

Limits and Potentialities of de facto States in the International Context

“The Impact of De Facto States on International Law and the International Community”

By Scott Pegg, Indiana University Purdue University Indianapolis *

Let me start by going through my definition of what a de facto state is. While different scholars use different terms including “unrecognized quasi-states,” “states-within-states,” and “as if states,” and they place somewhat different emphases on how they define these entities, there is, I believe, a fairly widespread consensus surrounding the basic elements of how to define a de facto state.

In other words, there are disagreements around the edges of the definition but a reasonably broad consensus on what the basic elements of the definition should be. In my framing of the term, there are six basic elements of the definition of a de facto state, a number of which come from Article 1 of the 1933 Montevideo Convention on Rights and Duties of States. First, there is an organized political leadership which receives some form of popular support. Second, this leadership has achieved sufficient capacity to provide governance or governmental services to a defined population. Third, the de facto state effectively controls its territory or the large majority of it for at least two years. Two years is a somewhat arbitrary figure but what I am trying to get at here is that these entities have some degree of permanence. They are not here today and gone tomorrow. Rather, they have staying power. Fourth, the de facto state views itself as capable of entering into relations with other states. Fifth, the de facto state actively seeks widespread international recognition of its sovereignty. Finally, the de facto state is, however, unable to achieve widespread recognition of its sovereignty and remains largely or totally unrecognized by the international society of sovereign states. Whereas many currently recognized sovereign states have never effectively controlled their territories or delivered governmental services to their populations, they are recognized as sovereign states no matter how weak or ineffective they are. The de facto state, on the other hand, remains unrecognized no matter how effective its governance capabilities or how long it has actually controlled the territory it claims to rule.

At any given time, there are probably anywhere from 5-15 de facto states in existence around the world. Again, as with the definition I just outlined, there is fairly widespread agreement on who or what most of these entities are. A list of current de facto states would certainly include at least the following cases: The Pridnestrovian Moldovan Republic or Transnistria, the Republic of South Ossetia, the Republic of Abkhazia, the Nagorno-Karabakh Republic, Tamil Eelam in Sri Lanka, the Turkish Republic of Northern Cyprus, Antarcticland and the Republic of Somaliland. Some scholars would also include Taiwan and Kosovo here. Others might treat them separately given their comparatively higher levels of international recognition. Past historical examples would include the Republic of Biafra, the Republic of Chechnya and the Serbian Republic of Krajina, all of which were militarily defeated and ultimately reincorporated into, respectively, Nigeria, Russia and Croatia; the Bosnian Serbian Republic which is now a constituent part of the sovereign state of Bosnia and Herzegovina; Eritrea which successfully graduated to sovereign statehood in 1993;

and, for some, Kosovo which has now been recognized by somewhere between 30-40 sovereign states. In terms of the impact that de facto states have on international society; let me highlight three main areas. These are the impacts that de facto states have on security, political economy and international law. Let me start with security. Although there are a small number of de facto states in the world at any given time and they have relatively small populations and are generally ignored or forgotten by the world’s media, they do have significant security impacts. The four cases that I considered in my book *International Society and the De Facto State* (Eritrea before it won its independence from Ethiopia, the Republic of Somaliland, Tamil Eelam and the Turkish Republic of Northern Cyprus) had, by the time the book was published in 1998, collectively produced somewhere in the vicinity of 160-275,000 fatalities and generated somewhere between 2-3,000,000 refugees and internally displaced persons.

Given the continued high levels of conflict surrounding Tamil Eelam in Sri Lanka, these figures would certainly be higher today. The four cases in Dov Lynch’s book *Engaging Eurasia’s Separatist States* (Nagorno-Karabakh, South Ossetia, Abkhazia and Transnistria) had, by the time his book was published in 2004, collectively produced more than 1,000,000 refugees and internally displaced persons. Obviously, including historical cases like Biafra, Chechnya and the Bosnian Serb Republic would send all of these figures much higher.

The good news in terms of de facto states and security is that most of these situations, with the notable exception of Tamil Eelam in Sri Lanka are now relatively stable with few new casualties or refugees being produced. The bad news is that these conflicts all remain largely unresolved and continue to hamper larger regional security and development prospects.

In terms of international political economy, de facto states again have a relatively modest impact. There are a variety of explanations for this. The limited number of de facto states in the international system at any given time, their generally

small size and their frequently impoverished conditions all make them of marginal or peripheral economic importance. The one big exception here is obviously Taiwan. The de facto state's lack of sovereignty and juridical standing also discourages foreign direct investment and international economic integration. Finally, when forced to choose, de facto state leaderships consistently prioritize political survival and security over the possible benefits of mutual economic exchange. Yet, business is certainly conducted with and in de facto states, sometimes with negative consequences. One big concern here is natural resource predation. Charles Taylor's "Greater Liberia" earned an estimated US\$8-10,000,000 a month in the early 1990s from various forms of timber and mineral extraction. The non-governmental organization Global Witness estimates that the Angolan rebel group UNITA earned nearly US\$4 billion from diamond sales during the Angolan civil war. A second big concern is just the general increase in criminal activity such as the smuggling of untaxed cigarettes and alcohol and black market oil and gas. Economic embargoes against some de facto states and their uncertain legal status combine to push these entities into shady, corrupt and sometimes outright criminal activities. It does not, however, have to be this way. Taiwan, with its advanced manufacturing facilities and high-tech leadership in semi-conductors and laptop computers has become one of the world's leading trading states and has developed rapidly. More modest examples include Somaliland's success for a time at increasing its livestock exports to the Persian Gulf states, the Turkish Republic of Northern Cyprus's modest tourist industry and Transnistria's success with some of its steel and heavy industrial plants. Turning to international law, by definition, the de facto state lacks juridical standing in the society of states. This does not mean, however, that it has no legal standing whatsoever. First, de facto states are bound by jus cogens — peremptory norms of international law from which no derogation is possible. Beyond this, it can be shown both historically and in case law that unrecognized entities have a juridically significant existence in international law. Historically, international law has accepted a wide variety of non-sovereign entities including colonies, trusteeships, protectorates, free cities and internationalized territories. European powers also conducted treaty relations with a large number of non-state entities before colonialism was established throughout Africa, Asia and Latin America. In terms of case law, the 1924 Tinoco Claims Arbitration ruled that the unrecognized Costa Rican government of Federico Tinoco was juridically cognizable. Three separate cases in the United States (*Wulfsohn v. Russian Socialist Federated Soviet Republic* (1923); *Salimoff and Co. v. Standard Oil Co. of New York* (1933); and *Upright v. Mercury Business Machines* (1961) all extended sovereign rights and privileges to unrecognized governments. The problem is not that international law is not sufficiently flexible to accommodate the existence of de facto states. International law could quite easily accommodate de facto states. Rather, the problem is the hostility of existing sovereign states to reaching any form of accommodation with de facto states. Let me give two examples here. The first concerns the persistent reluctance of sovereign states to apply Common Article 3 of the Geneva Conventions to conflicts taking place on their territories even though it explicitly states that applying this provision "does not constitute any recognition by the de jure government that the adverse party has any authority of any kind." The second example concerns the general reluctance to admit Taiwan to membership in international organizations. After years of delay, Taiwan was finally admitted to the World Trade Organization in 2001. It has still not been admitted to the World Health Organization. In this regard, international society can choose to keep Taiwan out of the WTO or the WHO but the problem is not that Taiwan cannot or will not meet its obligations under world trade law or under the WHO statutes.

In different ways, scholars like Dov Lynch and I have argued that in dealing with de facto states, the international community needs more options than just sovereign recognition or attempts at military eradication. Let me conclude today by discussing three possible alternatives that might have some relevance for dealing with contemporary de facto states. The first is what I would call the "Ethiopian model" or the "Meles formula" after the way in which Ethiopian Prime Minister Meles Zenawi chose to deal with the Provisional Government of Eritrea in the early 1990s. Essentially, Meles invited foreign governments, investors and organizations to deal directly with the Provisional Government of Eritrea before its referendum on independence in 1993. Meles stated that "The future of Eritrea will be determined by a referendum... and relations which any country maintains with the Provisional Government of Eritrea should not be viewed as determining events there." In essence, Meles separated the question of Eritrea's final status from dealings or relations with its de facto state government and allowed foreigners to maintain whatever level of contacts or relations they wanted with the Eritrean regime.

The second potential alternative is what I would call the "GATT/WTO model." Here I am referring to the World Trade Organization and its predecessor the General Agreement on Tariffs and Trade whose members are "contracting parties" and not necessarily sovereign states. This system was originally established so colonies that had not yet received their independence could join the GATT at its inception in 1947.

Indeed, three of the original 22 contracting parties (Burma, Sri Lanka and Southern Rhodesia) to the GATT were not recognized sovereign states at the time the General Agreement was drafted. Rather than sovereign statehood, the two main qualifications for GATT/WTO membership are that a government:

- 1) represents a customs territory that maintains its own trade policies;
- 2) is responsible for those trade policies and can adjust them in accordance with any future GATT/WTO obligations. The hallmark of the GATT/WTO model is thus its emphasis on functional competence rather than juridical standing. Such a model would ask, for example, whether or not Turkish Cypriot authorities could run a safe airport or Taiwanese authorities could meet the obligations of World Health Organization membership and not what their legal status was.

The third potential alternative that I will consider is what I call the "Taiwan model";

Here I am referring not to the standard diplomatic relations that Taiwan maintains with the 20 some odd countries in the world that recognize it as a sovereign state.

Rather, I am referring to the substantive economic, trade, cultural and other ties that Taiwan maintains with countries that do not recognize it as a sovereign state. There are arguably three main components to the Taiwan model. First, the Taiwanese have shown great flexibility and pragmatism in terms of nomenclature. "Taipei, China" is sometimes referred to as "the Olympic formula" because that is the formulation by which the International Olympic Committee allowed Taiwan to participate in the Olympics. Taiwan applied to join and was ultimately admitted to the World Trade Organization under the name "The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu"; Taiwanese flexibility in terms of nomenclature clearly eases its participation in international relations. Second, Taiwan has received active cooperation from states that do not recognize it. Maybe the best example here is the United States which passed the Taiwan Relations Act which basically stipulates that any time a US law, regulation or executive order mentions a state, country, nation or

government that those provisions will be considered to apply equally to Taiwan. The final component of the Taiwan model is what I call the "privatization" of diplomatic relations. There is, for example, no United States embassy in Taipei because the US does not recognize Taiwan. There is, however, the American Institute in Taiwan, a private non-profit corporation staffed by personnel who are seconded from the US State Department that performs almost all of the functions that a traditional embassy would undertake. Taiwan conducts its relations with the People's Republic of China through a similar "non - governmental" body called the Straits Exchange Foundation. Taken together, the various components of the Taiwan model have enabled Taiwan to become one of the leading trading states in the world and given it a level of economic prosperity that most other de facto states can only dream of. All three of these models have problems or limitations and none of them is necessarily a perfect solution to the question of how to engage de facto states in the contemporary world order. They do, however, all demonstrate some of the ways in which these entities could be engaged productively short of recognizing them as sovereign states.

Aside from their potential benefits to the de facto states themselves, all of these alternatives potentially offer much greater gains to the society of states than its more traditional response of isolating or ignoring de facto states.

* Note: substantive footnotes and detailed references can be found in Scott Pegg, *International Society and the De Facto State* (Aldershot: Ashgate, 1998). Article published with the author's permission.