

My Land, Your Land, But Never China's: An Analysis of Taiwan's Sovereignty and Its Claim to Statehood

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Abstract

Even after two Taiwan-born Presidents (the former President Lee Teng-Hui of the KMT and the current President Chen Shiu-Bian of the DPP) came to power for nearly 20 years (since 1987), when issues come to Taiwan's future, the world (academics and politicians) seems to stay still in the cold war thinking of "divided states pending reunification," without listening to the real will of the 23.5 million people of Taiwan. This paper begins with the concept of sovereignty, it attempts to evaluate the above-mentioned issues and Taiwan's international status, along with the Nationalist China's flee to this island and aftermath. The issue of statehood and relevant themes will be analysed before the author jumps to the conclusion that Taiwan is rightful for its claim to statehood.

Keywords: sovereignty, statehood, belligerent occupation, prescription, recognition

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I. Introduction: Sovereignty and Claims to Statehood in General

The English word “sovereignty” originally derived from the French term *souverain*: a supreme ruler not accountable to anyone, except perhaps to God. On the heels of the dynastic and imperial struggles of the Middle Ages, monarchs in early modern Europe advanced the notion of sovereignty to strengthen their grip on the reins of the state and to counter feudal claims by the nobility and religious claims by the papacy. In the period of religious schism and the dismembering of empire, rulers who trumpeted their sovereignty often intended other neighbouring peoples to hear their claim to supremacy. Over the centuries, as the international community of states evolved, people used sovereignty to focus not just on domestic authority within a state but on the relative independence of individual states. A political entity that has attained the status of sovereign statehood is presumed by its peers to be capable of receiving fundamental international rights. Within the modern society of states the presence or absence of sovereignty determines the status of particular political entities (Fowler & Bunck, 1995: 4-12).

A sovereign state, as it might be observed, is fundamentally composed of territory, people, and a government. However, this statement is a partial description, not a definition given the facts that Macau before 1999, Hong Kong before 1997, the Falkland Islands, and many other political entities have territory, people and a government, yet no one considers them to be sovereign states. It is often said that to attain sovereignty a political entity must demonstrate internal supremacy and external independence. First, a sovereign state is able to show actual political supremacy in its own territory. If a political

entity is the sole authority within a particular territory, if no other authority exercises actual control over the people who reside within the entity's boundaries, then, one might argue, the political community has established its domestic political supremacy. Second, the state must demonstrate actual independence from outside authority, not the supremacy of one state over others but the independence of one state from its peers. Those who take *de facto* external independence to be a prerequisite for sovereign status argue that a sovereign state is a political community that does more than merely claim its independence; rather, a sovereign state is able to assert its independence in practice (Fowler & Bunck, 1995: 39-47).

However, whether a political entity meets these requirements automatically qualifying it as a state or, in addition, it requires recognition by other states to endow it with international legal personality, has not been resolved to everyone's satisfaction.² One view is advocated by the declaratory school, which claims that an entity becomes a state on meeting the requirements of statehood and that recognition by other states simply acknowledges as a fact something which has hitherto been uncertain.³ For declaratory school, the primary function of recognition is to acknowledge the fact of the state's

² (Dugard, 1987: 7). Recognition of state and recognition of government must not be confused. A change in government does not affect the identity of the state itself. The state does not cease to be an international legal person because its government is overthrown. Recognition of a state will affect its legal personality, whether by creating or acknowledging it, while recognition of a government affects the status of the administrative authority, not the state. It is possible, however, for recognition of state and government to occur together in certain circumstances. This can take place upon the creation of a new state (Shaw, 1997: 305).

³ This approach echoes that taken at the Convention on the Rights and Duties of States, signed in the Montevideo in 1933. Article One of that Inter-American Convention reads: "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." It also reads that "the existence of states does not rely on recognition by other states" (Dugard, 1987: 7).

political existence and to declare the recognizing state's willingness to treat the entity as an international person, with the rights and obligations of a state. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation. Accordingly, a state may exist without being recognized. Recognition is merely declaratory (Henkin, *et al.*, 1993: 24).

The constitutive school, on the other hand, argues that recognition creates the state (Dugard, 1987: 7). The act of recognition by other states confers international personality on an entity purporting to be a state. In effect, the other states by their recognition constitute or create the new state. On this constitutive theory an observer or a court need only look at the acts of recognition (or lack thereof) to decide whether an entity is a state (Henkin, *et al.*, 1993: 244). From this perspective sovereignty means not necessarily actual independence of outside authority but legal, or constitutional, separation from other states (Fowler & Bunck, 1995: 50-51). The disadvantage of this approach is that an unrecognised state may not be subject to the obligations imposed by international law and may accordingly be free from such restraints as, for instance, the prohibition on aggression. A further complication would arise if a would-be state was recognised by some but not by other states. Could one accord it partial personality (Shaw, 1997: 296)?

Practice over the last century or so is not unambiguous but does point to the declaratory approach as the better of the two theories. Fowler and Bunck (1995: 51) argue that governments sometimes bow to wishful thinking and recognize entities that their officials hope will become sovereign. Likewise, governments sometimes bow to domestic or international pressures and fail to recognize entities as sovereign states not so much because they are seriously thought to lack sovereignty but because recognition of the particular regime

would be distasteful, perhaps even unpalatable, for weighty political constituencies.⁴

Similarly, Malcolm N. Shaw (1997: 298) argues that states which for particular reason have refused to recognise other states, such as the Arab world and Israel and the USA and certain communist nations, rarely contend that the other party is devoid of powers and obligations before international law and exist in a legal vacuum. The stance is rather that rights and duties are binding upon them, and that recognition has not been accorded for primarily political reasons. It is clear that the declaratory approach is more in accordance with practical realities, which is to say statehood exists as such prior to and independently of recognition. The act of recognition is merely a formal acknowledge of an established situation of fact. Based on these arguments, this paper intends to first examine how should Taiwan's claim to sovereignty and statehood be analysed in relation to recognition of international law? Also, the issue of statehood brings to the political proposition of territorial claim of Taiwan by three major players, namely Beijing (insisting Taiwan is part of China), Kuomintang (KMT, insisting eventual reunification with China) and the Democratic Progressive Party (DPP, insisting declaration of Taiwan independence), which will be analysed throughout this paper.

II. Rethinking the Legal Status of Taiwan

Taiwan, a home to a permanent population (23.5 million, 2006), a defined

⁴ By 1990, seventy-four states had recognized the Saharan Arab Democratic Republic despite Moroccan control of much of the Western Saharan territory. In February 1994, after two years of delay, the United States finally recognized the former Yugoslav Republic of Macedonia as a sovereign state. The two years of non-recognition illustrates how a state occasionally fails to recognize another whose sovereign status seems beyond question (Fowler & Bunck, 1995: 51).

territory (36,000 square kilometres) which is governed by a legitimate government (legitimacy in this context refers to the claims that a state and its institutions are worthy of respect on the ground that they are democratic and reflect the will of the people of the territory), has the capacity to enter into relations with some 25 states. It is likely that Taiwan meets the requirements to statehood in the eyes of the declaratory school. However, the dilemma it confronts is more complex than the statehood requirements expected, and that is its legal status and relations with China. James Crawford (1979: 143-44) presented a statement on Taiwan's historical background concerning its legal status:

Formosa (Taiwan) became part of the Chinese empire in 1683, and remained so, despite internal vicissitudes, until the Treaty of Shimonoseki of 1895, by Article 2 (b) and (c) of which Formosa and Pescadores (Penghu) were ceded to Japan. The islands remained Japanese until Japan's defeat in 1945. In the Cairo Declaration of December 1, 1943, the Allies declared their "purpose ... that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa (Taiwan) and the Pescadores (Penghu), shall be restored to the Republic of China." Paragraph (8) of the Potsdam Proclamation of July 26, 1945 affirmed 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."⁵

⁵ (Crawford, 1979: 143-44). The full name of the document after the Cairo Conference should be "Cairo Statement" instead of "Cairo Declaration." Arguably, the term "Cairo Declaration" used by Crawford did not appear until the Potsdam Proclamation of 1945. Article II of the Peace Treaty of Shimonoseki between Japan and China reads:

(a) China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications thereon.

Regarding other legal documents concerning Taiwan after the Nationalist China's retreat to this island in 1949, Crawford (1979: 145) said:

The Peace Treaty was in fact signed on July 8, 1951 by 48 Allied Powers (excluding the U.S.S.R. and China), and Japan. By Article 2(b) of the Treaty Japan renounced "all right, title and claim to Formosa and the Pescadores"; in whose favour was not stated ... Japan in a separate peace treaty with the Republic of China in 1952, "recognized" its renunciation of title to Formosa without further specification.

The legal status of Taiwan after the War must be examined here with regard to these documents. Arguably, this might prompt two contradictory conclusions, either the legal status of Taiwan has been determined to someone's favour, or to no one's favour after the war.

From one view, the legal status of Taiwan remained undetermined even after the renunciation of Japanese claims in the Peace Treaty (Henkin, *et al.*, 1993: 300). This view holds that the Peace Treaty, by which Japan merely relinquished its title and claims, left the position otherwise unchanged, and left sovereignty over Taiwan undetermined. Basically, the major powers held this view and did not change this position even when they established diplomatic ties with China, they just "acknowledge" or "take note," but do not "recognize" the Chinese claim that "Taiwan is part of China" (Chai, 1986).

From another view, Taiwan was legally part of China. This is the view taken by both the Chinese Communist Party (CCP) in mainland China and the Kuomintang (KMT, literally the Nationalist Party) in Taiwan, even though they

(b) The Island of Formosa, together with all the islands appertaining or belonging to said island of Formosa.

(c) The Pescadores Group—that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 24th degrees of north latitude.

disagree with the term “China.” For the CCP and the KMT, the Cairo and Potsdam Declarations were international agreements that gave the Chinese the right to take back Taiwan. Even if the San Francisco Peace Treaty of 1951 and the peace treaty between Japan and Taiwan of 1952 only stated that Japan renounced its sovereignty over Taiwan, and did not provide for the explicit transfer of Taiwan to China, the KMT argues that the position that Taiwan is part of China finally received international recognition when the Nationalist China was represented at the Cairo Conference with Great Britain and the United States in 1943, and it belonged to the Nationalist China since KMT regime had effectively controlled the island for a long period. If Taiwan is not just part of the Nationalist China, how would the KMT assert its rule on Taiwan after its retreat in 1949?

As a non-signatory of the two peace treaties (1951 and 1952), Beijing naturally rejected the two treaties (Hughes, 1997: 6-16). Since the People’s Republic of China (PRC) has never had control and jurisdiction over Taiwan, its claim to Taiwan is in large part based on the theory that it is a successor to the “benefits” belonging to the “Nationalist China.” Beijing argues that the PRC is the successor to the Nationalist China and that the R.O.C. has secured a title over the island – Taiwan. They defend the two proclamations in accordance with the 1972 Sino-U.S. Shanghai Communiqué by saying “the Chinese government took the sovereignty of Taiwan back from Japan in 1945 and the U.S. did not differ with the view that Taiwan is part of China.”

To some, claim that the legal status of Taiwan remains unsettled is not something new and has been discarded by its concocter (referring to the U.S. and Great Britain).⁶ To others, it is crucial to understand the sovereignty of

⁶ This is to say the British and the U.S. positions changed in the exchange of ambassadors with the PRC in 1972 and 1979 respectively by stating the governments of the United

Taiwan. It seems that the legal status of Taiwan was not determined to everyone's satisfaction immediately after the War. In the 1943 Cairo Conference, it reads:

The several military missions have agreed upon future military operation against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land and air ... It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and 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.

Few themes need to be analysed concerning the conclusion of the Cairo Conference. First, the full title of the conclusion of the Cairo Conference was "A Statement Regarding War Against Japan." No agreement or arrangement was signed between the three Allies (United States, China and United Kingdom). The only conclusion made was a "statement." Clearly, the Law of Treaties does not attribute "statement" as an international agreement.⁷ Second, the conclusion of the Cairo Conference was "expressed" by the "military missions." It is clear that it was only an expression of intention, and in formal sense, is not a legal document (Peng & Huang, 1995: 126-36).

Kingdom (and U.S.) acknowledge the position of the Chinese Government that Taiwan is a province of China (Chen, 1987: 1165).

⁷ The word "treaty" denotes a *genus* which includes the many differently named instruments by means of which States, or the heads of States, or Government Departments, conclude international agreements. The principal terms found in use are: Treaty, Convention, Declaration, Protocol, Act, A final Act, General Act. The following are some of the many other terms employed: Accord, Additional Articles, Agreement, Arrangement, Avenant, Compromis, Exchange of Notes, Letters Reversales, Modus Vivendi, Statute, Covenant, Pact, Concordat, etc. (McNair, 1986: 22-25).

Third, the conclusion of the 1943 Cairo Conference was termed as “declaration” only in Article 8 of the 1945 Potsdam Proclamation. In other words, it was not termed as declaration 18 months later in another proclamation that has no treaty effect. It is questionable that the Potsdam Proclamation of 1945 can accord the Cairo Statement of 1943 with the status of “declaration.” Even the conclusion of the Cairo Conference has been entitled “declaration,” according to the Law of Treaties, declaration usually denotes a treaty that declares existing law, with or without modification, or creates new law, after a conference of Heads of States. If the termed “Cairo Declaration” is to create new law, there must be rights and duties between the signatories. Reviewing the Cairo Statement, it revealed (1) the Allies’ determination to bring unrelenting pressure against Japan (2) the Allies’ unwillingness of territorial expansion (3) the Allies’ purpose to see Japan stripped of all the territories she has seized, occupied, or stolen, and (4) the Allies’ continuous fighting to procure the unconditional surrender of Japan. It is worth noting that in this conference, “Taiwan’s restoration to China” was illustrated as “the Allies’ purpose.” Neither duty nor rights among the three Allies were observed, nor were relations regulated. Thus, it would be wrong to accord the Cairo Statement with the status of a formal treaty (Peng & Huang, 1995: 128).

As for the Potsdam Proclamation, there are three documents, namely Potsdam Declaration Regarding Germany (June 5, 1945), Protocol of Proceedings approved at Berlin (Potsdam, August 2, 1945) and Potsdam Proclamation by Heads of Governments of the United States, United Kingdom and China (July 26, 1945). Only the third document related to the legal status of Taiwan. It reads:

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.

As noted, this Potsdam Proclamation provided a title for the Cairo Statement, it was termed the "Cairo Declaration." The Potsdam Proclamation also vowed to carry out the Cairo Declaration. Obviously, if the conclusion of the Cairo Conference was a statement of intention, so was the Potsdam Proclamation. It must be noted that during the period these two documents were issued, Japan was a legal occupant of Taiwan based on the Shimonoseki Treaty. Japan then had acquired a *de facto* title over Taiwan and had not yet surrendered it to the Allied Powers, nor was Japan involved in the arrangement of the above-mentioned documents. It is fair to say that these two documents were only unilateral statements of intention that excluded Japan's involvement, and their effectiveness were questionable.

Further documents that need to be examined are the San Francisco Peace Treaty and the peace treaty between Japan and the Nationalist China. These two treaties are international agreements and should prevail over the Cairo Statement and Potsdam Proclamations. These treaties did not specify who would be the beneficiary of Taiwan and the associated islands. The decision to keep Taiwan's status undetermined was deliberate, argued Trong R. Chai (1986). As indicated by the British delegate at the Japanese Peace Conference, at which the treaty was concluded:

The future of Formosa (Taiwan) was referred to in the Cairo Declaration but that Declaration also contained provisions in respect to Korea, together with the basic principles of non-aggression and no territorial ambition. Until China shows by her action that she accepts those provisions and principles, it will be difficult to reach a final settlement of the problem of Formosa. We therefore came to the conclusion that the proper treatment of Formosa in the context of the Japanese peace treaty

was for the treaty to provide only for renunciation of Japanese sovereignty (Chai, 1986).

Since neither the People's Republic of China nor the Republic of China was the beneficiary on the peace treaties' terms, it seems that the legal status of Taiwan after the War has not been determined by international law. Last but not least, Taiwan officially remained Japanese territory from 1895 to 1951 when the San Francisco Peace Treaty was signed. When Japan surrendered in 1945, the Supreme Commander of the Allied Command in the Pacific, General Douglas MacArthur, authorized the Nationalist China to accept the surrender of Taiwan from the Japanese and to temporarily undertake military occupation of the island as the agent of the Allied Powers.⁸ It is a rule of general international law that by mere occupation of enemy territory in the course of war the occupied territory does not become territory of the occupying belligerent, or – as it is usually formulated – the occupying belligerent does not acquire sovereignty over this territory, which remains the territory of the state against which war is directed.⁹ The occupant Power's position is that of an interim military administration, which entitles it to obedience from the inhabitants so far as it concerns the maintenance of public order, the safety of the occupying forces,

⁸ Chiang Kai-Shek's forces accepted surrender in accord with and on behalf of the orders of the Supreme Allied Commander. Japan did not surrender to any separate ally, but to the allies as a group. Article 1(a) of General Order No. 1 (dated September 2, 1945) reads "the senior Japanese Commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), and Formosa and French Indo-China north of sixteen degrees north latitude, shall surrender to Generalissimo Chiang Kai-shek" (Chen and Reisman, 1972: 611).

⁹ (Kelsen, 1996: 139). Important also is the point that belligerent occupation does not displace or transfer the sovereignty of the territory but involves the occupant Power in the exercise solely of military authority subject to international law. For this reason, occupation does not result in any change of nationality of the local citizens nor does it import any complete transfer of local allegiance from the former government. Nor can occupied territory be annexed (Starke, 1989: 564-67).

and such laws or regulations as are necessary to administer the territory (Starke, 1989: 564-67). Hence, as an occupying belligerent, the Nationalist China should not have acquired the sovereignty of Taiwan either in 1945 when occupation took place, or in 1951 at the conclusion of San Francisco Peace Treaty when Japanese renounced its title over Taiwan.

J. P. Jain (1963: 34) argues that since Japan surrendered not solely to China but to the Allied Powers as a whole, the island of Formosa (Taiwan) may not properly be said, on that basis, to have been conquered or annexed by any one Power. This view was espoused by British governments. It was put in the following way, for example, by Sir Anthony Eden in a written answer in 1955:

In September 1945, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers; but this was not a cession, nor did it in itself involve any change of sovereignty. The arrangements made with Chiang Kai-shek put him there on a basis of military occupation pending future arrangements, and did not of themselves constitute the territory Chinese (Crawford, 1979: 148).

If the Nationalist China was termed “belligerent occupant of Taiwan and Pescadores,” as J. P. Jain said, then the only argument that could be profitably adduced in favour of Nationalist China is that of *de facto* occupation of Taiwan. However, by mere occupation of enemy territory in the course of war, the occupied territory (Taiwan and Pescadores) does not become territory of the occupying belligerent (Nationalist China). Then, should one say the R.O.C. government has legitimized its sovereign claim to Taiwan?

III. On What Ground Does the R.O.C. Government Gain the Territorial Sovereignty over Taiwan?

Since Taiwan and the Pescadores were renounced by Japan without specifying in whose favour, the Nationalist China's acquisition of Taiwan and the Pescadores can be analysed under the five traditional and generally recognised modes of acquiring territorial sovereignty: occupation, annexation, accretion, prescription, and cession.¹⁰

Occupation

“Occupation” is legally a method of acquiring territory which belongs to no one and which may be acquired by a state in certain situations. It relates primarily to uninhabited territories and islands, but may also apply to certain inhabited lands (Shaw, 1997: 342-43). Occupation is preceded by discovery. Discovery, per se, does not establish a good title, giving only an inchoate and not a definite title of sovereignty. An inchoate title must be completed within a reasonable period by the effective occupation of the territory in question (Wallace, 1997: 94). The occupied area must be *terra nullius*, territory belonging to no one, while the occupying party must be a state and be effective, and it must be intended as a claim of sovereignty over the area.

The Nationalist China's occupation of Taiwan and Pescadores took place in 1945 after the defeat of Japan, but Taiwan and Pescadores were not *terra nullius*, they were officially Japanese territories until Japanese renouncement of

¹⁰ Among the five modes of acquiring territorial sovereignty, accretion is beyond this discussion, as title by accretion occurs where new territory is added, mainly through natural causes to territory already under the sovereignty of the acquiring state (Starke, 1989: 159-69).

titles to them in 1951. Besides, as argued, the Nationalist China's occupation was a belligerent occupation, not the conduct of a state. It is questionable that the then R.O.C. was a state even after Japan renounced the titles of Taiwan and Pescadores in 1951. The R.O.C. then governed Taiwan, Pescadores and other islands; however, it claimed to be the sole legal government of China and its defined territory extended to mainland China. The international law terms territory as "a tangible attribute of statehood within which a state enjoys and exercise sovereignty." The R.O.C.'s territorial claim was beyond the international law practice. Clearly that occupation mention cannot explain the R.O.C.'s sovereignty over Taiwan because when the occupation of Taiwan and Pescadores took place in 1945, they were not *terra nullius*; while they became *terra nullius* after 1951, it is doubtful that the then R.O.C. was a state in international law practice.

Annexation

Annexation is a method of acquiring territorial sovereignty which is resorted to in two sets of circumstances: (1) Where the territory annexed has been conquered or subjugated by the annexing state; (2) Where the territory annexed is in a position of virtual subordination to the annexing state at the time the latter's intention of annexation is declared (Starke, 1989: 166).

Conquest of a territory as under (1) is not sufficient to constitute acquisition of title; there must be, in addition, a formally declared intention to annex, which is usually expressed in a Note or Notes sent to all other interested Powers. Often exemplified is the annexation of Korea by Japan in 1910 since Korea had been under Japanese domination for some years (Starke, 1989: 166). In the case of Taiwan, it was temporarily put under the belligerent occupation of the Nationalist China, under the Supreme Allied Commander General

Douglas MacArthur. Taiwan was not conquered by the Nationalist China, nor was it in a position of virtual subordination to the Nationalist China. Therefore, the R.O.C.'s acquisition of Taiwan cannot be termed "annexation."

Cession

The cession of a territory may be voluntary, or it may be made under compulsion as a result of a war conducted successfully by the state to which the territory is to be ceded. As a matter of fact, a cession of territory following defeat in war is more usual than annexation (Starke, 1989: 167). Compulsory cession is illustrated by the cession to Japan in 1895 by the Qing dynasty of Taiwan. Although a cession by treaty is void where the conclusion of the treaty has been procured by the threat or use of force in violation of the principle of modern international law embodied in the United Nations Charter, it was deemed as "right" in the colonial era. The Japanese did not formally renounce all right, title and claim to Taiwan until the San Francisco Peace Treaty was signed in 1951. Japan was defeated by the Allied Powers, not by the R.O.C.; it renounced Taiwan and did not cede it to any country. It is intangible to argue that the Nationalist China's acquisition of Taiwan was due to the Japanese cession of it.

Prescription

A state may not only retain but also acquire territory by conduct which constitutes a violation of international law. This is admitted by many writers in the case of "prescription" (Kelsen, 1996: 313). Some argue that prescription is a mode of establishing title to territory which is not *terra nullius* and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition can not be demonstrated (Shaw, 1997: 343; Starke, 1989: 168).

Prescription assumes that territory in the possession of a state for a long period of time and uncontested can not be taken away from that state without serious consequences for the international order (Shaw, 1997: 344). In other words, prescription involves: (1) Territory which has previously been under the sovereignty of a state; (2) Evidence of sovereign acts by a state over a period of time; (3) Without contesting claims by other states.

Based on the concept of prescription, the Nationalist China's occupation of Taiwan and Pescadores entitled its claim to sovereignty over these territories, since they had been under Japanese sovereignty when the occupation took place in 1945. Although the Nationalist China has been occupying them for some period of time, and the PRC constantly challenges the Nationalist China's acquisition of Taiwan on the basis that the R.O.C. has not been a sovereign actor with the necessary capability to acquire any territory. However, Beijing's claims were predicated on its challenging the R.O.C. for the representation of China in the United Nations. They were not directed toward claiming sovereignty over the territory of Taiwan. The only remaining problem of the R.O.C.'s assertion over Taiwan as a result of prescription is that the R.O.C.'s occupation took place under the command of Supreme Commander of the Allied Command in the Pacific, General Douglas MacArthur, who authorized the Nationalist China to accept the surrender of Japan. If prescription was to solve the acquisition of Taiwan and Pescadores, then, the islands of Taiwan and Pescadores should be rendered to the Allied Powers instead of any one Power (Peng & Huang, 1995: 126-36). Nevertheless, prescription can validate an initially doubtful title provided that the display of state authority is public (Wallace, 1997: 97). The Nationalist China's acquisition of Taiwan was initially doubtful, but the international law allows the assertion of Taiwan by public, peaceful and continuous control of it to be validated. The *de facto* exercise of

sovereignty in the past six decades by the R.O.C. government made it public that the acquisition of Taiwan via prescription has been legitimised.

Given the above-discussed legal status of Taiwan and the R.O.C. government's assertion over Taiwan via prescription, the following propositions concerning Taiwan need to be re-examined.

IV. Reviewing the Following Propositions Concerning Taiwan

Taiwan as Part of China?

Some writers prefer a historical review arguing that Taiwan has been part of China since ancient times. They state:

In the mid-twelfth century, during the Nan Song dynasty, the Penghu Islands (Pescadores) were a part of the Chinese administrative area under the jurisdiction of Jinjiang County, Fujian Province. In the fourteenth century, the Yuan dynasty set up an Inspectorate Department, marking the beginning of a fully-fledged Chinese administration department in Taiwan and the Penghu area. The government of the Ming dynasty abolished this office in 1388, but restored it in 1563. In late Ming, many coastal people from the mainland migrated to Taiwan and Penghu ... These historical facts show that Taiwan has been China's territory since the Middle Ages.¹¹

¹¹ (Chen, 1987). Other writers such as Hungdah Chiu and Yu-min Shaw support this arguments by saying: "there are documentary evidences indicating that by 1171, Peng-hu (Pescadores) had become a Chinese military outpost, and at least by 1225 it was administratively incooperated into the Chinese Empire. As for Taiwan, no massive settlement began until General Cheng Ch'eng-kuan expelled the Dutch from Taiwan in 1661" (Chiu, 1981: 36).

Also, China's 1982 Constitution reads:

The Revolution of 1911, led by Dr. Sun Yat-sen, abolished the feudal monarchy and gave birth to the Republic of China. But the Chinese people had yet to fulfil their historical task of overthrowing imperialism and feudalism. After waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucratic capitalism, won the great victory of the new-democratic revolution and founded the People's Republic of China ... Taiwan is part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.

In this preamble, the Republic of China has been overthrown by the PRC, and disappeared from China's history. As for the island occupied by the Nationalist regime, it became part of China.

After decades of efforts on Taiwan's unbreakable links to the "motherland," China's principle on China-Taiwan relations is based on the so-called "one China doctrine," as expressed by China's top negotiator for Association for Relations Across the Taiwan Straits (ARATS) Wang Dao-han in 1999. This indicates that there is only one China and Taiwan is part of China. They subscribe to a domestic domino theory in which the loss of one piece of sovereign territory will encourage separatists elsewhere and hurt morale among the Chinese forces who must defend national unity (Christensen, 1996: 37), which stance similar to the KMT chairman Ma's argument. They argue that the sovereignty of Taiwan was taken by the Japanese as a conquest from China and that it was returned to China in 1945. However, as Taiwan is part of China, the sovereignty of Taiwan now belongs to the successor state of China which is the

People's Republic of China. The KMT, which once ruled the mainland, fled to Taiwan which the PRC had not occupied due to military and political factors. Nevertheless, Taiwan is part of China and hence sovereignty resides with the PRC even if it does not exercise political control over the island (Maguire, 1998: 107).

However, other parties hold different views on this proposition. They insist that to argue from history about which state was part of another state means little in the present era, as nearly 130 states today were the territories of other states before 1945. Also, if these arguments are taken seriously, then countries which occupied Taiwan such as the Dutch (1624-1662), Spanish (1626-1642) and Japanese (1895-1945) have the same right to claim that Taiwan is part of their countries. Furthermore, if this dispute is studied carefully, Taiwan did not appear as a province in the draft Constitution written for the new Republic of China in 1925, 1934 and 1936 in which were listed all of the provinces, including those under Japanese control (Chai, 1986; Hughes, 1997: 6). They also illustrate what Mao Zedong had to say about sovereignty over Taiwan in 1936:

The immediate task of China was to regain all its lost territories, but that did not include Japanese-occupied Korea, which instead was promised enthusiastic help in its struggle for independence. The same thing applies to Taiwan (The Economist, March 16, 1996; Chai, 1986; Hsiao & Sullivan, 1979: 446-49; Hughes, 1997; Snow, 1937).

Therefore, the Chinese illusion of "Taiwan as an inalienable part of China's sovereign territory" may be relatively recent. It seems to be based on geographic proximity, which is hardly an argument, ethnic kinship, which is not

much stronger,¹² and international law, which seems to mean other countries' acquiescence in the formulation (The Economist, March 16, 1996).

Some from the international law perspective argue that Taiwan is *de jure* part of China since it claims to be part of it. British scholar Crawford (1979: 151-52) argues:

Taiwan is not a state, because it does not claim to be, and is not recognized as such. Its status is that of a consolidated local *de facto* government in a civil war situation. The Republic of China may even be precluded, by its actions since 1949, from attempting to assert separate sovereignty over the island, although the final effective secession of part of a State may never be excluded in practice. But this is not to say that Formosa has no status whatever in international law. It is a party to various conventions binding its own territory. Courts faced with specific issues concerning its status may treat it on a *de facto* basis as a well

¹² At the CCP's Sixth National Congress, held in Moscow in 1928, the Chinese Communists took the first step accepting Taiwan's future political autonomy by acknowledging that the Taiwanese were ethnically separate from the Han. The Sixth National Congress of the Chinese Communist Party considers that the problems of minority nationalities within Chinese territory (Mongols and Mohammedans in the North, Koreans in Manchuria, Taiwanese in Fukien, the aborigines of Miao and Li nationalities in the South, and in Sinkiang and Tibetan nationalities) have important significance. In other words, the "Taiwanese in Fukien" were considered to be a "minority nationality" and not simply members of one provincial group residing in another province. More importantly, the Taiwanese were grouped with other minority nationalities – Mongols, Mohammedans, Miao, etc. – which had maintained their ethnic identity throughout the dynastic era. Mao Tse-tung's earliest comments on the Taiwanese came in his January 1934 "Report of the China Soviet Republic Central Executive Committee and the People's Committee to the Second All-China Soviet Congress" (commenting on various provisions in the 1931 Constitution), he said "in the Soviet areas, many revolutionary comrades from Korea, Taiwan, and Annam (Vietnam) are residing. In the First All-China Soviet Congress, representatives of Korea had attended. In the present Congress, there are a few representatives from Korea, Taiwan, and Annam. This proves that this Declaration of the Soviet is correct." Arguably, Mao reaffirmed that Taiwanese were a "minority nationality" and had similar status to Korea and Annam (Hsiao & Sullivan, 1979: 446-49).

defined geographical, social and political entity (with) ... a Government which has undisputed control of the island ... Internationally the Government of Formosa is a well established *de facto* government, capable of committing the State to at least certain classes of transaction.

Crawford remained this argument in his 2006 newly published book and this view was espoused by D. J. Harris (1998: 104), who simply states “an entity is not a state if it declines to be one, as in the case of Taiwan.” Similarly, Malcolm N. Shaw (1997: 166) argues:

The key point affecting status [of Taiwan] has been that both governments have claimed to represent the whole of China. No claim of separate statehood for Taiwan has been made and in such a case it is difficult to maintain that such an unsought status exists. Total lack of recognition merely reinforces this point. Accordingly, Taiwan would appear to be a non-state territorial entity which is *de jure* part of China but under separate administration.

It is worth repeating that the political development of Taiwan in the past decades has contributed some impacts on refuting this proposition. The R.O.C. government has given up the idea of representing the whole of China since the termination of the period of National Mobilisation for the Suppression of the Communist Rebellion in 1991; in the same year, all senior members of the National Assembly, the Legislative Yuan and the Control Yuan who were elected on mainland China in the 1940s were pensioned to retire. Whatsoever claims to represent the whole of China is no longer an issue for the R.O.C. government.

The other fallacy is the so-called “*de jure* independence of Taiwan.” Taiwan has been legally separated from China since 1895 under the Treaty of Shimonoseki. One must understand that for the past 112 years there is no any

treaty, pact or other international law attribute Taiwan to China. The period of 112 years is longer than all states who gain their independent status after the World War II. If those post-war colonies with 60 years of being independent states are entitled *de jure* independence from their colonial master, why a former colony of Japan with 112 years separation from China need *de jure* independence? Apparently, the issue of “*de jure* independence of Taiwan” is once again another agenda-setting by Beijing, who think that since a *de facto* independence of Taiwan is undeniable, why not creates another agenda by saying Taiwan is heading for *de jure* independence? Beijing's tactic can downplay Taiwan's status from “being an existing state” to “searching for *de jure* independence.” It also helps Beijing with the formulation of its anti-Secession Law since Beijing can argue “there is a small group of people in Taiwan searching *de jure* independence.”

Taiwan Is A Local Authority?

The similar positions that regard the R.O.C. on Taiwan as a “renegade province” or “local government” are mainly derived from the above-stated argument. China, for example, in her White Paper released by the Taiwan Affairs Office and the Information Office of the State Council in February 2000 states:

On October 1, 1949, the Central People's Government of the PRC was proclaimed, replacing the government of the Republic of China to become the only legal government of the whole of China and its sole legal representative in the international arena, thereby bringing the historical status of the Republic of China to an end. This is a replacement of the old regime by a new one in a situation where the main bodies of the same international laws have not changed and

China's sovereignty and inherent territory have not changed therefrom, and so the government of the PRC naturally should fully enjoy and exercise China's sovereignty, including its sovereignty over Taiwan.

The White Paper continues by saying:

Since the KMT ruling clique retreated to Taiwan, although its regime has continued to use the designations "Republic of China" and "government of the Republic of China," it has long since completely forfeited its right to exercise state sovereignty on behalf of China and, in reality, has always remained only a local authority in Chinese territory ... The state of hostility between the two sides of the Straits has not formally ended. To safeguard China's sovereignty and territorial integrity and realize the reunification of the two sides of the Straits, the Chinese government has the right to resort to any necessary means ... The Chinese government always makes it clear that the means used to solve the Taiwan issue are a matter of China's internal affairs, and China is under no obligation to commit itself to rule out the use of force.

In essence, the White Paper argues that when the Government of the People's Republic of China proclaimed itself the Government of China in 1949, its predecessor, the Nationalist Government, although having established its headquarters on the island of Taiwan, was deemed by Beijing as being replaced by the PRC and brought to an end. This proposition evolves its argument that Taiwan is a local government and the civil war is not yet ended and the use of force on Taiwan is legitimate.

These concepts need to be re-examined here. It is explicit that the argument of "replacement of government on the case of the R.O.C. by the PRC" has nothing to do with the "legal status of Taiwan." Between 1945-1949, the Nationalist China lost all of the territories it controlled on mainland China and was driven to Taiwan by the CCP. Since the Nationalist China was conducted as

a belligerent occupation on Taiwan and acquired its sovereignty via prescription, and since Taiwan has not been integrated into China under either Nanking's or Beijing's authority since 1895, it is not unquestionable to link Taiwan with the idea of local authority. Furthermore, the argument of replacement of government does not constitute the transformation of the territory of Taiwan to "another government," given the above-mentioned R.O.C.'s prescription over Taiwan's sovereignty.

Taiwan Is One Party of Divided States?

The frequently-used statement is to describe the R.O.C. on Taiwan as one part of the "divided state." In the decade after the Second World War, certain territorial entities which had previously been either State (Germany) or colonial possessions (Korea) found themselves divided into two or more separate units of administration. On Crawford's terms, an intention for eventual unification, and the reaffirmation that ceasefire lines are "temporary" are not necessarily subsisting legal reasons for "divided state," since either may be as consistent with two states as with one (Crawford, 1979: 272). Korea, for example, is an arguable case. After Japan's defeat in World War II, Korean territory north of the 38th parallel was occupied by Soviet troops whilst the south was occupied by US forces, as had been agreed by the Allies. In 1948 the division was formalised by the proclamation of the Republic of Korea (ROK) and the Democratic People's Republic of Korea (DPRK). The former had been established under international supervision, and it had been widely recognised by 38 countries (out of then 80 countries). The status of DPRK was less clear since it had been established by nomination of a single belligerent occupant without any form of international supervision and been recognised by very few states.

As argued by Crawford, the definition of divided state is not whether two entities are bound, on whatever terms, to the reunification of the nation and their reabsorption into a single state; but whether they do in truth constitute parts of a single state. It must be said that in the Japanese Peace Treaty of 1951, Japan recognise the independence of Korea, renouncing all right, title and claim to Korea. In other words, before 1951, Korea remained legally Japanese, as in the case of Taiwan. Korea became a sovereign state only after Japanese renunciation in 1951. The termination of the Korean War in 1953 created two consolidated states separated by the ceasefire line. If Korea was ever a divided State, Crawford (1979: 286) argues that it can only have been for the relatively brief period between the Japanese Peace Treaty and the end of the Korean War.

On these terms, it is not unequivocal to define Taiwan-China as “divided states.” “Korea as a whole” was occupied by two belligerent forces leading to its division. Nevertheless, the Chinese Communist Party on mainland China was a revolutionary regime which defeated the Nationalists in a civil war and formed a new government. Taiwan was temporarily occupied by the belligerent Nationalist troops and then accommodated the defeated KMT regime. Taiwan-China was neither divided by the UN, nor was either side simultaneously occupied by two external forces. Second, it is hard to believe that the present Taiwan-China do in truth constitute part of a single state since they both exercise effective jurisdiction over their territories and both are recognised by other countries respectively.

Entity Sui Generis?

The last consideration categorizes Taiwan as an “entity *sui generis*,” a territorial entity other than state that has international legal status. To them,

Taiwan's status is the same as the State of the Vatican City and the Holy See.¹³

They argue:

The Republic of China which appears to meet the qualifications for statehood, is not a state because it claims to be part of China, not a separate state ... It was acknowledged that Taiwan was under the de facto authority of a government that engaged in foreign relations and entered into international agreements with other governments (Henkin, 1993: 286, 300).

Ian Brownlie (1998: 65) holds similar views by arguing:

The case of territory the title to which is undetermined, and which is inhabited and has an independent administration, creates problems. On the analogy of belligerent communities and special regimes not dependent on the existence of the sovereignty of a particular (for example, internationalized territories and trust territories), communities existing on territory with such a status may be treated as having a modified personality, approximating to that of a state. On one view of the facts, this is the situation of Taiwan. Since 1972 the United Kingdom has recognized the Government of the People's Republic of China as the sole Government of China and acknowledges the position of the Chinese Government that Taiwan is a province of China. The question will arise whether Taiwan is a "country" within particular legal contexts.

These view base their arguments on first, Taiwan declining to claim to be a state, instead, it claims to be part of China; second, Taiwan is not recognized as

¹³ The Vatican City State, the Holy See, and the Roman Catholic Church are three distinct subjects of international law. The Vatican is a small territorial state; the Holy See is the central government of the church, which existed long before the Vatican City State, and is recognized by international law as a separate sovereign entity, irrespective of the temporal domain of the Pope (Brownlie, 1998: 64-65).

a state by others. As argued, since 1991 the R.O.C. government unilaterally annulled the Period of Mobilization for the Suppression of Communist Rebellion, it showed that Taipei would no longer compete with Beijing for the right to represent China. Neither would Taipei claim to be part of China in the international arena. The second argument is concerned with recognition and non-recognition.

V. Recognition and Non-Recognition

As mentioned earlier, the constitutive and declaratory schools differ in the granting of recognition to a new state. The former doctrine argues that recognition has a constitutive effect. Recognition is essential to the coming into legal existence of the state, through recognition only and exclusively a state becomes an international person and a subject of international law. The latter views recognition as a declaratory act, recognition does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state. To recognise an entity as a state means only to declare that this entity exists as a state, that the recognising state takes cognizance of the existence of the recognised state; but such declaration has no legal effect. It must be said that the granting or withholding of recognition can be used to further a national policy. States have refused recognition as a mark of disapproval, as nearly all of the states did to Manchukuo, the puppet regime in northeast China set up by Japan in the early 1930s; and states have granted recognition in order to establish the very independence of which recognition is supposed to be a mere acknowledgement, as when in 1948 the United States recognised Israel within a

few hours of its proclamation of independence (Harris, 1998: 145). In this sense, recognition is politically-motivated, not legally-based power. The author denotes recognition/non-recognition by individual/collective actors respectively.

Recognition by Individual State

In a Department of State memorandum of August 11, 1958, the policy of the American Government is described as one of refusing to extend “diplomatic recognition” to the Chinese Communist Government. The memorandum declares that:

In the view of the United States diplomatic recognition is a privilege and not a right. Moreover, the United States considers that diplomatic recognition is an instrument of national policy which it is both its right and its duty to use in the enlightened self-interest of the nation. However, there is reason to doubt that even by the tests often cited in international law the Chinese Communist regime qualifies for diplomatic recognition. It does not rule all China, and there is a substantial force in being which contests its claim to do so. The Chinese Communist Party, which holds mainland China in its grip, is a tiny minority comprising less than 2% of the Chinese people, and the regimentation, brutal repression, and forced sacrifices that have characterized its rule have resulted in extensive popular unrest ... Finally, it has shown no intention to honour its international obligations.

The memorandum goes on to state:

United States policy is, of course, based on full appreciation of the fact that the Chinese Communist regime is currently in control of mainland China. However, it is not necessary to have diplomatic relations with a regime in order to deal with it. Without extending diplomatic recognition the United States has participated in extended negotiations with Chinese

Communist representatives (Kelsen, 1996: 404-05).

Kelsen (1996: 405) argues that what the memorandum describes as “diplomatic recognition” is, in effect, political recognition and has no legal effect as to the existence of the government in question. The legal existence of the Chinese Communist Government is not affected by the fact that it does not rule “all China” or by the fact that China is governed by a “tiny minority” or by the fact that the Chinese Communist Government “has shown no intention to honour its international obligation.” The approach of the United States was emphasized in 1976. The Department of State noted that:

In the view of the United States, international law does not require a state to recognise another entity as a state; it is a matter for the judgment of each state whether an entity merits recognition as a state. In reaching this judgment, the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory and population; an organised governmental administration of that territory and a capacity to act effectively to conduct foreign relations and to fulfill international obligations. The United States has also taken into account whether the entity in question has attracted the recognition of the international community of states (Kelsen, 1996: 405).

Similarly, the view of the UK government was expressed as follows:

The normal criteria which the government apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant (Kelsen, 1996: 405).

According to Malcolm N. Shaw (1997: 301-02), the “other factors” may include human rights and other matters. The European Community adopted a Declaration on December 16, 1991 entitled “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” in which a common position on the process of recognition of the new states was adopted. It was noted in particular that recognition required “respect for the provision of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights.” Similarly, in granting recognition to Eastern Europe and the former USSR entities, the United States stressed the relevance of commitments and assurances given by these entities with regard to nuclear safety, democracy and free markets within the process of both recognition and the establishment of diplomatic relations.

Nevertheless, Taiwan's weaknesses in gaining diplomatic recognition and diplomatic allies are not the lack of statehood criteria, nor the lack of “other factors” such as rule of law, democracy and human rights. Recognition or lack of recognition of Taiwan by other states are mainly politically-motivated so as not to infuriate another state – China. Recognition is viewed as a policy to expand state's national interest but it would not seem in law to amount to a decisive argument against statehood itself. One thing that must be discussed is what if Taiwan, while meeting the conditions of international law as to statehood, went totally unrecognised?

Recognition by No State

If an entity went totally unrecognised, the declaratory approach contends that this would undoubtedly hamper the exercise of its rights and duties, especially in view of the absence of diplomatic relations, but it would not seem

in law to amount to a decisive argument against statehood itself. For example, Article 3 of the Montevideo Convention on Rights and Duties of States notes:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

Similarly, Article 9 of the Charter of the Organisation of American States adopted at Bogota in 1948 conferred that the political existence of the State is independent of recognition by other States. The Institut de Droit International emphasised in its resolution on recognition of new states and government in 1936 that “the existence of the new state with all the legal effects connected with that existence is not affected by the refusal of one or more states to recognize” (Shaw, 1997: 302). By contrast, the constitutive theory holds the views that non-recognition of a new state by a vast majority of existing states will constitute tangible evidence for the view that such an entity has not established its conformity with the required criteria of statehood. If Taiwan’s non-recognition by the majority states is to be examined under these two controversial theories, it does point to the declaratory approach as the better of the two theories that Taiwan’s statehood will remain unabated, because other states’ non-recognition of Taiwan are motivated not by the concerns of its legal status but on the consideration of Beijing’s pressures.

One important issue is Taiwan’s absence from the UN. The admission of a political entity to membership in the United Nations is the most convincing approach on which to confer statehood, because in practice, Article 4 of the UN Charter requires that only “states” can be admitted to the UN. Membership of

the UN is based on the concept of collective recognition.

Recognition by Collective Action

Although some exceptions were made upon the establishment of the UN with regard to the criteria for membership, it would be wrong to question the validity of statehood as a criterion for admission to the UN by reason of the inclusion of these entities.¹⁴ Although admission to the UN is prima facie evidence of statehood, according to the wording of UN Charter, Member States are not obligated to develop diplomatic ties with other Member States. If admission of a community not yet recognised by some Members does not imply the obligation of these Members to enter into normal diplomatic and political relations with that community, then, the admission of a community to the UN is in a merely political sense (Dugard, 1987: 47).

Today, 193 states are members of the United Nations. Taiwan has many of the attributes of statehood but is prevented from joining the United Nations as a result of Beijing's objection. In the past Taiwan has been applying unsuccessfully for membership to the UN. Not surprisingly, this has been and will be vetoed by Beijing even if the application can get majority support in the General Assembly. Beijing's veto power was also used in the UN peace-keeping operation in retaliation against Macedonia when Taiwan established diplomatic ties with it in the beginning of 1999. Even Nauru's application for UN membership could be directed to the review of Taiwan-Nauru bilateral relations by Nauru in the face of Beijing's veto power. One can argue that Taiwan's

¹⁴ Upon the United Nations being established in 1945, six entities were not fully independent (did not meet the requirements for statehood) but were recognised as original member states of the UN. Namely, Byelorussia, the Ukraine, India, the Philippines, Lebanon and Syria (Dugard, 1987: 53-55).

absence from UN can not be equally attributed to lack of recognition by collective action from the UN as a whole, but to the objection of one member state of the Security Council. This idea is different from collective non-recognition.

Collective Non-Recognition

The doctrine of collective non-recognition is restricted to forcible territorial acquisitions and treaties entered into under duress. The modern international law of collective non-recognition has its roots in the Covenant of the League of Nations (signed on June 6, 1919) and the Versailles Treaty (June 28, 1919). In Article 10 of the Covenant members of the League undertook “to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League.” Although the Covenant did not expressly provide for the non-recognition of territorial gains in violation of Article 10, it was generally believed that such an obligation was implicit in Article 10 (Crawford, 1979: 120-28; Dugard, 1987: 28; Shaw, 1997: 315-17; Starke, 1989: 153-56). The other source of non-recognition was generated from The General Treaty for the Renunciation of War, generally known as the Pact of Paris (or the Kellogg-Briand Pact) signed on August 27, 1928.¹⁵ In Article 1 (3 Articles in total) of this Treaty, signatory states

¹⁵ Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. Signed at Paris, August 27, 1928; ratification advised by the Senate, January 16, 1929; ratified by the President, January 17, 1929; instruments of ratification deposited at Washington by the United States of America, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, March 2, 1929; By Poland, March 26, 1929; by Belgium, March 27 1929; by France, April 22, 1929; by Japan, July 24, 1929; proclaimed, July 24, 1929. When this Treaty became effective on July 24, 1929, the instruments of ratification of all of the signatory powers were deposited at Washington. China and the other 31 countries, having deposited instruments of definitive adherence, became parties to it (<http://www.yale.edu/>

“condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” This Pact implied that states should act individually to withhold recognition of any territorial transfer contrary to peaceful means. Some preferred to see this Pact as only a “moral obligation,” but others argued that states were obliged to withhold recognition under this Pact (Dugard, 1987: 29).

A clear case of collective non-recognition is the Stimson doctrine enunciated in 1932 at the time of the Japanese invasion of Manchuria and in the action taken by the League of Nations in response to this act of aggression. From the time of the First World War Japan had attempted to expand its influence in China and in 1931-1932 it invaded Manchuria and established there a new puppet state, Manchukuo. At the time of the invasion the Council of the League of Nations was in session, but its sole response was to appoint a fact-finding body (Dugard, 1987: 29). The US Secretary of State, Mr. Stimson, dispatched the following Note to the government of China and Japan on January 7, 1932, announcing that:

The United States cannot admit the legality of any situation *de facto* nor does it intend to recognise any treaty or agreement between those Governments, or agents thereof, which may impair the treaty rights of the United States ... and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Treaty of Paris of August 27, 1928.

The Treaty of Paris referred to in Mr. Stimson's announcement was the General Treaty of 1928 for the Renunciation of War; this had been signed by the United States, as well as by China and Japan (Starke, 1989: 154). This doctrine

of not recognising any situation, treaty or agreement brought about by non-legal means was reinforced not long afterwards by a resolution of the Assembly of the League of Nations. It stressed that League members should not recognise any situation, treaty or agreement brought about by means contrary to the League's Covenant or the Pact of Paris (Shaw, 1997: 315). Since the adoption of the United Nations Charter in 1945, followed by the establishment of the United Nations as a working body, there has been a discernible trend towards a doctrine of the non-recognition of territorial changes and treaties that have resulted from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with purposes of the United Nations. J. G. Starke (1989: 155) lists the following Articles in international law as reflection:

- (1) The provision in the Bogota Charter of the Organisation of American States of April 30, 1948 reads “no territorial acquisition or special advantage obtained either by force or by other means of coercion should be recognised.”
- (2) Article 11 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949, to the effect that every state is under a duty to refrain from recognising any territorial acquisition by another state obtained through the threat or use of force against the territorial integrity or political independence of another state, or in any other manner inconsistent with international law and order.
- (3) Article 52 of the Vienna Convention on the Law of Treaties of May 22, 1969, providing that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

- (4) The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, proclaiming “no territorial acquisition resulting from the threat or use of force shall be recognised as legal.”
- (5) Paragraph 3 of Article 5 of the Definition of Aggression Resolution adopted by the United Nations General Assembly on December 14, 1974, providing “no territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful” (Starke, 1989: 155).

One common feature could be found from the above-mentioned international laws with regard to collective non-recognition, that is the territorial acquisition through the use of force should not be lawfully recognised. The question of obligatory non-recognition has arisen only in relation to the territorial acquisition against the international law. In the case of Taiwan, its absence in the UN and its non-recognition by the majority states is not on the basis of illegal acquisition of territory by force. Its weakness in foreign relations is not due to its legitimacy. Instead, Taiwan's isolation in the international community is majorly a political issue. Many states were forced to choose the Communist China as their counterpart to establish diplomatic ties, which has increasingly meant the non-recognition of the R.O.C. government by the majority states (Feldman, 1995: 6).

VI. Conclusion

Taiwan has traditionally been considered a colony. It was given to the Dutch in 1623, later became a Japanese colony, and finally occupied by the

troops of Chiang Kai-shek escaping to the island in 1949. What was important was the people of Taiwan were not asked when Japanese rule ended and the island was handed over to the occupying forces of another foreign power (Maguire, 1998: 108). This view was shared by the former Taiwanese President Lee Teng-hui (asserted Presidency in-between 1988-2000). In an interview with Japanese weekly *Shukan Asahi*, Lee told author Shiba Ryotaro that “all those who held power in Taiwan before were outsider regimes, including the Kuomintang regime of Chiang Kai-shek” (Thurston, 1996: 52-68). The so-called “outsider” government of the R.O.C. has asserted its legitimacy to rule Taiwan via prescription.

Today, Taiwan is a state, both *de facto* and *de jure* independence. The politically-motivated issue of recognition does not constrain Taiwan’s assertion to statehood given the declaratory school’s interpretation of recognition. The issue of “Taiwan is pursuing for *de jure* independence” is a created issue and is logically a fake issue since an independent Taiwan need not “pursuing independence.” What the unsatisfied themes remain in the mind of most Taiwanese people are the rectification of the national name, national flag, national anthem, constitution and other relevant Chineseness-symbolic totem, etc. These internal affairs need time and consensus from people of the ruling and opposition parties to find a solution to the majority satisfactions. It must be stressed that these internal issues do not constitute any variables constraining Taiwan’s assertion as a sovereign state in the eyes of international law. I conclude that the land of Taiwan belongs to no one but the people of Taiwan. The world states should not interpret Taiwan-China relations with the cold-war thinking of “divided states pending reunification” without listening to the people’s rightful claim for Taiwan’s statehood. Most importantly, an independent state of Taiwan has the legitimate rights to be involved in the

international arena.

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我的國土，你的國土，但絕不是中國的一 關於台灣主權及其對國家位格主張之分析

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摘 要

數十年來，議題設定在「統/獨」的討論已建構一個非常強但卻是錯誤的信念，那就是台灣所想的只有回歸中國，如同馬英九與北京的一廂情願想法。此種錯誤的信念與漸興起之台灣認同嚴重牴觸，並且牴觸了台灣人民希望確保台灣國家位格的要求。縱令二位台灣出生的總統已執政了近 20 年，當議題要探討台灣的未來時，全世界好像靜止在冷戰時期的「統一前的分裂國家」，完全無視二千三百五十萬台灣人民的真實心聲。

本文從主權觀念切入，試圖探討上述議題及台灣的國際地位，亦探討國民黨的中華民國來台灣之後續發展。在作者下結論說明台灣是合法、正當享有國家位格前，關於國家位格及相關議題會在文中討論說明。

關鍵字：主權、國家位格、交戰團體佔領、時效佔領、承認