimed home country.”²¹² Their formal legal status is often easy to state: none. But their resilience as international actors invites inquiry into whether it is useful to distinguish, as for putative states, between the multifaceted political, legal, and civil recognition practices of governments toward governments-in-exile—for such entities, if and when they displace the regime in the territories to which they aspire, may receive political recognition. One question then becomes what influence their legal and civil recognition in the preceding period should exert on political recognition at that time.

The Tibetan government-in-exile, which has now existed for more than forty years, offers unique insight into this question. Although it still lacks political recognition, it remains perhaps the most resilient and effective government-in-exile in history. It also enjoys a strong claim to legitimacy based on contemporary international norms. To appraise its status fully, it is instructive to distinguish again between the political, legal, and civil dimensions of recognition practices. Because much of this discussion would overlap with the preceding analysis of Tibet’s statehood, however, I will not reiterate the above observations insofar as they speak as much to the status of Tibet’s government as they do to its statehood.

²¹¹ BROWNLIE, *supra* note 15, at 91. See also MENON, *supra* note 15, at 36, 106; PETERSON, *supra* note 12, at 2.

²¹² Yossi Shain, Introduction, *Governments-in-Exile and the Age of Democratic Transitions*, in GOVERNMENTS-IN-EXILE, *supra* note 43, at 2.

A. *Political Recognition: Governing a Constituency Without a State*

Despite the European Parliament's efforts, the Tibetan government-in-exile's formal recognition remains, to date, non-existent. No government in the world recognizes the Tibetan government-in-exile *as a government*. But this observation does not end the analysis. Political recognition practices toward the Dalai Lama's putative government are more complex. Many states that lack the political will formally to recognize the Tibetan government nonetheless extend to it humanitarian aid to assist its "nationals" and engage its political elite in diplomatic dialogue. The United States, for example, provides more than \$100,000 annually to assist the government-in-exile to process and care for its growing constituency (i.e., newly arrived Tibetan refugees) and more than \$2 million in development aid to Tibetans still residing within Chinese-occupied Tibet.²¹³ And its chief executive not infrequently meets with the Tibetan government-in-exile's head of state, the Fourteenth Dalai Lama. States remain sensitive to offending China, but many receive the Dalai Lama in a manner that implies this political status. For this reason, President Bush's official audience with the Dalai Lama in May 2001 provoked a more hostile response from China's elite than former President Clinton's "drop by" meeting with him.

In terms of a constituency, more than 100,000 stateless Tibetans, forced from their nation by persecution or born and raised in Tibetan communities in India and Nepal, view the Tibetan government-in-exile as their legitimate political representative. Many Tibetans who *remain* in Chinese-occupied Tibet also view the Dalai Lama's government, rather than the Chinese elite installed by Beijing to govern the TAR, as their genuine political

²¹³ Interview with Julia Taft, former Assistant Secretary of State for Population, Migration, and Refugees, and Special Coordinator for Tibet during the Clinton Administration, Washington, D.C., (Apr. 17, 2001) (on file with author).

representative. Finally, it is worth noting that the efforts of the United States and Western Europe to convince China to enter into negotiations with the Tibetan government-in-exile imply, as they do for Taiwan, “state-to-state” relations inconsistent with a complete absence of political recognition.

Beyond this, little can be said. Despite these acts, no government recognizes the Tibetan government-in-exile formally at present. But to appraise state practice in this regard, it is critical to recognize that the *incidents* of governmental recognition, such as those noted above, and not only the formal positions of states expressed in diplomatic exchanges, have implications for political recognition practices toward governments-in-exile.

B. Legal Recognition of Governments-in-Exile: Precedents and Evolving Norms

Objective criteria to assess the Tibetan government-in-exile’s right to legal recognition do not exist in international law. International law generally acknowledges that “[r]ecognition [of governments], *as a public act of state*, is an optional and political act and there is no legal duty in this regard.”²¹⁴ Traditionally, states remain free to recognize or decline to recognize putative governments to further their diplomatic objectives and ideologies.²¹⁵ But today, this may not be strictly accurate. The United Nations and its derivative framework have established precedents for so-called “regimes of non-recognition”:²¹⁶ At times, the U.N.

²¹⁴ BROWNIE, *supra* note 15, at 90. See also HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 400 (1966).

²¹⁵ Shain, *supra* note 45, at 219.

²¹⁶ See, e.g., Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 *VAND. J. TRANSNAT’L L.* 273, 280-96 (2000) (reviewing “regimes of non-recognition” arguably established by the United Nations in the post-War era); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 *ICJ* 16, 58 (June 21) (holding that U.N. member states

Security Council instructs states to refuse recognition to governments that purport to exercise control over certain territory in what the international community deems an illegitimate fashion. Prominent examples include South Africa's occupation of Namibia after the United Nations withdrew its mandate, the State Law and Order Council's regime in Burma (Myanmar), and the Taliban's government in Afghanistan. Despite the effective control exercised by these regimes, contemporary norms of human rights and democracy have led the international community to refuse them recognition.

Second, even prior to the establishment of the United Nations, governments-in-exile *did*, under certain exigent circumstances, enjoy legal status despite their inability to exercise effective control over their territory or constituency:

Between the 1920s and the 1940s recognized governments-in-exile were for the most part governments deposed by a native or foreign regime. They were recognized as the legal and *de jure* sovereign power of their country, and were treated 'as if they were still ruling the state even though their government had lost effective control.'²¹⁷

During World War II, the Allies extended this precedent. Deposed regimes of Nazi-occupied Europe retained *de jure* recognition that entitled their political leaders to diplomatic immunity and other rights. Under the Maritime Courts Act of 1941, for example, the Allied governments-in-exile enjoyed jurisdiction over their nationals residing in foreign states. This meant, *inter alia*, that they could maintain

must "recognize the illegality of South Africa's presence in Namibia" and refrain from acts or dealings with the South African government respecting or implying recognition of the government's authority in this territory); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 202(2) (1987).

²¹⁷ Shain, *supra* note 45, at 37 (internal quotation marks omitted).

armies, control assets situated outside their occupied territory, and try their own nationals for specified offenses.²¹⁸ At the same time, “[t]he Allied powers, using the legal democratic principle to justify their recognition of the deposed governments, were hesitant to grant similar recognition to Charles de Gaulle’s Free French which had no legal status prior to its creation.”²¹⁹

Governments-in-exile during World War II thus established two crucial legal precedents: First, the Allies’ treatment of deposed European governments as de jure sovereigns emphasized the emerging criteria of liberal democratic legitimacy and a movement away from strict reliance on the *Tinoco* “effective control” criterion. Second, given sufficient recognition and the existence of a host state, the deposed European governments-in-exile, though unable to secure control of their territory, showed that governments without corresponding states can still perform some of the characteristic functions of a sovereign.

Based on historical precedents, Yossi Shain therefore notes that governments-in-exile historically have fallen into three principal categories:²²⁰ (1) lawfully elected, traditional or authentic exiles, who do not challenge the existence of a given state but claim title as its genuine representative (e.g., the deposed Spanish Republican government, which existed from the outset of the Spanish Civil War in the 1930s until the first democratic elections in Spain in 1977); (2) governments aspiring to statehood, characteristic of the era of decolonization (e.g., the self-proclaimed Sahawari Arab Democratic Republic, formed to challenge the annexation of Western Sahara by Morocco); and (3) deposed regimes struggling to regain power lost to a foreign invader

²¹⁸ Shain, *supra* note 43, at 224; *see, e.g.*, *Neth. v. Fed. Reserve Bank*, 201 F.2d 405 (2d Cir. 1953) (giving effect to legislation and regulations of the Netherlands government-in-exile passed during World War II); *but see Nat’l Coalition Gov’t of Union of Burma v. Unocal*, 176 F.R.D. 329 (C.D. Cal. 1997).

²¹⁹ Shain, *supra* note 43, at 225.

²²⁰ *Id.* at 2-5

(e.g., the London-based governments-in-exile of Czechoslovakia, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia, and Belgium, which subsisted during World War II). These categories are dynamic, and the status of governments-in-exile may vary over time. The Tibetan government-in-exile, for example, should be categorized simultaneously under both (1) and (3). In theory, classification does not render a putative government more or less legitimate; in practice, however, the “support of [government-in-exiles] alleged constituencies may be the most critical factor in determining validity of their claim and the attitude of foreign patrons toward their struggles.”²²¹

Accordingly, the Tibetan government-in-exile cannot be established as legally legitimate (or illegitimate); unequivocal international legal criteria capable of bestowing these labels simply do not exist at present. From the perspective of *Tinoco*, China’s puppet government in the TAR is the legitimate government of Tibet.²²² From the perspective of the Tobar approach, by contrast, the Dalai Lama’s government remains the legitimate political representative of Tibet.²²³ While the Tibetan government-in-exile therefore continues—largely because of China’s geopolitical and economic influence and permanent seat on the U.N. Security Council—to suffer from a lack of *political* recognition, it enjoys, as measured by emerging criteria, a strong claim to *legal* recognition.

²²¹ *Id.* at 5.

²²² For a description of the TAR’s de jure and de facto governmental power structure, see INT’L CAMPAIGN FOR TIBET & THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, *THE MYTH OF TIBETAN AUTONOMY* (1994).

²²³ VAN WALT VAN PRAAG, *supra* note 85, at 184. For more recent evidence of continuing support within Tibet for the Dalai Lama and his government, see TIBET INFO. NETWORK & HUMAN RIGHTS WATCH/ASIA, *CUTTING OFF THE SERPENT’S HEAD* (1996).

C. *Civil Recognition: The Self-Determination of Peoples and Putative Governments*

Contemporary trends in international law also animate civil recognition practices toward the Tibetan government-in-exile. Recently, there has been what some scholars call a “paradigm shift in the legal norms that govern regime legitimation.”²²⁴ Increasingly, the recognition of governments-in-exile has been based on criteria connected to popular sovereignty. This is true most often of putative regimes that represent a “dispossessed government trying to prolong a de jure international status” in the face of foreign military occupation or a coup rather than—as most post-War governments-in-exile had been—“aspiring exiled contenders seeking to transform their self-proclaimed de jure status into de facto control of a given target territory.”²²⁵ The post-War establishment of the United Nations, the Universal Declaration of Human Rights, and the subsequent proliferation of treaties constitutive of the contemporary international human rights regime²²⁶ contributed to entrenching the “self-determination of peoples”²²⁷ as a paramount principle of governmental legitimacy. In theory, the United Nations therefore now serves as the “custodian of collective legitimacy”²²⁸

In practice, however, most post-War governments-in-exile have been, by contrast to the exile governments of World War II, self-proclaimed liberation movements,²²⁹ “whose

²²⁴ Edward Collins, Jr. & Timothy M. Cole, *Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide*, 5 J. INT'L L. & PRAC. 199, 199 (1996); see also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

²²⁵ Shain, *supra* note 43.

²²⁶ See *id.* (noting that in the post-war period, “individuals, not only governments, [became] legal entities in the eyes of international law”).

²²⁷ U.N. CHARTER, art. 55.

²²⁸ Inis L. Claude, Jr., *Collective Legitimation as a Political Function of the United Nations*, 20 INT'L ORG. 367, 367-68 (Summer 1966); see generally DUGARD, *supra* note 7.

²²⁹ See Shain, *supra* note 45, at 227.

existence is by nature tenuous.”²³⁰ The United Nations and its constituent states, too, continue to employ recognition of governments as a political tool, often unrelated to the “self-determination of peoples” criterion. To take one (apropos) example,

despite the fact that the U.N. Charter prohibits the acquisition of territory and the annexation of people by means of force, a majority of governments has avoided challenging the annexation of Tibet by China, and has denied recognition to the Dalai Lama’s government-in-exile, even though it has enjoyed the overwhelming support of the Tibetans in the diaspora and under Chinese occupation. At the same time, Pol Pot’s criminal DK exiled government has been granted recognition as the authentic representative of the people of Cambodia, on whom it has been perpetrating genocide.²³¹

But the principles (or lack thereof) that govern political *recognition* of governments-in-exile should be distinguished from those that confer civil *legitimacy*.²³² With respect to the latter, for instance, Reisman argues that, while not yet instantiated, “aspirational norms provide a positive environment for appraising domestic contexts with international criteria and for legitimizing the use of the technique of governments-in-exile.”²³³ Indeed, the Second Circuit recently confirmed this trend toward distinguishing political recognition from tacit declarations of legitimacy. In *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, the court wrote: “[A]s this century draws to a close, the practice of extending formal recognition to new governments has altered: The United States Department of State has sometimes refrained from announcing recognition

²³⁰ *Id.* at 21.

²³¹ *Id.* at 234.

²³² *See id.* at 235.

²³³ Reisman, *supra* note 55, at 242.

of a new government because grants of recognition have been misinterpreted as pronouncements of approval [i.e., legitimacy].”²³⁴

The Tibetan government-in-exile continues to suffer from a lack of political *recognition*, but to the extent that we appraise civil recognition criteria, it retains a strong claim to *legitimacy*. Shain notes that “[w]hether governments-in-exile are fictional entities or serious contenders is a function of their ability to obtain the loyalty of their states’ constituencies . . . and to mobilize foreign support for their goal . . . diplomatic recognition is only one among many factors, neither sufficient nor necessary”²³⁵ Based on World War II and post-War precedents, the additional factors to be considered in the modern world order arguably include a government-in-exile’s (1) *continuity* with a prior existing regime, which retains a legitimate claim to authority over the territory and people it aspires to govern; (2) *resilience*, a putative government’s ability to project, under the auspices of a host state, an enduring international profile to challenge the legitimacy of the ruling regime; (3) *efficacy*, the ability of a putative government to exercise some traditional functions of sovereignty and to provide aid and assistance to its constituency in exile; and (4) *popular support*, the degree of civil support enjoyed by a putative government from both its exile and aspirational constituency.

²³⁴ Nat’l Petrochem. Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 554 (2d Cir. 1988) (citing 77 STATE DEP’T BULL. 462-63 (Oct. 10, 1977)); see also Sean D. Murphy & Mary Beth West, *The Impact of U.S. Litigation on Non-Recognition of Foreign Governments*, 26 STAN. J. INT’L L. 435, 436 (1990) (noting that in the twentieth century recognition began to signify “not merely realistic appraisal of a new entity’s status but approval of the entity itself” and consequently, “the United States [has become] unwilling to ‘recognize’ governments that, although admittedly in control of their states, [are] essentially anti-democratic”); see also Murphy & West, *supra* at 436 n.103 (1990) (citing 1969 statements by the Senate and the executive branch indicating that recognition and the exchange of diplomatic representatives does not imply U.S. approval of the “form, ideology, or policy” of the recognized government).

²³⁵ Shain, *supra* note 45, at 232.

Measured by these criteria, the Tibetan government-in-exile maintains a high degree of civil recognition: The Dalai Lama's putative government is not a "self-proclaimed liberation movement." To the contrary, it remains the direct *successor* of the government forced into exile by China's military invasion in 1949. Its subsequent adoption of a constitution that provides for free and fair elections bolsters its legitimacy under contemporary norms of democracy. In July 2001, in fact, more than 100,000 Tibetans living in exile went to the polls to elect their first Prime Minister, Samdong Rinpoche.

The Tibetan government-in-exile has also proved remarkably *resilient*. Ever since the Dalai Lama's entourage arrived in exile in March 1959, India has provided the government-in-exile with an amiable host state. India maintains historical, religious, and cultural affinities with Tibet; and large sectors of its population revere the personage of the Dalai Lama. Consequently, then Prime Minister Nehru officially welcomed the Dalai Lama when he arrived in India,²³⁶ and the State of India has since provided his exile government with a *de facto* territory, employment, and humanitarian aid.²³⁷ The Tibetan government-in-exile's enduring presence as a quasi-state actor—enhanced in no small part by the Dalai Lama's receipt of the Nobel Peace Prize in 1989—continues to challenge the Chinese government's claim to "ownership" of Tibet.²³⁸

The Tibetan government-in-exile has also been remarkably *effective*. Operating outside its aspirational territory, it has nonetheless been able to cultivate Tibetan culture abroad, provide education for its growing constituency, preserve the Tibetan national identity, provide assistance to the continuing influx of refugees

²³⁶ See French, *supra* note 45, at 188, 190.

²³⁷ See *id.* at 192.

²³⁸ See INFO. OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, TIBET—ITS OWNERSHIP AND HUMAN RIGHTS SITUATION (1992).

entering through Nepal and Bhutan,²³⁹ participate (through the auspices of sympathetic NGOs) in international and national conferences and human rights fora, mobilize its people in diaspora, and—despite its lack of formal recognition—enlist a remarkable degree of support from foreign nations. French observes that

the tremendous success of the Tibetan refugees and their government-in-exile in preserving their own identities and cultural heritage has stood as an example for refugee organizations throughout the world. Thirty years after the diaspora, Tibetan refugees have provided for the material success of their refugee population, educated their children, reconstructed much of their culture, preserved their religion and its monastic class, and kept a high degree of international profile.²⁴⁰

Finally, while a precise measure of the political support enjoyed by the Dalai Lama's government within its aspirational territory (historical Tibet) is not possible to gauge, available evidence overwhelmingly suggests that Tibetans within China continue to regard the Dalai Lama and his government-in-exile as the legitimate authority in Tibet.²⁴¹ According to credible reports, most ordinary Tibetans view Chinese government officials as foreign elements, wholly without *popular support*.²⁴²

Each of these four criterion, then, supports the conclusion that the Tibetan government-in-exile, like the Tibetan state, retains a strong claim to legitimacy bolstered by civil

²³⁹ For a description of the Tibetan government-in-exile's work establishing a Tibetan community in exile in Nepal, see generally ANN ARMBRECHT FORBES, *SETTLEMENTS OF HOPE: AN ACCOUNT OF TIBETAN REFUGEES IN NEPAL* (1989).

²⁴⁰ French, *supra* note 45, at 200.

²⁴¹ *E.g.*, VAN WALT VAN PRAAG, *supra* note 85, at 185.

²⁴² *E.g.*, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATIONS, TIBET SUPPORT GROUP NEDERLAND, & INTERNATIONAL CAMPAIGN FOR TIBET, *supra* note 88, at 74-75.

recognition. Again, these practices do not change the undeniable fact that China exercises effective control over Tibet or that every state in the world formally accepts Tibet as part of China. But civil recognition practices do ensure that the international legitimacy that China seeks desperately remains beyond its political power to compel; and legitimacy is more crucial than may generally be recognized. Without it, for example, China must spend millions of dollars annually to finance a large military and police force in Tibet; to encourage ethnic Chinese to resettle in Tibet in order to consolidate its base of political loyalty; to counter, thus far unsuccessfully, world opinion that remains highly critical of its human rights practices in Tibet; and above all, to govern effectively a foreign people, with a distinct language, set of values, cultural history, and loyalty—a people who for the most part decisively reject China's authority in Tibet.

That governments presently lack the political will to take more meaningful steps toward recognizing the state of Tibet and its putative government formally may reflect a misperception of the political consequences that would follow; and, more to the point, a failure to appreciate that, by neglecting to challenge China's revisionist history and claim to sovereignty in Tibet, these states confer a *venire* of legitimacy on an ongoing violation of international law. The question therefore becomes whether civil and legal recognition, in the face of *realpolitik*, can help vindicate an unjustly denied right to political recognition over time. To conclude, I focus on one prominent example in which it, at a minimum, contributed to this vindication: East Timor.

CONCLUSION

In 1975, Indonesia invaded East Timor. Like Tibet, East Timor contains a wealth of natural resources and is geographically attached to its—now former—occupying

power.²⁴³ In the sixteenth century, Portugal colonized the island of Timor, and for more than two hundred years, it shared colonial control with Holland, which established authority over the surrounding region, the former Dutch East Indies. In 1913, Holland and Portugal separated West and East Timor by treaty.²⁴⁴ Then, in 1949, at the outset of the decolonization era, Indonesia gained independence. West Timor chose to join the nascent state. But East Timor remained under Portuguese control for the next twenty-five years, oppressed by the fascist regimes of Antonio de Oliveira Salazar (1933-71) and Marcello Caetano (1971-74).²⁴⁵ On April 25, 1974, Otelo Saraiva de Carvalho, leading a number of military officers, orchestrated the "Carnation Revolution," overthrowing Caetano's brutal regime. The new Portuguese government, reacting to international pressure and military necessity, began to dismantle Portugal's colonial empire.

In August 1975, internal political fractions within East Timor's newly established political parties culminated in a brief civil war. *Fretelin*, the most pro-independence party quickly emerged victorious.²⁴⁶ From September to December 1975, *Fretelin* exercised effective control over East Timor because, during the civil war, the Portuguese interim-governor and his decolonization administration abdicated their responsibilities and fled. Like Britain's abdication of responsibility for Tibet after India gained its independence in 1949, Portugal's *lasseiz-faire* approach left East Timor in legal limbo. Portugal refused to recognize *Fretelin's* declaration of independence on November 28,

²⁴³ See SONNY INBARAJ, EAST TIMOR: BLOOD AND TEARS IN ASEAN 21 (1995). The Portuguese initially exploited East Timor for its sandalwood, a resource now largely depleted; later, East Timor became valued for its agricultural exports, including coffee, rubber, copra, and peanuts. Additionally, "[t]here are extensive fish stocks and significant oil reserves along the southern coast and in the Timor Gap between East Timor and Australia." *Id.*

²⁴⁴ *Id.* at 20.

²⁴⁵ *See id.*

²⁴⁶ *See id.* at 29, 37.

1975, but it also declined to resume responsibility for East Timor's decolonization. The Democratic Republic of East Timor therefore remained suspended in political limbo, powerless to invoke either Portuguese assistance or the authority of the United Nations when, just two weeks later, Indonesia launched a *blitzkrieg* assault on Dili and annexed East Timor.²⁴⁷ As in Tibet, a guerilla war ensued.²⁴⁸ East Timorese resistance fighters sought to dispel the occupying foreign forces, which committed massive human rights abuses in an effort to consolidate their control. By 1979, Indonesia's brutal efforts to crush resistance in East Timor had displaced approximately 300,000 East Timorese—nearly half the population—into “controlled hamlets,” where about 200,000 died of starvation and illness.²⁴⁹

Here, however, the parallel to Tibet ends. The United Nations rejected Indonesia's invasion and occupation of East Timor, refused to recognize its authority, called upon Suharto's government to withdraw its troops immediately, and affirmed the right of the East Timorese people freely to determine their political status.²⁵⁰ Security Council Resolution 384, issued on December 22, 1975, recognized “the inalienable right of the people of East Timor to self-determination and independence” and called upon all states

²⁴⁷ Indonesia invaded East Timor the day after then President Gerald Ford and Secretary of State Henry Kissinger completed a visit to Jakarta, and the United States apparently acquiesced, convinced by Indonesian President Suharto's characterization of *Fretelin* as a communist party.

²⁴⁸ See *id.* at 46, 57-58. For an account of Tibet's guerilla resistance movement, which lasted from roughly 1959 to the early 1970s, supported for much of this time by the American CIA, see JOHN KENNETH KNAUS, *ORPHANS OF THE COLD WAR: AMERICA AND THE TIBETAN STRUGGLE FOR SURVIVAL* (1999).

²⁴⁹ See INBARAJ, *supra* note 241, at 68.

²⁵⁰ Two Security Council resolutions, eight General Assembly resolutions, and two Human Rights Commission resolutions were issued condemning Indonesia's occupation of and human rights violations within East Timor. See S.C. Res. 384 (Dec. 22, 1975); S.C. Res. 389 (Apr. 22, 1976); G.A. Res. 3485 (XXX) (Dec. 12, 1975); G.A. Res. 31/53 (Dec. 1, 1976); G.A. Res. 32/34 (Nov. 28, 1977); G.A. Res. 33/39 (Dec. 13, 1978); G.A. Res. 34/40 (Nov. 21, 1979); G.A. Res. 35/27 (Nov. 11, 1980); G.A. Res. 36/50 (Nov. 24, 1981); G.A. Res. 37/30 (Nov. 23, 1982); H.R. Comm. Res. on the Situation in East Timor (Mar. 11, 1993); H.R. Comm. Res. 387 (Apr. 16, 1997).

“to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV).”²⁵¹ Unlike Tibet, which every state acknowledges as part of China, only a handful of states—including, regrettably, the United States, which viewed Indonesia as an ally against communist expansion during the Cold War—recognized East Timor as a de facto part of Indonesia.²⁵² Many, including China, expressly rejected Indonesia’s claim, declaring East Timor an independent state under illegal foreign occupation.²⁵³ In terms of political recognition, then, East Timor, unlike Tibet, never suffered international neglect at the level of state opinion—even though, like Tibet, most states treated East Timor in practice as part of Indonesia.

But in terms of legal and civil recognition, East Timor never became part of Indonesia. Unlike China, Indonesia, itself a former colony, could not claim that East Timor had “always” been part of its territory. Nor could it invoke any treaty, like the 17-Point Agreement, that purported to “reunite” East Timor with Indonesia. Its *sole* claim to sovereignty consisted in military annexation,²⁵⁴ which, as noted, no longer remains a valid means to acquire territory. Popular moral opinion, as well as legal and political recognition practices, rejected Indonesia’s annexation of East Timor.²⁵⁵

²⁵¹ S.C. Res. 384 (Dec. 22, 1975).

²⁵² The United States never formally recognized Indonesia’s sovereignty, but it treated Indonesia as its de facto government. Significantly, in light of later developments, Australia was one of the only states to recognize the de jure incorporation of East Timor into Indonesia. See Christine M. Chinkin, *East Timor Moves to the World Court*, 4 EUR. J. INT’L L. 206, 207 (1993) (quoting AUSTL. DEPT OF FOREIGN AFF., ANNUAL REPORT 1978, at 30 (1979)).

²⁵³ See Grant, *supra* note 7, at 299 n.96. These included “Angola, Cape Verde, Guinea- Bissau, Mozambique, Sao Tome and Principe, Albania, Benin, Cambodia, the People’s Republic of China, Congo (Brazzaville), Guinea (Conakry), North Korea, Laos, Vietnam, and Tanzania.” *Id.* (emphasis added).

²⁵⁴ See *id.* at 276 n.6.

²⁵⁵ See, e.g., *Let East Timor Vote*, ECONOMIST, July 4, 1998, at 15, 16;

These recognition practices—political, legal, and civil—meant that the international community never accepted in theory, even though its actions tended to reflect in practice, Indonesia's assertion of sovereignty over East Timor. Indeed, the complexity and tensions surrounding the modern concept of recognition emerged in the *Case Concerning East Timor*. There, Portugal contended that international law—in particular, U.N. resolutions condemning Indonesia's invasion of East Timor—obliged states *not* to recognize Indonesian sovereignty in East Timor.²⁵⁶ The majority held otherwise, concluding that these resolutions do not “impos[e] an obligation on States not to recognize any authority on the part of Indonesia over the Territory;” nor can it “be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering [p]ower of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor.”²⁵⁷

The majority therefore held that it lacked jurisdiction, for any ruling on the merits would require adjudication of the rights and duties of Indonesia, a non-party over which the ICJ could not exercise compulsory jurisdiction.²⁵⁸ Judge Oda concurred on the grounds that the U.N. resolution did not provide *Portugal* with standing, even if it did establish a rule of nonrecognition toward Indonesia's claim to sovereignty over East Timor, which, he noted, it had

UNREPRESENTED NATIONS AND PEOPLE'S ORGANIZATION, THE QUESTION OF SELF-DETERMINATION: THE CASES OF EAST TIMOR, TIBET AND WESTERN SAHARA (1996); East Timor Action Network, at <http://www.etan.org/> (last visited Jan. 28, 2002).

²⁵⁶ East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30). For analysis, see generally Grant, *supra* note 7, at 300-10; Michael Shane French-Merrill, Note, *The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty*, 8 CARDOZO J. INT'L & COMP. L. 285 (2000).

²⁵⁷ East Timor, 1995 I.C.J. at 103-04.

²⁵⁸ See *id.* at 105.

annexed by illegal force.²⁵⁹ Judges Weeraantry and Skubiszewski, by contrast, concluded that a law of non-recognition derived from the prohibition on the acquisition of territory by force—established in the former's view by U.N. resolutions concerning East Timor, and in the latter's, by general principles of international law that operate *erga omnes*—precluded states from recognizing Indonesia's sovereignty in East Timor.²⁶⁰

The *East Timor* case did not, however, establish a *mandatory* rule of nonrecognition; if anything, its majority holding reaffirmed the discretionary nature of recognition in the absence of an express rule of law to the contrary prescribed by the Security Council (such as Resolution 662 promulgated in the wake of Iraq's invasion of Kuwait). But at the same time, it indicates the increasing complexity of recognition practices and law in situations where there has been a clear violation of the right to self-determination—for the court, despite its jurisdictional holding, reaffirmed this right in the penultimate paragraph of its judgment.²⁶¹

In 1999, Indonesian citizens forced the resignation of President Suharto. This initiated a dramatic change in Indonesia's internal politics; and in short time, East Timor became an issue. While the cost in human life and political friction was high, East Timor ultimately received the right to a referendum supervised by the United Nations. In 1999, its people went to the polls to exercise their right to self-determination. Presently under a U.N. mandate, East Timor will soon attain independence in accordance with the freely expressed desires of its national polis. On August 30, 2001, East Timor held its first elections.²⁶²

²⁵⁹ *Id.* at 116 (Oda, J., concurring).

²⁶⁰ *See id.* at 202 (Weeramantry, J., dissenting); *see id.* at 262 (Skubiszewski, J., dissenting).

²⁶¹ *See id.* at 105-06.

²⁶² *East Timor Holds First Free Election Since Winning Independence*, N.Y. TIMES, Aug. 30, 2001, at A7.

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The principles of decolonization, the self-determination of peoples, and the emerging right to democratic governance impute a continuing legitimacy to the State of Tibet and the Dalai Lama's exile government—validated by legal and civil, if not yet political, recognition. This does not, of course, translate into an international legal imperative to take action to vindicate the Tibetan people's rights under international law. But the development of recognition practices in the post-War era, at a minimum, complicates the question of Tibet's legal status. Unlike in the case of East Timor, legal and civil recognition practices toward Tibet remain in conflict with the prevailing political recognition practices of states. For China, this means that Tibet continues to be a diplomatic liability; and this itself is critical to ensure that the Tibetan people's rights do not atrophy with the passage of time or become obscured by fictional historical and legal claims. Normative recognition practices, in short, may fail to compel states to follow suit politically, but they do have, in the long term, real influence on the public world order.

Since 1959, debate on the issue of Tibet's legal status in international political fora has been tabled. China's political and economic power, coupled with its veto power as a permanent member of the Security Council, for the time being prevent any serious action.²⁶³ But as China continues to deflect criticism of its human rights practices with statements decrying the legacy of Western imperialism and colonialism,²⁶⁴ it is, at a minimum, ironic that U.N. member states remain hesitant to confront China with its *own*

²⁶³ Indeed, in the 1959 debates in the General Assembly, India "questioned the purpose of debating the situation in Tibet in the United Nations since 'nobody is going to send an army to Tibet or China.'" INT'L COMM'N OF JURISTS, *supra* note 2, at 61 (citing U.N. Doc. A/PV.834, Oct. 21, 1959, para. 89 (statement of the Indian representative)).

²⁶⁴ *E.g.*, Statement of Mr. Wang GuangYa, Vice Foreign Minister of the PRC, at the Asia Regional Preparatory Meeting for the World Conference Against Racism, Teheran, Feb. 19, 2001.

practices of colonization in Tibet—and, we should add, East Turkestan (Xinjiang) and “Inner” Mongolia.

To recognize Tibet’s status formally as a *de jure* state under illegal foreign occupation would be unlikely to work dramatic improvements in Tibet’s prospects in the short term. Nor, however, would it be likely to exacerbate them. At most, it would provoke a vehement rhetorical response from China and symbolic retaliation. But with China under international scrutiny for Beijing’s pledge to host the 2008 Olympic Games, China’s economic need for free trade with the United States and European markets, and with its WTO membership still precarious, it seems unlikely that this minor step would lead China’s present government to take drastic measures (e.g., to cut off diplomatic ties or sever economic relations); it cannot afford that risk. And appeasement of China’s fiction of territorial sovereignty over Tibet, as Tibet’s tragic history for the past half-century makes clear, has hardly proven effective. For as long as the international community continues to indulge the fiction that Tibet is “part of” China, China’s political elite will continue to claim “interference in internal affairs” as a shield to fend off criticism of its alleged “ownership” of Tibet and scrutiny of its human rights abuses against the Tibetan people. To challenge this fiction will not by itself restore Tibet’s sovereignty. But it will prevent the *issue* of Tibet’s status from vanishing behind the *venire* of legitimacy generated by years of CCP propaganda and international acquiescence. It may therefore prove the first step—and an essential predicate—toward vindicating the Tibetan people’s right to self-determination.

It would be misguided to analogize simply East Timor’s occupation by Indonesia to Tibet’s occupation by China. But the general refusal to recognize Indonesia’s legal right to sovereignty over East Timor in the long-term helped to validate the East Timorese people’s right to self-determination. States could similarly recognize China’s *de facto* effective control over Tibet without, as they do today,

indulging the fiction of its de jure sovereignty and legitimacy. Such a shift in policy toward China's claim to "ownership" of Tibet—i.e., to recognize it as an occupying power rather than a legitimate sovereign—may in time enable Tibetans to reassert their equally, if not more, valid claim to self-determination and national sovereignty. And to acknowledge the multifaceted nature of recognition in contemporary international law may help to ensure, more generally, that the "self-determination of peoples" does not disintegrate into an empty relic of the era of decolonization—for assertions of this right, as recent events in Kosovo, Chechnya, and elsewhere suggest, remain unlikely to diminish of their own accord.