

TAIWAN IS NOT THE REPUBLIC OF CHINA: A LEGAL REAPPRAISAL OF THE “ONE CHINA POLICY”

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ABSTRACT

For a long time, the status of Taiwan (Formosa) has been in legal limbo. Both the People’s Republic of China (PRC) and the Republic of China (ROC) governments’ exile of Taiwan since 1949 insist that the sovereignty of Taiwan was restored to China in 1945. Notwithstanding the considerable loss of Chinese territory and people, the Cold War structure enabled the ROC government in exile to retain its seat in the United Nations until 1971, when it was replaced by People’s Republic of China. Such practice has left an impression that the Republic of China is still living in Taiwan, considering that the Constitution imposed by the Republic of China on Taiwan is still in use today. Since 1971, the international community has taken a One-China policy, recognizing the People’s Republic of China as the one and only China in the world, and Taiwan has effectively become an international orphan. The name “Republic of China” is welcomed by Beijing strategically because its very name suggests that Taiwan is part of China. This article looks back into the history which has placed Taiwan at its present dilemma, providing a

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comparative analysis from an international law perspective to clarify the statehood and identity of both the Republic of China and Taiwan. By identifying and analyzing the historical documents and state practices, this article suggests that the Republic of China and Taiwan are two different entities, and provides a new, and critical, angle of the "One China Policy." In addition, this article gives an insight into the reason why the "Status Quo" of Taiwan deliberately maintained by the calculating politicians defying international law is detrimental to the peace and security of the region, highlighting the significance of conforming to international law in solving global disputes and conflicts.

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In August 2022, when the US House speaker Nancy Pelosi visited Taiwan, a picture was taken portraying Pelosi and Taiwan's President Tsai Ing-wen standing in front of the ROC's flag and its national father-Sun Yat-sen at the Presidential Office in Taipei.

INTRODUCTION: CONFUSING IDENTITY OF THE ROC AND TAIWAN

In early December 2021, Nicaragua's Foreign Ministry issued a statement saying that: "Nicaragua today breaks diplomatic relations with Taiwan and ceases to have any contact or official relationship."¹ "The People's Republic of China (hereinafter "PRC") is the only legitimate government that represents all of China and Taiwan is an inalienable part of the Chinese territory," it added.² China's ambassador to the United Nations, Zhang Jun, commended on Twitter that "[t]he One-China

¹ *Nicaragua cuts ties with Taiwan in favour of Beijing*, BBC NEWS (Dec. 10, 2021), <https://www.bbc.com/news/world-asia-59574532> (last visited May 13, 2023).

² *Id.*

principle is a consensus widely accepted by the international community and allows no challenge.”³

After the cut-off, it was widely reported that Nicaragua broke its diplomatic relations with Taiwan, derecognizing Taiwan as a sovereign nation by switching allegiance to Beijing in recognition of the PRC’s One China policy.⁴ Nevertheless, China’s “One China Principle” and the U.S. version of the “One China Policy” are not the same. While the PRC’s “One China Principle” states that Taiwan is an inalienable part of China—with the PRC serving as the sole legitimate government of China, the U.S. only partly acknowledges this position without recognizing Taiwan as a part of China. This ambiguity makes journalists and analysts often conflate the two versions, and report that the U.S. abides by the PRC’s version of “One China.” However, this is incorrect, and a false interpretation of U.S. policy.⁵

Without knowledge of the controversy regarding the legal status of Taiwan (or Formosa) and the Republic of China (hereinafter “ROC”), the requirement for every country that establishes diplomatic relations with China to recognize that “the Government of the People’s Republic of China is the sole legal government representing the whole of China”⁶ may not immediately seem relevant to

³ *Id.*

⁴ Steven Lee Myers, *Taiwan Loses Nicaragua as Ally as Tensions With China Rise*, N.Y. TIMES (Dec 9, 2021), <https://www.nytimes.com/2021/12/10/world/asia/taiwan-nicaragua-china.html> (last visited May 13, 2023).

⁵ *The United States *One China Policy* is NOT the Same as the PRC *One China Principle**, THE US-TAIWAN BUS. COUNCIL (Jan. 1, 2022), <https://www.us-taiwan.org/resources/faq-the-united-states-one-china-policy-is-not-the-same-as-the-prc-one-china-principle/> (last visited May 13, 2023).

⁶ Statement by the Ministry of Foreign Affairs of the People’s Republic of China, *infra* note 47.

Taiwan. The Republic of China is the state name of the whole Chinese territory from 1912 to 1949, when Taiwan was still a formal colony of Japan.⁷ Although “Taiwan” is the universally accepted name of the island located southeast of China, Taiwan’s current government still operates under the name “Republic of China” or Republic of China (Taiwan). Taiwan also continues to use the “Blue Sky, White Sun, and a Wholly Red Earth” flag, which flew over the Chinese mainland from 1928 to 1949. Portraits of Sun Yat-sen,⁸ the national father of the ROC, still hang on the walls of almost every governmental department of Taiwan.⁹ Even the official calendar of Taiwan today uses 1912, the year of the establishment of the ROC, as the first year. For example, the year 2023 is recorded as ROC Year No.112 to preserve the continuity of the ROC. Such governmental practices perpetuate

⁷ CRAWFORD, *infra* note 71, at 207.

⁸ Sun Yat-Sen (November 2, 1866 – March 12, 1925) was the first provisional president of the Republic of China and the first leader of the Kuomintang (Chinese Nationalist Party or KMT). For the Chinese Communist Party (CCP), Sun Yat-sen is a “Forerunner of the Revolution.” He was one of PRC’s first President Mao Zedong’s first political heroes. In the official historiography of the People’s Republic of China, Sun has long been remembered as a “bourgeois revolutionary” who helped set the stage for the Communist Revolution. Peter Zarrow, *The Chinese Communist Party Has Followed Sun Yat-sen’s Road*, FOREIGN POL’Y (July 1, 2021), <https://foreignpolicy.com/2021/07/01/chinese-communist-party-ccp-sun-yat-sen/> (last visited May 13, 2023).

⁹ Sun Yat-Sen’s widow, Soong Qing-ling, is unofficially honored by the Chinese people as the National Mother of the People’s Republic of China (PRC), and she became the Vice President of the new Chinese government in 1949. For the reason why Soong Qing-ling chose to side with the new Chinese government, see Faison, *infra* note 175; see also Jenia Mukherjee, *Carrying forward the legacy of Sun-Yat Sen Song Qingling and China in the red years*, 71 PROC. OF THE INDIAN HIST. CONG. 893-99 (2010); HAROLD R. ISAACS, RE-ENCOUNTERS IN CHINA: NOTES OF A JOURNEY IN A TIME CAPSULE (1985).

confusion between Taiwan's state identity and that of the ROC.¹⁰

The remainder of this Article seeks to clarify this issue. Part II looks back on the history of the Republic of China, explaining its relations with Taiwan. Part III analyzes the historical legal status of the ROC and Taiwan respectively, explaining why they are two different entities. Part IV clarifies the identity of the ROC and Taiwan based on the identity/continuity theory of contemporary international law scholarship and case law. Part V discusses the recognition of the international players regarding the ROC and Taiwan, analyzing how the two are treated as separate entities. Part VI analyses Taiwan's current legal status and Part VII concludes.

I. HISTORICAL BACKGROUND

In 1895, with the defeat of the Chinese Qing Dynasty in the Sino-Japanese War (1894–1895) and the promulgation of the Shimonoseki Treaty, Taiwan was ceded to Japan.¹¹ During World War II, to boost the morale in the Chinese war zone, the Allied Forces announced in the Cairo Declaration on November 27,

¹⁰ On March 26, 2023, when Honduras formally established diplomatic ties with China and severed them with the “Republic of China on Taiwan,” CNN reported that “Taiwan had 56 diplomatic allies when it lost recognition from the United Nations in 1971” and that the “Blue Sky, White Sun, and a Wholly Red Earth” is the flag of Taiwan. Eric Cheung, *Honduras establishes diplomatic ties with China, severs them with Taiwan*, CNN (Mar. 26, 2023), <https://edition.cnn.com/2023/03/25/asia/honduras-cuts-diplomatic-ties-with-taiwan-intl-hnk/index.html> (last visited May 13, 2023).

¹¹ However, it is important to note that, by 1895, China only controlled one third of the territory of Taiwan. See YOSABURŌ TAKEKOSHI, *JAPANESE RULE IN FORMOSA* 218 (1907), <https://archive.org/details/japaneseruleinf00takegoog/page/n50/mode/2up?view=theater> (last visited May 13, 2023).

1943, and reaffirmed in the Potsdam Declaration on July 26, 1945, that Taiwan would be returned to China after the war. The Cairo Declaration stated, in part:

The Three Great Allies ... covet no gain for themselves and have no thought of territorial expansion. It is their purpose that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. The aforesaid three great powers are determined that in due course Korea shall become free and independent.¹²

This decision, however, was made without any reference to the wishes of the Taiwanese, despite the fact that a large section of the Formosan populace was “desirous of establishing an independent state or at the very least of preserving local autonomy.”¹³

After Japan lost the war, General MacArthur assigned the task of accepting the surrender of the Japanese commanders in Formosa (Taiwan)¹⁴ and Vietnam to Chiang Kai-shek on behalf of the Allied Powers;¹⁵

¹² Cairo Declaration, U.S.-China-Gr. Brit, Nov. 26, 1943 <https://digitalarchive.wilsoncenter.org/document/122101> (last visited May 13, 2023).

¹³ Leonard Gordon, *American planning for Taiwan, 1942-1945*, 37 PAC. HIST. REV. 201, 219-20 (1968) (referencing to DS, Gauss, Chungking, to Sec. of State, Desp. 3029, Oct. 1, 1944 (800)).

¹⁴ In 1542, when Portuguese sailors sighted this uncharted island and noted it on their maps as *Ilha Formosa* (“beautiful island”). The name *Formosa* remained in common use among English speakers into the 20th century.

¹⁵ Pursuant to Japanese Imperial General Headquarters General Order No.1, issued at the direction of the Supreme Commander for the Allied Powers (SCAP), Japanese commanders in Formosa surrendered to Generalissimo Chiang Kai-shek “acting on behalf of the United States, the Republic of China, the United Kingdom and the British Empire, and the Union of Soviet Socialist Republics.” See TKACIK, *infra* note 28, at 182, including the Memorandum of the Department

Manchuria and North Korea to the Joseph Stalin of USSR as another such trustee; South Korea to U.S. General John Hodge as another, and so on.¹⁶ In early October of 1945, an advance group of eighty Chinese officials arrived in Taiwan to establish the Chinese administration.¹⁷

However, the Chinese Nationalist (Kuomintang or KMT) government brought the corruption that had sapped its strength on the mainland to Taiwan. The Taiwanese, who were accustomed to a government that was strict but honest, were outraged by the corruption and abuses of power of the KMT government.¹⁸ In February 1947, a conflict between the Chinese Military Security Guards and Taiwanese civilians led to bloodshed on the whole island. It is estimated that at least 10,000 Taiwanese lost their lives during the atrocity.¹⁹ The atrocity committed by the Chinese army was later called “the 228 Incident” or “the 228 Massacre.” The brutality of Chiang’s army’s occupation in Taiwan led Secretary of State Dean Acheson to report on April 11, 1947, in a letter to Senator Joseph H. Ball (R-MN), that “the transfer of sovereignty over Formosa to China has not yet been formalized.”²⁰ On the

of State titled “the legal status of Taiwan” on July 13, 1971.

¹⁶ DAVID K. JORDAN ET AL., *THE MINOR ARTS OF DAILY LIFE: POPULAR CULTURE IN TAIWAN* 18-19 (2004).

¹⁷ Gordon, *supra* note 13, at 226.

¹⁸ SHELLEY RIGGER, *POLITICS IN TAIWAN-VOTING FOR REFORM* 56-57 (1999).

¹⁹ Tillman Durdia, *Formosa killings are put at 10,000; foreigners say the Chinese slaughtered demonstrators without provocation*, N.Y. TIMES (Mar. 29, 1947), <https://www.nytimes.com/1947/03/29/archive/s/formosa-killings-are-put-at-10000-foreigners-say-the-chinese.html> (last visited May 13, 2023).

²⁰ TKACIK, *infra* note 28, at 76, 182 with reference to the Memorandum of the Department of State titled “the legal status of Taiwan” on July 13, 1971 from the Office of the Legal Advisor to the Director of Republic of China Affairs under the U.S. Department of State.

Chinese Mainland, there was a Chinese Civil War between the KMT and the Chinese Communist Party (CCP).²¹ In the spring of 1949, as thousands of undisciplined troops, corrupt bureaucrats, and refugees streamed into the island, American observers considered another rebellion likely.²² Secretary of State Dean Acheson hoped to establish a UN trusteeship in Taiwan with the help of Formosan independence activists or Nationalist defectors.²³ Unexpectedly, however, after more than three years of civil war, the KMT government was chased out of mainland China by the victorious CCP, and was forced to take exile in Taiwan on December 8, 1949, which was followed by over one million Chinese refugees.

In place of the Republic of China, on October 1, 1949, the People's Republic of China (PRC) was established on the Chinese mainland. At that point, the KMT government in exile only administrated the island of Taiwan and its affiliated islands—the Pescadores, as well as Quemoy and Matsu, the two tiny islands alongside the southeast coast of China. While the Taiwan/Pescadores formation was ceded to Japan by the Chinese Qing Dynasty in 1895, Quemoy and Matsu remained part of China during the

²¹ Three years before the Communist take-over in China, President Harry S. Truman warned President Chiang Kai-shek that “selfish interests of extremist elements,” equally in Chinese Nationalist and Communist parties were threatening civil war. In a confidential message dated Aug. 10, 1946, and inspired jointly by Gen. George Marshall, President Truman’s personal envoy in post-World War II China, and by Ambassador J. Leighton Stuart, President Truman criticized the “cruel murders” of Chinese liberals in Government-held territory and the growing “resort to force, military or secret police” by the Chiang regime. In Benjamin Welles, *Truman Warning to Chiang is cited*, N.Y. TIMES (May 25, 1972), <https://www.nytimes.com/1972/05/25/archives/truman-warning-to-chiang-is-cited-secret-files-on-marshals-peace.html> (last visited May 13, 2023).

²² NICK CULLATHER, “FUEL FOR THE GOOD DRAGON”: THE UNITED STATES AND INDUSTRIAL POLICY IN TAIWAN, 1950–1965 11 (1996).

²³ *Id.*

twentieth century. These clusters were occupied by the KMT at the end of the Chinese Civil War, which was unwilling to retreat, but wanted to use them as stepping stones to counterattack the Chinese mainland. After the KMT retreated to Taiwan, it refused to acknowledge its defeat as permanent, instead, it continued claiming to be the representative government of the whole of China. In 1949, Chiang Kai-shek²⁴ declared a permanent state of martial law on Taiwan, which would last for thirty-eight years, until June 1987. Chiang and his son thereafter became lifetime dictators in Taiwan. On the other hand, the ROC constitution was ceremonially imposed on Taiwan,²⁵ despite the fact that most of the constitution's provisions regarding human rights were suspended with the adoption of the martial law. The preamble of the constitution reads "...in accordance with the teachings bequeathed by Dr. Sun Yat-sen in founding the Republic of China...hereby establish this Constitution, to be promulgated throughout the country for faithful and perpetual observance by all."²⁶ Article 6 of the constitution stipulates that "The national flag of the Republic of China shall be of red ground with a blue sky and a white sun in the upper left corner."²⁷ Accordingly, Chiang's regime claimed that the government of ROC was relocated to Taiwan.

At first, the U.S. had a bad impression of Chiang's corrupt regime,²⁸ but as the Cold War broke out, the U.S.

²⁴ The leader of the Republic of China and KMT from 1928 to 1949 in the Chinese mainland.

²⁵ For the illegitimacy of the imposition of ROC constitution on Taiwan, see Hsu, *infra* note 214, at 426-39.

²⁶ XIANFA pmbl. 1947 (ROC).

²⁷ *Id.* at art. 6

²⁸ See JOHN J. TKACIK JR., *Understanding and Misunderstanding China Policy: A Primer*, in RETHINKING "ONE CHINA" 73, 76 (John

took the opportunity to help the exiled ROC government²⁹ retain China's seat in the United Nations until 1971, as a method to contain the communist China. The myth of a "living Republic of China on Taiwan" was funded by the U.S. with \$4 billion over the period of 1951-1965.³⁰ One U.S. government study noted that a justification for the provision of "economic and military aid" was to "ensure. . . [the] preservation of the necessary degree of U.S. influence in key elements of government and society."³¹ For thirty years, the U.S. government recognized the ROC government's exile in Taiwan, which administrated only one to two hundred and sixty areas in proportion to the areas of China, as the only legitimate government of China. Benefiting from the substantial American support and aid, Taiwan grew into a major economic force in Asia.³²

During these years, the Taiwanese identity was suppressed in promotion of a Chinese identity, on the basis of the "One China Principle" and the belief that the ROC was the legitimate "China" which would eventually regain control of the mainland under KMT rule. Moreover,

Tkacik ed., 2004).

²⁹ Strictly speaking, a government in exile is a government whose mother country has been occupied by foreign powers. In this sense, the organization occupying China's UN seat at that time was hardly a Chinese government in exile, but rather a one man-dictatorship regime formed by some Chinese officials following Chiang to Taiwan. However, as the KMT always claims that the ROC relocated its government to Taiwan in 1949, the term "ROC government in exile" is appropriated in this article to differentiate from a truly representative government of Taiwan.

³⁰ NEIL H. & BELL D. JACOBY, U.S. AID TO TAIWAN: A STUDY TO FOREIGN AID, SELF-HELP, AND DEVELOPMENT 38, 118 (1966).

³¹ STEVEN M. GOLDSTEIN, THE UNITED STATES AND THE REPUBLIC OF CHINA, 1949-1978: SUSPICIOUS ALLIES 29 (2000), with reference to the documents of Foreign Relations of the United States from 1958 to 1968.

³² *Id.* at 21.

human rights were severely abused by the martial law imposed by the incoming regime, and any dissenters daring to challenge the authoritarian regime were accused of sedition. According to Christian Schafferer, “the number of people executed during the martial law period for violating the laws of the KMT is uncertain. Estimates go far beyond tens of thousands.”³³ By designating Taiwan as a province of China, the KMT government was able to deny equal representation to the Taiwanese people and dominate their political life. While the native Taiwanese accounted for 85% of the whole population of Taiwan, their representatives were only allocated according to its size in proportion to the whole of China.³⁴ The national representatives elected in the Chinese mainland, and taking refuge in Taiwan, controlled the “Congress.”³⁵

In 1971, the PRC government had been firmly established for over two decades, and it had become clear that the ROC government in exile had lost any chance and ability to “recover the mainland.” The United Nations General Assembly therefore voted to award China’s UN seat to the PRC government and to “expel forthwith the

³³ CHRISTIAN SCHAFERER, *THE POWER OF THE BALLOT BOX: POLITICAL DEVELOPMENT AND ELECTION CAMPAIGNING IN TAIWAN 5* (2003).

³⁴ The representatives elected by the Chinese people in 1948 were in fact permanent members of the “congress” of Taiwan until the 1991 amendment of the Constitution. As a result, the 85% of the population who were Taiwanese were allotted just 3% percent of the legislative seats on the island, while the KMT members who fled from China were given 97% of the seats to represent their so-called “lost” constituencies on the Chinese mainland, now under the PRC’s communists’ rule. See LUNG-CHU CHEN, *THE US-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW AND POLICY* 15-6 (2016).

³⁵ Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 *PAC. RIM L. & POL’Y J.* 531, 537 (2002).

representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations.”³⁶ Chiang’s legitimacy in Taiwan was undercut thereafter. On January 1, 1979, the U.S. formally granted diplomatic recognition to the PRC and broke its official ties with the ROC government in exile in order to strategically align with the PRC as a check on the Soviet Union.

By the late 1980s, there was already an overwhelming number of States recognizing the PRC as the representative government of China. Only “fewer than 40 States still recognized the ROC as the representative government of China. All of those States were small and, except the Holy See (the Vatican), had received significant financial aid from the ROC government.”³⁷ More and more countries that had previously established diplomatic relations with ROC came to the PRC’s side thereafter, leaving only thirteen small states still recognizing the ROC, as of March 2023.³⁸

As the fiction of the ROC government in exile representing the whole China became untenable, the KMT government had no excuse to deny the equal

³⁶ The full Resolution is entitled, “Restoration of the Lawful Rights of the People’s Republic of China in the United Nations.” G.A. Res. 2758, at 2 (Oct. 25, 1971).

³⁷ FRANK CHIANG, *THE ONE-CHINA POLICY: STATE, SOVEREIGNTY, AND TAIWAN’S INTERNATIONAL LEGAL STATUS* 154 (2017). However, these opportunistic recognitions because of financial aid are of no evidentiary value to prove the statehood of a state, according to James Crawford, “an entity is not a State because it is recognized; it is recognized because it is a State...At least where the recognizing government is not acting in a merely opportunistic way, recognition is important evidence of legal status.” CRAWFORD, *infra* note 71, at 93.

³⁸ Invariably, however, Taiwan’s relationship with these countries has been confused with the ROC’s foreign relations. See Ryan C. Berg & Wazim Mowla, *Taiwan’s Future in Latin America and the Caribbean*, *THE DIPLOMAT* (Sept. 1, 2022), <https://thediplomat.com/2022/09/taiwan-future-in-latin-america-and-the-caribbean/> (last visited May 13, 2023); see also Cheung, *supra* note 10.

representatives of the Taiwanese people any longer. Since 1972, with more and more representatives from mainland China aging or deceased, the martial law and relevant statutes were revised to fill vacancies by holding supplementary elections or adding more seats on the local level.³⁹ Yet the government remained severely unrepresentative. In the late 1980s, the uprisings of the democratic activists, along with the adoption of the Reagan administration's foreign policy to promote democracy abroad, eventually led Chiang Kai-shek's son, Chiang Ching-kuo,⁴⁰ to make three decisions before his

³⁹ YEH, *infra* note 42, at 171-72.

⁴⁰ After Chiang Kai-shek's death in 1975, his son-Chiang Ching-kuo became the de facto president of its regime in Taiwan in 1978. Chiang Ching-kuo went to the Soviet Union at the age of 15 in the year of 1925, when Sun Yat-sen died, and stayed there for his education until 1937. As the party-state regime was in peril during his tenure, Chiang Ching-kuo's rule was characterized as "soft authoritarianism," who was under increasing pressure to indigenize the KMT. Ironically, however, like most Marxism-Leninism party leaders, he created a personal image of "a great leader of the people" through most of the authoritarian rules inherited from his father, including the manipulated media and educational system, despite that most of his regime's external aid came from the anti-communism bloc. Chiang Ching-kuo had been leading Taiwan's national security department after he followed his father to Taiwan until his death in 1988. Like most Marxism-Leninism leaders, he created an extensive network of intelligence for the protection of KMT's ROC rhetoric and authoritarian rule both at home and abroad. Chiang Ching-kuo's intelligence education in the Soviet Union and 38 years of intelligence network building are still paying off in Taiwan's politics up until today. See Ko Tsi-jin, *A second look at Chiang Ching-kuo*, TAIPEI TIMES (Jan. 22, 2009), <https://www.taipeitimes.com/News/editorials/archives/2009/01/22/2003434382>; See also *infra* notes 231 and 235. During Chiang Ching-kuo's period, Taiwan became one of the "Four Asian Tigers" along with South Korea, Singapore, and Hong Kong, which benefited from the economic assistance from the United States, demonstrated by the spread of American electronic goods in traditional households of the four countries. Taiwan's growing economic boom was, of course, essential to KMT's legitimacy. This period of anomalous and unbalanced development of Taiwan's economy and politics could

death in early 1988. Those decisions included lifting martial law, legalizing political parties, and ending restrictions on public assembly and freedom of speech.⁴¹ The Taiwan-born politician, Lee Teng-hui, succeeded the presidency. Lee embarked on a series of rigorous political reforms to end the colonial and authoritarian rule of the KMT government. Those members who were representing the Chinese Mainland districts were removed and replaced with representatives who were elected by the people of Taiwan. The first democratic presidential election happened in 1996. Since then, Taiwan has undergone three peaceful power transitions through direct-voting elections.

Despite the call for a brand-new constitution tailored for the political reality of Taiwan, the KMT government remained in power and there were no international authorities in place to supervise the self-determination of the Taiwanese people. As such, the democratic reforms of Taiwan occurred through a process of negotiations and compromises between the KMT and a growing civil society.⁴² A contamination of rice oil in 1979 led to the creation of the first voluntary consumer group in 1980. Following this, the Awakening Foundation, a group of

explain why there is some kind of authoritarian nostalgia among certain age groups of Taiwanese people, and why the KMT suddenly saw eye to eye with the CCP after they began to be in touch with each other. For the KMT's infiltration into the Taiwanese society, *see* Hsu, *infra* note 214, at 456-62; For the KMT's policy of cooperating with the CCP to integrate Taiwan with China in the democratic era of Taiwan, *see* Rowen, *infra* note 63; For Taiwan's economic development through the financial aid of the U.S., *see* CULLATHER, *supra* note 22; For the development of the "Four Asian Tigers," *see* *Four Asian Tigers Hong Kong, Taiwan, Singapore, and South Korea*, CORP. FIN. INST. (Dec. 7, 2022), <https://corporatefinanceinstitute.com/resources/economics/four-asian-tigers/> (last visited May 13, 2023).

⁴¹ Chen, *infra* note 232, at 188.

⁴² JIUNN-RONG YE, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 37 (2016).

women lawyers, was formed in 1982. The Taiwan Association for Human Rights, composed of human rights lawyers, was subsequently founded in 1984. Eventually, in 1986, the first opposition political party, the Democratic Progressive Party (DPP), was established.⁴³ The KMT, which had cultivated its systematic advantages during the authoritarian period, demanded the integrity of the ROC Constitution remain intact⁴⁴ to maintain its political legacies and legitimacy of its authoritarian rule in the past four decades.⁴⁵ Therefore, whenever someone challenges the legitimacy of the portraits of Sun Yat-sen and the “Blue Sky, White Sun, and a Wholly Red Earth” flags hanging on the walls of almost every governmental department of Taiwan, the KMT argues: how could one question the constitution of our country (ROC)? The national father and flag of ROC are stipulated in the preamble and article 6 of the 1947 ROC constitution respectively.⁴⁶

On the other hand, the PRC on the mainland regards the ROC government taking exile in Taiwan as a threat to its regime and makes every state establishing diplomatic relations with the PRC recognize that “[t]here is but one China in the world, Taiwan is an inalienable part of China’s territory, and the Government of the People’s Republic of China is the sole legal government

⁴³ W-C Chang, *Public-Interest Litigation in Taiwan: Strategy for Law and Policy Reforms in Course of Democratization* in PUB. INT. LITIG. IN ASIA 136, 138-39 (P. J. Yap & H. Lau eds, 2011).

⁴⁴ YEH, *supra* note 42, at 13.

⁴⁵ For the illegitimacy of the ROC constitution imposed on Taiwan in both international law and constitutional law, and the unconstitutionality of the residues of ROC left in Taiwan, *see* Hsu, *infra* note 214, at 427-88.

⁴⁶ XIANFA pmbl.; art. 6 1947 (ROC).

representing the whole of China.”⁴⁷ In March 2000, a general election was held in Taiwan, which was won by Chen Shui-bian of the DPP. It was the first time the KMT lost the executive power of the government, though the Party still retained a majority in the “congress.” In August 2002, the Taiwanese President-Chen Shui-bian’s “two countries facing each other on each side of the Taiwan Strait” alarmed the Bush Administration just as it was powering up its international campaign to disarm Iraq. In August 2002, Deputy Secretary of State Richard Armitage flew to Beijing, probing for China’s position for Iraq.⁴⁸ He reiterated that the U.S. “did not support Taiwan independence.”⁴⁹ On September 6, 2003, 150,000 Taiwanese people marched in the streets of Taipei to demand that government agencies, companies, and private institutions which use “China” in their names replace it with “Taiwan.”⁵⁰

Nevertheless, during President Bush’s October 19, 2003 meeting with new Chinese President, Hu Jintao, at the APEC Summit in Bangkok, Thailand, Chinese media disputably reported that Bush repeated his “opposition” to Taiwan’s independence.⁵¹ Regardless of President Bush’s private view, the expression “no support for Taiwan

⁴⁷ Statement by the Ministry of Foreign Affairs of the People’s Republic of China, https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/202208/t20220802_10732293.html (last visited May 13, 2023).

⁴⁸ TKACIK, *supra* note 28, at 105.

⁴⁹ James Wang, *Armitage’s clarification is sensible*, TAIPEI TIMES (Sept. 9, 2002), <https://www.taipeitimes.com/News/editorials/archives/2002/09/09/0000167432> (last visited May 13, 2023).

⁵⁰ ROBERT ANDREWS & STEVE CHABOT, TWO CONGRESSMEN LOOK AT “ONE CHINA,” HERITAGE FOUND. (Feb. 6, 2004) <https://www.heritage.org/asia/report/two-congressmen-look-one-china> (last visited May 13, 2023).

⁵¹ *US stands firm on one-China policy*, CHINA DAILY (Oct. 20, 2003), https://www.chinadaily.com.cn/en/doc/2003-10/20/content_273454.htm (last visited May 13, 2023).

independence” is still used in official U.S. statements.⁵² In March 2004, Chen Shui-bian was reelected for a second term of the presidency. In April, Chen’s new foreign minister, Mark Tang-shan Chen, admitted that the international pressure was becoming unbearable. The ROC has always been sovereign and independent, he said: “the ROC is on Taiwan, and I am the foreign minister of ROC.”⁵³ This stance has been insisted by the Taiwanese government up until today.⁵⁴

Emboldened by Bush’s statement of opposing Taiwan’s changing of the status quo, in March 2005, China passed the Anti-Secession Law,⁵⁵ which stated that China could use “non-peaceful means” if Taiwan secessionist forces sought independence or if it deemed that possibilities of peaceful reunification were “completely exhausted.”⁵⁶ Facing the double pressure

⁵² The Taiwan Relations Act: The Next Twenty-Five Years: Hearing before the Comm. on International Relations, 108 Cong. 93–229 (2004) (Statement of James A. Kelly) http://commdocs.house.gov/committees/intlrel/hfa93229.000/hfa93229_of.htm (last visited May 13, 2023).

⁵³ Wang Pingyu, *Chen Tangshan: Yibian Yiguo Lunshu Ke Tiaozheng Bu Ke Tuifan* (Mark Chen Says One Country on Either Side Formula Can Be Adjusted But Can Not Be Overturned), EPOCH TIMES, Apr. 30, 2004 <https://www.epochtimes.com/b5/4/4/30/n525039.htm> (last visited May 13, 2023).

⁵⁴ In the National Day Address of October 2022, Taiwan’s President Tsai-Yingwen stated that “Today is the 111th National Day of the Republic of China, and the 73rd National Day since the Republic of China government relocated to Taiwan.” in Office of the President, Republic of China (Taiwan), *President Tsai delivers 2022 National Day Address*, <https://english.president.gov.tw/News/6348> (last visited May 17, 2023).

⁵⁵ Edward Cody, *China Sends Warning to Taiwan With Anti-Secession Law*, WASH. POST (Mar. 8, 2005), <https://www.washingtonpost.com/archive/politics/2005/03/08/china-sends-warning-to-taiwan-with-anti-secession-law/5dcdfae8-4523-4350-9d45-77a85f6b240f/> (last visited May 13, 2023).

⁵⁶ *Id.*

from the U.S. and China, in June 2005, the seventh round of constitutional revisions was made in Taiwan. It took a bold step in locking the ROC Constitution into its current iteration, so as to keep the status quo. “The threshold to pass a subsequent constitutional revision was raised an extremely high procedural threshold⁵⁷—so high that many believe any future constitutional revision to be almost impossible.”⁵⁸

As a result, despite the democratic reforms that have made Taiwan a self-governing territory, the government of Taiwan today is still operating under the name of Republic of China. Even though the PRC’s legal status as a successor state on the Chinese mainland has never been questioned in international law academia, the Taiwanese people are forced to perpetuate the rhetoric that Taiwan is equivalent to the ROC, which had been a sovereign state on the Chinese mainland from 1912 to 1949, and relocated to Taiwan thereafter. Although the government of Taiwan today is a truly representative government of the Taiwanese people, the minority Party of KMT is still named as the “Chinese Nationalist Party” in Chinese. It has never clarified whether it is a Chinese party serving the interest of China or a truly representative party settled in Taiwan. Of course, the KMT is desperate to maintain the legacy of the ROC in Taiwan to highlight it’s all along legitimacy,⁵⁹ and this issue is further complicated by the

⁵⁷ Under the existing rules, a constitutional amendment bill can only be initiated by one-fourth of the legislators, and a constitutional amendment first must pass the legislature by a three-fourths vote with a quorum of three-fourths of members, and then be ratified in a constitutional referendum held six months afterwards by an absolute majority of eligible voters.

⁵⁸ YEH, *supra* note 42, at 247.

⁵⁹ For a detailed discussion of how the KMT infiltrated the Taiwanese society and the constitutionality of it, see Hsu, *infra* note 214, at 160-83, 441-88.

PRC's intimidation and infiltration.⁶⁰ In the constitutional reforms in the 1990s, the pro-Chinese KMT hardliners demanded the following lines be added into the preamble of the Additional Articles of the ROC constitution imposed on Taiwan, "to meet the requisites of the nation prior to national unification, the following articles of the ROC Constitution are added or amended to the ROC Constitution."⁶¹ The KMT invokes this preamble as evidence to prove that Taiwan is a part of China, the ultimate constitutional goal of which is to reunify with the mainland China. Notably however, it was insisted by the first-term representatives who were elected in China in 1948, and continued to occupy the "congress" for more than four decades without any re-election by the Taiwanese people.⁶² In the 1997 constitutional amendment, when the KMT still controlled the "Congress" due to its systematic advantages cultivated during the authoritarian period, two geographic regions were created: "the Free Area" and "Chinese mainland area." The term "the Free Area" refers to the territory under the actual control of the ROC government, including the "Province of Taiwan" and two offshore islands alongside the southeast coast of China, Quemoy and Matsu. The entire country includes both the territory under the control of the

⁶⁰ Before the general de-recognition of the ROC, the existence of the "ROC on Taiwan" was seen as an existential threat for the PRC. After the general de-recognition of the ROC, however, the KMT has become a natural partner with the CCP in maintaining the "ROC on Taiwan" claim, either consciously or unconsciously, despite that the PRC always insists that the ROC had already been displaced by the PRC in 1949, which retains the sovereignty of Taiwan up until today.

⁶¹ CONST. OF THE REP. OF CHINA, pmb. <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002> (last visited May 13, 2023).

⁶² Hsu, *infra* note 214, at 370. For a detailed discussion of the constitutionality of this article, see Hsu, *infra* note 214, at 482-88.

ROC government and the “Chinese mainland area” under the control of the PRC.⁶³ This constitutional arrangement was based on the hypothesis that the relationship between the ROC and PRC is like that of a divided state, such as Korea and Germany, the ultimate goal of both sides is to seek “reunification” with each other. However, Caty excludes the Chinese situation from the rubric “divided State” on the ground that Taiwan is a separate State.⁶⁴ James Crawford argues that no general conception of

⁶³ ADDITIONAL ARTICLES OF THE REPUBLIC OF CHINA, available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002> (last visited May 13, 2023). From March 27 to April 7, 2023, Taiwan’s former KMT leader and president, Ma Ying-jeou, paid a 12 day-visit to Mainland China with a warning that the current government in Taipei is risking the island’s future. “Our country amended the constitution in 1997 In defining our country, there are two parts, one is the Taiwan area and the other is the mainland area. Both are part of our Republic of China, both are China,” Ma told an audience at Hunan University in Changsha, referring to the official name for Taiwan. Lawrence Chung, *Ex-Taiwan leader Ma Ying-jeou finishes tour of mainland China by warning island must “choose between peace and war;”* SOUTH CHINA MORNING POST (Apr. 7, 2023), <https://www.scmp.com/news/china/diplomacy/article/3216347/ex-taiwan-leader-ma-ying-jeou-finishes-tour-mainland-china-warning-island-must-choose-between-peace> (last visited May 13, 2023); During Ma Ying-jeou’s presidency (2008-2016), he pushed Taiwan in the direction of substantial social and economic integration with Mainland China. The lack of public consultation and support for Ma’s aggressive efforts have precipitated the Sunflower Movement in 2014. On the evening of March 18, 2014, a group of Taiwanese students stormed the national legislature to resist a free trade deal with China, evolving into a twenty-four-day confrontation, which won widespread public sympathy in Taiwan. The Sunflower Movement represented the culmination of protests and activism that had gathered momentum since the return of the pro-Chinese KMT in 2008. See Ian Rowen, *Inside Taiwan’s Sunflower Movement: Twenty-Four Days in a Student-Occupied Parliament, and the Future of the Region*, 74 J. ASIAN STUD. 5-21 (2015).

⁶⁴ CRAWFORD, *infra* note 71, at 477, referencing G. CATY, LE STATUT JURIDIQUE DES ÉTATS DIVISÉS (The legal status of divided states) 23-30 (1969).

divided statehood⁶⁵ is of value in analyzing the legal status of Taiwan.⁶⁶ What these constitutional arrangements made in defiance of international law mean for Taiwan's new electoral democracy is that, the Taiwanese people have to face the risk of losing their popular sovereignty every four years. The KMT always seeks to integrate Taiwan with China. The chaos and the predicament, caused by this ambiguity in Taiwan's new democracy thereafter, are not hard to imagine.⁶⁷

Commenting on the Taiwanese government's claim to be the government of the Republic of China that was established in 1912, Crawford argues that the government in Taiwan continues to characterize itself as the "Republic of China" and to stress its continuity based on a constitutional system of China, while increasingly practicing discontinuity.⁶⁸ According to Crawford, "whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State, is not a matter of domestic jurisdiction of the latter State, nor is it determined conclusively by the municipal law of that State."⁶⁹

⁶⁵ For the characteristics of a divided state, see Hsu, *infra* note 214, at 87-88.

⁶⁶ CRAWFORD, *infra* note 71, at 477.

⁶⁷ See Hsu, *infra* note 214, at 474-81, 517-24.

⁶⁸ CRAWFORD, *infra* note 71, at 218-19. On May 15, 2023, an opinion piece written by Taiwan's representative in Sweden, Klement Ruey-sheng Gu reads "The government of the Republic of China (ROC), which was founded in 1912 and moved to Taiwan during the civil war in 1949. Since then, the ROC has had effective jurisdiction over the main island of Taiwan itself as well as a number of surrounding islands, meaning that Taiwan and China are governed by different governments." See Klement Ruey-sheng Gu, *Taiwan är inte del av Kina* (Taiwan is not part of China), NWT (May 15, 2023), <https://www.nwt.se/2023/05/15/taiwan-ar-inte-del-av-kina-e8e01/> (last visited May 17, 2023).

⁶⁹ CRAWFORD, *infra* note 71, at 353.

Nevertheless, the Taiwanese people's hands and feet are tied by these constitutional arrangements defying international law. As O'Connell pointed out in 1956, "a government is only recognized for what it claims to be."⁷⁰ Since the government of Taiwan has never claimed a separate identity from China, Crawford comments that Taiwan is not yet an independent sovereign state.⁷¹

As a matter of fact, the PRC's claim that Taiwan is part of China is deduced from the fiction of "Republic of China on Taiwan" since 1949 maintained by the KMT, which claims that Taiwan is a Chinese province instead of a separate entity from China. The problematic identity of the ROC and Taiwan has indeed lent color to China's endeavor to isolate Taiwan from the international community. Given that law must be based on facts—insofar as such facts are not in themselves contrary to law,⁷² and that habits alone cannot create law, it is imperative to clarify the statehood and identity of Taiwan and the Republic of China.

II. RELATIONSHIP BETWEEN TAIWAN AND CHINA

To evaluate whether the entity of Taiwan, administered by the ROC government in exile since 1949 was qualified as a state, the criteria for statehood must be discussed first.

⁷⁰ D.P. O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT'L L. 405, 415 (1956).

⁷¹ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 218-19 (2d ed. 2007); For a critical appraisal of James Crawford's viewpoints about Taiwan, see Hsu, *infra* note 214, at 356-69. See also CHEN, *supra* note 34, at 76-80; Brad R. Roth, *The Entity that Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 91 E. ASIA L. REV. 91, 98 (2009); H. C. Chiang & J. Y. Hwang, *On the statehood of Taiwan: A legal reappraisal*. in *THE "ONE CHINA" DILEMMA* 57-80 (2008).

⁷² H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L. J. 385, 390 (1944).

The best-known criteria for statehood are laid down in Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”⁷³ These criteria have to be “based on the principle of effectiveness among territorial units.”⁷⁴

Under the Montevideo Convention, an entity that meets the requirements of statehood becomes a State regardless of recognition. Domestic and international courts, including federal courts in the United States⁷⁵ and the International Court of Justice (ICJ),⁷⁶ have also applied the declaratory theory,⁷⁷ that excludes recognition as a constitutive element of statehood.⁷⁸ After all, rights

⁷³ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

⁷⁴ CRAWFORD, *supra* note 71, at 46.

⁷⁵ *See, e.g.,* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), it is stated that, “The definition of a state is well established in international law: Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities. [...] Although the Restatement’s definition of statehood requires the *capacity* to engage in formal relations with other states, it does not require recognition by other states.”

⁷⁶ The International Court in the Bosnian Genocide case indirectly dealt with the question. “For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty.” In Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections & Judgment, 1996 I.C.J. 595, at 613.

⁷⁷ On the other hand, the constitutive theory takes recognition as a constitutive element of statehood.

⁷⁸ *See e.g.,* Kadic, *supra* note 75 (discussing the existence of jurisdiction over Radovan Karadzic, President of the self-proclaimed

under international law are not contingent upon the acceptance of the right-holder by other states.⁷⁹ Nevertheless, even for the declaratory school, recognition has the consolidating effect to secure the independence of the State and to bolster the effectiveness of its government by lending international legitimacy.⁸⁰

Furthermore, since “self-determination” became a core principle of international law: “[T]here is a consistent practice of resolutions or decisions taken by States or international organizations calling for the non-recognition of de facto entities created in breach of the non-use of force or of the principle of self-determination.”⁸¹ This new development has been supported by the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union issued by the European Community in 1991.⁸² Crawford points out that the principle of self-determination “in its positive form requires not a democratically organized government but rather a system of government instituted with the approval of the majority of the people concerned.”⁸³ This criterion is closely

Bosnian-Serb republic of Srpska).

⁷⁹ CRAWFORD, *supra* note 71, at 93 with reference to AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES 107 (1965).

⁸⁰ John Dugard & David Raic, *The role of recognition in the law and practice of secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 94, 135 (Marcelo G. Kohen ed., 2006).

⁸¹ Antonello Tancredi, *A normative “due process” in the creation of States through secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 171, 206 (Marcelo G. Kohen ed., 2006).

⁸² The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, Dec. 16, 1991 <https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/> (last visited May 13, 2023); *see also* Geoffrey Marston, *United Kingdom Materials on International Law*, 62 BRIT. Y. INTEL. L. 535, 559 (1991); Colin Warbrick, *Recognition of states*, 41 INT'L & COMP. L. Q. 473, 477 (1992)

⁸³ CRAWFORD, *supra* note 71, at 150.

associated with the concept of popular sovereignty, social contract tradition, and earlier medieval legal doctrine of the *quod omnes tangit*: “what touches all ought to be decided by all,”⁸⁴ the central tenet of which is that the legitimacy of rule has to be based on the consent of the governed.

After the democratic reforms of Taiwan in the 1990s, the pro-independence governments have been holding the position that the territory of the ROC had narrowed down to only including Taiwan and the other three small islands since 1949, so that there is no need for it to claim independence; the ROC has been an independent sovereign state since 1912. On the other hand, the PRC government has long held the position that the ROC had been replaced and succeeded by the PRC since 1949. The conclusion that flows from this logic is that Taiwan is an integral part of China. To evaluate the legitimacy of the above two claims, the relationship among Taiwan, the ROC and the PRC will be analyzed as follows: transference of territory and Taiwan as a self-determination unit.

A. Transference of Territory

The Republic of China was a country in East Asia based in mainland China from 1912 to 1949, until the main members of its government were driven out by the victorious communists in the Chinese Civil War. From then on, they took refuge in Taiwan, claiming that the ROC government relocated to Taiwan since then. At the

⁸⁴ On the *Quod omnes tangit*, see the classic study of Gaines Post, *A Romano-Canonical Maxim, “quod omnes tangit,” in Bracton, 4 TRADITIO 197-251 (1946).*

time, Taiwan was still a formal territory of Japan,⁸⁵ under the ROC's administration by the delegation of the Allied Power, pending the peace treaty with Japan.

In 1949, the British Foreign Secretary Mayhew of the Attlee (Labor Party) Administration said in the House that "the Chinese Nationalist authorities are in control of the island [of Formosa]. However, [any] change in the legal status of Formosa can only be formally affected in a treaty of peace with Japan."⁸⁶ Another similar remark was made by British Foreign Secretary Younger of the Attlee Administration in 1950, stating that "Formosa is still de jure Japanese territory. Following on the surrender of Japan, the Chinese Government of the day assumed, with the consent of the remaining Allies, the provisional administration of the territory pending the final determination of its status at a peace settlement."⁸⁷ In May 1950, the U.S. was prepared to abandon the ROC in Taipei and accept the PRC in Beijing, backing the UN trusteeship move and would ready the fleet to prevent any armed attack on Formosa while the move for trusteeship was pending.⁸⁸ On June 27, 1950, two days after the Korean War broke out, U.S. President Truman stated that: "The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United

⁸⁵ CRAWFORD, *supra* note 71, at 207.

⁸⁶ 469 Parl Deb HC (5th ser.) (1949) at 1679 (UK), cited in CHIANG, *supra* note 37, at 226.

⁸⁷ 478 Parl Deb HC (5th ser.) (1950) at 60 (UK), cited in CHIANG, *supra* note 37, at 226.

⁸⁸ U.S. Dep't of State, *Memorandum by the Deputy Special Assistant for Intelligence (Howe) to Mr. W. Park Armstrong, Special Assistant to the Secretary of State for Intelligence and Research*, 4 FOREIGN RELS. OF THE U.S., VOL. VI, E. ASIA AND THE PAC., (May 31, 1950), <https://history.state.gov/historicaldocuments/frus1950v06/d182>

Nations.”⁸⁹ The above statements were echoed by MacArthur on May 4, 1951, in response to a question raised by the Chairman of the U.S. Senate Foreign Relations Committee, Senator Richard Russell; MacArthur noted that “[t]he Allies turned over the administration and the trusteeship of Formosa to China[the ROC], just as Japan was turned over to us, and it is still in that status.”⁹⁰

Regarding the nature of the Cairo Declaration and Potsdam Proclamation that stated the intention of the Allies to return Formosa (Taiwan) to China, Winston Churchill, who took part in the Declaration, later emphatically said that “[i]t contained merely a statement of common purpose.”⁹¹ Professor Quincy Wright also asserted in 1955 that “the Japanese surrender [based on the Cairo and Potsdam Declarations] was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace.”⁹² Professor Frank Chiang argues that “[a]t the time when the two declarations were issued, Japan had not yet surrendered. The United States was winning the war, but had not yet defeated Japan. A general rule of law accepted by civilized nations is: one cannot give something that he does not have.”⁹³

In the Japanese Instrument of Surrender on September

⁸⁹ Harry S. Truman, *Statement by the President on the Situation in Korea* (June 27, 1950), <https://history.state.gov/historicaldocuments/frus1950v07/d119> (last visited May 13, 2023).

⁹⁰ CHIANG, *supra* note 37, at 226 referencing to *The General Declines to Say That the US Has Lost the Initiative in Foreign Policy Matters (Statement of General Douglas MacArthur before a congressional hearing)*, N. Y. TIMES, May 5, 1951, at A7.

⁹¹ 536 Parl Deb HC (5th ser.) (1955) at 901(emphasis added), cited in CHIANG, *supra* note 37, at 201.

⁹² Quincy Wright, *The Chinese Recognition Problem*, 49(3) AM. J. INT’L L. 320, 332 (1955).

⁹³ CHIANG, *supra* note 37, at 202.

2, 1945, Japan announced it would accept the provisions set forth in the Potsdam Declaration issued on July 26, yet it went on to “command all civil, military and naval officials to obey and enforce all proclamations, and orders and directives deemed by the Supreme Commander for the Allied Power[s] to be proper to effectuate this surrender.”⁹⁴

It could therefore be inferred that the disposition power of the territories conquered from Japan during the World War II was in the hands of the Allied Powers as a whole. As Judge McNair points out, “new States or territorial regimes have often been created by or pursuant to general treaties of peace.”⁹⁵ Moreover, according to Crawford, even though the terms of the treaty have been in part pre-arranged in binding form between the belligerents, the cession of territory at the end of a war must await the peace treaty.⁹⁶ Like Taiwan under the administration of China, South Korea was administered by the U.S. force from 1945 to 1948, both pending the peace treaty with Japan.

In Article 2 of the Treaty of Peace with Japan, that was signed by forty-nine countries, excluding China,⁹⁷ in San Francisco on September 8, 1951. It states that, Japan, (a) recognizing the independence of Korea, “renounces all right, title and claim to Korea, including the islands of

⁹⁴ *Surrender of Japan*, NAT'L DIET LIB., Sept. 2, 1945 <https://www.ndl.go.jp/constitution/e/etc/c05.html>.

⁹⁵ CRAWFORD, *supra* note 71, at 505.

⁹⁶ *Id.* at 208.

⁹⁷ As a result of the Chinese Civil War, by 1952, there was no government firmly controlling the whole Chinese territory to represent China. Therefore, neither the PRC government on Chinese mainland nor the ROC government in Taiwan was invited to attend the San Francisco Conference. For the rights and obligations of a failed state, and its relevance to China in this case, see Hsu, *infra* note 214, at 45-48, 291-323.

Quelpart, Port Hamilton and Dagelet; and (b) Japan renounces all right, title and claim to Formosa and the Pescadores.”⁹⁸ The intent of the Allied Powers regarding the disposition of Taiwan expressed during the war, was therefore overridden by this binding agreement. However, it is this article whereby Japan did not list a beneficiary of Formosa and the Pescadores that led to the controversy of the legal status of Taiwan today. Both the ROC government in exile and the PRC government on the mainland had long held the position that China had recovered the sovereignty of Taiwan by the Cairo Declaration, the Potsdam Declaration, as well as the Japanese Document of Surrender. The U.S. insisted that “the status of Taiwan remains undetermined,”⁹⁹ since no beneficiary was designated in the Peace Treaty with Japan.

Nevertheless, the characteristic of the finality of a territorial treaty is reflected in Article 62(a) of the Vienna Convention, which stipulates that the *rebus sic stantibus* rule¹⁰⁰ would not be invoked “if the treaty establishes a boundary.”¹⁰¹ From the International Law Commission’s Commentary, it is clear that such treaties should constitute

⁹⁸ Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 45.

⁹⁹ TKACIK, *supra* note 28, at 191-92 with reference to the 1970 State Department Hearings before the subcommittee on United States Security Agreements and Commitments Abroad of the Senate Committee on Foreign Relations, 91 Cong.; *John Tkacik on Taiwan: Taiwan’s “undetermined” status*, TAIPEI TIMES (May 13, 2009), <https://www.taipeitimes.com/News/editorials/archives/2009/05/13/2003443455> (last visited May 13, 2023).

¹⁰⁰ The concept of *rebus sic stantibus* stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question. See Giacomo Marchisio, *Rebus Sic Stantibus: A Comparative Analysis for International Arbitration*, July 11, 2012, available at SSRN: <http://dx.doi.org/10.2139/ssrn.2103641> (last visited May 13, 2023).

¹⁰¹ Vienna Convention on the Law of Treaties art. 62(2a), Jan. 27, 1980, 1155 U.N.T.S. 331.

an exception to the general rule permitting termination or suspension in case of fundamental change of circumstances, since otherwise the rule might become a source of dangerous frictions.¹⁰² Therefore, as the peace treaty with Japan is clearly a final document regarding the transference of Taiwan, it is essential to find out if any other legal ground or development could made this issue indisputable.

Importantly, in a declassified letter from Chiang Kai-shek to Chen-cheng, the Taiwan Garrison Commander, in November 1949, Chiang stated: “Before the Peace Treaty with Japan is concluded, the ROC government is just a mandatory power delegated by the Allied Power to take over Taiwan, how could it possible for us to take Taiwan as a steppingstone to counterattack the mainland?”¹⁰³ In July 1952, the ROC Foreign Minister George Yeh told the Legislative Yuan in Taipei that under the San Francisco Peace Treaty, “no provision was made for the return [of these islands] to China.” He continued:

Formosa and the Pescadores were formerly Chinese territories. As Japan has renounced her claim to Formosa and the Pescadores, only China has the right to take them over. In fact, we are controlling them now, and undoubtedly, they constitute a part of our territories. However, the delicate international situation makes it that they do not belong to us. Under

¹⁰² United Nations, 2 Y.B. OF THE INT'L L. COMM'N., 259, A/CN.4/SER.A/1966/Add.1 (1966), available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (last visited May 13, 2023).

¹⁰³ Zhong Lihua, *Guoshiguan Jiemi Jiangjieshi Ceng Yan Taiwan Buguo Wei Woguo Yi Tuoguan di* (Academia Historica Revealing Chiang Kai Shek's Acknowledgement of Taiwan's Legal Status as a Mandated Territory) LIBERTY TIMES (Jan. 4, 2017), <https://news.ltn.com.tw/news/politics/paper/1068163> (last visited May 13, 2023).

present circumstances, Japan has no right to transfer Formosa and the Pescadores to us; nor can we accept such a transfer from Japan even if she so wishes...¹⁰⁴

Regarding China's claim of reversing its lost territory after the war, it has been held that there is no principle of reversion to some earlier and superseded territorial formation.¹⁰⁵ The rejection of reversion in the context of territorial claims was stated in the Eritrea-Yemen Arbitration.¹⁰⁶ In 1945, even though it was generally believed that the Taiwan transference would be formalized by the Peace Treaty with Japan thereafter, this intention has no binding effect, as aforementioned. Even if it had binding effect, however, considering the abuse of right of

¹⁰⁴ TKACIK, *supra* note 28, at 182, including the Memorandum of the Department of State titled "the legal status of Taiwan" on July 13, 1971; 187-88 with reference to the enclosure 2, dispatch No. 31 from the American embassy in Taipei to the Department of State, July 23, 1952.

¹⁰⁵ CRAWFORD, *supra* note 71, at 644.

¹⁰⁶ The State of Eritrea and the Republic of Yemen both claimed sovereignty over a group of islands in the Red Sea and disagreed as to the location of their maritime boundary. The Arbitration Agreement, between the Parties dated October 3, 1996, required the Tribunal to rule on these two issues in separate stages. Yemen's arguments on historic and ancient title relates to the identity of historic Yemen and whether it comprised the islands in dispute, the existence of a doctrine of reversion recognized in international law, and the place of continuity within a concept of reversion of ancient title. In response to whether there is a doctrine of reversion in international law, the Tribunal stated that "It has not been established in these proceedings to the satisfaction of the Tribunal that the doctrine of reversion is part of international law.... No 'reversion' could possibly operate, since the chain of titles was necessarily interrupted and whatever previous merits may have existed to sustain such claim could hardly be invoked." In *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* 1998 XXII R.I.A.A. 211, ¶¶ 118-25, *see also* ¶¶ 114-44, 145-99, 441-50 (Oct. 9) https://legal.un.org/riaa/cases/vol_XXII/209-332.pdf.

the KMT government and the Chinese civil war after 1945, the Allied Power could either invoke the Article 62 (the clause of fundamental change of circumstances) of the Vienna Convention on the Law of the Treaties of 1969 (VCLT),¹⁰⁷ or abuse of right under Article 38 (the general principles of law recognized by civilized nations) of the Statute of the International Court of Justice¹⁰⁸ to reject the execution of the specific terms of the Cairo and Potsdam documents.

With regard to the exiling ROC government's title over Taiwan, among four types of territory acquisition, the territory unoccupied and unacquired—terra nullius could be acquired merely by an occupation sufficiently effective, accompanied by an intention to acquire sovereignty. Where territory was already occupied or acquired, cession, conquest and acquisitive prescription¹⁰⁹ were the appropriate modes. To define whether a territory is of no master (terra nullius), the civilization of the society is in question. In the International Court in the Western Sahara case, the Court noted that “the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius.”¹¹⁰ As a former colony of Japan which was administered by an established Japanese government, and even had a certain level of autonomy at

¹⁰⁷ Vienna Convention, *supra* note 101, at art. 62.

¹⁰⁸ Both of the two articles were already customary international law at the time.

¹⁰⁹ Acquisitive prescription deals with the acquiring of rights after a certain period of time. It stems from the Roman law concept of usucapio. Usucapio required an object susceptible of ownership, a title even if defective, good faith (bona fide), possession which included physical control and the intent to possess as owner, and an uninterrupted possession during a certain period of time. See Jan Wouters & Sten Verhoeven, *Prescription MPEPIL* (2008).

¹¹⁰ On Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 80 (Oct. 16).

the time, Taiwan clearly had a social and political organization.¹¹¹ For the acquisitive prescription, with the clarification by Japan and the U.S., in addition to the constant resistance of the Taiwanese people, the ROC government was neither in good faith nor had uninterruptedly occupied Taiwan for a long and peaceful period of time. Territory acquisition by occupying terra nullius and acquisitive prescription is therefore both rejected. Conquest is not lawful after the non-use of force became peremptory international law, and there was no cession between Japan and the ROC government.

Some might argue that at the time of 1952, the ROC government was still occupying the UN seat representing China, with a large number of countries still maintaining formal diplomatic relations with the ROC. Some of these countries even signed treaties with the ROC government, so that the statehood of ROC must be admitted and the territorial integrity of ROC must take priority over territory transference. To analyze the legitimacy of the claim that the territory of ROC had narrowed down to Taiwan and the other three small islands since 1949, it all comes down to evaluating the statehood of the ROC before it lost its UN seat in 1971, the treaties signed with it, as well as the recognitions granted to it.

B. Taiwan as a Self-Determination Unit

It is important to note that the ROC government's

¹¹¹ For the political development of Taiwan during the Japanese period, see generally RIGGER, *supra* note 18; see also Harry J. Lamley, *Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism*, in TAIWAN: A NEW HISTORY. 201, 241-42 (M. A. Rubinstein ed., 1999); KATUTUGU YOSHIDA, TAIWAN'S LONG ROAD TO DEMOCRACY: BITTER TASTE OF FREEDOM (Toshie Hwabu & Peter Hayes ed. and trans., 2009).

exile in Taiwan was substantially dependent on the support of the U.S., both economically and politically, which had neither formed an established government in Taiwan, nor firmly controlled the territories of Taiwan by 1952.¹¹² On the other hand, Taiwan's legal status as a self-determination unit must be taken into consideration. It has been observed that for a people to be entitled to exercise the right of self-determination, those territories must be established as separate political units, such as the communities created by colonial powers within the same borders. Where a self-determination unit is not already a State, its people have the right of self-determination to choose its own political organization.¹¹³ Nonetheless, in decolonization practice, it is argued that colonial enclaves that were an integral part of the state surrounding it are not treated as a self-determination unit, such as Hong Kong and Macau. As Rigo Sureda noted, on small colonial territories which are not enclaves but islands, the General Assembly recognizes a fully-fledged right of self-determination, while in the case of colonial enclaves, it appears to deny its people this right, and "favors a delimitation of the subject of self-determination based on the assumption that the territory concerned is already part of the state surrounding it."¹¹⁴

However, first occupied by the Dutch in 1624,¹¹⁵

¹¹² See generally GOLDSTEIN, *supra* note 31; see also CULLATHER, *supra* note 22.

¹¹³ See CRAWFORD, *supra* note 71, at 237.

¹¹⁴ A.R. SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 176-77 (1973).

¹¹⁵ Not to mention that the Austronesians had lived there for thousands of years before the arrival of the Dutch. See generally WILLIAM CAMPBELL, FORMOSA UNDER THE DUTCH (1967); TAIWAN: A NEW HISTORY (M.A. Rubinstein ed., 1999); TONIO ANDRADE, LOST COLONY: THE UNTOLD STORY OF CHINA'S FIRST GREAT VICTORY OVER THE WEST (2011).

Taiwan was never an integral part of China.¹¹⁶ Furthermore, it is important to note that by 1895, when Taiwan was ceded to Japan, China only controlled one-third of the territory of Taiwan.¹¹⁷ Thus, unlike Hong Kong and Macau,¹¹⁸ Taiwan was notably not a colonial enclave surrounded by China upon which China can claim historical right. Moreover, the Taiwanese people have already effectively exercised their right of self-determination through full-scale electoral democracy on a daily basis,¹¹⁹ which is both irreversible and irrevocable.¹²⁰

¹¹⁶ The islands administered by the Taiwanese government today include Matsu, Quemoy, Pescadores, Taiwan and several rocks in the South China Sea. The two tiny islands of Matsu and Quemoy alongside the Chinese southeast coast were occupied by the KMT military force at the end of the Chinese Civil War, and only the islands of Pescadores and Taiwan were covered by the 1952 Peace Treaty with Japan. While the main island of Taiwan was originally occupied by the Dutch in 1624, the Pescadores were not treated as affiliated islands of Taiwan until 1895, when it was ceded to Japan with Taiwan as a whole. It is this ambiguity that plays into China's hands. For a detailed historical analysis of the statehood of Taiwan, see Hsu, *infra* note 214, at 91-183.

¹¹⁷ See TAKEKOSHI, *supra* note 11, at 218.

¹¹⁸ CRAWFORD, *supra* note 71, at 637; In 1961, the General Assembly established The Special Committee of Twenty-Four (the "Special Committee") to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), which compiled a list of sixty-four dependent territories that it confirmed as Non-Self Governing under the guidelines set forth under the Charter and Resolution, Hong Kong was included on this list. With the adoption of Resolution 2908 (XXVII) on 2 November 1972, the General Assembly among other things approved the report of the Special Committee to remove Hong Kong and Macau from the list of Non-Self-Governing Territories as a result of a letter to the Special Committee from the People's Republic of China. See Patricia A. Dagati, *Hong Kong's lost right to self-determination: A denial of due process in the United Nations*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 153, 153-79 (1992).

¹¹⁹ See CHEN, *supra* note 34, at 325.

¹²⁰ For democracy as a continuing form of self-determination and its

Self-determination has developed into a right *erga omnes*, which was supported by the ICJ in the matters of East Timor¹²¹ and the Palestinian Wall Advisory Opinion,¹²² the central tenet of which is that legitimacy of rule or of law has to be based on the consent of the governed. In this sense, an entity formed without the consent of the people governed by it is hardly qualified as a state. Though self-determination as a constitutive condition for statehood is a new development in international law, it has been observed that “interpreted rule is not a new rule and can therefore be retroactive.”¹²³ After all, it is long settled that a people “under the rule of another” is not a State.¹²⁴ The Cairo and Potsdam Declarations were made without consulting with the Taiwanese people, who only accepted the KMT government as their ruler after their society had been bled dry in the extreme violence of the 228 Atrocity. Even though there was some kind of democracy on the local

limitations, *see, e.g.*, T.M. Franck, *The Emerging Right to Democratic Governance*, 84 AM. J. INT'L L. 46 (1992); James Crawford, *Democracy in International Law*, 64 BRIT. Y. INT'L L. 113 (1993); James Crawford & Susan Marks, *The Global Democracy Deficit: An Essay in International Law and its Limits.*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 73 (Archibugi, Held, and Köhler eds.,1998); GREGORY H. FOX & BRAD R. ROTH, *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (2000); SUSAN MARKS & ANDREW CLAPHAM, *INTERNATIONAL HUMAN RIGHTS LEXICON*, 61–70 (2005), cited in CRAWFORD, *supra* note 71, at 126; The case of Hong Kong is indeed a vivid example of why democracy is not able to live independently of sovereignty.

¹²¹ Case Concerning East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30).

¹²² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 183, ¶ 118 (July 9).

¹²³ JOÃO GRANDINO BODAS, THE DOCTRINE OF NON-RETROACTIVITY OF INTERNATIONAL TREATIES 346-67 (1973) <https://core.ac.uk/download/pdf/268355415.pdf> (last visited May 13, 2023).

¹²⁴ *See* VATTEL, *infra* note 222.

level, the denial of Taiwanese people's equal participation in the central government during the authoritarian period should not prevent Taiwan from being a non-self-governing territory under Article 73 of the Charter.¹²⁵ At any rate, it has been argued that the fact that a territory is not listed and reported on is not decisive for its legal status as a non-self-governing territory.¹²⁶ In the case of Southern Rhodesia, the General Assembly argues about the illegitimacy of a constitution imposed by a minority regime, and took the view that the degree of internal autonomy possessed by Southern Rhodesia in British constitutional law before 1965 did not prevent it from being non-self-governing.¹²⁷ The reason was that

¹²⁵ For the denial of Taiwanese people's equal participation in the government, *see* CHEN, *supra* note 34.

¹²⁶ *See* CRAWFORD, *supra* note 71, at 127.

¹²⁷ In the GA Res. 1747 adopted in June 28, 1962, in response to the report on the question of Southern Rhodesia submitted by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to colonial Countries and Peoples, the General Assembly confirmed that "territory of Southern Rhodesia is a Non-Self-Governing Territory within the meaning of Chapter XI of the Charter of the United Nations," "considering that the vast majority of the people of Southern Rhodesia have rejected the Constitution of 6 December 1961," the General Assembly deplores the Administrating Power's "denial of equal political rights and liberties to the vast majority of the people of Southern Rhodesia, and requests the Administering Authority to "undertake urgently the convening of a constitutional conference, in which there shall be full participation of representatives of all political parties, for the purpose of formulating a constitution for Southern Rhodesia, in place of the Constitution of 6 December 1961, which would ensure the rights of the majority of the people, on the basis of 'one man, one vote,' in conformity with the principles of the Charter of the United Nations and the Declaration on the granting of independence to colonial countries and peoples, embodied in General Assembly resolution 1514 (XV)." G.A. Res. 1747 (June 28, 1962). Furthermore, in the G.A. Res. 2022 adopted in November 5, 1965, the General Assembly "calls upon all States to refrain from rendering any assistance whatsoever to the minority régime in Southern Rhodesia" .

Britain's effective control in Rhodesia was, on Fawcett's account: "[B]ased upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage."¹²⁸ Notably, there was no reason not to treat Taiwan as such.

However, due to the Cold War structure, Taiwan was neither put under the UN trusteeship as the U.S. originally planned,¹²⁹ nor listed as a non-self-governing territory under Article 73(e) of the Charter.¹³⁰ Instead, the ROC government in exile, consistently abusing the human rights of the Taiwanese people, not only maintained its seat as a Chinese representative government in the UN,

It requests that "the administering Power effect immediately... the removal of all restrictions on African political activity and the establishment of full democratic freedom and equality of political rights." It "[r]equests once more the Government of the United Kingdom to suspend the Constitution of 1961 and to call immediately a constitutional conference in which representatives of all political parties will take part, with a view to making new constitutional arrangements on the basis of universal adult suffrage and to fixing the earliest possible date for independence" and "Requests all States to render moral and material help to the people of Zimbabwe in their struggle for freedom and independence." Question of Southern Rhodesia, G.A. Res. 2022 (Nov. 5, 1965).

¹²⁸ CRAWFORD, *supra* note 71, at 611 referencing to J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y. INTEL. L. 103, 112 (1966).

¹²⁹ CULLATHER, *supra* note 22, at 11; *see also* U.S. Dep't of State, *supra* note 88.

¹³⁰ Though never formally declared a non-self-governing territory, the geographic separation of Bangladesh from the administering State, its ethnic distinctness and the arbitrary subordination of the territory to Pakistani rule made it in effect a non-self-governing territory. For the category of self-determination units, that is, entities part of a metropolitan State but that have been governed in such a way as to make them in effect non-self-governing territories—in other terms, territories subject to *carence de souveraineté* (lack of sovereignty), *see* CRAWFORD, *supra* note 71, at 126, 145.

but also received a large amount of financial aid to support its unpopular rule on Taiwan.

With regard to the Chinese UN representation, at the end of World War II in 1945, China joined the United Nations as an original member under the name “The Republic of China,” when Taiwan was still an official territory of Japan. Since the KMT government was defeated in the Chinese Civil war and took exile in Taiwan in 1949, the PRC established by the Communist Party attempted to replace the ROC in the United Nations for twenty-two years. It claimed that it was entitled to represent an existing member, China, in the United Nations on the ground that it was China’s sole legitimate government.¹³¹ In the cold war period following the Korean War, under the influence of the U.S., no proposal to replace the ROC government with the PRC government had received the required two-thirds majority vote, regardless of the fact that the KMT government’s exile on the island of Taiwan administered territories only accounting for a ratio of 1:260 when compared to the area of China.

However, it is important to bear in mind that “law must be based on facts-insofar as such facts are not in themselves contrary to law.”¹³² In respect of the purely political act of recognition disregarding reality, it is observed that the constitutive school of recognition should not be applied to this category. According to Kelsen, “the political act of recognition, since it has no legal effect whatsoever, it is not constitutive for the legal existence of the recognized state or government.”¹³³ In light of the

¹³¹ See CHIANG, *supra* note 37, at 147.

¹³² Lauterpacht, *supra* note 72, at 390.

¹³³ Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605 (1941).

political consideration and UN manipulation during the cold war period, the retainment of the UN membership of the ROC could not be taken as conclusive evidence to prove its statehood. Besides Taiwan and Pescadores, even if the KMT government had legitimate title over the two small islands off the Chinese coastline-Quemoy and Matsu, given that there was no government on these islands being able to conduct foreign relations independently, the claim that the territory of the ROC state had been narrowed down to Quemoy and Matsu is also without any foundation. Moreover, the treaties signed between the KMT government and other states after 1949, must be closely analyzed to explore the real relationship between the ROC government in exile and Taiwan.

In the early 1950s, the U.S pressured Japan to recognize the government of ROC led by Chiang Kai-shek as the legitimate government of the whole of China, which signed a peace treaty with Taipei as proof of this close tie. In the Treaty of Taipei, signed in 1952, Article 10 states that:

for the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).¹³⁴

Some invoke the Taiwanese people's nationality of the ROC as evidence to prove the ROC's sovereignty over

¹³⁴ Treaty of Peace art. X, China-Japan, Apr. 28, 1952.

Taiwan.¹³⁵ Nevertheless, international practice shows that the grant of nationality is a matter that only States can perform by their domestic law, which does not necessarily have an international effect.¹³⁶ It has also been held that “nationality is dependent upon statehood, not vice versa.”¹³⁷ For instance, people of “A” Mandates, which were not States, were granted nationality of its Mandatory (administrating power).¹³⁸ Moreover, the imposition of the national identity by mandatory power on the inhabitants of the mandated territories is not inconsistent with the mandate arrangement. For example, in French Togoland, the natives could acquire French nationality, which was also the case in Ruanda-Urundi in South-West Africa, in Western Samoa, and in the Japanese Islands.¹³⁹

This is also true regarding the ROC government administrating power over Taiwan. According to the United Nations Treaty Series Volume 138, the Japanese plenipotentiary, Isao Kawada, acknowledged that the

¹³⁵ During the interpellations of the Sino-Japanese Peace Treaty in the Legislative Yuan, when the Foreign Minister Yeh of the Republic of China was asked “What is the status of Formosa and the Pescadores?” He replied among other things that “In the Sino-Japanese peace treaty, we have made provisions to signify that residents, including juristic persons of Formosa and the Pescadores bear Chinese nationality, and this provision may serve to mend any future gaps when Formosa and the Pescadores are restored to us.” See TKACIK, *supra* note 28, at 187-88, including the Memorandum of the Department of State titled “the legal status of Taiwan” on July 13, 1971 with reference to the Enclosure 2, Dispatch No. 31 from the American embassy in Taipei to the U.S. Dep’t of State, July 23, 1952.

¹³⁶ *Nottebohm Case (Liech. v. Guat.)*, Judgment, 4, 20 (Apr. 6, 1955), <https://www.icj-cij.org/public/files/case-related/18/018-19550406-JU-D-01-00-EN.pdf> (last visited Feb. 22, 2022).

¹³⁷ CRAWFORD, *supra* note 71, at 52.

¹³⁸ *Id.* at 43.

¹³⁹ James C. Hales, *Some Legal Aspects of the Mandate System: Sovereignty: Nationality: Termination and Transfer*, 23 TRANSACTIONS OF THE GROTIUS SOC’Y 85, 110 (1937).

Treaty of Peace shall be applicable to all the territories which are now, or which may hereafter be, under the control of the Republic of China Government. Nevertheless, through the Exchange of Notes No. 1. Regarding the effect of the Exchange of Notes No. 1, in 1964, Japanese Minister for Foreign Affairs Masayoshi Ōhira explained in the House of Councilors:

With regard to the Republic of China, the provisions of this treaty are “applicable to all territories now existing or hereafter entered” under the rule or control of the Government of the Republic of China. As indicated, these provisions are premised on the fact that the National Government administers these areas, and do not imply that they have territorial rights in these areas, is clear. We understand that the use of the word “control” is intended to express this purpose.¹⁴⁰

After the Geneva Conference, intended to settle outstanding issues resulting from the Korean War and the First Indochina War in July 1954, Beijing began a campaign to “liberate Taiwan.”¹⁴¹ By September, the

¹⁴⁰ The 46th House of Councilors Budget Committee No. 3, (Feb. 12, 1964), <https://kokkai.ndl.go.jp/#/detail?minId=104615261X00319640212> (in Japanese) (last visited May 13, 2023).

¹⁴¹ The Geneva Conference had failed to unite Korea, but had divided Vietnam. With regard to the Korean war, four substantive points at issue between the Communists and the Sixteen: 1) withdrawal of foreign troops, 2) elections, 3) proportionality between North and South, and 4) the role of the UN. The “Communists” refers to the Soviet Union, China, and North Korea, the other side being “The Sixteen,” which included the United States, South Korea, and the fourteen Unified Command countries that were there. The Communists demanded that the South Korea and North Korea be treated equally, at a time when the United States and the United Nations still considered only the Nationalist Chinese government of Chiang Kai-shek and Syngman Rhee’s (president from 1948 to 1960) Republic of Korea to be legitimate. It also demanded a complete withdrawal of foreign forces and North and

offshore island group of Quemoy was under artillery attack. The crisis spurred the United States to sign a Mutual Defense Treaty¹⁴² in December 1954 with the ROC government in exile, whereby the United States committed itself to the defense of Taiwan (Formosa) and the Pescadores (Penghu).¹⁴³ Article VI specifically states that “for the purposes of Articles II and V, the terms ‘territorial’ and ‘territories’ shall mean in respect of the Republic of China, Taiwan and the Pescadores.” However, Chiang Kai-shek’s assertion that mainland recovery was a domestic issue was not covered by the treaty.¹⁴⁴

To clarify the ambiguous language in the Mutual Defense Treaty, in February 1955, Secretary of State John Foster Dulles said that the Eisenhower Administration “does not regard the sovereignty of Formosa and the Pescadores as settled and the [Mutual Defense Treaty] would not give General Chiang sovereignty over these islands.”¹⁴⁵ The US Senate Foreign Relations Committee Chairman, Senator Walter F. George, commented that the committee’s understanding of the treaty was that “Senate

South Korea settle their differences by mutual agreement. The Sixteen viewed this as simply a prelude to a North Korean takeover of the South by force, and stood firm on a role for the UN in supervising withdrawal of forces, elections, and unification, now under the auspices of UNCURK (The United Nations Commission for the Unification and Rehabilitation of Korea (UNCURK) was established in 1951 and was disbanded in 1973). As no compromise could be made between the two sides, on June 15, 1954, the Korean phase of the Geneva Conference ended in shambles. See Mark Tokola, *The 1954 Geneva Conference on Korea: From Armistice to Stalemate*, THE ASAN FORUM (Feb. 14, 2019), <https://theasanforum.org/9324-2/> (last visited May 13, 2023).

¹⁴² Mutual Defense Treaty, U.S.-China, Dec. 2, 1954, 6 U.S.T. 443.

¹⁴³ *Id.*

¹⁴⁴ GOLDSTEIN, *supra* note 31, at 8.

¹⁴⁵ James Reston, *New Formosa Bid*, N.Y. TIMES (Feb. 7, 1955), at A1, <https://www.nytimes.com/1955/02/07/archives/new-formosa-bid-aggression-watch-plan-will-go-to-assembly-to-avoid.html?searchResultPosition=1> (last visited May 13, 2023).

approval of the Treaty would neither strengthen nor weaken the Chiang (the ROC) Government's claim to sovereignty over Formosa, the international status of which is yet to be decided."¹⁴⁶ It could therefore be inferred that the ROC government's exile in Taiwan, was treated by the U.S. as an administrative power instead of the sovereign of Taiwan.

According to the true intentions conveyed by the signatories of two treaties mentioned above, the ROC government in exile should not be considered as the sovereign of Taiwan. To explore the true relationship between the ROC government in exile and Taiwan, the legal status of the mandated and trust territories might shed some light. It has been argued that the concept of sovereignty is simply inapplicable to mandated and trust territories.¹⁴⁷ As Lord McNair states in his separate opinion in the Status of South West Africa case:

The Mandates System (and the "corresponding principles" of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to the new system. Sovereignty over a Mandated Territory is in abeyance; if, and when the inhabitants of the Territory obtain recognition as an independent State ... sovereignty will revive and vest in the

¹⁴⁶ William S. White, *Senate Approves Formosa Treaty*, N.Y. TIMES (Feb. 10, 1955), at A1, <https://www.nytimes.com/1955/02/10/archives/senate-approves-formosa-treaty-vote-is-646-reservations-by-morse-to.html> (last visited May 13, 2023).

¹⁴⁷ CRAWFORD, *supra* note 71, at 571.

new State ... Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate ...¹⁴⁸

Hence, establishing a Mandate (or Trusteeship) over a territory did not constitute cession of that territory to the Mandatory.¹⁴⁹ The U.S.,¹⁵⁰ Britain,¹⁵¹ and Chiang Kai-shek government¹⁵² all acknowledged that the KMT government was delegated by the Allied Powers to administrate Taiwan.¹⁵³ Even though there was no written agreement, the delegation relationship was nothing but the truth. The only difference was that the human rights of the Taiwanese people had never been protected as the people of mandated and trusteeship territories, but the legal principles appropriated to interpret such relationships should not be denied either.

III. IDENTITY OF ROC AND TAIWAN

Although Taiwan's appearance on the international stage has been suppressed, the recognition granted by other states during this period did not support the idea of "equating Republic of China to Taiwan." In September 1971, when the General Assembly convened, members who spoke in opposition to the draft resolution presented by the U.S. and other members calling for the seating of

¹⁴⁸ See International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11).

¹⁴⁹ *Id.*

¹⁵⁰ For the U.S. government's position on this issue, see *supra* notes 89-90.

¹⁵¹ For the British government's position, see *supra* notes 86-87.

¹⁵² Zhong, *supra* note 103.

both the People's Republic of China and the Republic of China made the point that:

...the precise issue of the restoration of the lawful rights of the People's Republic of China in the United Nations did not imply a question of admission or expulsion. Rather, the issue was one of credentials. The vacating of the seat of China by the Chiang Kai-shek régime was a legal, logical consequence of the restoration of the lawful rights of the People's Republic of China. Moreover, Taiwan had never been a Member State of the United Nations. There was only one Chinese State that was entitled to a seat at the United Nations. To have an additional seat would require as a prior condition the creation of a second Chinese State which would have to apply for membership under the Charter.¹⁵⁴

As a result, Albania's proposed resolution to replace the ROC with the PRC was carried by a large margin. Resolution No. 2758 of the General Assembly stated:

The General Assembly ... decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.¹⁵⁵

Notably, the UN General Assembly used the term "representatives of Chiang Kai-shek" instead of the "ROC government," indicating that the organization occupying

¹⁵⁴ 1971 U.N.Y.B. 131, <https://www.un-ilibrary.org/content/books/9789210601986/read> (last visited May 13, 2023).

¹⁵⁵ G.A. Res. 2758 (XXVI) (Oct. 25, 1971).

China's UN seat at the time was neither a representative government of China, nor a Chinese government in exile expelled by foreign powers, but rather a one-man dictatorship regime comprised of some Chinese officials following it to Taiwan. During the debate in the General Assembly, the spokesman of the ROC said that the present government was the very same that participated in the founding of the United Nations.¹⁵⁶ There had been no break in the continuity of its leadership, institutions, or policy. Its legal status had not in any way changed, even though the communists had been in occupation of the Chinese mainland since 1949.¹⁵⁷ This is the position held by the KMT government after it took exile in Taiwan. It is clear that the UN manipulation during the Cold War period muddied the waters. To clarify the tricky relationship between the ROC and the PRC, the theory of identity/continuity of state must be introduced.

In the eyes of Marek, the identity/continuity of a State is the problem of its very existence. To examine whether one State is identical with the one proceeding, the relevant consideration is to ask whether one State has died and another was born in its place.¹⁵⁸ It has been firmly established that neither the change of government nor change in the internal legal order of a given state, even by revolution or coup d'état, affects the identity and continuity of the state.¹⁵⁹ Crawford points out that "[t]here is a strong presumption that the State continues, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there

¹⁵⁶ 1971 U.N.Y.B., *supra* note 154, at 130.

¹⁵⁷ *Id.*

¹⁵⁸ KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 1 (2d ed. 1968).

¹⁵⁹ CRAWFORD, *supra* note 71, at 678-80.

is no, or no effective, government.”¹⁶⁰

With regard to the loss of territory, Hall found that, “[t]he identity of the state therefore is considered to subsist as long as part of the territory which can be recognized as the essential portion through the preservation of the capital or of the historical nucleus, remains either as an independent residuum or as the core of an enlarged organization.”¹⁶¹ By the same token, Marek observed that territorial changes have no effect on the identity of States, as it is not territory which determines that identity. Nevertheless, she admitted that state identity would be lost if the territorial loss is “total or very considerable,”¹⁶² whereas internal changes, whether brought about by constitutional means or not,¹⁶³ or belligerent occupation of a state’s territory will not affect a state’s identity.¹⁶⁴ According to Crawford, “[...] as long as an identified polity exists with respect to a significant part of a given territory and people,”¹⁶⁵ the irreducible core of the state remains. Its constitutional system need not be the same, as long as it is independent and proclaims its continuity.¹⁶⁶

Accordingly, in the case of the USSR and Russia, the “core” State of Russia, occupying three-fourths of the territories of the USSR, is able to continue the legal personality of the USSR and retain its seat in the UN.¹⁶⁷ In contrast, the Federal Republic of Yugoslavia’s claim to

¹⁶⁰ *Id.* at 34.

¹⁶¹ W. E. HALL, A TREATISE ON INTERNATIONAL LAW 23 (1880).

¹⁶² MAREK, *supra* note 158, at 15-24.

¹⁶³ *Id.* at 24-73.

¹⁶⁴ *Id.* at 73-128.

¹⁶⁵ B. STERN, RECUEIL DES COURS 80 (1996), cited in CRAWFORD, *supra* note 71, at 671.

¹⁶⁶ CRAWFORD, *supra* note 71, at 671.

¹⁶⁷ *Id.* at 677-78.

continue the international legal personality of the SFRY was rejected by the UN Security Council, which in 1992 declared that:

[T]he state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist [...] [The Security Council] [c]onsiders that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly [...]¹⁶⁸

In light of the situations where there is no real continuity or rather the concept of state identity is a legal fiction to support a political claim,¹⁶⁹ Cansacchi based state continuity on the material element of the people, which constitutes the international personality of the state, notwithstanding changes in the legal order or government of the state.¹⁷⁰

Following the above theories of state identity/continuity and state practices, the ROC government in exile is clearly unable to claim identity/continuity of the Chinese state entering the United Nations as an original member in 1945. The principle of

¹⁶⁸ S.C. Res. 777, ¶1 (Sept. 19, 1992).

¹⁶⁹ Anne Østrup, *Conceptions of State Identity and Continuity in Contemporary International Legal Scholarship*, 6 EUR. SOC. INT'L L.1, 17 (2016) referencing to Giorgio Cansacchi, *Identité et continuité des sujets internationaux (Identity and continuity of international subjects)*, in RECUEIL DES COURS, 130, 2, 1-94 (1970).

¹⁷⁰ *See id.*

the retroactivity of recognition assumes that the identity/continuity of the state of China had been replaced by PRC retroactive to PRC's establishing date on October 1, 1949. As Brownlie observes, once statehood is firmly established, it is justifiable to assume the retroactive validation of the legal order during a period prior to general recognition, when some degree of effective government existed. Therefore, for some legal purposes at least, the principle of effectiveness dictates acceptance of continuity before and after statehood is firmly established.¹⁷¹

Notably, having lost the material elements of the Chinese people and Chinese territory, after 1949, the Republic of China is nothing but a fiction.

IV. RECOGNITION REGARDING ROC AND TAIWAN

Under the administration of the severely unrepresentative ROC government, the Taiwanese people could exert little influence in the government's foreign policy decision making. Considering that "a government is only recognized for what it claims to be,"¹⁷² the government of Taiwan, operating under the name of the Republic of China, appears to be unacceptable in the eyes of the international community. Just as the letter came from International Amateur Athletic Federation (IAAF) honorary treasurer Fred Holder to the secretary-general of the ROC Track and Field Association, Chi Cheng, in 1978, points out:

...if your association can accept the change of name to Taiwan, there will be widespread

¹⁷¹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 77 (6th ed., 2003)

¹⁷² O'Connell, *supra* note 70, at 415.

support for your association as the only effective governing body in the ‘territory’ of Taiwan ... A refusal to change is likely to be interpreted as a refusal to accept a limitation of your jurisdiction to the island of Taiwan. Many member federations of the IAAF find it difficult to understand the reluctance to affiliate as Taiwan, when the name Taiwan is so widely used in promoting and identifying trade products. Under the name Taiwan there can be no doubt or confusion, and you have a clear right to continue in IAAF membership.¹⁷³

However, since the KMT’s predominance and legitimacy in Taiwan was entirely dependent on its claim to represent China, this recommendation was unsurprisingly rejected by Chiang’s regime. Instead, the KMT government finally formulated the name “Chinese Taipei,”¹⁷⁴ which still appears as the official name of Taiwan in the Olympic Games up until today.

As a matter of fact, when the ROC was expelled from the UN, even some high-ranking Chinese diplomatic officials saw the imperative need to separate Taiwan’s identity from the ROC. A declassified telegram from the embassy in the Republic of China to the U.S. Department of State recorded that, in late 1971, in an endeavor to counter PRC’s drive to isolate Taiwan internationally, the Vice Foreign Minister, Yang Hsi-kun, advocated for the establishment of the Chinese Republic of Taiwan by giving up all mainland claims and pretensions. He was supported by the retired Foreign Minister, George K. C. Yeh, and future premier, Y. S. Tsiang. Yang specifically

¹⁷³ Catherine K. Lin, *How “Chinese Taipei” came about*, TAIPEI TIMES (Aug. 5, 2008), http://www.taipeitimes.com/News/editorials/archives/2008/08/05/2003419446?fb_comment_id=10150579271156738_10155681518986738 (last visited May 13, 2023).

¹⁷⁴ *Id.*

emphasized that the term “Chinese” did not have any political connotation but was used merely as a generic term stemming from the Chinese ethnic origin of the populace on Taiwan. He advised Chiang Kai-shek to use his emergency powers to set aside the Constitution and dissolve all of the parliamentary type bodies, and set up a new unicameral provisional representative body to be composed of two-thirds Taiwanese and one-third Mainlanders. Yet Chiang Kai-shek’s wife, Madame Chiang,¹⁷⁵ pressured him not to budge an inch from the

¹⁷⁵ Madame Chiang (or Soong Mei-ling), was the most famous member of one of modern China’s most remarkable families; she was also the younger sister of Sun Yat-sen’s widow, Soong Qing-ling. Madame Chiang’s elder brother, T. V. Soong, often called Nationalist China’s financial wizard, served at various times as finance minister, acting prime minister and foreign minister, where his primary role was raising money from America. It became clear in later years that the Chiang family had pocketed hundreds of millions of dollars of American aid intended for the war. After Sun Yat-sen’s death in 1925, in 1927, Chiang shocked his Soviet backers by carrying out a massacre of leftists in Shanghai. Edgar Snow, the American journalist, estimated that Chiang’s forces had executed more than 5,000 people. The massacre caused a permanent rent in the Soong family. Soong Qing-ling, as Sun’s widow, led a faction of Nationalists who voted to expel Chiang from all his posts. T. V. Soong resigned as finance minister, though he was later persuaded to resume his alliance with Chiang. When the vanquished Nationalists retreated to Taiwan in 1949, Soong Qing-ling stayed behind. The Communist Party leadership called her the only true patriot in the Soong family, and appointed her honorary chairman of the People’s Republic in 1980, a year before her death...President Franklin D. Roosevelt and other leaders became disillusioned with Madame Chiang and her husband’s despotic and corrupt practices. “She can talk beautifully about democracy,” Mrs. Roosevelt said later. “But she does not know how to live democracy.” The governing Nationalists received considerable American aid, but American officials in China warned of vast amounts of graft among Nationalists. More than \$3 billion was appropriated to China during the war, and most of it was transmitted through T. V. Soong, who as China’s foreign minister was based in Washington. “They’re thieves, every damn one of them,” Truman said later, referring to Nationalist leaders. “They stole \$750 million out of the billions that we sent to Chiang. They stole it, and it’s invested in real estate down in São

old claims, pretensions, or “return to the Mainland” slogans. Yang believed she still wielded considerable influence over the President, and Madame Chiang was in return pressured by her family members. Yang “spoke contemptuously of the Soong–Kung family group¹⁷⁶ as fanatically advocating a die-hard line, although most of them were among the first to retreat to safety when the Communists moved.”¹⁷⁷ “President Chiang is not likely to move without the application of a powerful persuasive effort by the US Government,”¹⁷⁸ Yang said. Lei Chen, a Mainland-Chinese liberalist and a former high-ranking KMT official, also advocated for the establishment of a new state.¹⁷⁹ Unsurprisingly, however, their advice

Paolo and some right here in New York.” In Seth Faison, *Madame Chiang Kai-shek, a Power in Husband's China and Abroad, Dies at 105*, N.Y. TIMES (Oct. 25, 2003), <https://www.nytimes.com/2003/10/25/world/madame-chiang-kai-shek-a-power-in-husband-s-china-and-abroad-dies-at-105.html> (last visited May 13, 2023).

¹⁷⁶ The Soong–Kung family group was the richest family in the early 20th century Republic of China. H. H. Kung was an American-educated Minister of Finance in the turbulent China of the 1930s. He was the husband of Madame Chiang’s elder sister–Soong Ai-ling. As the Japanese invaded, the economy in China progressively worsened. With little regard for the law, Kung proved adept at raising revenue by forcing Chinese to pay taxes, by bank fraud, by manipulating the currency, always with something on the side for him and his family. As the war worsened, he extracted aid dollars from the American taxpayer. When the Communists took power Kung reinvented himself as a wealthy Wall Street banker. ALAN BOLLARD, *ECONOMISTS AT WAR: HOW A HANDFUL OF ECONOMISTS HELPED WIN AND LOSE THE WORLD WARS 7* (2019).

¹⁷⁷ FOREIGN RELS. OF THE U.S., 1969–1976, VOLUME XVII, CHINA, 1969–1972, available at <https://history.state.gov/historicaldocuments/frus1969-76v17/d174>.

¹⁷⁸ *Id.*

¹⁷⁹ Lei Chen was also the co-founder and publisher of “Free China,” a magazine founded by a group of intellectuals in 1949 in China as a pro-democracy, anti-communist publication under Chiang’s support. After the organizers retreated to Taiwan with the KMT, the magazine gradually turned from bashing communists to criticizing the lack of

received no response. The vested interest of certain party or people in maintaining the claim of the Republic of China is not hard to imagine, despite that it would be disastrous for the Taiwanese people, as a whole, in the decades since. As the vested interest increases over the years,¹⁸⁰ this footnote of history could shed some light on why it becomes more and more difficult for the Taiwanese

democracy and freedom in Martial Law era Taiwan, especially with its call for opposition parties in a time of one-party rule. Lei Chen was expelled from the KMT in 1954 for running a reader-contributed editorial that criticized political interference in the education system. In May 1960, "Free China" published a commentary stressing the need for a "strong opposition party." A few weeks later, Lei Chen and other non-KMT reformers — notable for featuring an alliance between mainlanders and ethnic Taiwanese — met to form a new party on September 4, Lei Chen and three others were arrested and charged with sedition. On Oct. 8, Chiang issued an order that Lei's sentence should not be less than 10 years, and that no appeal should be allowed. Several hours later, Lei was sentenced to exactly 10 years in prison by a military court. "Free China" was shut down, and Lei's collaborators attempted to push forward with the new party to no avail. Taiwan wouldn't see the successful establishment of an opposition party until the 1980s. Upon his release in 1970, Lei immediately resumed his previous mission, presenting 10 political and military reforms to the presidential office and Executive Yuan, including renaming the country the Democratic Republic of Chinese Taiwan. He reportedly received no response. He died in 1979. *See* Han Cheung, *The opposition party that never happened*, TAIPEI TIMES (Oct. 4, 2015), <https://www.taipeitimes.com/News/feat/archives/2015/10/04/2003629214>.

¹⁸⁰ In the past, the net value of the KMT's assets was frequently estimated to be about NT\$100 billion (about US\$ 3.3 billion). Most of them were stolen or seized from the public during the early years of its one-party rule. In 2016, when the DPP for the first time controlled the "congress," and was under public pressure to confiscate the KMT's assets, the party said that no more than NT\$16 billion (about US\$0.52 billion) was left. *See KMT must own up on party asset*, TAIPEI TIMES (Mar. 16, 2016), <https://www.taipeitimes.com/News/editorials/archives/2016/03/16/2003641671>; For the ROC's military deep state, *see* Eric Setzekorn, *Military reform in Taiwan: the Lafayette scandal*, *National Defense Law and All-Volunteer Force*, 21 AM. J. OF CHINESE STUD. 7-19 (2014).

people to get rid of the “Republic of China” shackle.¹⁸¹

On the other hand, since the PRC government replaced the ROC’s UN seat in 1971, the PRC had launched a “One-China Principle,” the central element of which states “there is only one China and that is the People’s Republic of China, and Taiwan is a part of China.” However, as Pasha L. Hsieh pointed out in 2009, while most countries do, indeed, recognize the PRC as the legal government of China, “they almost uniformly disagree with the PRC’s territorial claim over Taiwan.”¹⁸² He then noted that individual states have added important qualifiers—they may “take note of,” “acknowledge,” or “understand and respect” the PRC’s position that Taiwan is part of China, but they do not share that position. A recent research report found out that only fifty-one countries now maintain positions on “one China” that substantively approach the PRC’s “one China principle,” rather than the 181 countries that Beijing claims.¹⁸³

¹⁸¹ Today, this shackle is even more tightened by the mental habits of the Taiwanese people, in addition to the threat and infiltration of the PRC. For how the Taiwanese people are still deadly locked up in the KMT’s ROC rhetoric, see *infra* note 235.

¹⁸² Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 DIE FRIEDENS-WARTE 59, 63 (2009).

¹⁸³ Chong Ja Ian, *The Many “One Chinas”*: *Multiple Approaches to Taiwan and China*, CARNEGIE ENDOWMENT (Feb. 9, 2023), <https://carnegieendowment.org/2023/02/09/many-one-chinas-multiple-approaches-to-taiwan-and-china-pub-89003> (last visited May 13, 2023). Nonetheless, even the countries that accept the PRC’s “One China Principle” ambiguously use the word “Chinese Territory” to leave some room for interpretation, in contrast to the PRC’s claim that “Taiwan is a part of China.” For instance, when Honduras switched its recognition to the PRC on March 26, 2023, it stated that “The government of the Republic of Honduras recognizes the existence of one China in the world and that the government of the People’s Republic of China represents China as a whole...Taiwan is an inalienable part of Chinese territory and as of today, the government

As a matter of fact, the state practices that recognized “One China” were not as undisputable and consistent as the PRC claimed. While most of the western powers were pressured by the PRC to abandon Taiwan during the 1969-1970 negotiations, no comparable pressure appears to have been exerted on Turkey, Austria, Mexico, or Equatorial Guinea, all of which recognized the PRC in 1971 with no mention of Taiwan.¹⁸⁴ Such disparity was probably due to the weight of the western states’ voices in shaping the international order, as well as China’s desperation to align as many third-world states as possible to break the blockade of the western league in the Cold War structure. Given the significance of Taiwan in maintaining the free trade and navigation in the Asia Pacific region, which is essential to the economic and geopolitical interest of the western powers, the following discussion will be focused on the positions of the Group of Seven (G7) members (Canada, France, Germany, Italy, Japan, United Kingdom and United States). The economic volume of the G7 roughly accounted for over eighty

of Honduras has informed Taiwan about the rupture of diplomatic relations.” At the same time, a statement from China’s Foreign Ministry read: “There is but one China in the world and the government of the People’s Republic of China is the sole legal government representing the whole of China. Taiwan is an inalienable part of China’s territory,” it added. *See* Cheung, *supra* note 10. This pattern of discrepancy in recognition can be found in the recognition of many other countries that accept China’s “One China Principle.” For the recognition by Nicaragua, *see* BBC NEWS, *supra* note 1; for recognition by France, *see* Cohen, *infra* note 193.

¹⁸⁴ Der-yuan Wu, Institutional Development and Adaptability: Canada, Taiwan and the Social construction of “One China” 245 (2001) (Ph.D dissertation, University of Carleton), *available at* https://curve.carleton.ca/system/files/etd/e4ac546a-7d13-4852-be2b-3e7db839f89c/etd_pdf/76b564d7c2ffffd7b6462ce7324629cd/wu-institutionaldevelopmentandadaptabilitycanada.pdf (last visited May 13, 2023).

percent and thirty percent¹⁸⁵ of the global gross domestic product (GDP) in 1980s and 2020 respectively.

A. *United States*

Whenever Beijing is irritated by Washington's contacts with Taipei, the PRC alleges that the U.S. has violated its "commitments" in "the three communiques" despite that the Normalization Communique simply "acknowledges the Chinese position that there is but one China and Taiwan is part of China."¹⁸⁶ When questioned on this point during hearings on the Taiwan Relations Act of 1979, the Carter Administration agreed that it had acknowledged the "Chinese position" that Taiwan is part of China, but emphasized that "The United States has not itself agreed to this position."¹⁸⁷

Moreover, the Taiwan Relations Act (TRA) was introduced by the U.S. immediately after its de-recognition of ROC in 1979. It provides that treaties previously in force between the United States and "the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978 are to continue in force."¹⁸⁸ It could be inferred that whether the U.S. recognizes the Republic of China or not, there is no difference between the relationship between the U.S. and

¹⁸⁵ See M. Szmigiera, *Breakdown of global GDP share from G7 and G20 countries 2020 and 2026*, STATISTA (Feb 7, 2022), <https://www.statista.com/statistics/722962/g20-share-of-global-gdp/> (last visited May 13, 2023).

¹⁸⁶ Known as the "Normalization Communique" of December 15, 1978, available at <https://www.ait.org.tw/u-s-prc-joint-communique-1979/> (last visited May. 8, 2023).

¹⁸⁷ ANDREWS & CHABOT, *supra* note 50.

¹⁸⁸ 22 U.S.C. § 3303(c).

Taiwan, indicating again that the ROC government in exile was regarded as the administrative power of Taiwan, which is in line with the mandate/trusteeship theory.

B. United Kingdom

The U.K. was able to grant China recognition without having to address Taiwan in 1950, with the ROC still occupying China's seat in the UN.¹⁸⁹ In 1972, in announcing the exchange of ambassadors with the PRC, the Foreign Secretary of U.K. stated: "the Government of the United Kingdom acknowledge [sic] the position of the Chinese Government that Taiwan is a province of the People's Republic of China . . . We think that the Taiwan question is China's internal affair to be settled by the Chinese people themselves..."¹⁹⁰ The U.K. also took the same position as the U.S. by only acknowledging China's position on Taiwan, instead of recognizing it, itself. By saying "the Taiwan question is China's internal affair to be settled by the Chinese people themselves," the U.K. did not necessarily mean the sovereignty of Taiwan could only be settled by the Chinese people themselves, it probably means the civil war between KMT and CCP should be settled by themselves. At any rate, the U.K. is bound by the Peace Treaty with Japan,¹⁹¹ which had renounced its

¹⁸⁹ ERIC LERHE, RETHINKING THE TAIWAN QUESTION: HOW CANADA CAN UPDATE ITS RIGID "ONE-CHINA" POLICY FOR THE 21ST CENTURY 12 (2018).

¹⁹⁰ 833 Parl Deb HC (1972) at 31-38 (UK).

¹⁹¹ Article 23 of the San Francisco Treaty provided that: (a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United

titles to Formosa. Still, the term “Chinese” did not necessarily have any political connotation, but might be used merely as a generic term stemming from the Chinese ethnic origin of the populace on Taiwan.

C. *France*

Like the U.K., with the ROC retaining its seat in the UN, France granted China recognition without mentioning Taiwan in 1964.¹⁹² In 1994, France publicly accepted “the Government of the People’s Republic of China as the sole legal government of China and Taiwan as an integral part of the Chinese territory”¹⁹³ Regarding the word “Chinese,” there was some ambiguity. Since the government of Taiwan at the time did not claim otherwise, it was not unusual for France to make such an announcement. Even when Nicaragua established diplomatic relations with the PRC in 2021, it chose this form of recognition to appease the PRC government instead of recognizing Taiwan as a territory of the PRC.¹⁹⁴ Regardless of what the PRC government insisted, other states could not be oblivious to the law and fact.

Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force of each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.” See Treaty of Peace with Japan, *supra* note 98, at art. 23.

¹⁹² Garret Martin, *Playing the China Card? Revisiting France’s Recognition of Communist China, 1963–1964*, 10 J. OF COLD WAR STUD. 52-80 (2008).

¹⁹³ Roger Cohen, *France Bars Taiwan Sales, Warming China Ties*, N.Y. TIMES (Jan. 14, 1994), <https://www.nytimes.com/1994/01/13/world/france-bars-taiwan-sales-warming-china-ties.html> (last visited May 13, 2023).

¹⁹⁴ See BBC NEWS, *supra* note 1.

D. *Canada*

Canada neither challenged nor endorsed China's claim that Taiwan is part of China, but only to "takes note" of it.¹⁹⁵ In the 1970 Canada-China Joint Communiqué, Canada accepted the PRC as China's sole government, instead of the "Chinese people" as Beijing initially demanded, and agreed to support its entry into the United Nations.¹⁹⁶ According to the Joint Communiqué between China and Canada, "The Chinese reaffirms that Taiwan is an inalienable part of the territory of the People's Republic of China. The Canadian government takes note of this position of the Chinese government. The Canadian government recognizes the government of the People's Republic of China as the sole legal government of China."¹⁹⁷

E. *Japan*

When Japan recognized the PRC, the Joint Communiqué of the Government of Japan and the Government of the PRC was signed on September 29, 1972 in Beijing, whereby:

The Government of Japan recognizes that Government of the People's Republic of China as the sole legal Government of China. The Government of the People's Republic of China

¹⁹⁵ *Joint Communiqué of the Government of the People's Republic of China and the Government of Canada Concerning the Establishment of Diplomatic Relations Between China and Canada*, MINISTRY OF FOREIGN AFFS. OF THE REP. OF CHINA, Nov. 7, 2000, available at https://www.fmprc.gov.cn/eng/gjhdq_665435/3376_665447/3382_664830/3383_664832/202304/t20230407_11056015.html (last visited May 13, 2023).

¹⁹⁶ See LERHE, *supra* note 189.

¹⁹⁷ *Joint Communiqué*, *supra* note 195.

reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China, the Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8¹⁹⁸ of the Potsdam Proclamation.¹⁹⁹

Some argue that even if the Peace Treaty in 1952 did not list a beneficiary of the title of Taiwan, Japan's reiteration in the 1972 Joint Communiqué to carry out the terms of the Cairo Declaration had confirmed China's title over Taiwan. However, it is important to note that the 1952 Peace Treaty with Japan was a territorial treaty, and that "territorial treaties provide a final settlement of the territories between the parties."²⁰⁰ Since the Allied Power had jointly defeated Japan,²⁰¹ the right to dispose of Taiwan had already been executed in the Peace Treaty with Japan in 1952. Though Japan simply renounced its title to Formosa without listing a beneficiary, Article 64 of Vienna Convention stipulates that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."²⁰² As self-determination has developed into a right *erga omnes*, which the ICJ supported in the matters of East Timor and the Palestinian Wall Advisory

¹⁹⁸ It stated that "the terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." POTSDAM DECLARATION, <https://www.ndl.go.jp/constitution/e/etc/c06.html> (last visited May 13, 2023).

¹⁹⁹ *Joint Communiqué of the Government of Japan and the Government of the People's Republic of China*, MINISTRY OF FOREIGN AFFS. OF JAPAN, Sept. 29, 1972, available at <https://www.mofa.go.jp/r/egion/asia-paci/china/joint72.html> (last visited May 13, 2023).

²⁰⁰ CHIANG, *supra* note 37, at 105.

²⁰¹ GEORGE H. KERR, *FORMOSA BETRAYED* 39 (1965).

²⁰² Vienna Convention, *supra* note 101, at art. 64.

Opinion, the new peremptory norm of self-determination may require some degree of restitution of defeated rights or interests.²⁰³ It then naturally leads to the conclusion that the legal principles appropriated to interpret the 1952 Peace Treaty must include the principle of self-determination—that is to say, when Japan renounces all right, title and claim to Formosa and the Pescadores, it could be no one else but the people of Formosa and the Pescadores that have sovereignty of their islands.

F. Germany

After World War II and the division of Germany into two states, only the Eastern German Democratic Republic (GDR) immediately established official relations with the PRC in October 1949. The Western Federal Republic of Germany (FRG), in spite of strong U.S. pressure to support the KMT regime in Taiwan, opted for neutrality and recognized neither Beijing nor Taiwan, since it was important for the FRG “not to prejudice the German Question through becoming involved in the ‘China complex.’”²⁰⁴

The FRG established official relations with the PRC in October 1972. However, in the Communiqué, there was no explicit acknowledgement that Taiwan is an integral part of China. In order not to provoke the FRG’s insistence on a “Berlin-Clause” to state the legal status of Berlin unequivocally, the PRC probably stepped back in

²⁰³ See CRAWFORD, *supra* note 71, at 259.

²⁰⁴ Gunter Schubert, *the European Dimension of German-Taiwanese Relations* 4, (Conference on The Role of France and Germany in Sino-European Relations, Hong Kong, June 22-23, 2001) <https://www.sciencespo.fr/cei/sites/sciencespo.fr/cei/files/schubert.pdf> (last visited May 13, 2023).

advance to not anger East Germany.²⁰⁵ Walter Scheel, then Foreign Minister, during his trip to China in October 1972, promised that the FRG would not upgrade West Germany's relations to the ROC. FGR's position has not changed much after German unification and the disappearance of the GDR.²⁰⁶

G. *Italy*

On November 6, 1970, Italy and the PRC agreed to establish diplomatic relations. The Foreign Ministry of Italy stated that Italy had taken note of Peking's claim to sovereignty over Taiwan and recognized that "the Government of the Chinese Peoples Republic is the sole legal Government of China."²⁰⁷ In a separate declaration, the Italian Government explained that it did not consider itself qualified to express any judgment on the question of Taiwan.²⁰⁸

From the above state practices regarding the recognition of the ROC and Taiwan, it was clear that the international community treats the ROC and Taiwan as two separate entities. The Friendly Relations Declaration (1975) might shed some light on the true relationship between the two:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the

²⁰⁵ *Id.* at 5.

²⁰⁶ *Id.*

²⁰⁷ Paul Hofmann, *Rome and Peking in Accord on Ties*, N.Y. TIMES, (Nov. 7, 1970) <https://www.nytimes.com/1970/11/07/archives/rome-and-pekings-in-accord-on-ties-nationalist-link-to-italy-is.html> (last visited May 13, 2023).

²⁰⁸ *Id.*

territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter.²⁰⁹

Whether Taiwan was a non-self-governing territory²¹⁰ or a quasi-Mandate/Trusteeship territory under the administration of the ROC government in exile, Taiwan did have a status separate and distinct from the ROC. In fact, the relationship between the two fit squarely into the nature of Mandate/Trusteeship, and it is important to note that the establishment of a mandate (or trusteeship) over a territory did not constitute cession of that territory to the Mandatory (administering power).²¹¹ In other words, the Mandatory possesses the right to exercise the powers of sovereignty over a territory without having sovereignty.²¹²

V. TAIWAN'S CURRENT LEGAL STATUS

Since 1991, Taiwan has become a self-governing

²⁰⁹ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), Oct. 24, 1970.

²¹⁰ In the discussion of the case of East Bengal, James Crawford points out that "though never formally declared a non-self-governing territory, the geographic separation of Bangladesh from the administering State, its ethnic distinctness and the arbitrary subordination of the territory to Pakistani rule built the case for its special status. Gross abuses amounting to genocide or crimes against humanity effectively made the separation irreversible." See CRAWFORD, *supra* note 71, at 145.

²¹¹ See International Status of South-West Africa, *supra* note 148, at 132.

²¹² James C. Hales, *Some Legal Aspects of the Mandate System: Sovereignty: Nationality: Termination and Transfer*, in 23 TRANSACTIONS OF THE GROTIUS SOC. 85, 94 (1937).

territory, when the representatives were finally elected by the Taiwanese people with full franchise.²¹³ Since then, self-determination has been exercised by the Taiwanese people through the democratic reforms that was facilitated by seven rounds of constitutional revisions made between 1991 and 2005,²¹⁴ without satisfaction though. In the Western Sahara case, Judge Dillard expressed the view that self-determination remains in all cases the “cardinal principle” of international law, which cannot be overridden by territorial claims of third States:

It seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient “legal ties” of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people...it may be suggested that self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it.²¹⁵

It reminds us of the dictum of Stratford A.C.J. in

²¹³ For democracy as a continuing form of self-determination, *see supra* note 120.

²¹⁴ For a detailed discussion of the constitutional independence of Taiwan, *see* Stephanie Y.S. Hsu, the formation and consolidation of the democratic state of Taiwan: interrelations of international law and constitution 413-88 (2022) (Master Thesis, National Taiwan University).

²¹⁵ On Western Sahara, Separate Opinion of Judge Dillard, 1975 I.C.J. 114-15 (Oct. 16).

Ndlwana v. Hofmeyer: “[F]reedom once conferred cannot be revoked.”²¹⁶ The legal status of Taiwan cannot be well explained without resorting to the theory of the mandate/non-self-governing system, although Taiwan had never been formally treated as such. “The long list of resolutions which, following in the wake of resolution 1514 (XV), have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self-governing territories.”²¹⁷ On Crawford’s account, “Termination of a Mandate involved compliance with the basic purpose of the Mandate and a determination of political fact—that effective self-government existed.”²¹⁸ Furthermore, the independence of these territories could be recognized as consistent with the object and purpose of the Mandate, notwithstanding the absence of formal termination by the League.²¹⁹ In respect of the definition of independence, Crawford observes that:

Two main elements of independence are: the separate existence of an entity within reasonably coherent frontiers; and it’s not being subject to the authority of any other State or group of States, which is to say that it has over it “no other authority than that of international law.” ... It may be that an entity, while not formally independent, operates in fact with substantial freedom in both internal and external affairs. This situation arises where formal or nominal claims are made to “suzerainty” or “residual sovereignty,” or where the gradual grant of power from a

²¹⁶ See *Ndlwana v. Hofmeyer* (1937) AD 229, 237 (S. Afr.).

²¹⁷ On Western Sahara, Separate Opinion of Judge Dillard, *supra* note 215, at 113.

²¹⁸ CRAWFORD, *supra* note 71, at 579.

²¹⁹ *Id.* at 577.

metropolitan State to a former colony masks the emerging statehood of the latter.²²⁰

In reality, the government of Taiwan has substantial freedom in both its internal and external affairs, in spite of some abstract and theoretic legal links between Taiwan and China. However, in the case of a once-established system, it has been argued that no rule is to count as a rule of the system if it has ceased to be the legal system of the group.²²¹ In this sense, no matter what the ROC constitution and PRC constitution stipulate, Taiwan has a legal system entirely separate from the Chinese mainland no later than 1949. Since 1949, Taiwan had been under the administration of the ROC government in exile, which had sovereign power without sovereignty over Taiwan, for sovereignty is “the right to self-government.” A people “under the rule of another” is not a State.²²² It is probably this unique development that has been masking Taiwan’s emerging statehood.

Nevertheless, law is not static but dynamic. Since the democratic reforms in the 1990s, the Taiwanese people have already effectively exercised their right of self-determination through the full-scale electoral democracy on a daily basis.²²³ The self-determination of the Taiwanese people is satisfied, in Judge Dillard’s words,

²²⁰ *Id.* at 66; *see also* Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at ¶ 81 (Sept. 5).

²²¹ H.L.A. HART, *THE CONCEPT OF LAW* 103 (3d ed. 2012).

²²² E DE VATTEL, *LE DROIT DES GENS: OU PRINCIPES DE LA LOI NATURELLE, APPLIQUE’S A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (The law of nations: or Principles of natural law, applied to the conduct and in the affairs of nations and sovereigns) vol. I, ch. 1, 5-11 (CG Fenwick trans., 1916), in CRAWFORD, *supra* note 71, at 66.

²²³ *See* CHEN, *supra* note 34, at 325. For democracy as a continuing form of self-determination, *see supra* note 120.

“by a free choice not by a particular consequence of that choice or a particular method of exercising it.”²²⁴ Considering that habits alone cannot create legal norms, the residues of ROC left in Taiwan Today is not ought to derogate from the law and reality of Taiwan’s statehood.

To conclude, Judge Hudson’s statement in the Permanent Court of International Justice in *Lighthouses in Crete and Samos* made a classic statement about hollow sovereignty:

It will suffice to say that after 1899 the Ottoman Government exercised no governmental powers in Crete, and that although the Sultan’s flag was ceremoniously flown in Crete until February 1913, the government of this island was entirely in the hands of the High Commissioner and the Cretans themselves.... In its external relations, the Cretan Government acted independently of the Ottoman Government also. . . If it can be said that a theoretical sovereignty remained in the Sultan after 1899, it was a Sovereignty shorn of the last vestige of power. A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities of this situation.²²⁵

Except for some differences between the two cases, the relationship between China and Taiwan fit squarely into the above description. Similarly, after 1949, China exercised no governmental power in Taiwan, and although the flags of the old Chinese regime—the ROC—are still flown ceremoniously in Taiwan today, the government of

²²⁴ On Western Sahara, Separate Opinion of Judge Dillard, *supra* note 215, at 115.

²²⁵ *Lighthouses in Crete and Samos (Fr. v. Greece)*, Judgment, 1937 P.C.I.J. (ser. A/B) No. 62, at ¶ 121 (Oct. 8).

this island is entirely in the hands of the Taiwanese themselves. The Taiwanese government acts entirely independently of the Chinese government. If it can be said that a theoretical Chinese sovereignty remained in Taiwan after 1949, it was a sovereignty shorn of the last vestige of power. A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty of China cannot be permitted to obscure the realities of this situation. Furthermore, as observed by Elias, the doctrine of intertemporal law requires that: "...in order subsequently to prove a valid title the original acquirer must show that it has continuously maintained its authority and manifested it in an un-mistakable way up to the moment when a dispute arises for determination."²²⁶ Given that law must be based on facts—insofar as such facts are not in themselves contrary to law,²²⁷ no political recognition could obscure the reality that the ROC government in exile stopped representing the Chinese people on the Chinese territory in practice since 1949, and no political claim thereafter could obscure the fact that the ROC, as a state name in the legal sense, means China from 1912 to 1949, unequivocally. Thus, the democratic reforms of Taiwan in the 1990s that have transferred it from a non-self-governing territory/quasi-mandated territory to a self-governing territory, must be taken into account in the analysis of its statehood.

However, Taiwan has neither entered the United Nations nor any other international organization requiring statehood, due to its problematic international identity that is confused with the ROC. The constitutional name of the

²²⁶ T. O. Elias, *The doctrine of Intertemporal law*, 74 AM. J. INT'L L. 285, 288 (1980).

²²⁷ Lauterpacht, *supra* note 72, at 390.

ROC, imposed by the incoming KMT seven decades ago, has prevented Taiwan from claiming its independent identity ever since. Nonetheless, one cannot over-emphasize that law must be based on facts—insofar as such facts are not in themselves contrary to law.²²⁸ In the legal sense, Sun Yat-sen and the “Blue Sky, White Sun, and the Wholly Red Earth” flag were China’s national father and flag respectively before 1949. After 1949, they have become historical facts of China. In light of the differences between constitution and constitutional law, the conclusion flows from the established separate identity of Taiwan and the ROC is that, even if a brand-new constitution tailored for Taiwan has not been made yet, everything about the identity of ROC stipulated in Taiwan’s current constitution should not be applied to Taiwan by default. To remedy Taiwan’s fragile democracy and precarious popular sovereignty,²²⁹ the right of the Taiwanese people to have a tailor-made constitution, or at least a government operating under the name of Taiwan, and their own flag and national anthem, cannot be ignored and denied any longer. Considering that the Taiwanese people have full control of their Constitutional Court today,²³⁰ and that Taiwan has become a geopolitical hot

²²⁸ *Id.*

²²⁹ For the fatal defects of Taiwan’s current constitution, and the precarious sovereignty and unsustainable democracy caused by it, see Hsu, *supra* note 214, at 473-81, 516-28.

²³⁰ In April 2022, the Taiwan-born, internationally recognized scholar in international law, and the former chairman of the Executive Council of the American Society of International Law, Pro. Lung-chu Chen speaks in a forum that “Although Taiwan has developed into an independent sovereign state, it is not a formal state yet... in the sense of the criteria for statehood, the ‘Republic of China’ is an illusory and unjustifiable state name for Taiwan.” He also advocated for the rectification of this issue through constitutional instruments. Li Xin-fang, *Lung-chu Chen: Taiwan De Guoji Diwei Yi Ding, Dan Yao Guojia Zhengming Xianfahua* (Taiwan’s legal status is settled, but it

spot which is essential to the security of the Asia-Pacific region, either municipal /international judiciary intervention or clarification by international partners could be a viable way to solve this issue. Otherwise, it is not hard to imagine that the aberrant status quo of Taiwan could become the Achilles' heel of the democratic world. The case of Taiwan is indeed a vivid example of how the constitutional order of a single player in the international community and the international legal order are actually interacting with each other, and how the abnormality of either side could lead to calamity for the other.

CONCLUSION

The statehood and identity between Taiwan and the Republic of China have long been confused with each other due to complex historical factors, international power plays, and political calculus. Since the PRC replaced the ROC in the UN in 1971, the PRC had launched a "One-China Principle," the central element of which states that "there is only one China and that is the People's Republic of China, and Taiwan is a part of China." The rationale behind it is that the constitution and official name imposed on Taiwan indicate that Taiwan is part of China, given that the ROC has already been replaced and succeeded by the PRC, the PRC's right to Taiwan naturally derives from the ROC's right to Taiwan. Unfortunately, however, the decades-long rhetoric dominated by the KMT government²³¹ and the mental

needs to be constitutionalized), LIBERTY TIMES (Apr. 23, 2022), <https://news.ltn.com.tw/news/politics/breakingnews/3903040>.

²³¹ During the KMT's authoritarian rule, it purged all the dissent voices against the ROC and advocating for an independent identity of Taiwan, both at home and abroad. Hundreds of Taiwanese dissidents

habits of the Taiwanese people who have been brainwashed for over four decades,²³² make most people insensible to this fallacy, which has lent color to China's

overseas were blacklisted and banned from returning to Taiwan for decades. One of the most famous names on the blacklist is Lung-chu Chen, the world-renowned scholar in international law, and the former chairman of the Executive Council of the American Society of International Law. In an article published in 2007, Chen recalled that "in my 1967 English book *Formosa, China and the United Nations*, I said that although at that time Chiang Kai-shek called Taiwan 'Free China.' Taiwan was neither free nor China. I advocated a policy of one China and one Taiwan, with self-determination for the Taiwanese in the hope that this would open up a new road for Taiwan. The book was noticed and praised internationally, but it also attracted the hostility of Chiang's government-in-exile... after the book came out, I was reviled as a traitor and put on the blacklist. This was during the dark days of the Chinese Nationalist Party's (KMT) oppressive, authoritarian martial law rule. The government had spies in many places, and we were not even safe overseas. In May 1993, after the blacklist was abolished, I accepted an invitation from my alma mater National Taiwan University (NTU). After 33 years abroad, I returned to my homeland Taiwan for a series of lectures about UN membership for Taiwan. I emphasized that Taiwan should apply for membership as a new country, instead of trying to 'return' under the name 'Republic of China.'" In Lung-chu Chen, *Fight for Taiwan no longer lonely*, Taipei Times (Sept. 23, 2007), <http://www.taiwanncf.org.tw/media/TaipeiTimes/20070923.htm>; See also HSUEN HUA-YUAN & SHIU WEN-TANG, ZHANHOU HEIMINGDAN WENTI ZHI DIAOCHA YANJIU (Investigation and research on the post-war blacklist problem) (2022).

²³² In Taiwan's elementary school textbook in the 1960s, a text was written as follows, "my parents told me that our hometown is in the Chinese Mainland...we shall reconquer the mainland and rebuild our home." See Guan-Renjian, *Ma Ying-jeou De "Fangongdalu" You Huoguo lai Le Ma?* (Does Ma Ying-jeou's "Reconquer the Mainland" slogan resurrect?), NEWTALK (Apr. 11, 2023), <https://newtalk.tw/news/view/2023-04-11/866037> (last visited May 13, 2023); During the KMT education reform, Taiwanese literature, geography and history were abandoned, while Chinese history, geography and writings were glorified and promoted. Children in the public school system from age 6 to 18 were taught military songs such as "Fight our way back to the Mainland," "I am a Chinese," "China will be Strong," and "I love China." See Ketty W. Chen, *Disciplining Taiwan: The Kuomintang's Methods of Control during the White Terror Era (1947-1987)*, 4(4) TAIWAN INT'L STUD. Q. 185, 202 (2008).

aggression and intimidation.²³³ As a result, Taiwan has been largely isolated from the international community since the 1970s.

As a matter of fact, the representatives of Taiwan were not elected by the Taiwanese people with full franchise until the democratic reforms in the 1990s. The crux of the tricky legal status of Taiwan is that before the 1990s, the government in Taiwan was neither the sovereign of Taiwan nor a truly representative government of the Taiwanese people. In the legal sense, all the foreign relations and constitutional frameworks established by the old Chinese government or its remnants have to be reinterpreted or revamped, so as to manifest Taiwan's new identity and popular sovereignty.²³⁴ Nevertheless, the internal vested interest as well as the external threat and discouragement, made the current government reluctant to rectify the unjustifiable identity imposed by the incoming regime seven decades ago.²³⁵ The indeterminacy of the

²³³ Hsu, *supra* note 214, at 210-12.

²³⁴ For the popular sovereignty doctrine embedded in Taiwan's constitutional law, *see id.*, at 461-81, 523-28.

²³⁵ In the DPP's party platform, it commits to make a new constitution and establish the Republic of Taiwan. *See* DPP PARTY PLATFORM, available at https://www.dpp.org.tw/en/upload/download/Party_Platform.pdf (last visited May 13, 2023). Yet after the DPP came into office, and for the first time controlled the "congress" in 2016, this mission has not even been mentioned by it. Instead, it invented a name as ROC (Taiwan) on the pretext of mollifying everyone. Nevertheless, it has been disclosed that Taiwan has indeed not gotten out of the KMT's party-state shadow yet, with the KMT's five decades of dominance in the Taiwanese people's life still haunting the politics of Taiwan up until today. *See Taiwan Zhengzhi Xianmin Fengbo Ji Yichu Jiang Jieshi Tongxiang Zhengyi: Zhuanxin Zhengyi Ruhe Miandui Gengduo Tiaozhan* (Taiwan's "political informant" scandal and the removal of Chiang Kai-shek's bronze statue controversy: How "transition justice" faces more challenges), BBC CHINESE NEWS (Nov. 22, 2021), <https://www.bbc.com/zhongwen/trad/chinese-news-59339027> (last

representatives has intensified the indeterminacy of all,²³⁶ despite that the abnormal status quo of Taiwan in defiance of international law, has not only caused decades of chaos for Taiwan's new democracy, but also poses an ongoing risk for regional stability and international security. Under these circumstances, the clarification of both the law and facts of Taiwan and the ROC's identity and statehood, has become an imperative academic subject.

State decisions have always been determined by national interests; since the typical goal of a state is to become a universally accepted normal state, the status quo

visited May 13, 2023); *see also* Mingjindang Qiang Jiangjingguo Pai? Zhiqingzhe Bao Muliao Qianglie Fandui, Caiyingwen Jianchi Yaoqu, (DPP Praises Chiang Ching-guo? Insider Exposed Tsai's insistence disregarding the Party's backlash) STORM MEDIA (Jan. 14, 2022), <https://www.storm.mg/article/4166521?kw=%E8%94%A3%E7%B6%93%E5%9C%8B&pi=4> (last visited May 13, 2023); Wu Chuan-li, *Lao Lan Nan Weihe ZHEME Wen? (why the old KMT men's jobs are so stable?)*, UP MEDIA (Sept. 21, 2016), https://www.upmedia.mg/news_info.php?Type=2&SerialNo=4390; With decades of lobbying experiences, extensive resources and networks overseas, the KMT's influence in Taiwan's foreign relations should not be underestimated even today. For instance, in June 2022, the KMT Representative Office in the United States was reopened, in an effort to promote its views among American politicians and academics. In March 2023, the former Deputy Representative of KMT in the US, Eric Yu-Chua Huang, became a Taiwan-analyst in the Washington tank, The Center for Strategic and International Studies (CSIS). *See* Laurance Chung, *Taiwan's KMT opposition party reopens US office to have a greater voice in Washington*, SOUTH CHINA MORNING POST (May 7, 2022), at <https://www.scmp.com/news/china/diplomacy/article/3176932/taiwans-kmt-opposition-party-reopens-us-office-give-itself>; Liu wan-lin & Qiu Cai-wei, *KMT Zhumei Fudaibiao Yu-Chua Huang Bei Cehan, Jie CSIS Taiwanyiti Yanjiuyuan (KMT's Deputy Representative Eric Yu-Chua Huang jumped to CSIS as a Taiwan-analyst)*, UNITED DAILY NEWS (Apr. 3, 2023), <https://vip.udn.com/vip/story/121160/7066990> (last visited May 13, 2023).

²³⁶ Considering that Taiwan has not come out of the party-state shadow yet, the democratic dilemma facing the Taiwanese people is aggravated by the "ROC on Taiwan" or ROC (Taiwan) fiction. *See* Hsu, *supra* note 214, at 474-82, 517-29.

of Taiwan is definitely not ideal. However, if a state wants to show its image and legitimacy to the international community, its decisions must be well-justified by international law. Otherwise, they will risk a reaction from the international community of labeling their decisions as illegal and constituting a breach of international law. This is true for all the parties involved, especially Taiwan, China, and the U.S. In fact, in light of the “century of humiliation” before the Chinese Communist Party took over the power in 1949, China’s concern for its international reputation and its interlinkage with the country’s compliance record provides Taiwan and the international community with significant leverage.²³⁷ One prominent instance of the legalization of disputed territory issue is the South China Sea Arbitration in 2016, which

²³⁷ On the 2014 United Nations Day, China’s Minister of Foreign Affairs, Wang Yi made a statement that: “upholding international rule of law is a momentous choice China has made based on its own experience ... the Chinese people fully recognize how valuable sovereignty, independence and peace are. China ardently hopes for the rule of law in international relations against hegemony and power politics, and rules-based equity and justice, and hopes that the humiliation and sufferings it was subjected to will not happen to others. ...First, we must uphold international law and the universally recognized norms governing international relations, so as to shore up the foundation of international rule of law. Such principles as respect for sovereignty and territorial integrity, peaceful settlement of international disputes and non-interference in the internal affairs of others, as enshrined in the UN Charter, are the foundation stones upon which modern international law and conduct of international relations are built. They are the core elements that must be adhered to in promoting international rule of law. What has transpired in international relations shows time and again that these principles, if followed in earnest, are the blessings for all mankind, while their breach and betrayal will cause endless harm.” See Wang Yi: *China, a Staunch Defender and Builder of International Rule of Law*, MINISTRY OF FOREIGN AFFS. OF CHINA SPEECHES (Oct. 24, 2014), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201410/t20141027_678233.html.

had forced China to negotiation.²³⁸

For the democracy of Taiwan and the security of the Taiwan Strait are vital for a “free and open” Indo-Pacific region,²³⁹ the legalization of an independent sovereign democratic state of Taiwan protected by political independence and territorial integrity is in the best interest of the Taiwanese people and the free world. Yet the discrepancy among the law, fact and political reality has put the sovereignty of Taiwan at an embarrassing and precarious status, which is detrimental to the peace and prosperity of the region. In this light, clarifying the law and fact from the international law perspective is crucial for paving the path for a peaceful resolution of this issue. After all, international law is rarely pivotal in solving international conflicts and disputes, but it is still significant to the states which intend to justify their behaviors in front of the international community.

²³⁸ See Tim Rühlig, *How China approaches international law: Implications for Europe*, EU-ASIA AT A GLANCE (2018).

²³⁹ See Joseph A. Bosco, *Taiwan and Strategic Security: the US declarative policy on Taiwan of “strategic ambiguity” needs to change sooner rather than later*, THE DIPLOMAT (May 15, 2015), <https://thediplomat.com/2015/05/taiwan-and-strategic-security/> (last visited May 13, 2023).