

2000

## Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan

Jianming Shen

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

Shen, Jianming. "Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan." American University International Law Review 15, no. 5 (2000): 1101-1161,

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# SOVEREIGNTY, STATEHOOD, SELF- DETERMINATION, AND THE ISSUE OF TAIWAN

JIANMING SHEN\*

INTRODUCTION .....	1102
I. TAIWAN'S ATTRIBUTES AND THE NATURE OF THE TAIWAN ISSUE .....	1104
A. HISTORICAL BASIS FOR CHINA'S SOVEREIGNTY OVER TAIWAN .....	1105
B. LEGAL BASES FOR CHINA'S SOVEREIGNTY OVER TAIWAN	1109
1. <i>Historic Title as a Legal Basis</i> .....	1109
2. <i>Invalidity of the Shimonoseki Treaty</i> .....	1110
3. <i>Legal Effects of the Cairo/Potsdam Declarations</i> .....	1112
4. <i>The 1951 San Francisco Peace Treaty</i> .....	1114
5. <i>The 1952 Peace Treaty</i> .....	1116
C. INTERNATIONAL RECOGNITION OF CHINA'S SOVEREIGNTY OVER TAIWAN .....	1117
1. <i>PRC's Continuity of the ROC and Its Legal Effects</i> ...	1117
2. <i>Recognition by 160+ States</i> .....	1121
3. <i>Recognition by International Organizations</i> .....	1122
4. <i>Significance of the General Recognition Accorded to             the PRC</i> .....	1123
II. CRITERIA OF STATEHOOD AND THE STATUS	

---

\* Visiting Professor of Law, St. John's University School of Law. Formerly Research Fellow, University of Hong Kong Faculty of Law; Kenneth Wang Research Professor of Law, St. John's University School of Law; Assistant Professor of Law, Peking University Faculty of Law. LL.B. (Peking), M.A. (Denver), LL.M. (U. Penn) and S.J.D. (U. Penn). I welcome comments and criticism, and can be reached by e-mail at [jshen@sjulawfac.stjohns.edu](mailto:jshen@sjulawfac.stjohns.edu). Finally, this Essay is dedicated to Professor Jerome A. Cohen to commemorate his 70th birthday (Qishi Dashou) (July 1, 2000).

OF TAIWAN .....	1125
A. PERMANENT POPULATION .....	1126
B. DEFINED TERRITORY .....	1127
C. GOVERNMENT .....	1130
D. CAPACITY TO ENTER INTO FOREIGN RELATIONS .....	1134
III. Self-Determination and Taiwan .....	1140
A. HISTORICAL OVERVIEW .....	1141
1. <i>Doctrinal Origins</i> .....	1141
2. <i>Self-Determination in the Decolonization Process</i> ....	1142
3. <i>Use/Misuse of Self-Determination in Non-colonial</i> <i>Contexts</i> .....	1144
B. MEANING OF SELF-DETERMINATION .....	1144
1. <i>The UN Charter</i> .....	1144
2. <i>The Decolonization Declaration</i> .....	1145
3. <i>The International Law Principles Declaration</i> .....	1146
4. <i>International Human Rights Instruments</i> .....	1147
5. <i>Forms of Self-Determination and Sovereignty</i> .....	1148
C. SELF-DETERMINATION AND UNILATERAL SECESSION ....	1150
1. <i>Constitutional Secession</i> .....	1150
2. <i>Secession by Agreement</i> .....	1150
3. <i>The Ultimate Attitude or Compromise of the Parent</i> <i>State</i> .....	1151
4. <i>Unilateral Secession Opposed by the Parent State</i> ....	1152
5. <i>Minority Rights v. Self-Determination</i> .....	1155
6. <i>Detriments of Unqualified Self-Determination</i> .....	1157
D. THE UNAVAILABILITY OF SELF-DETERMINATION TO TAIWAN .....	1158
CONCLUSION .....	1160

## INTRODUCTION

Since the infamous visit by Lee Teng-hui (Li Denghui) to the United States in 1995, the issue of Taiwan has received much academic and political attention. More recently, Lee's separatist orientation became so bold that he made an unprecedented remark to German journalists on July 9, 1999. Specifically, he stated that the

relations across the Taiwan Strait should be "State-to-State relations, or at least special State-to-State relations...." This irresponsible remark again caused a new round of tensions between China's mainland and Taiwan.

Lee's "two-states" theory reinvigorated debates over a variety of issues. Some of these include: *inter alia*, what political status the regime in Taiwan possesses; whether Taiwan already satisfies the criteria for statehood and therefore independence; and whether Taiwan has the right to self-determination, including the right to unilaterally secede from China as a whole. This essay discusses these three broad issues from the point of view of international law. Section I discusses the attributes of Taiwan as Chinese territory and the nature of the Taiwan issue by examining the history of Chinese settlement and administration, the invalidity of the 1895 Treaty of Shimonoseki ceding Taiwan to Japan, the legal effects of relevant international legal instruments such as the 1943 Cairo Declaration and the 1945 Potsdam Proclamation, the effects of the PRC Government's succession to the former ROC Government, and the effects of the international community's general recognition of the PRC Government as the sole legitimate government representing China as a whole, including Taiwan. Section II deals with the assertion that Taiwan is already a sovereign State because it already meets the criteria for

---

1. See *Responses to Questions Submitted by Deutsche Welle*, (visited March 25, 2000) <[http://www.dsis.org.tw/database/china\\_taiwan/lee\\_two\\_states\\_e.htm](http://www.dsis.org.tw/database/china_taiwan/lee_two_states_e.htm)> [hereinafter *Responses*] (reporting statements of Lee Teng-hui that amendments to Taiwan's Constitution set special state-to-state relations between China and Taiwan); see also *Spokesman on Lee Teng-Hui Separatist Malice*, (visited March 28, 2000) <[http://202.99.23.245/english/199907/12enc\\_990712001028TopNews.html](http://202.99.23.245/english/199907/12enc_990712001028TopNews.html)> (reporting statements by Lee Teng-hui and other Taiwanese officials that relations between China and Taiwan are as between two states); People's Daily, 10 July 1999; New York Times, 10 July 1999. Since the completion of this Essay in late February 2000, some major changes have taken place in the political life of Taiwan. In March 2000, the opposition party in Taiwan, the Democratic Progressive Party (DPP), won the local general election, resulting in (1) the selection of DPP "presidential" candidate Chen Shui-bian to take office on May 20, 2000 as the new leader of the Taiwanese authorities, and (2) the loss of power by Kuomintang (KMT) for the first time in the local politics. See Terry McCarthy, *Chen's Triumph*, CNN.com Asia Now, vol. 155, no. 12 (visited Mar. 27, 2000) <[www.cnn.com/ASIANOW/time/magazine/2000/0327/cover1.html](http://www.cnn.com/ASIANOW/time/magazine/2000/0327/cover1.html)>. Over angry protesters and demonstrators blaming Lee Teng-hui for KMT's defeat, Lee resigned as KMT Chairman. See *Taiwan's Lee Teng-hui Resigns as Party Chief*, CNN.com.Asianow (visited Mar. 24, 2000) <[www.cnn.com/2000/ASIANOW/east/03/24/bc.taiwan.politics.reut/index.html](http://www.cnn.com/2000/ASIANOW/east/03/24/bc.taiwan.politics.reut/index.html)>.

statehood. Upon a brief review of the basic criteria for statehood, I argue that while there is a permanent population in Taiwan, the province can hardly be said to have met the requirements of a "territory" and a "government" because of its lack of "legal title" in both categories, and it certainly does not meet the criterion of "sovereignty" or "independence" because it does not possess the legal competency to represent China as a whole, or Taiwan as part of China, on the international plane. In Section III, I explore the inapplicability of the principle of self-determination to Taiwan. After stating that linking the concept of self-determination with Taiwan in order to support its independence would amount to an abuse of the concept, I conclude that neither the Taiwanese authorities nor the inhabitants in Taiwan have the right to unilaterally secede Taiwan from China *absent* a constitutional structure or consent on the part of the Chinese Government and its 1.3 billion people permitting such secession.

## I. TAIWAN'S ATTRIBUTES AND THE NATURE OF THE TAIWAN ISSUE

There are several possible categories for Taiwanese secessionists and their overseas supporters. One category concedes that Taiwan, under current legal framework, is not in itself a State, but endeavors eventually to turn Taiwan into a so-called independent nation. A second category considers Taiwan a political entity having an equal status with Beijing and aims at attaining eventual independence by expanding Taiwan's "international living space". A third category openly avers that Taiwan or the "Republic of China in Taiwan" is already an independent nation.<sup>2</sup> A fourth category calls for a formal declaration of independence. Lee Teng-hui, at different times, seemed to fall into each of the former three categories. The only thing he had not done thus far was formally declare independence for Taiwan. Despite his past actions, we are now certain that Lee, although often unpredictable, exposed himself to the world as a naked separatist by moving closer towards creating "two Chinas" or "one China, one Taiwan". People are more convinced than ever that Lee essentially stood on the same line as *Tai du fenzi*, "independence for Taiwan" activists, both within and without the island province.

---

2. See *Responses*, *supra* note 1 (reporting statement of Lee Teng-hui that declaring independence would essentially be superfluous).

To support their claims for Taiwan's independence, the secessionists and their supporters either ignore or distort historical facts and present realities relating to the attributes of Taiwan. Some politicians, scholars and media in the West, particularly in the United States, are also not willing to accept that Taiwan is a part of China and that there is only one China. They will refer to Taiwan, or the so-called "Republic of China," as a State<sup>3</sup> before ever acknowledging territorial sovereignty of China over Taiwan. They at most state that China regards Taiwan as a renegade province, as if, to them, this were not necessarily so.<sup>4</sup> True, China does take Taiwan as an inalienable part of its territory, but this is a position based upon solid foundations in history, fact, and law.

#### A. HISTORICAL BASIS FOR CHINA'S SOVEREIGNTY OVER TAIWAN

Historically, Taiwan has been part of China since ancient times. Ancient Chinese called this island *Daiyuan* in the primitive era. In the Warring States period (475-221 B.C.), the island was renamed *Daoyi* and *Yizhou*.<sup>5</sup> Contacts between the Chinese people and the Taiwan Island, then known as *Yizhou*, took place as early as during the Qin (221-206 B.C.) and Han (206 B.C.-220 A.D.) Dynasties.<sup>6</sup>

In the Three-Warring States period (220-280 A.D.), the development of the *Yizhou* island by the Chinese people was documented in *Seaboard Geographic Gazetteer*, an official annual compiled by Shen Ying of the Wu State of that period.<sup>7</sup> Surviving historical records indicate that in the year of 230, two admirals of the Wu State, Wei Wen and Zhuge Zhi, led ten thousand soldiers to *Yizhou*.<sup>8</sup> The

---

3. See *id.* (recounting Lee Teng-hui's statement that Taiwan has been a sovereign state since it was founded in 1912).

4. See *id.* (declaring Beijing's characterization of Taiwan as a renegade province as untrue).

5. See CIHAI (THE SEA OF WORDS) 477 (Shanghai Dictionary Publishing House, abridged ed. 1979); see also Ru Xin, *China has Indisputable Sovereignty over Taiwan*, PEOPLE'S DAILY (overseas ed.), Oct. 31, 1995, at 5.

6. See CIHAI, *supra* note 5, at 477.

7. See *The Taiwan Question and Reunification of China*, BEIJING REVIEW, Sept. 6-12, 1993 at I [hereinafter *White Paper*] (recounting the common history of China and Taiwan to demonstrate that Taiwan has long been a part of China).

8. See CIHAI, *supra* note 5, at 477.

state of Wu in the third century A.D. and the Sui Dynasty in the Seventh century A.D., sent several expeditions to Taiwan consisting of over ten thousand men each.<sup>9</sup>

In the Sui Dynasty (581-618 A.D.), the island was renamed *Li-uqiu*.<sup>10</sup> This latter name continued through the Tang (618-907 A.D.), Song (960-1279 A.D.) and Yuan (1279-1368 A.D.) Dynasties, and well into most part of the Ming Dynasty (1368-1644 A.D.).<sup>11</sup> By the end of the Ming era, the name *Taiwan* was used to refer to part and eventually the whole of the island.<sup>12</sup>

Despite relatively shorter periods of foreign invasion and domination in modern times, the presence and settlement of Chinese people on the island in addition to China's actual exercise of authority throughout history supports the character of Taiwan as part of China.<sup>13</sup> The Chinese Government effectively established and exercised jurisdiction over Taiwan in various dynasties. The Southern Song Dynasty (1127-1279 A.D.), for example, set up a garrison in Penghu and placed the territory under the jurisdiction of Jinjiang County, Quanzhou Prefecture, of Fujian Province.<sup>14</sup> In the Yuan and Ming Dynasties, the Chinese Government continued to exercise such jurisdiction by establishing and maintaining an Administration of Patrol and Inspection (*Xun Jian Si*) in Penghu.<sup>15</sup>

In 1624, the Dutch invaded Taiwan and occupied the island for 38 years.<sup>16</sup> In 1661, General Zheng Chenggong (known in the West as

---

9. See *White Paper*, supra note 7, at I.

10. See *id.* at I.

11. See CIHAI, supra note 5, at 477; see also Run Xin, supra note 5.

12. See CIHAI, supra note 5, at 477.

13. See *White Paper*, supra note 7 at I (finding that Taiwan's cultural traditions are founded in Chinese traditions, a fact that has not been affected by Japanese occupation).

14. See CIHAI, supra note 5, at 477.

15. See *id.*; see also *White Paper*, supra note 7, at II (providing examples of administrative bodies established by China to govern Taiwan). The Yuan Dynasty established a patrol and inspection agency in Penghu. During the mid and late 16th century, the Ming Dynasty reinstated this agency after it had been abolished and sent reinforcements to Penghu to thwart foreign aggressors. See *id.*

16. See *White Paper*, supra note 7, at II (stating that the Dutch initially occupied the southern part of Taiwan and in 1642 seized the northern part from the

Koxinga or Cheng Ch'eng Kung) and his soldiers sailed across the Taiwan Strait from Fujian, and, in 1662, he expelled the armed forces of the Netherlands, thus completely recovering what he called "the native land of our ancestors" (*xianren gutu*).<sup>17</sup> General Zheng established *Chengtian* Prefecture on the island under the jurisdiction of Fujian Province<sup>18</sup> and "subsequently, the Qing government expanded the administrative structure in Taiwan, thereby strengthening its rule over the territory...."<sup>19</sup>

In 1684, the Qing Dynasty set up a Taiwan-Xiamen Patrol Command and a Taiwan Prefecture Administration, still under the jurisdiction of Fujian Province.<sup>20</sup> The Command and the Prefecture in turn had jurisdiction over three counties on the island: Taiwan County (now Tainan), Fengshan County (now Gaoxiong) and Zhuluo County, now called Jiayi.<sup>21</sup>

In 1721, Emperor Kangxi created an office of imperial supervisor for the inspection of Taiwan, and replaced the Taiwan-Xiamen<sup>22</sup> Patrol Command with the name "Prefecture Administration of Taiwan and Xiamen". The jurisdiction of this Prefecture Administration, also under Fujian, covered the above named counties as well as the subsequently created Zhanghua County and Danshui Canton.<sup>23</sup>

In 1727, Emperor Yongzheng restructured the administration on the island by establishing the Prefecture Administration of Taiwan, again under Fujian Province.<sup>24</sup> This Prefecture Administration, which was later renamed Prefecture Command for Patrol of Taiwan, incorporated the newly established Penghu Canton along with previously existing counties and cantons.<sup>25</sup>

---

Spaniards who had occupied that part since 1626).

17. See Ji Chonwei, *History May Not be Distorted*, PEOPLES DAILY, Nov. 1, 1995, at 5.

18. See *White Paper*, *supra* note 7, at II.

19. See *id.* at II.

20. See *id.* at II.

21. See *id.* at II.

22. See *id.* at II.

23. See *id.* at II.

24. See *White Paper*, *supra* note 7, at II.

25. See *id.* at II.



In 1875, in order to upgrade the administration of Taiwan, Emperor Guangxu of the Qing Dynasty created Taibei Prefecture, Jilong Canton, Danshui County, Xinzhu County and Yilan County.<sup>26</sup>

In 1885, Emperor Guangxu formally upgraded Taiwan to the status of a full province covering three prefectures, one sub-prefecture, eleven counties and five cantons.<sup>27</sup> During the tenure of office of Liu Mingchuan, the first Governor of Taiwan, "railways were laid, mines opened, telegraph service installed, merchant ships built, industries started and new-style schools set up. Considerable social, economic, and cultural advancement in Taiwan was achieved as a result...."<sup>28</sup>

In 1894, Japan launched a war of aggression against China, and coerced the losing party, the Qing government, to sign the humiliating Treaty of Shimonoseki (Treaty of Maguan) in 1895, under which Taiwan and Penghu were ceded to Japan.<sup>29</sup> This began a history of fifty years of Japanese colonial reign of Taiwan against the will of the Chinese people, including the inhabitants on Taiwan.<sup>30</sup> Efforts by the Chinese people on the island and the mainland to resist Japanese occupation and return Taiwan to the motherland never ceased.<sup>31</sup>

During the Second World War, the Chinese Government, in its Declaration of War against Japan, proclaimed to abrogate all treaties, conventions, agreements, and contracts regarding relations between China and Japan, including the Treaty of Shimonoseki.<sup>32</sup> The proclamation declared China's resumption of sovereignty over Taiwan, Penghu and four northeastern provinces, emphasizing that China

---

26. *See id.* at II.

27. *See id.* at II.

28. *See id.* at II.

29. *See id.* at II; *see also* JIANG ZEMIN, *Continue to Promote the Reunification of the Motherland* (visited March 25, 2000) <<http://www.chinaembassy.org/cgiin/press.pl?65>> (stating that despite the fact that Taiwan has been separated from China in the past, the Chinese continue to promote reunification of Taiwan with mainland China).

30. *See White Paper*, *supra* note 7 at II.

31. *See id.* at II (stating that people on the mainland gave donations or volunteered for the effort to fight the Japanese).

32. *See id.* at II.

would recover these territories.<sup>33</sup> After China won the war against Japanese aggression in 1945, the Chinese government reinstated its administrative authority in Taiwan Province, thereby formally resuming sovereignty of China over the territory.<sup>34</sup>

In 1949, the defeated Kuomintang forces retreated from the mainland to Taiwan.<sup>35</sup> Since then, the Taiwan Strait has separated the island province from the motherland. This internal and temporary separation, however, does not change the attributes of Taiwan as an integral territorial part of China.

## B. LEGAL BASES FOR CHINA'S SOVEREIGNTY OVER TAIWAN

### 1. *Historic Title as a Legal Basis*

The sovereignty of China over Taiwan is also firmly established in law. China's legal title to Taiwan is inseparable from the historical facts relating to China's actual exercise of jurisdiction over Taiwan. Despite the allegation that in certain periods in history the Chinese government's control over Taiwan was weak and fragile, such control "was particularly strong and continuous" in comparison with other Chinese frontiers.<sup>36</sup> China's long-time display of effective authority over the island exceeds all the requirements of international law for the acquisition and maintenance of territorial title either by way of occupation or prescription.<sup>37</sup>

---

33. See *id.* at II (referring to the Chinese Government's declaration of war against Japan); see also Ru Xin, *supra* note 5, at 5 (arguing that China has sovereignty over Taiwan).

34. See Ru Xin, *supra* note 5, at 5 (arguing that China has sovereignty over Taiwan).

35. See *White Paper*, *supra* note 7, at III (stating that once the Republic of China was overthrown and the People's Republic of China proclaimed as the sole government of China, officials of the Kuomintang clique, which was associated with the Republic of China, left, seeking refuge in Taiwan).

36. See Jonathan I. Charney & J.R.V. Prescott, *Sovereignty Issues between the People's Republic of China and the Republic of China*, 16 (Jan. 14, 2000) (on file with the author) (finding that before China relinquished Taiwan to Japan, rebellions were not abnormal).

37. See Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 1, 7-8 (1997) (discussing five modes of acquisition of territory: occupa-

## 2. *Invalidity of the Shimonoseki Treaty*

The *de jure* territorial attributes of Taiwan to China remained uninterrupted by the Qing Government's cession "in perpetuity".<sup>38</sup> Although the island ceded to Japan by an unequal treaty, the validity of the cession was in itself questionable because the Qing Government signed it under extreme duress.<sup>39</sup> Under modern and contemporary international law, a treaty is void and invalid *ab initio* if entered into under coercion or fraud.<sup>40</sup>

According to Professor Wang Tieya, the Treaty of Shimonoseki was one of the many unequal treaties imposed upon China by foreign powers.<sup>41</sup> Among all Sino-foreign treaties from the 1842 Sino-British Treaty of Nanjing to the early part of the 20th century, "very few treaties were equal".<sup>42</sup> During this period of time, "what applied in China's foreign relations were not principles and rules of international law, but rather unequal treaties"<sup>43</sup> that were concluded under

---

tion, prescription, accretion, cession, and subjugation or annexation).

38. The Treaty of Shimonoseki ceded Taiwan and some other territories of China to Japan "in perpetuity". See GUOJI GUANXI SHI (17 SHIJI ZHONGYE – 1945) (A HISTORY OF INTERNATIONAL RELATIONS (MID-17<sup>TH</sup> CENTURY – 1945)) 191-192 (Wang Changzu, He Chunchao & Wu Shimin, eds., Beijing: Law Publishing House, 1986). Such perpetual cession, however, has no legal and practical significance given the unequal nature of the treaty made under duress, China's refusal to recognize the treaty, and Japan's renunciation of any interest and title in Taiwan. Hong Kong Island *per se* was also ceded to Great Britain in perpetuity, but that fact similarly never precluded China from maintaining its sovereignty over Hong Kong and regaining physical possession of it.

39. See *White Paper*, *supra* note 7, at II (stating that because of defeat to the Japanese, the Qing government was forced to sign the Treaty of Shimonoseki).

40. See Vienna Convention on the Law of Treaties, May 23, 1969, *entered into force* Jan. 27, 1980, art 52, U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875, 891(1969) (nullifying any treaty obtained by force or the threat of force). The International Law Commission, responsible for drafting the text of the Convention, concluded that the principle concerning the legitimacy of a treaty obtained by illegal threat or use of force is *lex lata* in current international law. See I.L.C. *Final Draft*, [1966] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/NC.4/SER.A/1966.

41. See WANG TIEYA, GUOJI FA YIN LUN (AN INTRODUCTION TO INTERNATIONAL LAW) 387-88 (Peking University Press 1998).

42. See *id.* at 390.

43. See *id.* at 391.

the use or threat of armed force or coercion.<sup>44</sup> As early as 1924, Dr. Sun Yet-sien, the founding father of the Republic of China, declared his intent to abolish all unequal treaties between China and foreign nations.<sup>45</sup> On May 11, 1927, the Nationalist Government issued a "Declaration to Abolish All Unequal Treaties by Appropriate Means."<sup>46</sup> On May 31, 1931, the Chinese National Assembly declared that "the Chinese people do not recognize all unequal treaties hitherto imposed upon China by foreign States."<sup>47</sup> More specifically, the Government of the Republic of China, during the War of Resistance against Japan, abrogated all unequal treaties between China and Japan, including the Treaty of Shimonoseki.<sup>48</sup> When China declared war against Japan during the Second World War "the Chinese Government proclaimed that all treaties, conventions, agreements, and contracts regarding relations between China and Japan, including the Treaty of Shimonoseki, had been abrogated ... [and] ... stressed that China would recover Taiwan, Penghu and the four northeastern provinces."<sup>49</sup>

After the founding of the People's Republic of China ("PRC"), the new Chinese Government solemnly declared that it would not recognize the validity of any unequal treaties imposed upon prior governments of China.<sup>50</sup> It is thus beyond doubt that the 1895 Treaty of Shimonoseki could not and can not validly bind the Chinese Government.

Furthermore, under a 1952 "Peace Treaty" between Japan and the "Republic of China" ("ROC"), Japan agreed to regard all treaties and agreements it had entered into with China before December 1941 as invalid.<sup>51</sup> While the 1952 treaty is not valid for the People's Republic

---

44. *See id.* at 392.

45. *See id.* at 398.

46. *See id.* at 399.

47. *See id.* at 399.

48. *See id.* at 399 (noting that China declared null and void all unequal treaties between China and Germany, Italy, and Japan).

49. *See White Paper, supra* note, 7 at II.

50. *See, e.g.*, GUOJI FA (INTERNATIONAL LAW) 18 (Wang Tieya & Wei Min eds., 1981); MU YAPING ET AL., DANGDAI GUOJI FA LUN (A TREATISE OF CONTEMPORARY INTERNATIONAL LAW) 36 (1998).

51. *See infra* notes 55-62 and accompanying text (discussing the 1952 Treaty

of China in a technical sense, it nevertheless manifests Japan's unilateral commitments which, given all the circumstances, are legally binding upon Japan. By undertaking to nullify, rather than to terminate, the Treaty of Shimonoseki and other unequal treaties, Japan arguably lost its right, title, or claim, if any, to Taiwan *ab initio*, not simply as of 1941 or 1952. That is to say, any legal title to Taiwan that accrued to Japan as of 1895 no longer exists. In any case, the PRC Government considered the Treaty of Shimonoseki and all other coerced unequal treaties invalid *ab initio*. In that sense, China never legally lost her sovereignty over Taiwan, but merely lost her physical control over it until the recovery of 1945.

Notwithstanding, whether the nullification of the Treaty of Shimonoseki took effect in 1895, 1941, 1949 or 1952 is not important. It is most important that such nullification, no matter when taking effect, has practically the same effect. If the 1895 treaty ever became effective, it was at least invalidated by the Chinese Government's abrogation and Japan's commitment to accept such abrogation. Since China held the sole title before the 1895 treaty, the only natural and logical result of the nullification of the treaty is that, Taiwan remains part of China.

### 3. *Legal Effects of the Cairo/Potsdam Declarations*

More importantly, China obtained full resumption of *de facto* and *de jure* sovereignty over Taiwan following Japan's surrender in August 1945. A series of international legal instruments and Japan's own commitments affirm and guarantee such resumption of sovereignty. On December 1, 1943, China, Great Britain, and the United States issued the well-known Cairo Declaration. It proclaimed, among other things, that "Japan shall be stripped of all the islands in the Pacific which she seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan stole from the Chinese, such as Manchuria, Formosa [Taiwan] and the Pescadores [Penghu], shall be restored to the Republic of China."<sup>52</sup>

---

of Peace between the so-called "Republic of China" and Japan).

52. See Conference of President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill in North Africa, Dec. 1, 1943, 9 DEP'T ST. BULL., 1943, 393 (providing a description of the three nations' military operations against Japan).

On July 26, 1945, these three powers (later joined by the Soviet Union) signed the Potsdam Proclamation, emphasizing that "[t]he terms of the Cairo Declaration shall be carried out", and that "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such other minor islands as we determine."<sup>53</sup>

One might argue that the Cairo Declaration and the Potsdam Proclamation were not treaties and therefore not legally binding. It is true that these instruments may lack the characteristics of typical treaties from the point of view of formality because they were not in the form of a seemingly binding agreement. Further, Japan was not a party to either declaration. However, one can not ignore that these instruments certainly had significant legal effects.

First, these instruments, touching upon certain important political matters, manifested the meeting of minds of the major allied powers near the end of World War II, and were intended to be, and were indeed subsequently, carried out after Japan's surrender. In this sense, it is arguable that these declarations amounted to two legally binding pacts between the victorious major allied powers. They would bind not only the parties as the major victors-to-be, but also Japan as the aggressor and the defeated-to-be, whose prior agreement to the terms set forth therein was not necessary.

Second, if these instruments were not formal treaties, they were at least quasi-legally binding instruments. Specifically, they, *inter alia*, set the tones for post-war settlement of political boundaries in Asia and imposed basic conditions and terms upon Japan, which was soon to be defeated. Again, whether Japan liked them or not, it had no choice but to unconditionally accept such terms. Thus, these declarations were at least legally significant for the signatory parties as well as Japan.

Third, these declarations reiterated the formal recognition by the United States, Great Britain and the then Soviet Union that Taiwan belonged to China, although "stolen" by Japan from China, and that it "shall be restored to China." Such express recognition cannot be

---

53. See Proclamation Defining Terms For Japanese Surrender, July 26, 1946, 13 DEP'T ST. BULL., 1945, 137, para. 8 (noting the limitation on Japanese sovereignty following the Cairo Declaration in addition to other terms of the Japanese surrender).

without legal consequence. In fact, the rest of the international community at large has never challenged that recognition. Instead, most States followed suit by recognizing Taiwan as part of China.

Finally, the relevant terms set forth in the Cairo Declaration and incorporated in the Potsdam Proclamation became active upon Japan's surrender and by binding unilateral undertakings. Under the instrument of Japan's surrender of August 1945, Japan undertook "the provisions in the declaration issued by the heads of the Governments of the United States, China and Great Britain on July 26, 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics."<sup>54</sup> Japan's instrument of surrender was indeed an unconditional acceptance of the major terms contained in the Cairo Declaration and the Potsdam Proclamation. If the declarations were merely an unconditional "offer", then the instrument of Japan's surrender would constitute a mirror image "acceptance", thereby completing the process of creating a virtual "treaty" comprising three or several instruments.

#### 4. *The 1951 San Francisco Peace Treaty*

Under the San Francisco multilateral Treaty of Peace with Japan of 1951, Japan once again formally affirmed its renunciation of all its claims to Taiwan and other territories it took from China and other countries.<sup>55</sup> The Treaty specifically provides that "Japan renounces all right, title, and claim to Formosa and the Pescadores."<sup>56</sup>

Some argue that the 1951 Peace Treaty superceded the Cairo and Potsdam declarations and did not identify to whom Taiwan should be returned. Therefore the treaty did not explicitly cede Japan's sovereignty over Taiwan to any specific party.<sup>57</sup> For those supporting this argument, the Peace Treaty formally abolished Japan's claim under the Treaty of Shimonoseki. "As a result," write Charney and

---

54. See *White Paper*, *supra* note 7, at III.

55. See Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 45 [hereinafter 1951 *Peace Treaty*] (designating sovereignty over land Japan had seized).

56. See *id.*, art. 2.

57. See, e.g., Lung-chu Chen, *Taiwan's Current International Legal Status*, 32 N. ENGL. L. REV. 675, 677 (1998) (indicating that Taiwan was separated from Japan but not joined with any other country).

Prescott, the 1951 Peace Treaty does "not resolve the question of whether the ROC or the PRC has sovereignty over Taiwan."<sup>58</sup> This argument, although extensively utilized by the DPP and other pro-secessionist forces in Taiwan, is not based on any legal merit.

In the first place, nothing in the 1951 Peace Treaty or in its "legislative history" suggests any intention for it to "supercede" the Cairo Declaration and the Potsdam Proclamation. Rather, the purpose of the Peace Treaty, to which China is not a party, was to formalize and itemize the principles embodied in the Cairo and Potsdam declarations. Even if the Peace Treaty were designed to "supercede" the two wartime declarations, it would not effect China, who did not participate in the making of that treaty.

In addition, China had already resumed sovereignty over Taiwan under a bundle of legally binding instruments and its continued sovereignty over Taiwan did not rely upon any reference or lack thereof to China as the beneficiary in the Peace Treaty. It is true that the 1951 Peace Treaty did not specify the recipient of Taiwan and other relevant territories (such as the Spratlys and the Paracels) which formerly belonged to China, however, such specification was not legally necessary. After all, the Cairo Declaration, the Potsdam Proclamation and Japan's instrument of surrender had indeed solved the problem. The aggregate of these three instruments made it clear that Japan was to return Taiwan and other relevant territories to the then "Republic of China", and China indeed reestablished control and sovereignty over Taiwan shortly after Japan's surrender.

Further, even if we assume the Cairo and Potsdam declarations had not specified the recipient of Taiwan, the issue would still be a non-issue as to who would have sovereignty over Taiwan after Japan's renunciation. Taiwan had been a part of Chinese territory before Japan pillaged it from China under an unequal and invalid treaty. When Japan renounced its claim to Taiwan upon its defeat in World War II, it was only natural for China to resume sovereignty regardless of whether Japan or any peace treaty identified China as the recipient.

Neither the Chinese Central Government nor the Taiwanese authorities received an invitation to the peace conference. China was

---

58. See Charney & Prescott, *supra* note 36.



not a party to the Peace treaty and therefore did not have an obligation to abide by the terms of the treaty. China's rights and interests under international law in general and under the aggregate of the Cairo/Potsdam instruments in particular would not be affected by anything written into the 1951 Peace Treaty. That is to say, China's natural and logical recovery of Taiwan did not depend on the terms of the San Francisco Peace Treaty, in the creation of which China took no part. Japan's formal renunciation of claims to Taiwan and other relevant territories under the Peace Treaty merely happened to reaffirm the arrangements under the legally binding Cairo/Potsdam instruments. Moreover, even if the 1951 Treaty changed the recipient of Taiwan to the United States, or if it provided for the separation of Taiwan from China, it would not result in any legally binding effects upon the Chinese government.

### 5. *The 1952 Peace Treaty*

On April 28 1952, the authorities in Taiwan, in the name of the ROC, entered into a bilateral Treaty of Peace with Japan.<sup>59</sup> Article 2 of the Treaty recognized that under the San Francisco Peace Treaty, Japan had "renounced all right, title and claim to Taiwan (Formosa) and Penghu (The Pescadores) as well as the Spratly Islands and the Paracel Islands."<sup>60</sup>

As far as Taiwan is concerned, this bilateral treaty did nothing more than restate what the 1951 multilateral Peace Treaty purported to provide. In turn, the 1951 treaty did nothing other than confirm already existing *status quo* and legal arrangements under the Cairo Declaration, the Potsdam Proclamation, and the instrument of Japan's surrender.

Further, the 1952 treaty was not "entered into" until after a successful and effective succession of government occurred in China. In 1949 PRC replaced ROC, and therefore the so-called ROC could no longer make treaties on behalf of China. Accordingly, the 1952 treaty has no binding effect upon the Chinese Government and is therefore legally insignificant.

---

59. See Treaty of Peace, Apr. 28, 1952, China-Japan, 138 U.N.T.S. 3 [hereinafter 1952 Peace Treaty] (resolving territorial disputes after the war).

60. See *id.*, art. 2.

Nevertheless, concurring with Charney and Prescott, I am prepared to say that the Cairo Declaration, the Potsdam Proclamation, the 1951 Peace Treaty, and in some respects the 1952 bilateral Peace Treaty constituted "the chain of instruments returning [Taiwan] and . . . all the islands that appertain to or belong to [Taiwan] to China,"<sup>61</sup> provided that the 1951 and 1952 treaties may be said to enhance that chain rather than to make it complete.

Further, technically speaking, the 1952 treaty may serve as manifestations of Japan's binding *unilateral* statements or commitments concerning certain essential political issues. These key issues include the reaffirmation of its renunciation of any right, claim, or title to Taiwan, and the undertaking that "all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan, are invalid as a consequence of the war."<sup>62</sup> This latter undertaking, together with China's own abrogation of all unequal treaties with Japan, is significant because even in the absence of the Cairo/Potsdam instruments and the 1951 and 1952 treaties, China would be the sole country entitled to recover Taiwan.

#### C. INTERNATIONAL RECOGNITION OF CHINA'S SOVEREIGNTY OVER TAIWAN

##### 1. *PRC's Continuity of the ROC and Its Legal Effects*

As noted above, when Japan surrendered in 1945, the then Nationalist Government of the Republic of China reinstated China's physical sovereignty over the administration of Taiwan Province. An unfortunate civil war ensued between the Nationalist forces and the People's Liberation Army led by the Chinese Communist Party. By the latter part of 1949, the Nationalist forces were completely defeated on the Chinese mainland. Consequently, with the regime of the Republic of China overthrown, the Central People's Government of the People's Republic of China on October 1, 1949 soon replaced it. Generalissimo Chiang Kai-shek and his forces retreated from the mainland to the Province of Taiwan. Since that time, Taiwan Province has been under the administration of the Taiwanese authorities

---

61. See Charney & Prescott, *supra* note 36.

62. See 1952 Peace Treaty, *supra* note 59, art. 4.

in the name of the so-called "Republic of China," while the new PRC Government administered the main part of China.

When the PRC Government replaced the ROC Government in 1949, a matter of succession took place. This succession was not a succession of State, but a succession of government. The change from the ROC to the PRC was not a change of State, but a change in the name, form, and system of the State. The State of China's international personality remained unaffected by the revolutionary change of government. The PRC is in fact the legal continuation of the ROC and therefore entitled, under rules and principles of international law relating to State continuity and government succession, to every piece of territory over which the ROC had sovereignty on and before October 1, 1949.

Truly, the nationalist regime, after fleeing to Taiwan, continued to use the name of the "Republic of China". Nevertheless, this self-claimed "Republic of China" is not the same "Republic of China" that was overthrown. The so-called "ROC" or "ROC in Taiwan," however confusing it may be, is not the continuity of the former Republic of China that existed *de jure* between 1911 and 1949. The PRC Government replaced the former Republic both in fact and in law.

Although the regime in Taiwan exercised *de facto* administration of Taiwan Province for the past some fifty years, it is merely a special local government. It is a *local* government regardless of the name it adopts and incapable of representing the State of China on the international plane. It is a *special* local government in the sense that it has separately administered Taiwan Province not physically controlled by the central government. By recognizing the *special* nature of the Taiwanese authorities, we acknowledge the fact that the province of Taiwan has been under a very distinct and separate administration from the PRC Government. Emphasizing the *local* character of the regime in Taiwan means that the province, albeit under distinct and separate administration, is under the sovereignty of the State of China. The international community at large considers the PRC government China's sole legitimate government. On the international plane, a State cannot have two equally representative governments. The international community generally recognizes the PRC Government as the sole legitimate Government of China and

Taiwan as part of China. These general expressions of recognition all suffice to render the regime in Taiwan as no more than a special local government. This, however, does not prevent the two sides of the Strait from engaging in political, trade and other dialogues and negotiations based on equality and mutual benefits.

There is a fundamental difference between sovereignty and administration. In ordinary circumstances, sovereignty and administration overlap in part because the entity that exercises central administration is usually the one with sovereignty. In extraordinary circumstances, however, it is possible for different parts of a State's territory to come under two or more separate administrations without affecting the State's entire sovereignty and ownership. Such was the case of China in the 1920s when there were two separate administrations, but China as a whole remained the same, and its sovereignty over all parts of China also remained unaffected. Currently, there exists a similar situation in the cross-Strait relationship. The two sides of the Taiwan Strait constitute one State and are subject to the same State's sovereignty even though under two different administrations. Dr. Chien-kuo Wu, a former "congressman" of Taiwan's "National Assembly" and presently a visiting fellow at the International Affairs Council of Yale University, characterizes this distinction as one between "sovereignty" (*zhǔquán*) and "jurisdiction" (*zhìquán*), with the former denoting to ownership and legal title, and the latter referring to custodial right and the right to use. He observed that although the sovereignty and jurisdiction of a State normally reside in the same government, different "governments" could exercise it. In this case, the sovereignty resides in the State that the international community recognizes as the sovereignty holder, and the "government" exercising separate jurisdiction cannot unilaterally deny the sovereignty of the entire State.<sup>63</sup>

The regime in Taiwan is a special government and is, therefore, competent to exercise a broad range of governmental authorities over matters appertaining to the people and property of the province. However, some matters should remain under the control of the central government. For example, the regime in Taiwan certainly is not

---

63. C.K. Wu, Chedi Pepan Li Denghui "Liangguo Lun" de Miuwu (Thoroughly Animadverting on the Fallacy of Lee Tung-hui's "Two State Theory") 3 (Jan. 2000, on file with the author).

competent to dispose of or otherwise change any part of the Chinese territory, including the Taiwan Island and its auxiliary islands. Neither is it competent to unilaterally separate Taiwan from the entire country.<sup>64</sup> Any change in the territory of China's is a matter for the central government in Beijing to decide.

When Charney and Prescott recognized that China clearly resumed sovereignty over Taiwan after Japan's surrender because of a chain of international instruments, they raised the question of "what government(s) represent(s) 'China.'"<sup>65</sup> However, given the succession by the PRC Government to the former ROC Government, the question is a non-issue.

Although the Cairo Declaration provided for the return of Taiwan to the "Republic of China", it in fact referred to the State of China whose form of government changed from the Imperial Qing Government, to the war-lord Government of the Republic of China in Beijing, to the Nationalist Government in Nanjing, (and Chongqing during the War of Resistance against Japan) and finally to the Government of the People's Republic of China. The reference to "Republic of China" in the Cairo Declaration denotes the State of China, and is thus not related to the "ROC" or "ROC in Taiwan" currently in use by the regime in Taiwan. It is beyond question that the Government of the PRC is the only central Chinese government capable of representing the State of China and handling territorial matters.

Until in the 1990s, the Taiwanese authorities purported to represent the entire China, and claimed themselves as the sole legitimate government of the whole country. That alleged representation was of course a fiction. Since 1990s, the regime in Taiwan turned to a more dangerous and detrimental direction: A "Republic of China in Taiwan" no longer covering the mainland, a claim designed for, or at least working towards, the formal independence of Taiwan. The central government in Beijing resolutely rejected both claims. In addition, the international community recognized neither claim of the Taiwan authorities at large.

---

64. See *infra* text accompanying notes 193-208 (discussing unilateral secession, minority rights and harmful consequences of abusive self-determination).

65. See Charney & Prescott, *supra* note 36.

## 2. Recognition by 160+ States

As noted above, the general international community has overwhelmingly recognized the sovereignty of China over Taiwan. Since the founding of the People's Republic of China, more than 160 countries have established diplomatic relations with China. As a result of such diplomatic relations, all these countries recognize three inseparable things: (1) that there is only but one China in the world; (2) that the Government of the People's Republic of China is the sole legitimate government of China, and; (3) that Taiwan is an inalienable territorial part of China. China has made recognition of these three factors a precondition for all cases of mutual recognition and establishment of diplomatic relations.

Following Lee Teng-hui's pronouncement of his "Two-States" theory July 9, 1999, a majority of those countries with diplomatic relations with China, including the United States, officially reaffirmed their "one-China" policy and their recognition of China's sovereignty over Taiwan.<sup>66</sup> While Taiwan's "money diplomacy" enabled the regime in Taiwan to maintain "diplomatic relations" with a handful of States and the Vatican City and, at times, even to lure some developing countries away from recognizing and maintaining official relations with the PRC Government, the overall trend in the last five decades is obvious. More States recognize the PRC Government instead of the "ROC". In 1949, eight States entered into diplomatic relations with the newly established PRC. By 1956, twenty-five States established diplomatic relations with the PRC Government.<sup>67</sup> By 1969, the number doubled to some fifty States.<sup>68</sup> In 1972, particularly following the resumption of China's representation at the United Nations, the number of States with diplomatic relations with the PRC dramatically increased to about eighty-eight.<sup>69</sup> In 1979,

---

66. See, e.g., C.K. Wu, *supra* note 63, at 2 (noting that more than 140 countries have reaffirmed their one-China policy since Lee's July 1999 statement).

67. See Tang Jiaxuan, *Xin Zhongguo Waijiao de Guanghui Licheng (A Glorious Course of New China's Diplomacy)* (visited Mar. 29, 2000) <[http://www.fmprc.gov.cn/zt/zt\\_01/wjb\\_zt\\_wz\\_tjhl.htm](http://www.fmprc.gov.cn/zt/zt_01/wjb_zt_wz_tjhl.htm)>.

68. See *id.*

69. See *Principles Governing the Establishment of Diplomatic Relations with Other Countries* (visited Mar. 24, 2000) <<http://www.china-embassy.org/cgi-bin/china.pl?H3>> (providing a list of countries with which China has established

more than 110 States maintained such relations with Beijing.<sup>70</sup> The number kept growing at a steady pace in the following two decades: about 128 by the end of 1985, about 141 by the end of 1991,<sup>71</sup> and 161 by 1999.<sup>72</sup> Currently, about only twenty-nine States, mostly in Central America and Africa, are maintaining official relations with Taiwan. These facts speak for themselves.

### 3. *Recognition by International Organizations*

With respect to China, the United Nations and other inter-governmental organizations take the same position as the majority of nation-States. China's seat at the United Nations should have transferred from the former nationalist government of China to the PRC Government as soon as the latter replaced the former on the mainland in 1949. As early as November 15, 1949 and January 8, 1950, Premier Zhou Enlai telegraphed the President of the General Assembly and the Secretary-General of the United Nations, demanding for the expulsion of "the illegal representatives of the Kuomintang regime." Furthermore, Premier Zhou claimed the PRC's lawful rights of representation at the UN.<sup>73</sup> At the time, however, the United States and its allies dominated the United Nations. They repeatedly rejected any legitimate form of PRC representation at the main bodies of the UN. Further, the PRC's seat and other international organizations serving as the UN's specialized agencies were also blocked. The General Assembly adopted Resolution 396 (V), providing that the position of the General Assembly on China's membership be taken into account in other bodies of the United Nations system so that "a Member State [w]ould not be represented in a different manner in various organs of the United Nations."<sup>74</sup> The rise of the third world in the United Nations finally led to the resolution of the issue of

---

diplomatic relations.

70. See SHIJIE DITU CE (WORLD ATLAS), 4 (1972).

71. See *supra* note 69.

72. See <[http://www.fmprc.gov.cn/bjzl/bjzl\\_ztjs\\_twwt\\_02.htm](http://www.fmprc.gov.cn/bjzl/bjzl_ztjs_twwt_02.htm)>.

73. See GUOJI GUANXI SHI (1945-1980) (A HISTORY OF INTERNATIONAL RELATIONS (1945-1980)) 132, n. 1 (He Chunchao, Zhang Jiliang, & Zhang Zhi, eds., 1986).

74. See UNITED NATIONS, 1 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 286 (1955).

China's representation at this international organization and its various bodies in 1971.

We are well reminded of the historically significant Resolution 2758/XXVI (1971), which was adopted at the twenty-sixth session of the General Assembly by an overwhelming majority. In this resolution, the General Assembly considered that "the restoration of the lawful rights of the [PRC] is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter."<sup>75</sup> It clearly and unequivocally recognized "that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent representatives of the Security Council."<sup>76</sup> Accordingly, it decided "to restore all rights of the People's Republic of China in the United Nations, and to expel the representatives of Taiwan "from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."<sup>77</sup>

Resolution 2758/XXVI is significant in that it reaffirmed the "one China" principle by deciding resolutely to restore the lawful seat of the People's Republic of China at the United Nations and in the same resolute manner to expel the so-called "Republic of China" from the United Nations. This "one China" principle is reaffirmed by the General Committee of the General Assembly which in all its successive sessions since 1993 has decided not to include the question of the so-called Taiwan's "representation" in the agenda of the General Assembly.

All other inter-governmental organizations of which China is a member State have followed the same one-China policy of the United Nations.

#### *4. Significance of the General Recognition Accorded to the PRC*

Recognition is merely declaratory and does not in itself constitute or create States. Recognition "does not bring into legal existence a state which did not exist before," while "[a] state may exist without

---

75. See G.A. Res. 2758, U.N. GAOR, 26th Sess. (1971).

76. See *id*

77. See *id*.



being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state."<sup>78</sup> Nevertheless, recognition, particularly non-recognition, of State or Government does have significant legal consequences. The international community's recognition that there is only one China, that the PRC Government is the sole legitimate Government of China and that Taiwan is an inalienable part of China involves two aspects of the same position: recognition of the PRC and non-recognition of Taiwan or the so-called ROC.

On one hand, the international community actively recognizes China as one State of which Taiwan is an integral territorial part, and further recognizes the Government of the PRC as the central government of that State. On the other hand, the international community's negative action toward Taiwan, namely their non-recognition of or withdrawal of recognition from Taiwan, further indicates this community's acknowledgment and acceptance of the fact that Taiwan is not a State but a part of China, and that the Taiwanese authorities are not the government of China.

The ninth edition of *Oppenheim's International Law* properly states some of the legal consequences of non-recognition:

Generally, a situation denied recognition, and the consequences directly flowing from it, will be treated by non-recognizing states as without international legal effect. Thus a non-recognized state will not be treated as a state, nor its government as a government of the state; and since the community or authority in question will thus not be treated as having the status or capacities of a state or government in international law, its capacity to conclude treaties, or to send agents of a diplomatic character, or to make official appointments of persons whose acts are to be regarded as acts of a state may all be called in question. Generally, in its relations with non-recognizing states that community will not benefit from those consequences, which normally flow from the grant of recognition.<sup>79</sup>

It is true that an entity that fulfils the criteria for statehood does not disqualify as a State merely because of the lack of recognition by

---

78. See J.L. BRIERLY, *THE LAW OF NATIONS* 138 (Sir Humphrey Waldock ed., 1963).

79. 1 OPPENHEIM'S *INTERNATIONAL LAW* 199 (Sir Robert Jennings & Sir Arthur Watts eds., 1992) [hereinafter OPPENHEIM].

certain other States. However, recognition, particularly precipitate recognition, does not necessarily turn into a State an entity that does not satisfy all the essential conditions for statehood. Nevertheless, one can not overlook the significance of recognition or non-recognition. In the case of Taiwan, the province does not itself satisfy the criteria for statehood and thus does not stand as a State. The international community's one-China policy and its refusal to recognize Taiwan as a State are highly declarative of the fact that Taiwan is not a sovereign nation but a part of a sovereign nation – the State of China legitimately represented by the PRC Government.

## II. CRITERIA OF STATEHOOD AND THE STATUS OF TAIWAN

One of the arguments supporting Taiwan's independence is that the territory satisfies all the requirements of statehood and therefore is already a sovereign nation. For example, Lung-chu Chen, a long-time activist and proponent for Taiwan's independence, recently wrote: "Judged by the international legal standard of statehood, Taiwan is a sovereign, independent state in every sense of the word. According to this standard, an independent state must have a permanent population, control over a defined territory, and a government capable of governing effectively in internal processes and acting responsibly in external relations. Taiwan has more than fulfilled all of these requirements."<sup>80</sup> Is this the case? Let us reexamine the criteria for statehood in customary international law and determine whether Taiwan really meets this criteria.

To qualify as a State, an entity must have its own people, its own territory, its own government and freedom from any external dependency or sovereignty. Simply stating, using the words of Oppenheim, "[a] state proper is in existence when a people is settled in a territory under its own sovereign government."<sup>81</sup> According to the Montevideo Convention on the Rights and Duties of States, a puta-

---

80. See Chen, *supra* note 57, at 678-79 (pointing out that the sovereignty of Taiwan depends on its people).

81. OPPENHEIM, *supra* note 79, vol. 1, at 120 (defining the concept of the state).

tive State must meet at least four criteria: (1) A permanent population; (2) a fixed territory; (3) a government; and (4) the capacity to enter into relations with other nations.<sup>82</sup> Although this Convention itself binds upon only States Parties, it "is commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law."<sup>83</sup>

It is important to emphasize from the outset that the criteria elaborated in the Montevideo Convention should be viewed intra-actively as a whole. These criteria, when correctly analyzed, "cannot be applied piecemeal"; rather, they "relate to and find definition in one another."<sup>84</sup> Thus, "[a] putative state . . . must possess a government that, itself, governs a population within a specified territory and that, itself, has the capacity to enter into foreign relations."<sup>85</sup>

#### A. PERMANENT POPULATION

Some elastically construe the requirement for a permanent population. Oppenheim defines a population or "people" as "an aggregate of individuals who live together as a community, though they may belong to different races or creeds or cultures, or be of different colour."<sup>86</sup> Under this construction, for the purpose of statehood, an entity's population must first live together as one people, and secondly must form a national community.<sup>87</sup> Under another construction, the permanent population requirement suggests that "there must be people identifying themselves with the territory no matter how small or

---

82. See Convention on Rights and Duties of States, 1933 L.N.T.S. 19, U.S.T.S. No. 881, 28 A.J.I.L. Supp. 75, art. 1 (1934).

83. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 102 (5th ed. 1998); see also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 31-34 (1979) (discussing the criteria for statehood); NIL LANTE WALLACE-BRUCE, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 51 (1994) (defining the traditional concept of statehood).

84. See Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 82 (1997).

85. See *id.* at 82.

86. See OPPENHEIM, *supra* note 79, vol. 1, at 121 (providing a definition of people for purposes of determining the extent of a fixed or permanent population).

87. See *id.* (requiring that a permanent population is one that identifies itself as a single cohesive unit).

large the population might be.”<sup>88</sup>

The population in Taiwan may meet the permanent population criterion under either construction. There are about 21 million permanent residents in the province of Taiwan.<sup>89</sup> They live together as part of the Chinese population and form a special local Chinese community in the same way as in any other province on the Chinese mainland. To the extent of habitual inhabitation, this local Chinese population also identifies with Taiwan. They, therefore, constitute the permanent population of the province.

Nevertheless, since ninety-seven percent of the “people” of Taiwan are ethnic *han* Chinese, they are no different from the permanent population of any other province or political subdivision in the mainland.<sup>90</sup> They are all citizens of China covering the same geographical sphere, *i.e.*, the Chinese mainland and the Taiwan Island. The permanent population in Taiwan is simply part of the permanent population of the entire State of China, regardless of the name used to designate it.

#### B. DEFINED TERRITORY

In general, a putative State without a defined territory is impossible, for this territory is the necessary space in which the putative State exercises its sovereign power.<sup>91</sup> Nevertheless, the requirement of a “defined territory” for statehood has elastically been construed so that the territory of a putative State does not need to meet or exceed a minimum size,<sup>92</sup> nor does it need to be completely self-

---

88. See WALLACE-BRUCE, *supra* note 83, at 53.

89. See (last visited May 2, 2000) <[www.chinataiwan.org/chinataiwan/tour/lying/1999081301t.htm](http://www.chinataiwan.org/chinataiwan/tour/lying/1999081301t.htm)> (stating that the size of the population in Taiwan was 21,470,000 in 1999).

90. See (last visited May 2, 2000) <[www.chinataiwan.org/chinataiwan/tour/lying/1999081302t.htm](http://www.chinataiwan.org/chinataiwan/tour/lying/1999081302t.htm)> (noting that more than 98% of the population of Taiwan are ethnic *Han* Chinese).

91. See OPPENHEIM, *supra* note 79, vol. 1, at 563-64 (noting that “[a] wandering tribe, although it has a government and is otherwise organized, is not a state until it has settled down in a territory of its own”).

92. See *id.*, at 563 (stating that “the necessary territory [of a State] may be very small, as with the Vatican City, the Principality of Monaco, the Republic of San Marino, the Principality of Liechtenstein or Nauru”).

coherent or to conform to any particular form.<sup>93</sup> Further, although a *defined* territory is generally required, perfect demarcation of the territorial boundaries of a State or putative State is not. As was stated in the following passage from a decision of 1929, the requirement of a "defined territory" does not require precise delimitation of every corner and every portion of a putative State's boundaries:

Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected, the state in question cannot be considered as having any territory whatsoever . . . In order to say that a state exists . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory.<sup>94</sup>

China's territorial and boundary disputes with some of its neighboring States do not make China a non-State.<sup>95</sup> For example, Albania has unsettled border disputes with Serbia, but its statehood and capacity to participate in international organizations as a sovereign State remained unaffected.<sup>96</sup>

Essentially the putative State must have a territory *of its own* over which it exercises sovereign and independent authority.<sup>97</sup> If the entire territory under the custody of an entity is owned or claimed by another entity, then whether the former entity can claim statehood becomes highly questionable because it is doubtful whether it indeed

---

93. See WALLACE-BRUCE, *supra* note 83, at 38 (stating that a State, such as the United States and Tanzania, may be comprised of non-contiguous territories).

94. See *Deutsche Continental Gas-Gesellschaft v. Polish State*, 5 A.D. No. 5, 14-15 (Polish-German Mix. Arb. Trib. 1929).

95. See MU YAPING, ET AL., *supra* note 50, at 265-271.

96. See *Monastery of St. Naoum Case* (Advisory Opinion), 1924 P.C.I.J., Ser. B, No. 9, at 19 (recognizing Albania's international personality and capacity for membership in the League of Nations despite its border dispute with Serbia); see also *North Sea Continental Shelf Cases*, 1969 I.C.J. Rep. 3, 32 (Feb. 20) (discussing the border disputes between Albania and Serbia and the extent to which territorial disputes over sovereign territory did not affect Albania's ability engage in international discussions and organizations).

97. See CRAWFORD, *supra* note 83, at 36 (discussing the fundamental criteria for statehood as requiring territorial sovereignty and the possession of territory).

owns a territory.<sup>98</sup> In other words, a self-owned and necessary territory is inseparable from the sovereign and independent operation of a putative State. Using the words of Crawford of Cambridge, "the State must consist of a certain coherent territory effectively governed—a formula which demonstrates that the requirement of territory is rather a constituent of government and independence than a separate criterion of its own."<sup>99</sup>

In the case of Taiwan, it is true that there does exist a defined land territory consisting of the Taiwan Island *per se* and a number of smaller islands, including some just off the shore of the Chinese mainland.<sup>100</sup> Yet, to claim statehood, an entity must own territory essentially free from claims by any other entity.<sup>101</sup> The territory of Taiwan is not owned, and therefore not disposable, by any entity other than the State of China. Although the Taiwanese authorities are in actual possession, custody, and control of the territory in question, they do not have legal title to the territory and therefore do not possess the capacity and authority to legally sever such territory from that of the Chinese mainland.<sup>102</sup>

The Chinese territory in Taiwan may not become Taiwan's own unless and until the Chinese Government in Beijing abandons its sovereignty over Taiwan, which is unlikely to happen. Taiwan's situation is no different from that of any other province of China. The province of Hainan, *e.g.*, administers the territory of Hainan Island on behalf of the central Government.<sup>103</sup> This territory, however,

---

98. *See id.* at 36-37 (arguing that continuous territorial disputes and the lack of a defined territory creates questions as to whether or not a State exists due to the lack of ownership of a fixed territory).

99. *See id.* at 40.

100. *See* CIHAL, *supra* note 5, at 477.

101. *See* CRAWFORD, *supra* note 83, at 37-38 (arguing that statehood fundamentally requires that is free from claims, especially when there are conflicting claims over the entire territory as opposed to only a portion, since this is a requirement for admission to the United Nations as a sovereign entity).

102. *See supra* notes 97-99 and accompanying text (discussing the requirement that an entity must have a territory *of its own*).

103. Hainan is the second largest island of China. It was a special administrative region under Guangdong Province until 1988 when it was *upgraded* to the status of province. *See* (last visited May 2, 2000) <[www.hainan-window.com.cn/word.htm](http://www.hainan-window.com.cn/word.htm)> (noting the establishment of Hainan Province in 1988).

is not Hainan's own. Because China owns the island as a whole, Hainan does not meet the criterion of a "defined territory" for the purpose of claiming statehood and neither does Taiwan.

In other words, the fact that Taiwan does not own a territory of its own and does not possess ultimate sovereign and independent authority over such a territory constitutes a legal impediment to its claims to statehood.<sup>104</sup> While the Taiwanese authorities hold significant municipal authority over areas under its control, they do not possess sovereignty over them in any legal or even practical sense.<sup>105</sup> It is China as a whole that retains sovereignty over Taiwan. Neither the Kuomintang nor DPP authorities, nor any other political organization, may change the status of the territory of Taiwan as part of the territory of the entire State of China without consent from the Chinese central Government.<sup>106</sup>

Accordingly, Taiwan does not have a territory of its own and fails to meet the "defined territory" requirement. Therefore, the Taiwanese authorities do not exercise *sovereign* and *independent* authority over any territory of their own at all. Rather, they are merely administering a part of China's territory on behalf of the State of China or the Chinese central Government.

### C. GOVERNMENT

A government is an indispensable requirement for statehood.<sup>107</sup> The question arises as to what kind of government is required. For the purpose of statehood, the government criterion does not require that an entity conform to a particular form of government.<sup>108</sup> The family of nations comprises States with various forms of government with different degrees and forms of democracy, from republics to

---

104. See *supra* notes 97-99 and accompanying text (discussing the requirement that an entity must have a territory *of its own*).

105. See *id.*

106. See *id.*

107. See CRAWFORD, *supra* note 83, at 42 (stating the proposition that to be a State, one must have an effective government).

108. See *id.* at 42-43 (arguing that although a form of government is a requirement for statehood, the type of government itself is not prescribed in order for other countries to recognize the State as a sovereign entity).

monarchies to theocracies.<sup>109</sup> The form of government and its degree of democracy do not matter. A government constituted by way of popular election does not make it more a government. Similarly, a government constituted not by general election, or a government lacking any element of democracy, does not make it less a government as long as it exercises effective public authority and sovereignty.<sup>110</sup>

Further, when we discuss government in the context of criteria for statehood, we do not mean any type or any level of organizations of public authorities. A local government, for example, does not meet the criterion of a government for the purpose of statehood because it does not have the necessary legal credentials and capacity to claim statehood for the community it administers.<sup>111</sup> Therefore, what matters are effectiveness and legitimacy. The degree of actual authority exercised measures effectiveness, while legal title to exercise that authority measures legitimacy.<sup>112</sup> In other words, what is essential for statehood in this connection is a stable central political organization that exercises effective public power within a defined territory and over a permanent population, acts as the executive organ responsible for the external relations of the State and is not subject to the sovereignty of any other authority.<sup>113</sup> As Crawford points out, "[t]he point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority".<sup>114</sup>

A government's *actual exercise of authority*, or its effectiveness,

---

109. See *id.* at 43 (providing a list of the variety of governments that exist in the world and how and when they were recognized throughout history).

110. See *id.* at 44 (arguing that the form of selection of a government does not govern whether or not others States recognize it, the factor is whether it has authority to act on behalf of the sovereign territory).

111. See *id.* at 47 (stating that although the existence of a government is a requirement for statehood, the capacity to claim statehood also hinges on other factors such as the capacity to enter into relations with other states, which is why local territories and governments do not have the authority to claim statehood).

112. See CRAWFORD, *supra* note 83, at 42 (stating that the fundamental requirements of legitimacy and effectiveness hinge on the combination and extent to which the state has the authority to act on behalf of the state).

113. See *id.* at 48 (listing the requirements for the exercise of authority as well as the other requirements that enables recognition of a sovereign state).

114. See *id.* at 44.



refers to its structural coherence and its general capacity to maintain law and order within an area it controls or purports to control.<sup>115</sup> There is little development, however, regarding the degree and standards of effectiveness. Some special situations admitted exceptions. Harris, for example, notes:

State practice suggests that the requirement of a "stable political organization" in control of the territory does not apply during a civil war in a state that already exists (e.g. the Lebanese Civil War 1975-1990). A State that currently has problems of effective government is Somalia. Since guerrillas overthrew President Barre's Government in 1991, fighting has persisted between rival clan-based militias with different territorial bases. A separate state of Somaliland declared its independence in the north west of Somalia in 1991, but has not gained international recognition. The Djibouti Conference of interested states and parties led to the establishment of an interim Government, but this does not have effective control of Mogadishu, the capital, or the country at large. UN forces were sent into Somalia between 1992 and 1995, but failed to bring the situation under control. Despite these problems, Somalia remains a UN member and continues to be recognized as a state by the international community.<sup>116</sup>

Legal title, or legitimacy, refers to the government's exclusive sovereign and legal right to govern a territory under international law.<sup>117</sup> It is possible that this territory came into acquisition by way of occupation, prescription, succession, or cession by the former sovereign of the territory.<sup>118</sup> However, where applicable, one can obtain territory in accordance with the principle of self-determination. Therefore, the government criterion possesses both factual and legal dimensions.

It is also noteworthy that to a certain degree, the elements of effectiveness and legal title can complement one another. A solid legal

---

115. See *id.* at 46 (describing the exercise of authority as one which requires control over the territory).

116. HARRIS, *supra* note 83, at 104.

117. See CRAWFORD, *supra* note 83, at 77 (discussing the traditional criteria for statehood which includes the authority to govern effectively a particular sovereign territory).

118. See *id.* (describing various forms of territorial acquisition leading to governance and recognition as States, including Rhodesia, Formosa, and Guinea-Bissau).

title can make up for a lack of actual exercise of authority.<sup>119</sup> Similarly, a weak and fragile legal title would require a higher degree of effectiveness.<sup>120</sup> This inverse and complementary relationship between effectiveness and legal title provides an explanation why the Belgian Congo, now Zaire, was accorded precipitate recognition in 1960 when its new government “was bankrupt, divided, and in practice hardly able to control even the capital”.<sup>121</sup> Conversely, the lack of legal title on the part of the government of Rhodesia, which assumed power in violation of the principle of self-determination, to govern the territory in question resulted in almost universal non-recognition of the regime as a State or government, even if it maintained effective control over the territory at the time.<sup>122</sup>

Judging the situation in Taiwan against the above criterion, one may fail to see the Taiwanese authorities as a government for the purpose of claiming statehood. It is true that the Kuomintang or DPP authorities function as a *de facto* public administration in Taiwan, and in that sense a “government,” but it is no more than a special local government, for it is not a central political organ that satisfies *both* the elements of effectiveness and legal title.<sup>123</sup> Although the Kuomintang or DPP regime’s administration of Taiwan has been generally effective and stable, it does not have the required “legal title” to pose itself as a government for statehood.<sup>124</sup> Instead, the Chinese Government in Beijing is the sole legitimate Government with legal title to represent and govern the entire Chinese territory, including Taiwan. The Taiwanese authorities do not even possess the weakest and most fragile legal title to the territory of Taiwan. Thus,

---

119. See *id.* at 79, 83 (arguing that if a nation has a treaty or other form of formal recognition of its sovereign authority, then the ability to actually exercise it does not diminish its recognition as a state).

120. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 102 (Genève Libr. Droz. 1968) (stating a counter-argument that if an entity only has a weak hold on legal title, States require a greater amount of exercise of actual authority to warrant recognizing it as a sovereign entity).

121. See CRAWFORD, *supra* note 83, at 43-44.

122. See John Dugard, *RECOGNITION AND THE UNITED NATIONS* 97-98 (Cambridge, Grotius 1987).

123. See *supra* notes 111-122 and accompanying text (discussing the elements of effectiveness and legal title).

124. See *id.*

no matter how strong and how effective their *de facto* exercise of authority over the territory may be in the meantime, their total lack of legitimacy determines that they do not meet the government criterion for statehood.

#### D. CAPACITY TO ENTER INTO FOREIGN RELATIONS

The fourth requirement for statehood, the capacity to enter into foreign relations, refers to the legal capacity or legal competence of an entity to participate in public international relations, including the legal competence to discharge its international obligations.<sup>125</sup> This legal capacity relates very little with economic or monetary ability or political or military power. Some developing States lack the economic capacity to engage in active relations with other nations, they are nevertheless States and recognized as such.<sup>126</sup> California, on the other hand, possesses more than abundant economic power to fully participate in the international system, yet it is not and cannot be recognized as a State in the sense of international law, because it does not possess the legal competence to act as a State on the international plane.<sup>127</sup>

Indeed, the capacity to enter into foreign relations necessarily embodies the element of "sovereignty" or "independence", which determines whether an entity has or has not the legal competence to participate in international relations and to effect the undertakings into which it enters on behalf of the population and territory it governs.<sup>128</sup>

Judge Anzilotti stated the significance of sovereignty or independ-

---

125. See WALLACE-BRUCE, *supra* note 83, at 55-6 (discussing the fact that in addition to owning territory, having a valid government, a state must also have the authority to act for its territory in foreign relations, then only can it be a State).

126. See *id.* at 72-3 (citing examples of such nations as Serbia and Albania who have meager economic capacity, yet many nations still recognize these as sovereign entities and acknowledge their ability to engage in foreign relations with other nations).

127. See CRAWFORD, *supra* note 83, at 48-9 (stating that in addition to the ability to exercise in foreign relations, a sovereign state must also have the ability to act independently and of its own accord).

128. See *id.* at 48-9 (discussing in general the requirements for international recognition as a state including the ability and authority to commit its population to international undertakings).

ence to statehood in his opinion in the *Austro-German Customs Union Case*:

[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint Germain, as a separate state not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty* [*italics original*], by which is meant that the State has over it no authority other than that of international law.

The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as "dependent States". . . .

[T]he legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterise the relation of one country to other countries.

[T]he restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.<sup>129</sup>

Some commentators even identify the element of sovereignty or independence with the capacity requirement. As is stated in the Ninth Edition of *Oppenheim's International Law*, for example,

There must . . . be a *sovereign* government. Sovereignty is supreme authority, which on the international plane means . . . legal authority which is not in law dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country [emphasis in

---

129. See CRAWFORD, *supra* note 83, at 51 (quoting the *Austro-German Customs Union Case*, P.C.I.J., Ser. A/B, No. 41, 1931, at 57 (separate opinion of Anzilotti, J.)).

original].<sup>130</sup>

Harris has also made it clear by stating that:

When the Montevideo Convention refers to "capacity to enter into relations with other states" as a requirement of statehood it is referring to independence as that term is understood in Judge Anzilotti's [separate] opinion [in the *Austro-German Customs Union Case*], i.e., independence in law from the authority of any other state (and hence the capacity under its national law to conduct relations with other states).<sup>131</sup>

Crawford similarly recognizes the importance of this independence element by stating that "each State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by 'capacity to enter into relations with other States.'"<sup>132</sup>

It therefore follows that, in arguing that a State must have the legal competence to engage in international relations, we necessarily mean that it must be both separate *and* sovereign. In other words, the State must possess a legal identity that is distinct from any other State's *and* subordinate to nothing but international law. The legal capacity or competence, writes Crawford, "depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of such relations so that no other entity carries out and accepts responsibility for them".<sup>133</sup>

The very concept of international law requires that a State be separate from any other State. According to Marek, "international law . . . is a legal order governing relations between independent States, that is to say, between separate and distinct entities," and that is why independence functions as a criterion of statehood.<sup>134</sup> In addition, an entity purporting to act as a State must be sovereign and not subject to any authority but that of international law to which it has con-

---

130. See OPPENHEIM, *supra* note 79, vol. 1, at 122.

131. See HARRIS, *supra* note 83, at 106-07.

132. See CRAWFORD, *supra* note 83, at 47.

133. See *id.* at 51-52.

134. See MAREK, *supra* note 120, at 162-63.

sented or accepted.<sup>135</sup> Only if such an entity satisfies the element of sovereignty can it possess the legal capacity to act as a State on the international plane.

Judge Huber was right when he stated in the *Island of Palmas* arbitration case: "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."<sup>136</sup> The element of sovereignty or independence is so essential for statehood that the capacity of an entity to enter into foreign relations is actually contingent upon the degree of such sovereignty or independence.<sup>137</sup> Since sovereignty or independence as an essential requirement for statehood is exclusive, an entity cannot be said to meet the capacity criterion for statehood if it is in fact and/or in law subordinate to another State's sovereignty or legal order even if it satisfies all other criteria.<sup>138</sup>

Among all criteria, the sovereignty element is undoubtedly the most important and most essential requirement for statehood, and is also the one that has been gravely misconstrued in the case of Taiwan. The assertion that the regime in Taiwan acted "responsibly in external relations"<sup>139</sup> is nowhere near the sovereignty requirement. A local government is to some degree considered able to "act responsibly in external relations."<sup>140</sup> For example, when Kunming of Yunnan Province and Denver of Colorado became sister cities, the mayors of both cities acted "responsibly in their external relations."<sup>141</sup> In main-

---

135. See CRAWFORD, *supra* note 83, at 52 (stating that to be a State, one must have the independence to direct its own actions subject only to the international law that it accepted).

136. See *id.* at 48 (quoting the *Island of Palmas Arbitration*, 2 R.I.A.A. 829, 838 (Huber, J.)).

137. See *id.* (stating that the ability to enter into international agreements which bind the territory is a fundamental requirement of sovereignty and statehood).

138. See *id.* at 48-49 (arguing that if a state is subject to the sovereignty of another entity, then it is incapable of entering into independent foreign relations, and thereby cannot meet the criteria for statehood).

139. See Chen *supra* note 57, at 679.

140. See CRAWFORD, *supra* note 83, at 148-49 (interpreting the ability to engage in external relations to include the actions of local governments to a certain degree, although not arising to full-fledged statehood from an international perspective).

141. In his welcoming speech at a luncheon in honor of visiting Chinese Premier

taining and advancing this relationship, they continue to act responsibly on the international plane by, e.g., entering into and honoring various agreements for cultural and other exchanges.<sup>142</sup> The ability to act, however, does not render Kunming or Denver capable of independently entering into foreign relations.

To a certain degree, the special local authorities in Taiwan may also enter into and maintain "external relations" and act responsibly in such relations.<sup>143</sup> Yet, these relations are not State-to-State relations for a simple reason: A political subdivision or a local government, no matter how special it may be, does not have the sovereignty and independence to act as a State.<sup>144</sup> In other words, a non-sovereign and non-independent entity, no matter what it purports to be, does not have the necessary legal competence and qualifications to enter into relations with other nations on a State-to-State basis.<sup>145</sup>

Although politically separated from the Chinese mainland for slightly more than fifty years,<sup>146</sup> Taiwan remains under the sover-

---

Zhu Rongji, Mayor Wellington Webb of Denver stated that "Denver has built a sister-city relationship with China's Kunming City", believing that "Premier Zhu Rongji's visit will further promote friendly cooperation between Denver and China". *Xinhua Reports on Zhu Rongji Visit to Denver*, World News Connection, Apr. 11, 1999, available at WESTLAW 1999 WL 14780360. For a list of Sino-US sister cities (including the Denver-Kunming relationship), see <<http://sister-cities.wego.com>>.

142. *See id.*

143. Taiwan currently maintains trade and other non-diplomatic relations with most countries of the world maintaining diplomatic relations with the PRC Government. China "has not objected to non-governmental economic or cultural exchanges between Taiwan and foreign countries" within the ambit of one China. *See White Paper*, *supra* note 7, at V.

144. *See CRAWFORD*, *supra* note 83, at 146-51 (demonstrating that local governments regardless of its economic capacity and authority, does not have the international recognition sufficient to enable it to engage in relations with other sovereign entities and other States will not recognize its exercise of international power).

145. *See id.* at 146-51 (repeating his premise that local governments do not have the authority to engage in foreign relations and therefore other sovereign states will not recognize the entity as a sovereign entity).

146. Since the Nationalists' retreat from the mainland in 1949, Taiwan has been under the administration and control of one fraction of the political forces of China, namely, the KMT and now the DPP. By "politically separated", I mean that the Chinese Mainland and Taiwan are separately administered by different political forces of the same country that is still technically in a state of civil war. The fact

eignty of China.<sup>147</sup> Even though Taiwan may arguably satisfy the requirement of separateness in the sense that it is maintaining a separate legal order different from that of the mainland, it clearly does not fulfil the requirement of sovereignty.<sup>148</sup> The persistent position of China throughout history is that Taiwan is an inalienable part of China.<sup>149</sup> It was also the official position of the Taiwanese authorities since 1949 and at least until the 1990s. The international community recognizes this fact, in addition to the fact that the Government of the People's Republic of China is the sole legitimate Government of China in its entirety.

Thus, it is only the PRC Government that holds sovereignty over Taiwan and therefore the legal competence to enter into relations with other nations on behalf of the entire State of China, including Taiwan. Just as the Hong Kong SAR ("HKSAR")<sup>150</sup> Government is governing Hong Kong on behalf of China, the Taiwanese authorities are at most exercising *de facto* administrative control over Taiwan as a special local government on behalf of China, not on behalf of themselves.<sup>151</sup> Again, the reason is quite simple: the sovereignty over these territories is vested in China as a whole, not in the respective territory or local government itself.

In view of the above, it would be impossible to characterize Tai-

---

that a country is *internally* divided into two parts under separate political forces does not in itself change the nature and scope of sovereignty of the country as a whole.

147. See CRAWFORD, *supra* note 83, at 146-51.

148. See *supra* notes 132-138 and accompanying text (discussing the necessary elements of separateness and sovereignty). Taiwan is merely *internally* and *temporarily* separate from the rest of China. It is not *internationally* distinct from the Chinese Mainland and has never been granted a status that gives it the legal competence to enter into inter-governmental relations with other nations. Thus, Taiwan is not sovereign even if it may be to some extent separate.

149. See *White Paper*, *supra* note 7.

150. HKSAR stands for "Hong Kong Special Administrative Region", a special political subdivision of China's under the Hong Kong Basic Law. See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *reprinted in* 29 I.L.M. 1511 (1990).

151. See CRAWFORD, *supra* note 83, at 51 (describing the difference between the authority of a local government and a sovereign national government and the extent to which a national government has greater authority to act on behalf of its peoples than a local authority).



wan or the Taiwanese authorities as an independent and sovereign entity. While Taiwan under the Kuomintang or DPP authorities is leading a somewhat distinct life separate from the rest of China, it does not possess the legal authority over the province in international relations.

### III. SELF-DETERMINATION AND TAIWAN

The principle of self-determination, like many other principles and concepts of international law, has been misleadingly and irresponsibly construed and abused by politicians and scholars. One of such misconstructions or abuses arises in its improper application to Taiwan. Some suggest, for example:

We need a *new* international norm of self-determination to fit the Taiwan/China model. It would read something like this: "If the majority (or we might demand a higher percentage) of the adult population of a geographic area expresses its wish, for any reason, to separate from the territorial unit of which it is currently a part, it has the right to do so." A modified version of this right, and one that would also fit the Taiwan/China situation, would read: "If the majority of the adult population of a geographic area expresses its wish to separate from the territorial unit of which it is currently a part because the government of the territorial unit does not represent the whole people, it has the right to do so."<sup>152</sup>

Notwithstanding, the author of the above passage is honest about the status of the principle of self-determination. The foregoing author acknowledges that what she proposes, if accepted, is going to be "a new" version of the principle and, therefore, before its adoption, is a non-existing legal "principle" as a matter of positive law. In other words, her formula is at most *lex ferenda*. It does not reflect the *lex lata* of the norm at all.

What is the *lex lata* of the norm? Who is and can be the "self"? What "determination" can be made under what circumstances? Does the principle of self-determination apply to any territorial unit of an existing State? If so, in what contexts? Where the principle does apply, does it include the right to secede unilaterally from the parent State? In addressing the above issues, this section illustrates why the

---

152. See Valerie Epps, *Self-Determination in the Taiwan/China Context*, 32 NEW ENG. L. REV. 685, 692 (1998) (emphasis added).

principle of self-determination does not apply to Taiwan, and why Taiwan does not have the right to unilaterally secede from China under existing international law.

## A. HISTORICAL OVERVIEW

### 1. *Doctrinal Origins*

Compared with the lasting notions of sovereignty and territorial integrity, self-determination is a relatively young concept in the body of international law.<sup>153</sup> The doctrinal origins of self-determination go back in history to the first Soviet leader, Vladimir Ilich Lenin, and President Woodrow Wilson. With regard to Lenin's observations on self-determination:

Lenin envisioned a right of the Russian Empire minorities to secede. Although Lenin did not favor secession, he considered the right to secede a prerequisite to a free and voluntary association among nationalities, distinct from the tsarist "prison of nations." Accordingly, the Soviet multinational association was based upon an agreement among equal partners—a treaty that Lenin considered characteristic of a federation. Lenin believed that only a treaty embodying the sovereign will of all nationalities could reconcile self-determination with the transfer of power to a higher entity.<sup>154</sup>

Wilson also espoused the principle of self-determination by advocating that "every people has a right to choose the sovereignty under which they shall live".<sup>155</sup> Wilson's vision of self-determination, however, was different from Lenin's. Wilson proposed an idea focusing on the freedom of the people to choose their sovereign, thereby envisioning an ideal of internal self-determination, whereas Lenin advocated a secessionary nature of self-determination "as a means to lib-

---

153. See CRAWFORD, *supra* note 83, at 85 (arguing that the principle of self-determination is a new concept when compared to other concepts of statehood).

154. See Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L.J. 581, 607.

155. See James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L. J. 209, 219 (1991) (quoting Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1,2 (1976)).

erate people from exploitative bourgeois governments in pursuit of socialist realization."<sup>156</sup>

Nevertheless, whether under Lenin's or Wilson's espousal, self-determination was little more than a political principle throughout the post-First World War era. Self-determination as we know it today did not become a principle of international law until after the Second World War.<sup>157</sup>

## 2. *Self-Determination in the Decolonization Process*

The principle of self-determination of peoples has given birth to a multitude of newly independent States.<sup>158</sup> It has in particular served the decolonization process largely generated by the two World Wars. However, the decolonization process, with which the principle of self-determination is closely associated, has had a history of more than two centuries. In a sense, the attainment of independence by the United States from British rule in 1776 may have started the global process of decolonization.<sup>159</sup> As fruits of this process, major Spanish and Portuguese colonies in central and south America became independent nations in the 19th century: Colombia in 1800, Paraguay and Venezuela in 1811, Argentina in 1816, Chile in 1818, Mexico and Peru in 1821, Brazil in 1822, Uruguay in 1825, and so on.<sup>160</sup> In Africa, Ethiopia was a pioneer in the decolonization process by attaining its independence from Italian colonial rule in 1896 and, after a period of Italian reoccupation, reestablishing itself as a sovereign

---

156. See Michael J. Kelley, *Political Downsizing-Re-Emergence of Self-Determination and the Movement Toward Smaller States*, 47 *DRAKE L. REV.* 20, 214-215 (1999) (citing ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* 21-22 (1995)).

157. See CRAWFORD, *supra* note, 83 at 85-86 (setting forth the historical development of self-determination and its development following World War II).

158. See Sam Blay, *Self-Determination: A Reassessment in the Post-Communist Era*, 22 *DENV. J. INT'L L. & POL'Y* 275, 277 (1994) (listing the new states developing as a result of self-determination including newly independent states, the division of Czechoslovakia into two countries and the division of Yugoslavia into multiple states).

159. See Falkowski, *supra* note 155, at 213 (explaining that American independence and the Declaration of Independence was a form of self-determination).

160. See SHIJIE DITU CE, *supra* note 70, at 47 (Mexico), 49 (Colombia), 50 (Venezuela), 51 (Paraguay & Peru), & 52 (Argentina, Brazil, Chili & Uruguay).

empire at the end of the Second World War.<sup>161</sup>

Self-determination, on the other hand, did not enter the realm of international law until the late 1900s and the early part of the twentieth century.<sup>162</sup> The first major self-determination movement took place after the Allied victory in the First World War, when defeated empires were forcibly broken up in order to create new nation-States.<sup>163</sup> The breakup of the Ottoman Empire resulted in the independence of new sovereigns such as Iraq, Syria, Jordan, Lebanon, Palestine and Saudi Arabia.<sup>164</sup> The Austro-Hungarian Empire dissolved into Yugoslavia, Hungary, Czechoslovakia and Austria.<sup>165</sup> Poland reemerged as a sovereign nation from portions of Germany, Austro-Hungary and Czarist Russia. Latvia, Lithuania, Estonia and Finland declared independence from the Czar.<sup>166</sup>

The most dramatic wave of self-determination and decolonization came after World War II, resulting in independence from major European colonial powers of new nation-States in virtually every part of the world. Most notably, newly independent States appeared on the political maps of Asia and Africa in quick succession.<sup>167</sup> It is noteworthy that the boundaries of many of these newly independent States had been artificially created under colonial rule, with the result that many such States contained significant ethnic minorities.<sup>168</sup>

---

161. *See id.* at 34.

162. *See* Falkowski, *supra* note 155, at 220 (providing a history of the development of self-determination from just prior to World War I to the mid-20th century).

163. *See id.* at 220 (stating that in the post World War I period, the defeat of numerous colonial empires resulted in the formation of several states).

164. *See id.* (describing the breakup of the vast Ottoman empire and listing the nations which resulted from the dissolution).

165. *See* 1 THE NEW BOOK OF KNOWLEDGE 524-525 (Grolier Inc., 1999); J.A.S. GRENVILLE, HISTORY OF THE WORLD IN THE TWENTIETH CENTURY 129-130 (The Belknap Press of Harvard University Press, 1994).

166. *See* GRENVILLE, *supra* note 165, at 128-29.

167. *See* Blay, *supra* note 158, at 277 (discussing the reformation of several African and Asian empires right after World War II as a result of decolonization).

168. *See id.* at 276 (noting that as a result of decolonization, African nationalists disregarded ethnic boundaries and created national borders using the colonial borders which did not account for different ethnic groups).

### 3. *Use/Misuse of Self-Determination in Non-colonial Contexts*

Since the decolonization process is essentially complete, the principle of self-determination is increasingly used, and often abused, as a tool by sub-groups within States to demonstrate their continued existence as diverse and uniquely different cultures. In the international community consisting of some 200 sovereign States, there are some 3,000 different linguistic groups and 5,000 distinct ethnic minorities.<sup>169</sup>

Particularly in the post-Cold War era, ethnic, linguistic, religious, or cultural groups within nations reemerge demanding devolution or secession in pursuit of limited or full sovereignty.<sup>170</sup> Examples of such groups invoking self-determination include the dissolution of the former Yugoslavia, the plight of the Kurds in Turkey, Iraq, and Iran, the demands of the Basques in Spain, and those of the Quebecois in Canada.<sup>171</sup> Self-determination was "proclaimed by, and on behalf of, non-state populations as diverse as the Kurds, the Quebecois, the Basques, the Scots, the Palestinians, the East Timorese, and the Tamils."<sup>172</sup>

Later this section discusses the impropriety of extending the principle of self-determination to minority groups, territorial units or identity communities within an existing nation-State.

## B. MEANING OF SELF-DETERMINATION

### 1. *The UN Charter*

The incorporation of self-determination in the Charter of the United Nations serves as a cornerstone for its establishment as a le-

---

169. See Daniel Therer, *National Minorities: A Global, European, and Swiss Perspective*, 19 FLETCHER F. WORLD AFF. 53 (Winter/Spring 1995).

170. See Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, FOREIGN AFF., Mar.-Apr. 1998, at 13 [hereinafter Hannum] (summarizing the insurgence of independent states along the lines of religion, culture, and/or ethnicity).

171. See *id.* at 14 (listing the number of ethnic groups that wish for separate states but resulted in only internal self-determination within a formally recognized State).

172. See Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255, 259 (1996).

gal principle. Under the Charter, one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>173</sup> Here, the Charter refers to the “equal rights and self-determination of peoples” in the context of “relations among *nations*,” implying that nationhood is a precondition for statehood.

Article 55 of the UN Charter, building upon Article 1, states that “peaceful and friendly relations among *nations* based on respect for the principle” of self-determination are to be developed.<sup>174</sup> Chapters XI, XII and XIII of the Charter regarding the disposition of non-self-governing territories and the trusteeship system may be said to have implicitly put the principle of self-determination into practice in the trusteeship and colonial context.<sup>175</sup> Unfortunately, the Charter offers no definition of self-determination, nations and peoples.

## 2. *The Decolonization Declaration*

The intention of States in regard to self-determination became clearer when the United Nations General Assembly adopted Resolution 1514 (XV)<sup>176</sup> containing the Declaration on the Granting of Independence to Colonial Territories and Peoples in 1960 (“Decolonization Declaration”). Under the Declaration, “All *peoples* have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>177</sup>

The Decolonization Declaration further calls for the taking of immediate steps “to transfer all powers to the peoples of [Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence] . . . in accordance with their freely

---

173. See U.N. Charter art. 1, para. 2.

174. See *id.* art. 55 (emphasis added).

175. See M.C. Baussiouni, *Self-Determination and the Palestinians*, 65 AM. SOC’Y INT’L L. PROC. 31, 32 (1971) (stating that these Chapters embody the principle of self-determination “in spirit”).

176. See Declaration on the Granting of Independence of Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960). [hereinafter Decolonization Declaration].

177. See *id.* (emphasis added).

expressed will and desire.”<sup>178</sup> Yet, like the UN Charter, the Decolonization Declaration fails to define the *self* of self-determination and the term “peoples.”

### 3. *The International Law Principles Declaration*

The Decolonization Declaration is supplemented by General Assembly Resolution 1541 (XV),<sup>179</sup> Resolution 2621 (XXV) embodying the 1970 Programme of Action for the Full Implementation of the [1960] Declaration,<sup>180</sup> and more importantly Resolution 2625 (XXV) containing the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States (“1970 Declaration” or “International Law Principles Declaration”).<sup>181</sup>

The 1970 Declaration reaffirms the principle of self-determination as a right, providing that “[b]y virtue of the principle of . . . self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.”<sup>182</sup>

The International Law Principles Declaration further articulates the right to self-determination as belonging to “peoples” by proclaiming that “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-

178. *See id.* para. 5.

179. *See* Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For Under Article 73c of the Charter, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

180. *See* Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2621, U.N. G.A.O.R., 25th Sess., Supp. No.28, at 10, U.N. Doc. A/8086 (1970).

181. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625, U.N. G.A.O.R., 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970) [hereinafter International Law Principles Declaration].

182. *See id.* at 124.

determination by that people.”<sup>183</sup> However, the General Assembly, again, did not define “peoples” in the 1970 Declaration.

Furthermore, The failure of the Charter to define the term *nation* and the General Assembly likewise neglecting to qualify the term “peoples” ultimately created a definitional vacuum regarding the *self* of self-determination. Nevertheless, the 1970 Declaration makes it clear not to construe it as “authorizing or encouraging any action which would dismember or impair the territorial integrity or political unity of sovereign and independent States.”<sup>184</sup> It further warns against “any action aimed at the partial or total disruption of the national unity and territorial integrity of any . . . State or country.”<sup>185</sup> The Decolonization Declaration contained provisions to the same effect.<sup>186</sup> Therefore self-determination does not intentionally serve as, nor is it accepted as, an unqualified right of all “peoples” and identity communities. This section elaborates more on this topic later.<sup>187</sup>

#### 4. *International Human Rights Instruments*

The International Covenant on Civil and Political Rights begins in its operative part by providing that “[a]ll *peoples* have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>188</sup> The Covenant similarly contains no definition of “peoples.” It is helpful, however, to take into account the following provision which serves, to some extent, to illustrate what types of “peoples” and communities are entitled to self-determination: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the

---

183. *See id.*

184. *See id.*

185. *See id.*

186. *See* Decolonization Declaration, *supra* note 176, para. 66.

187. *See infra* text accompanying notes 201-206 (discussing minority rights and the disadvantages of unqualified self-determination).

188. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (emphasis added) [hereinafter *Civil Rights Covenant*].



provisions of the Charter of the United Nations.”<sup>189</sup> The International Covenant on Economic, Social and Cultural Rights contains identical provisions in Article 1.<sup>190</sup>

It was in 1966 that these two human rights covenants were adopted at the General Assembly, and their timing, like that of the UN Charter and the 1960 and 1970 declarations, should be taken into special account. The mid-1940s marked the beginning of large-scale national liberation and decolonization movements. The 1960s and 1970s were the most important decades in the global decolonization process. As many “peoples” in colonial territories and other non-self-governing territories were demanding or struggling for independence, it was natural, and indeed highly desirable, for the drafters and contracting parties to include in the covenants the principle of self-determination as embodied in the UN Charter.

The historical background of the covenants, together with the illustrative paragraph concerning the obligation to promote and respect self-determination by non-self-governing territories, suggests that self-determination is not a human right for any individual or for any particular group of people. Rather, it denotes a collective human right of “peoples” of colonial territories, trust territories and other non-self-governing territories that were separate and distinct from but subordinate to their metropolitan or administering States.

##### 5. *Forms of Self-Determination and Sovereignty*

Self-determination does not require any particular form of government and politics. A former trust territory, for example, might well achieve independence by exercising the right of self-determination, not necessarily through plebiscite, but through the actions and proclamations of local political leaders or organizations that could speak on behalf of the territory or its population.

Indeed, self-determination has nothing to do with the degree and form of democracy. Where a “people” is entitled to self-determination, that people, through plebiscite, popular representation

---

189. See *id.* art. 1(3).

190. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Annex, Supp. No. 16, at 49, U.N. Doc. A/6136 (1967), art. 1.

or even dictatorship, may choose its own form of government free of any external interference. This freedom of choice is in reference to other States. The "people" exercising the right to self-determination is free to determine its own form of government *vis-à-vis* all other members of the international community. It may choose a "people's republic," a republic, a federation, or a monarchy. The former administering State or any other State may not dictate to such "people" on what to do in that regard.

Internally speaking, however, whether the members of such "people", *vis-à-vis* the *élite* or ruling class, have the right to choose or change a particular form of government is not a matter of international law. More specifically, the international law principle of self-determination does not necessarily entitle any particular class or members of a "people" to decide on their form of government as of right. It is a matter of *internal* affairs of the people concerned to determine how to exercise their right to self-determination and to determine who decides what form of government to adopt. One could hardly conclude that simply because Ethiopia re-emerged from colonial occupation as an empire in 1896 and again after the World War II its self-determination was invalid.

The same is true in the case of nation-States when they exercise their sovereign and independent rights not in the context of self-determination. As a corollary of sovereignty and independence, a State has similar freedom of choice in selecting its political, social, cultural and legal system *vis-à-vis* other States. It is not, however, the concern of international law to determine how, by, or through whom that freedom of choice is exercised. In other words, international law neither supports nor forbids any particular form of government except where specifically provided for; however, there are rules concerning minority representation and prohibition of *apartheid* and racial and gender-based discrimination.

An internal revolution may well take place, overthrowing an existing regime in a State without violating international law, but this does not mean that the populace of a State possesses a right to revolution or a right to overturn a regime under international law. Whether to be a monarchy or a republic, what degree or what kind of democracy to adopt, and how to constitute its government, are essentially matters of a State's domestic affairs in which no external

interference is permissible under the principles of sovereign equality and non-intervention.

### C. SELF-DETERMINATION AND UNILATERAL SECESSION

International law recognizes no "right to self-determination" for the purpose of unilateral secession from an existing sovereign nation-State. Rather, the legality and likelihood of success of an independence movement is mainly determined by (1) the constitution and domestic law of the existing State, (2) negotiations and agreements between the central authorities of the existing State and the fractions seeking independence, and/or *ultimately* (3) the attitude of the existing State. Foreign interventions in the form of precipitate recognition, which are not permissible under international law, or foreign withholding of recognition, may also affect the outcome of an independence movement, although the influence of the attitude of other nations may be limited.

In any event, an independence movement within the existing borders of a State, whether successful or likely to succeed, is not a matter of self-determination as of right under international law. If international law is relevant at all, it is most important to meet the criteria for statehood, a subject discussed above.

#### 1. *Constitutional Secession*

The constitution or domestic law of an existing State, particularly one with a federal structure, may permit a constituent territorial unit to secede from the State by following or going through established procedures. The seceding territorial unit, if constitutionally and legally no longer a part of the former State, may join and become a part of another State, or declare independence to become a third State if it meets the requirements for statehood. Here, the international law principle of self-determination does not support the secession. Rather, it is a matter of domestic law arising through the exercise of a constitutional or statutory right to "self-determination" in the form of secession.

#### 2. *Secession by Agreement*

A valid decision by the central authorities, or an agreement between the constituent members, of an existing State in the process of

dissolution may successfully dissolve their former bond. An agreement between the central authorities of the existing State and a seceding fraction may achieve a similar outcome. It is only after the voluntary dissolution or contractual severance of this prior bond that a former constituent member becomes derivatively entitled to self-determination in the form of secession. Such a former member may choose to associate with another existing State based on agreement, or simply to declare independence.

Strictly speaking, however, this derivative entitlement to self-determination in the form of secession does not arise from general international law, but from the relevant parties' agreement. The only relevance of international law is that the new entity declaring independence must meet the necessary qualifications of a State.

### 3. *The Ultimate Attitude or Compromise of the Parent State*

Where secession is unsupported by the existing State's constitution and law, or by any valid administrative decision or agreement, it is less likely to succeed. Nevertheless, it is still possible for the existing State to subsequently acknowledge or recognize, explicitly or implicitly, the separation or independence of a former territorial unit. Such subsequent express or implied recognition would equate to renouncing the existing State's sovereignty and control over the seceded territorial unit or homogeneous group, and its effect would constitute an agreement between the relevant parties. Here, again, the seceding party's success does not result from the international law principle of self-determination, but from the existing State's compromise of recognition and renunciation.

It is not unusual for a parent State that initially resisted secession, to recognize the separation of a seceding entity that used to be its territorial part. This may occur either because of the parent State's unwillingness to retain the seceding entity at the expense of losing other important interests, or due to its physical inability to keep the country whole.

Such was the case of Pakistan and Colombia, for example. Pakistan eventually, albeit reluctantly, recognized the independence of Bangladesh (formerly East Pakistan)<sup>191</sup>, as Colombia did Panama.<sup>192</sup>

---

191. See OPPENHEIM, *supra* note 79, at 144, n.6.

Both Pakistan and Colombia strongly opposed the independence of their respective seceding territories, but gave up or withdrew their opposition as an ultimate compromise. Indeed, neither Pakistan nor Colombia was able to prevent its former territorial parts from seceding. Their compromised recognition provided a legal basis, at least in form, for the independence of Bangladesh and Panama, regardless of how illegal, how immoral and how unjust the initial schemes of separating Bangladesh from Pakistan and Panama from Colombia might have been. However, the independence of *neither* Bangladesh *nor* Panama could be said to be the result of the exercise of the right to self-determination in the form of secession, for such a right was not available to them in their respective course.

#### 4. *Unilateral Secession Opposed by the Parent State*

The right to self-determination is distinguishable from unilateral secession from existing non-colonial nation-States. Except for in the context of self-determination, unilateral secession from an existing State is not in itself a right that is recognized by and enforceable under international law. In other words, the right to unilateral secession is available under international law only to those "peoples" who are recognized the right to self-determination in the form of secession.

While the self of self-determination and "peoples" are left undefined, there is basis for the belief that not all peoples, sub-groups and communities are entitled to self-determination, particularly where the self-determination takes the form of secession. The principle of self-determination mainly, if not solely, applies in colonial and quasi-colonial contexts. "Peoples" who are recognized the right to self-determination mainly consist of peoples of colonial territories, trust territories, which were also colonies, and other non-self-governing territories whose political status or attributes prior to self-determination may be uncertain, but whose identity may be clearly distinct from the parent, administering, or governing State.

In particular, the principle of self-determination does not endorse a right to unilateral secession from an existing nation-State. Absent a colonial or quasi-colonial element, where a territorial unit or an ethnic or cultural group within an existing State seeks to secede in order

---

192. *See id.*, n.7.

to become an independent nation, whether it can do so successfully is not so much a matter of international law, but essentially a matter of domestic law of the parent State and a matter of agreement between the parent State and the secessionists. It may thus be argued that where the existing State is firm in opposing any secessionist attempt, a unilateral declaration of independence by a territorial unit or homogeneous group of such State would not have any legal effect under international law.

The degree of the existing State's opposition to secession, the degree of its determination to keep the country intact, the political will of the entire population, and its physical ability, including its military capabilities, to protect its territorial integrity and political independence, are all determinant factors for determining whether a secessionist fraction can lawfully and successfully establish itself as an independent nation. When judging whether the fraction meets the most important criterion for statehood, for example, its capacity to independently enter into relations with other nations at the international level, we must look to these factors.

Hannum rightly observes that "no state, no foreign ministry, and very few disinterested writers or scholars suggest that every people has the right to a state, and they implicitly or explicitly reject a right to secession" and that "[t]here simply is no right of secession under international law, nor has there been even preliminary agreement on the criteria that might be used in the future to determine when secession should be supported."<sup>193</sup> He further states that "self-determination today does not mean either independence or secession."<sup>194</sup>

When discussing unilateral secession, Crawford opines:

From the perspective of different participants it might be seen either as an expression of an inherent right to be free from oppression or as an act of treason. But, however described by the participants, unilateral secession did not involve the exercise of any right conferred by international law.

---

193. See Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 776 (1998) [hereinafter Hannum, *Self-Determination*]; see also Hannum, *The Specter of Secession*, note 170, at 16 (stating that "policy makers should continue to reject the notion that there is a legal right of secession").

194. See Hannum, *Self-Determination*, *supra* note 193, at 777.

International law has always favoured the territorial integrity of states, and correspondingly, the government of a state was entitled to oppose the unilateral secession of part of the state by all lawful means. Third states were expected to remain neutral during such a conflict, in the sense that assistance to a secessionary group which had not succeeded in establishing its independence could be treated as intervention in the internal affairs of the state in question, or as a violation of neutrality. . . .<sup>195</sup>

After carefully studying the international law and practice relating to the right of self-determination, Crawford concludes that "there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more "peoples" in the ordinary sense of the word"; if it is possible to talk about self-determination for peoples or groups within an existing State at all, such determination "is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity."<sup>196</sup>

Two commentators recently write: "international law is today quite clear that self-determination should only occur within currently existing borders, except where otherwise agreed by sovereign states. Additionally, it is supposed to be a right only for colonial territories to gain their independence."<sup>197</sup>

In fact, secession as an outcome is clearly in conflict with the principle of territorial integrity, which has a clear prior place in the norm. Both the Decolonization and 1970 Declarations establish self-determination explicitly with the caveat that its exercise should not disrupt territorial integrity. The 1960 Decolonization Declaration states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."<sup>198</sup> The 1970 International Law Principles Declaration also

---

195. See James Crawford, *State Practice and International Law in Relation to Unilateral Secessions* (visited Mar. 28, 2000) <<http://www.canada.justice.gc.ca.html>>.

196. See *id.*

197. See Stephen Farry & Sean Neeson, *Beyond the 'Band-Aid' Approach: An Alliance Party Perspective upon the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1221, 1231 (1999).

198. See Decolonization Declaration, *supra* note 176, para. 6.

specifically subjects the principle of self-determination to the principle of sovereignty and territorial integrity by providing that:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.<sup>199</sup>

The Arbitration Commission of the E.C. Conference on Yugoslavia, in its Opinion No. 2, observes that "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise."<sup>200</sup> Although the Commission's statement is less than clear, it seems to support the view of not using self-determination to disrupt the territorial integrity and political unity of existing nation-States.

##### 5. *Minority Rights Versus Self-Determination*

The right to self-determination is also distinguishable from the rights of minority groups or sub-groups. Minority rights, which do not include the right to secede but are, nevertheless, general and broad in scope, are available to all ethnic, cultural, religious and other identity minority groups within any type of nation-State. Self-determination, on the other hand, includes the right to form an independent nation, but is designed and recognized to govern only certain special territorial situations concerning certain special categories of rights of certain special "peoples," although the precise meaning of such "peoples" is yet to be authoritatively determined.

---

199. See International Law Principles Declaration, *supra* note 181, at 124, "Principle of Self-Determination," para. 7.

200. See Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M., 1497, para. 1 (1992).



Relevant international instruments seem to distinguish “peoples” from minority groups, when read in contexts and with reference to each other. Article 1 of the International Covenant on Civil and Political Rights, for example, recognizes a right to self-determination for “peoples,” whereas Article 27 accords members of ethnic, religious or linguistic minorities 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.”<sup>201</sup>

In his report to the United Nations, the former Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities suggested that “[s]elf-determination is essentially a right of peoples. . . . It is peoples as such which are entitled to the right to self-determination. Under contemporary international law minorities do not have this right.”<sup>202</sup>

To ensure its continued existence and preserve its unique culture, a minority group or sub-group within a nation-State does not need to resort to the principle of self-determination. Misuse or abuse of self-determination by minority groups often leads to undesirable and unnecessary unilateral secession at the expense of the peace, security and interests of the parent State, the seceding entity and perhaps neighboring societies. Therefore, minority groups, in exercising their minority rights, should refrain from resorting to self-determination, particularly self-determination in the form of unilateral secession.

More importantly, rights of minorities under international law do not necessarily include or intermingle with the right to self-determination. This is particularly so where the minorities in question do not qualify as “peoples” eligible to use self-determination to separate themselves from the colonial powers or other remote and alien governing States.

In general, where the government or other groups of an existing State aggrieve an ethnic, cultural, religious or other minority group, the remedy is not resort to self-determination, especially not to seek independence. There are ways for such a group or sub-group to dem-

---

201. See Civil Rights Covenant, *supra* note 188, arts. 1 & 27.

202. See Hector Espiell, *The Right to Self-determination: Implementation of United Nations Resolutions*, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, at 9, para. 56 (1980).

onstrate its identity and uniqueness and to seek redress. The rules of international law relating to the rights of minorities already protect these groups' ability to do so. In essence, such general minority rights are independent of, and should not be confused with, the principle of self-determination.

#### 6. *Detriments of Unqualified Self-Determination*

The Commission of Jurists of the League of Nations stated in 1921:

To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.<sup>203</sup>

Despite the passage of time, the foregoing statement still holds true. Truly, more and more ethnically, culturally, linguistically or religiously homogeneous identity groups are invoking self-determination as a justification for seeking to secede from their parent State. This trend obviously poses a threat to the sovereignty of the nation-State, the very foundation of the international legal system.

The threat posed by the unqualified exercise of self-determination was identified by the U.S. representative to the United Nations long ago in 1959: "self-determination[, if] carried to a logical but absurd extreme, would in fact threaten the very existence of most of the States members of the United Nations."<sup>204</sup> While we have not quite reached that point, we are proceeding steadily down a dangerous path. More recently, an American politician thoughtfully observed that the concept of "self-determination is neither a clear legal principle nor an overriding moral claim" and that it "has often led to dis-

---

203. See Report of the Commission of Rapporteurs Presented to the League of Nations Council, League of Nations Doc. B.7.21/68/106 (1921).

204. See ANTONIO CASSESE, *SELF- DETERMINATION OF PEOPLES* 317 (1995) (quoting Watson W. Wise, *The Right of Peoples and Nations to Self-Determination*, 40 DEP'T ST. BULL., 2 Feb. 1959, at 173).

aster.”<sup>205</sup>

The international community should discourage secessionist movements within the borders of existing States. Such movements, whether or not under the guise of self-determination, undermine the sovereignty of existing nation-states. As a territorial unit or identity group within a nation is not entitled to self-determination, its unilateral declaration of independence should be withheld recognition by the international community unless and until the parent State so recognizes. In the event, for example, that the Quebecois declare an independent Quebec or the northern Italians declare an independent Padania, other nations should refrain from granting recognition until and unless Canada and Italy indicate their express or implied recognition of such regimes. In addition to these examples, there are numerous other territorial units or identity groups within existing nation-States that seek to secede from their respective parent State and form a separate independent nation, in which case the international community should similarly refrain from recognizing or otherwise encouraging secessions until the parent State no longer objects.

Fortunately, the international community of nation-States in general has been antagonistic, or at least not affectionate, to independence movements because such movements threaten their very existence. To endorse one secessionist group would encourage more others to pursue the same goal. As Judge Cassese stated:

“[to] concede to minorities . . . the right of withdrawing from the community to which they belong, because it is their wish . . . would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.”<sup>206</sup>

#### D. THE UNAVAILABILITY OF SELF-DETERMINATION TO TAIWAN

Finally, the option of self-determination is not available to Taiwan. The territory of Taiwan is not an appropriate object for self-determination. Furthermore, the population in Taiwan does not qualify as a “people” or “peoples” or as holders of the right of self-

---

205. See Joseph S. Nye Jr., *A Taiwan Deal*, WASH. POST, Mar. 8, 1998, at C7.

206. See CASSESE, *supra* note 204, at 317.

determination within the meaning of relevant international instruments referred to earlier.

The territory of Taiwan is not a colony of China, a trust territory, nor is it any other type of non-self-governing territory within the meaning of the UN Charter. Rather, it is an integral territorial part and administrative unit of the State of China represented by the Government of the People's Republic of China. Geographically speaking, Taiwan is not separate and remote from the Chinese mainland. It is not a territory whose ownership is yet to be determined. Instead, Taiwan is an integral territorial part of China. Although China owns it, it did not acquire such ownership through colonization, mandate, or trusteeship but through long time discovery, occupation, and prescription. As such, the territory of Taiwan is not disposable through the operation of self-determination absent the consent of the titleholder.<sup>207</sup>

The Taiwanese people are essentially ethnic *han* Chinese, sharing the same origin, tradition, culture, language and to some extent the same religions as the mainlanders. They are like the permanent population of any other province or political subdivision in the mainland. As such, they do not constitute a distinct *people* from the rest of the Chinese population in order to be eligible to possess a right to self-determination.

Neither does international law recognize Taiwan's right to secession, nor does Chinese law provide for unilateral secession. The Chinese central Government, the sole legitimate government representing the State of China, is firmly against the independence of Taiwan. It has never and will never enter into an agreement with the secessionists permitting Taiwan to secede from the mainland. Should Taiwan ever declare formal independence, the Chinese Government will never recognize the validity of such a move, but may instead do everything it can to keep the country intact.

At the recent discussion on "Rethinking the Cross-Strait Relationship" convened by the Council on Foreign Relations, a colleague from the Chinese mainland made a very good point. The Chinese people and Government on the mainland respect the rights and inter-

---

207. See *supra* notes 91-106 and accompanying text (discussing the element of "territory" in the context of Taiwan).

ests of their brothers and sisters in Taiwan. They respect the freedom of choice of the Taiwanese people. However, just as one cannot choose his or her family trees, parents, blood and gender, the people of Taiwan cannot choose their history and identity. They cannot choose their ethnic and cultural ties. They cannot opt out their "poor relatives" on the mainland. They cannot opt out of relevant international legal instruments providing for China's recovery of Taiwan, and cannot choose to deny the fact that the predecessor of the Chinese Government indeed resumed China's *de jure* and *de facto* sovereignty over Taiwan upon Japan's surrender.<sup>208</sup> In sum, while the people of Taiwan have a broad range of rights to choose their political system and participate in or influence the political life in the locality, there simply does not exist any legal basis, nor any practical possibility, for Taiwan to attain independence through the so-called self-determination or unilateral secession.

## CONCLUSION

Before concluding, a brief summary of the main points follows. First, there is only one China; Taiwan is an integral territorial part of China; the Government of the People's Republic of China is the sole legitimate government of the State of China. Second, the issue of Taiwan is an internal matter for the Chinese people on both sides of the Taiwan Strait and no external interference is acceptable or permissible. Third, the PRC's continuity of the imperial and republican China, and China's sovereignty over Taiwan, are well supported by historical facts, legally binding international instruments, and general international law. Fourth, Taiwan does not meet the real criteria for statehood. It in particular lacks sovereignty over a territory of its own, and does not have a government capable of independently entering into relations with other nations. The argument that Taiwan or the "ROC in Taiwan" is already a sovereign and independent nation

---

208. The three-day discussion on "Rethinking the Cross-Strait Relationship" was convened by the Council on Foreign Relations, with the support of the U.S. Institute of Peace the Rockefeller Brothers Fund, at the Pocantico Conference Center, New York, Feb. 10-13 2000. About 31 participants from the United States as well as from China's mainland and Taiwan, including the present author, took part in the discussion. The consensus of the conference prohibits the disclosure of the identity of any participant concerning any oral presentation or remark made at the conference.

since 1912 fails. Finally, Taiwan as a territorial part and political unit of China is not entitled to self-determination. It in particular does not possess the right to secede unilaterally from China. Any attempt to declare independence for Taiwan, whether through local plebiscite or otherwise, would have no legal validity under Chinese law and international law.

It is beyond doubt that Taiwan is an inalienable part of the territory of China and that China's sovereignty over Taiwan is firmly established both in fact and in law. The issue of Taiwan is completely an internal matter of China, the resolution of which is up to the entire Chinese people, including those in Taiwan. The authorities in Taiwan, until recently, also upheld the "one China" principle, although they maintained that they represented China as a whole, a claim that was false both in fact and in law. The change of policy on the side of the Taiwan authorities, particularly Mr. Lee's theory of "state-to-state relations" or "special state-to-state relations," will not change the attributes and status of Taiwan as an inseparable part of the Chinese territory, nor will a unilateral declaration of independence.

Any attempt at linking the concept of self-determination or unilateral secession with Taiwan in order to support its independence would amount to an abuse of the principle of self-determination and an interference with the internal matters of China. Due to the inapplicability of the extreme form of self-determination to Taiwan, neither the Taiwanese authorities nor the inhabitants in Taiwan have the right to unilaterally secede Taiwan from China absent a constitutional structure and/or the consent on the part of the Chinese Government and its 1.3 billion people permitting such secession.

History and common sense tell us that we need to be practical and realistic, and refrain from attempting to accomplish the impossible. Independence for Taiwan is a dead-end. It is not only a legal impossibility, but also an actual impracticability, because the PRC Government will not allow that to happen or succeed. I sincerely hope that leaders and politicians on both sides of the Taiwan Strait will refrain from making irresponsible and risky statements and taking irresponsible and risky actions detrimental to the cause of China's *internal* reunification, get down to the business of dialogues and negotiations, and eventually find mutually acceptable, peaceful, and political solutions to the Taiwan issue.