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Taiwan Imbroglio: A Brazen Violation of U.N. Charter and Its Basic Principles

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Abstract

The question of Taiwan represents an unsolved episode in international law and global politics. It is a potential trouble affecting the international community and poisoning international relations in general. In the First Taiwan Strait crisis itself, the U.S. Joint Chiefs of Staff recommended the use of nuclear weapons against the mainland. The then U.S. Secretary of State John Foster Dulles also stated publicly that the U.S. was seriously considering a nuclear strike. The United Nations, which bears the sacred trust of international community, needs to be more outspoken and proactive in fulfilling its mandated tasks. There is ample back up of international law, precedents and established practices and norms for the U.N. to take up and find an amicable solution to the "Taiwan Question." The present policy of "do nothing" does not augur well for the idealistic U.N. Inertia on the part of the U.N., in particular, threatens to undermine the very normative foundation of the current international order, with disastrous consequences for humanity.

Keywords: Taiwan imbroglio, U.N. membership, international dispute settlement, declaration of independence, recognition

> Taiwan must stand tall on the international stage, with parity and dignity. This is a wish shared by the 23 million people of Taiwan. In the same spirit, it is the yearning of each of our fellow citizens to see our national flag raised and our national anthem played in the Olympic awards ceremonies. It is but a simple wish that should never be ignored by any member of civilized societies nor met with the belligerent attitude that retorts: "nobody cares about you!"
>
> Taiwan President Chen Shui-bian's National Day Speech

PREAMBLE

Taiwan Issue

The question of the global status of Taiwan is increasingly a topic for intense academic scrutiny throughout the world. Both by established juriconsults of international law and lawyers, Taiwan issue is academically agitated through various law journals, magazines, newspapers and on numerous public forums as well as at conferences. Everyone has their different views on the facts, law and other political issues involved in the Cross-strait dispute. Each one's standpoint is colored by his/her own view of the problem.

The issues surrounding the current status of Taiwan are infused with political and emotional sentiments along with the views deeply colored by the ends a particular scholar or organization wishes to achieve. Most of the prominent jurists on international law voiced their opinions on Taiwan based upon their individual views on international jurisprudence. Hence, these discourses have proved to be mere intellectual exercises in futility. So far as the question of Taiwan's legitimate statehood is concerned no viable solution has

come forth. It is high time that a peaceful resolution to the dispute is arrived at in the best interest of both China and Taiwan as well as the democratic nations of the international community.

The Scholars interpretation of international law encompassing Taiwan Question deals inter alia with the following issues:

1. Which is the right U.N. forum to discuss Taiwan issue?
2. Is China bound or not bound by the constraints of Article 2(4) of *U.N. Charter*? (Non use of force)
3. Can Taiwan approach the World court (International Court of Justice) for relief?
4. Whether *Declaration of Independence* or Statehood is a necessary requisite to become a state?
5. Will the lack of whole spread international recognition affects Taiwan's claim as an independent state?

Scholars differ with diametrically opposite views while dealing with the above questions. Therefore the long outstanding Taiwan imbroglio has to be solved with practical and workable solutions, which uphold the identity of the people of that tiny Island. The global actors on the Taiwan issue and other member countries of U.N. should understand the long cherished desire of Taiwan to be an independent nation at par with others.

Membership in the U.N. [Article 4(1) & 4(2)]

Article 4(1) of the *United Nations Charter* is an open invitation to all peace- loving states to join the Organization. It states "Membership in the U.N. is open to all peace-loving states which accept the obligations contained in the present charter and, in the judgment of the Organization, are able and willing to carry out these obligations." From this very same article and other provisions in

the Charter, it is apparent that only states can apply and be members of U.N. Hence it is to be examined as to what it means to be a state for the purposes of membership provision in the Charter in theory and practice.

Historical Perspective

Earlier History

The history of Taiwan is a story of both frustrations and miracles. This mountainous island in the South China Sea is about 140 Kilometers off the coast of Peoples Republic of China. The Chinese call the island Taiwan, meaning “terraced bay.” The wild, forested beauty of the island led Portuguese sailors in 1500 to name it ILHA FORMOSA, meaning beautiful island. Taiwan’s first inhabitants left no written records of their origins. Anthropological evidence suggests that Taiwan’s indigenous peoples are of proto-Malayan ancestry. The morphology and syntax of their languages belong to the Austronesian language family, with whose speakers they share many customs and cultural features such as tattooing, gerontocracy, and spirit worship. Over 1000 prehistoric sites in Taiwan, including many dwelling areas, tombs and shell mounds, have provided more and seemingly contradictory clues to the origins of Taiwan’s aborigines. What is known for certain is that tribes of indigenous peoples, plus Han people from China, were already living in Taiwan when survivors of a Portuguese shipwreck first visited the island in 1582 (Chang & Lim, 1997; Chen, 1998: 223; Chen, 1998: 675; Carolan, 2000: 429; Government Information Office, 2006: 36-45).

Taiwan’s history since the 17th century has been one of continuous colonial rule by the Portuguese, Dutch and Japanese. For brief periods, Chinese forces

also occupied Taiwan. There are competing interpretations about how long and in what capacity China has held jurisdiction over Taiwan. Some Chinese came to the island from the mainland as early as 500s but large settlements did not begin until the 1600s. Dutch traders occupied a Taiwanese post from 1624 until 1661. Koxinga, a Chinese Ming dynasty official drove them out. Manchu conquerors had overthrown the Ming dynasty in Mainland China, and Koxinga hoped to restore the Ming dynasty to power. He therefore wanted to use Taiwan as a base from which to attack the Manchus. But the Manchus conquered Taiwan in 1683 and administered it as part of China for the next 212 years. But one fact is clear: Taiwan did not become a formal Chinese province until 1887 with Liu Ming-ch'uan as its governor. Before that, island was regarded by Chinese rulers as nothing more than an insignificant backwater[1] (Vertente, *et al.*, 1991: 130). Taiwan's status as a province was short-lived i.e. only 8 years, for China defeated in the Japanese war of 1894-1895. After suffering defeat in the Sino-Japanese war, the Ch'ing Dynasty surrendered Taiwan "in perpetuity" to Japan under the 1895 *Treaty of Shimonoseki*.[2] Japan gave the Taiwanese a two-year period during which they were free to return to China if they wished. The overwhelming majority of Taiwanese—who numbered three million at the time-chose to stay and live as "resident aliens" in the Japanese empire[3] (Chen & Reisman, 1972: 599, 610).

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1 See Letter from Lord Avebury, Chairman of the Parliamentary Human Rights Group, House of Lords, to Ma Yuzhen, Ambassador to the United Kingdom (Sept. 27, 1994) (As early as AD 603, Taiwan is referred to in the Chinese annals as a foreign Country. Later, in the thirteenth century, Yuan Dynasty official works refer to Taiwan's inhabitants as "eastern Barbarians," tung fan): Taiwan was seen as a lawless, "trifling place" of rebellious peasants, so much so that the Ch'ing Emperor K'ang Hsi thought "relinquishing it would not be a loss."

2 See The *American Journal of International Law*, Vol. 1, p. 378 (Supp. 1907).

3 Article V of the *Treaty of Shimonoseki*. Only 0.16% of the Taiwanese population chose Chinese nationality.

Unable to influence the Manchu government, the Taiwanese revolted and established the Republic of Taiwan. With a year, the republic was suppressed by an invading Japanese force (Morse, 1919: 23-27). From 1895 to 1945, Formosa was a colony of Japan, this formal status continuing until 1951.[4] Japanese development of Taiwan was extensive, as modern transportation and infrastructure, agricultural research and development, public health, banking, education and literacy, co-operatives, as well as business practices were brought to Taiwan. Such development, however, was primarily for the benefit of Japan, not Taiwan. Moreover, the Taiwanese were denied the right of self-governance and were kept out of high positions in all facets of society. In 1945, following Japan's defeat and surrender at the end of World War II, the Republic of China assumed control of Taiwan.

Recent History

In 1949, the Nationalist government in Nanjing relocated to Taiwan after losing a civil war against the Chinese Communists under the leadership of Generalissimo Chiang Kai-shek. The influx of around one and a half-million soldiers and civilians from the mainland turned the Island into a frontline of the Cold War. With the start of the Korean War in 1950, the United States dispatched its Seventh fleet to protect Taiwan from attack by the Communists and began to provide Taiwan with considerable economic and military assistance. Taiwan became the focus of attention again in August 1958, when the communists attempted to take over the Islands of Kinmen and Matsu. The attacks eventually stopped, and in October 1958, the U.S. and R.O.C. governments issued a joint communique reaffirming their solidarity. Invaluable

[4] Considering the Peace Treaty with Japan signed at San Francisco on Sept.8, 1951 [1952] 3 U.S.T 3169. It came into effect on 28 April, 1952.

military support continued through the 1950s and 1960s, preventing Taiwan from being conquered by the Communists. The history of Taiwan after 1949 is one of sweeping change. Over the past few decades, rapid economic development has made the island one of the world's largest and most dynamic economies, with rapid industrialization, urbanization and modernization dramatically transforming the lives of Taiwan's residents. Following the lifting of martial law in 1987, a process of democratization began, and eventually Taiwan became the first ethnic Chinese democracy (Government Information Office, 2006: 41-42).

From the timeline, we can see that following the death of Chiang Kai-shek in 1975, Yen Chia-kan served as President until Chiang's son, Chiang Ching-kuo was elected in 1978. In 1987, shortly before his death, Chiang lifted martial law, which made full democratization possible. The late 1970s and early 1980s saw the growth and evolution of the dangwai (KMT-party outsiders) democratic opposition movement. In December 1979, a rally in Kaohsiung sponsored by opposition leaders and "Formosa" magazine to commemorate International Human Rights Day turned into a bloody conflict between demonstrators and military police. This is infamously known as the Kaohsiung Incident. Many opposition figures were arrested and sentenced to long prison terms. Nevertheless, this event paved the way for a united and organized opposition to the ruling KMT. The formation of the Democratic Progressive Party (DPP) on September 28, 1986 was a landmark moment in Taiwan's progression towards multi-party democracy.

Chiang Ching-kuo's successor, Lee Teng-hui, continued to reform the rigid political system that had been in place during decades of civil war and martial law. Under his administration, press freedoms were accepted, opposition parties developed, visits to China increased dramatically, and the Constitution was

revised to allow for the popular election of all legislators and the President.

Taiwan's first direct presidential election was held in 1996, and KMT incumbent Lee teng-hui was re-elected. But the real test of Taiwan's democratic progress came with the first transfer of power in March 2000. DPP candidate Chen Shui-bian won the second presidential election, ending the KMT's half-century hold on the presidency. This blossoming of Taiwan's democracy after decades of germination and growth was truly a historic turning point, completing the country's transformation from a one-party state to a full-fledged democracy. Chen was re-elected in March 2004.

In the international plane, in 1971, the United States announced, it favoured U.N. membership for communist China. But the United States also said vehemently that Nationalist China—then a Charter member of U.N.—should retain its U.N. seat. Under the proposed scheme, both the Taiwan and the People's Republic of China would have become members of U.N. at the same time. Thus Taiwan would have become a legitimate member of international community and not an exceptional land mass left in the lurch as today. But the overzealous and unruly Chiang Kai-shek rejected outright the U.S. proposal to allow dual representation in the United Nations.

The United Nations and its members were more eager to bring the P.R.C. out of its iron curtain and make a participant in global affairs. In October 1971, the U.N. expelled the Nationalists (Taiwan) and admitted Communist China. In 1972, U.S. President Richard Nixon made his epoch making visit to Communist China and agreed to the withdrawal of U.S. military forces from Taiwan. During the seventies, a number of nations ended their diplomatic relations with Taiwan and established ties with Communist China. Even the one time close ally, the United States terminated its diplomatic relations with Taiwan at the end of 1978. They established diplomatic relations with Communist China at the

start of 1979. The *Mutual Defense Treaty* between U.S. and Taiwan was ended on Dec.31 1979. But the U.S. agreed to continue to supply Taiwan some military aid. Also, the two countries agreed to carry on unofficial relations through non-governmental agencies. In order to make this possible the U.S. Congress also passed a special Act called Taiwan Relations Act, conferring Taiwan the status of a state. Trade between the two countries continues to thrive. About 40% of Taiwan's exports go to the United States (World Factbook, 2008).

The People and the Government

Most Taiwanese are Chinese whose ancestors came to the island from Fujian (Fukien) and Guangdong province on the mainland. More than 1.5 million people fled to Taiwan from the mainland after the Communists take over in 1949. About 2% of the population is non-Chinese native peoples related to Indonesians and Filipinos. Most of the native peoples are sometimes called aborigines since they live on reservations in the mountains.

The Taiwanese speak various Chinese dialects. But almost all the people also know the Northern Chinese (Mandarin), the official Chinese dialect. About half of the Taiwanese people practice a local traditional religion that blends Buddhism, Confucianism and Taoism. About 42% of the Country's people are Buddhists and about 8% are Christians. About 90% of Taiwan's people can read and write. The law requires that Children attend primary school for six years and secondary school for three years.

The Chinese Nationalist Government, which moved into Taiwan in1949, was based on a Constitution adopted in 1946 on the Mainland. It provides for five branches of government namely executive, legislative, judicial, control and

examination. Each branch is headed by a “Yuan” (Council). The R.O.C. government is divided into central, provincial/municipal, and county/city levels. The President is Taiwan’s most powerful government official. The President is elected by the National Assembly to a six-year term. The President appoints a Prime Minister to head the Executive Yuan. The National Assembly’s chief functions are to elect the President and to amend the Constitution. Most law making is done by the legislative Yuan.

After moving to Taiwan in 1949, the Nationalist government established a National Assembly and legislative Yuan made up of members who had been elected on the Mainland in 1947 and 1948. They were allowed to keep their seats indefinitely. They became known as “life time” members. By 1991, about 85 of the 580 members of the National Assembly and 100 of the 215 members of the legislative Yuan represented various areas in Taiwan. A 1990 judicial decision declared the system of “life term” members unconstitutional. It required that all the “life term” members retire by the end of 1991. Following the retirements, all the members of the National Assembly have been elected by Taiwan’s voters to six-year term. Legislative Yuan members are elected to three-year terms.

The judicial Yuan is Taiwan’s highest court. The Control Yuan reviews the activities of the government officials and has the power of impeachment. The Examination Yuan gives tests that are used to appoint and promote government employees (Copper, 2003; Government Information Office, 2006).

It may, hence, be seen that Taiwan has a chequered history of political existence and stability in the last 5 decades. It governs the country well as a sovereign state and has matured itself as a modern democratic country fulfilling all the conditions under international law to be an independent nation with global privileges and recognition from all international organizations.

Role of U.N. in International Peace Settlement

No one doubts the competence of U.N. to solve or to assist in the solution of problems, which threatens or is likely to endanger international peace and security.[5] The provisions of the Charter undoubtedly attest to that competence. The Organization has two distinct responsibilities; one is to bring about cessation of armed conflict whenever it occurs, and to assist the parties to international disputes to settle their differences by peaceful means. The U.N. with the aid of international law should focus not only on conflict resolution but on conflict prevention also[6] (Carolan, 2000: 429). It is fair to say that international law has always considered its fundamental purpose to be the maintenance of peace (Murty, 1968; Merrils, 1998).

The U.N. system is founded in constitutional terms upon a relatively clear theoretical distinction between the functions of the principal organs of the organization. However due to political conditions in the international order, the system failed to operate as outlined in the Charter and adjustments had to be made as opportunities presented themselves (Shaw, 2003). The legal requirement for the peaceful settlement of disputes emerged as a clear international rule in the *United Nations Charter*, as a direct result of the motivation "to save succeeding generations from the scourge of war" and, aided by the power given to the Security Council to seek to maintain international peace and security. It could be that this rule requiring the peaceful settlement of

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5 The Charter gave primacy to the maintenance of international peace and security in its purposes as mentioning it in Article 1(1) see *U.N. Charter*.

6 The author addresses international law's potentially powerful use as a resource not just for conflict resolution but conflict prevention.

disputes now has the character of jus cogens,[7] at least if the non-use of force has that character.

The general obligation to settle disputes by peaceful means is principally contained in Articles 1(1),[8] 2(3)[9] and 33[10] of the *U.N. Charter*. The principle of settlement of disputes by peaceful means is, of course, one of the principles basic to the whole structure of international society. One of the main purposes of international law is to provide a framework for the peaceful settlement of disputes and Article 33 places an obligation on states to settle their disputes by peaceful means. Its juxtaposition in Article 2(3) of the Charter with Article 2(4)

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7 In contemporary international law, as codified in the 1969 *Vienna Convention on the Law of Treaties* (Articles 53 and 64), the prohibition enunciated in Article 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character. Jus cogens or peremptory norm is a fundamental principle of international law considered to have acceptance among the international community of states as a whole. Under the *Vienna Convention on the Law of Treaties*, any treaty in violation of a peremptory norm is null and void. It is clear, on the basis of both a teleological and historical interpretation of Article 2(4), that the prohibition enacted therein was, and is, intended to be of a comprehensive nature. The International Court of Justice in *The Republic of Nicaragua v. The United States of America* [1986] ICJ Rep 14 held that prohibition of the use of force embodied in Article 2(4) forms part of customary international law and is a Jus cogens norm.

8 Article 1(1): “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

9 Article 2(3): “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

10 Article 33: “1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.”

is no accident of drafting: for it is the corollary of the prohibition of the use or threat of force as means of resolving international disputes (Bowett, 1983: 169). A General Assembly Resolution of 1970[11] after quoting Article 2(3) declares:

> States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

Such a resolve and determination of the international community is further seen amplified by the *Manila Declaration* on the Peaceful Settlement of International Disputes adopted by the General Assembly.[12] The Declaration grandiloquently announced that the *Charter of the United Nations* embodies the means and an essential framework for the peaceful settlement of international disputes, the continuance of which is likely to endanger the maintenance of international peace and security. It recognized the important role of the United Nations and the need to enhance its effectiveness in the peaceful settlement of international disputes and the maintenance of international peace and security, in accordance with the principles of justice and international law, in conformity with the *Charter of the United Nations.*

The rationale behind the need for pacific settlement of disputes in the U.N. Scheme is that the employment of force is, in principle, reserved to the Organization, the members are under an obligation to settle their conflicts by peaceful means. The U.N. not only provides the law relating to the settlement of international disputes but to its procedure, means and methods also. Both the

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[11] *Declaration on Principles of International Law* **c**oncerning Friendly Relations and Co-operation among States in accordance with the *Charter of the United Nations*. Resolution 2625 (XXV), adopted by consensus 24 October 1970 [*Friendly Relations Declaration*].

[12] *Manila Declaration* on the Peaceful Settlement of International Disputes. A/RES/37/10 At 68th plenary meeting on 15 November 1982.

Security Council and the General Assembly have made extensive use of their powers to make recommendations to states concerning the settlement of disputes. Under Article 33(2)[13] of the Charter the Council may call upon the parties to settle a dispute by the peaceful means specified in Article 33(1), and under Article 36(1)[14] it can recommend the specific means to be employed (Merrils, 1998: 223). In 1976 the Council called upon Greece and Turkey "to resume direct negotiations over their differences" with regard to the Aegean Sea dispute and appealed to them to do everything within their power to ensure that this results in mutually acceptable solutions.[15] The General Assembly exercises similar powers and like the Security Council, when it acts under Articles 37(2)[16] and 38,[17] can go so far as to recommend possible terms of settlement. In 1948, for example, in a recommendation addressed to the incipient Arab-Israeli struggle, the Assembly set out an elaborate plan for the future of Palestine. Another action by these organs is the fact-finding missions to investigate the fact situation on the spot and bring evidence to arrive at conclusions. In Corfu Channel dispute, the Security Council established a fact-finding sub-committee. The role of the Secretary-General in this field is also important and has been

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13 Article 33(2) reads "The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

14 Article 36(1) reads "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment."

15 UNSC Resolution 395(1976).

16 Article 37(2) reads "If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate."

17 Article 38 reads "Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute."

employed on many occasions creating precedents.[18]

U.N. VIS A VIS TAIWAN ISSUE

Regarding the "Taiwan Question," we can see that the U.N. seems to be oblivious on the matter.[19] Its continued inertia shows that it is not at all concerned with the problem. It doesn't even issues press statements on the matter. Even regional organizations such as EU periodically issues press statements responding to specific happenings on the Taiwan Strait such as felicitating lunar new year cross-strait flights, on anti-secession law, urging both sides to show restraint, on SARS and so on.[20] Why this vital matter is of little importance to the global organization is baffling. This problem is a left over of World War II and the cold war. The P.R.C.'s territorial claim over Taiwan is deficient in law as well as facts. It is a known fact that both sides maintain huge military and ammunition; Taiwan purchases billions worth arms from countries such as U.S. for 'defensive' purposes.[21] Both sides don't even talk with each other.[22] The cross-strait divide is on the increase in all fields-from political, economic, social, cultural to the people's way of life. The U.S.

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[18] This will be detailed in a later part of this work. The 1954 incident of American airmen detained in China, Iran U.S. Embassy hostage issue, Kashmir problem, Falklands Islands war etc are instances where SG stepped in either on his own initiative or on being asked by SC or GA.

[19] There is no action or even statements by U.N. or its agencies regarding Taiwan as if there is no issue or problem regarding Taiwan in world politics.

[20] The Council of European Union which operates under the Common Foreign and Security policy issues such statements on behalf of European Union countries.

[21] *Taiwan Relations Act* enacted by U.S. Congress authorizes and guarantees such sale of arms to Taiwan for defending P.R.C. in case of military attack.

[22] There is no talks since the 1993 Singapore meeting between heads of semi-official agencies of P.R.C. and R.O.C. on Taiwan. The talks were led by Taiwan's Strait Exchange Foundation (SEF) Chairman Koo Chen-fu and P.R.C.'s Association for Relations Across the Taiwan Straits (ARATS) Chairman Wang Daohan. They evolved the so called "1993 consensus." Despite these talks, cross-strait relations began to deteriorate shortly thereafter.

Department of defence testifies that 900 plus missiles are targeted at Taiwan by P.R.C[23] (Copper, 2003: 193). The P.R.C. never renounced the employment of force in resolving the issue and even threatened it many times. Is this all not a precarious situation? For U.N., it is not. Otherwise it would have stepped into the matter and done what it could. Credibility often depends not only on one's ability and willingness to do its duty but also in doing it effectively at the proper time and place.

Overview of U.N. Practice in Membership Matters

The U.N. membership is open to all peace-loving states, which accept the obligations contained in the present charter as per Article 4(1) of the *United Nations Charter*. Notably, neither the *U.N. Charter* defines the term "states" nor do the two advisory opinions of the International Court of Justice. It is pertinent to turn on to the actual practice of the U.N. in granting membership to states. Only two organs of the U.N. viz. the Security Council and the General Assembly are involved in the process. Article 4(2) states that the admission of any state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council. The ICJ made it clear that only the conditions enumerated in article 4 were to be taken into account in considering a request for membership not other extraneous matters.[24]

Regarding the term "states," the Security Council and the General Assembly have followed a number of criteria and have given a wide variety of

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[23] Taiwan's biggest concern has been the short range missiles Beijing has placed in areas adjacent to Taiwan across the strait. China now has several hundred missiles aimed at Taiwan and is reportedly increasing the number by fifty per year.

[24] Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J.57 and Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J.4.

meanings to the term in admitting them into the U.N. Prof. Frederick Tse-shyang Chen pondered over this area with admirable excellence and scholarly erudition (Chen, 2001). The traditional Montevideo definition of statehood is not strictly followed all the time. For example they gladly admitted entities newly independent from colonial or other forms of non-self governing rule though many among them are not really independent or self-governing. Prof. Frederick Tse-shyang Chen (2001) observes that "the resultant effect is that the term states in the Charter provisions has not been given one uniform meaning but instead a number of plainly discordant meanings. An entity may appear to fall short of statehood in one or another important respects yet be held a state eligible for membership. Conversely, an entity may appear to be well qualified as a state yet is refused the status of statehood remaining ineligible for membership. Under this practice, states can mean a full-fledged independent sovereign entity, a political subdivision, an overseas possession of a state, a mandated territory, entity with a dubious degree of independence, an entity with a government controlled in varying degrees by another government, entity without a government, an entity with a disputed territory and so on." There is no consistency and coherence in the definition, criterion and attributes of "state" adopted by the U.N. Security Council for the purpose of membership. This made Prof. W. Michael Reisman of Yale Law School comment, "The word State plainly had some metaphysical attributes requiring serious scholastic inquiry" (Reisman, 1973: 59).

Even those entities, which did not even prima facie fulfill the criteria, are seen admitted. Prof. Frederick Tse-shyang cites an example of Monaco's U.N. admission in 1993. Under a treaty with France in 1918, Monaco, in exchange for France's protection, undertook to limit both the constitution and operation of its government. Monaco's measures concerning the exercise of a regency or

succession to the throne are always the subject of prior consultation with France, and the throne can only pass to a person of French or Monegasque nationality. While Prince is the Head of the State, the head of the Government is the Minister of State, who is appointed by the Prince from a list of three French nationals selected by the French government. Under the operation of the government, Monaco is required to exercise its sovereignty in complete conformity with the political, military, naval and economic interests of France. Monaco's measures regarding its international relations are always the subject of prior consultation with the French Government. Under the *Treaty Regime*, Monaco's government and governance are clearly subject to substantial control by France. Yet in 1993, while the 1918 *Treaty Regime* remained basically intact, Monaco's application for admission was recommended by the Security Council without a vote and approved by the General Assembly by acclamation. The case of Andorra which was admitted in the same year is more or less same whose co-princes are the French President acting in his non-governmental personal capacity and the Bishop of Urgel, Spain. Prof. W. Michael Reisman rightly quipped that many U.N. members had economic, customs, nationality and monetary ties, which linked them closely if not inextricably, to a larger state. Many had defense arrangements with larger states, which were extremely one-sided. Many had virtually no foreign policy apparatus. If the traditional criteria were followed strictly, they would not have entered the U.N. (Chen, 2001).

Taiwan's Fulfillment of International Norms for Statehood

Being the state of things as described, what is the impediment for Taiwan to enter this Organization, which boasts of Universal membership? Why can't the "Republic of Taiwan" presently known under the official title "Republic of

China" become a member of United Nations? The nomenclature doesn't matters much. What matters is the substance. Taiwan can also apply under Republic of Taiwan if it adopts that name, to avoid confusion, through a constitutional amendment. The present situation that allows the above said entities such as Monaco, Andora etc as sufficiently capable of international life while Taiwan cannot is a formalism of uneven handed sort. Some scholars opine that Taiwan is using a name it is not free to use. But in 2007 Taiwan President Chen Shui-bian formally submitted application to the U.N. Secretary-General Ban Ki Moon seeking U.N. membership under the name "Taiwan." That is also summarily rejected. It is true that cross-strait dispute traditionally centered on the existence of competing claims as to who is the de jure government of China and not issues of statehood. This was the case until 1991 when the R.O.C. President officially announced that hereafter Taiwan does not purport to represent China internationally nor claim to recover the mainland but will seek participation in international Organizations on its own.[25] So, now it is not a question of recognition of governments but creation and recognition of an independent Taiwan nation.

It is to be by current international legal standards (Chen, 1998: 678-79).[26] The R.O.C. government lost its legal status in international law as representing mainland when the communists came into power in 1949 and drove them out from Mainland (or after some time when the international community widely recognized P.R.C.). But progressively in 1996 the "alien" R.O.C. regime (some

[25] In 1991, Taiwan unilaterally declared a formal end to the war with Beijing. The National Assembly in an extraordinary session abolished the "Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion." Taiwan started applying to U.N. thereafter.

[26] The author wrote, "Judged by the international legal standard of statehood, Taiwan is a sovereign, independent state in every sense of the world. Taiwan has more than fulfilled all of the requirements for statehood."

call it as a foreign occupation one since it is imposed on Taiwan without their consent) is supplanted by popular sovereignty of the Taiwanese people when they directly chose their masters by Universal adult suffrage[27] (Chen, 1991: 1287; Buruma, 1996: 81). Now Taiwan is truly self-governing. It also satisfactorily meets the Montevideo criteria which stipulates that state as an international juristic person should possess (a) a Permanent population (b) a defined territory (c) a stable government and (d) capacity to enter into relations with other states.[28] Also it meets the ancillary criteria such as Democracy (Franck, 1992: 46)[29] and State responsibility.[30]

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27 Taiwan President Chen shui-bian consistently maintained that Taiwan enjoys popular sovereignty and is already a sovereign, independent nation. He reterieted it recently in aftermath of the enactment of *Ant-Secession Law* by P.R.C. Professor Lung-chu Chen observes that "free elections are the very essence of 'popular sovereignity' of people: authority comes from people and rest upon the people as a whole, not a handful of purported rulers. Such popular will can be best expressed in free and genuine elections." He cites the *Universal Declaration of Human Rights* as declaring the will of the people forms the bedrock of a government's legitimacy.

Ian Buruma observes, "This popular sovereignty alone constitutes an "irrefutable argument" in favour of Taiwan's independence."

28 Scholars and international law practitioners made no serious dispute to this.

29 Thomas M. Franck (1992) states that democracy is becoming normative requirement for governmental legitimacy.

30 State responsibility is a strong indicator of sovereignty and statehood. If Taiwan were a province of China, then China would be liable for Taiwan's actions under international law. In actual practice we can observe that the international community does not regard Taiwan as part of P.R.C. It deals with Taiwan as of itself. Two examples can be cited. In "Maersk Dubai" incident, seven Taiwanese sailors were arrested in Nova Scotia, Canada for the murder of three Romanian stowaways on their ship Maersk Dubai. Taiwan asked for the release of the sailors into its custody and promised to prosecute them in Taiwan. The P.R.C. also asked for the sailors, basing their jurisdiction on the claim that Taiwan is part of China. They contented that extradition cannot happen between a state and a province of another state but only between states. But the Canadian Ministry of justice opted to allow the Taiwanese authorities to prosecute and released sailors to Taiwan including collected evidences. Another is a recent one in which the International Tuna Commission fined Taiwan and reduced its allowable catch quota for excess fishing violating its norms and rules. It can't fine P.R.C. for these. These incidents show the current reality, which no one can refuse to accept.

It can, therefore, be inferred that the *United Nations Law,* as some scholars call may be different from international law, which encompasses Montevideo criteria etc in this particular area. In both sense Taiwan is qualified. The principle of Universality also supports the admission of Taiwan. Prof. Frederick Tse-shyang testifies that though the Charter does not provide for automatic universal membership, the principle never ceased to surface in deliberations on membership matters and has received widespread support (Chen, 2001). Also Self-determination is a core principle and one of the purposes of U.N. upon which Taiwan can base its claim.[31] Antonio Cassese, a much-respected juriconsult of international law observed, "Over the years, member states of the U.N. gradually turned that standard (Principle of Self-determination) into a precept that was also directly binding on states" (Cassese, 1995: 43).

Another question that is to be considered now is whether Taiwan's present status falls within the accepted definition on sovereignty. Taiwan has control over its internal affairs (Domestic sovereignty) and is able to keep outsiders from operating within its borders or influencing internal decisions (Westphalian sovereignty). The Westphalian sovereignty on nation's statehood involves issues of authority and legitimacy of control. Undoubtedly Taiwan fulfills those

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[31] The principle of self-determination is prominently embodied in Article I of the *Charter of the United Nations* as one of its purposes.

Article 1(1) reads "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

Its inclusion in the *U.N. Charter* marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognized as a right of all peoples in the first article common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which both entered into force in 1976. Paragraph 1 of this Article provides: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

conditions. Stephen D. Krasner, Professor at the Stanford University and an acclaimed publicist identifies four prominent conceptualizations of sovereignty (Krasner, 2001: 2):

1. the ability of a government to regulate the movement of goods, capital, people and ideas across its borders,
2. the state's effectiveness or control,
3. whether a state is recognized by other states, and
4. the autonomy of domestic authority structures—that is, the absence of authoritative external influences.

When applying these four elements, which Krasner distilled from various disciplinary approaches, it is quite evident that Taiwan fulfills all except one-that it is not widely recognized by other states. That situation exists solely because of P.R.C.'s pressure tactics and threats committed in infraction of international law[32] (Charney & Prescott, 2000: 476). One of the primary requirements for Statehood is the *Declaration of Independence* by the putative state. It has become a requirement of customary international law, which binds the world community irrespective of individual consent through consistent state

[32] See the Taiwan President's National Day speech, TJ, Oct.15, 2004, "The threat of military force poses the greatest shadow of terror and force of darkness across the Taiwan Strait." The threats by the P.R.C. to use force against Taiwan if it declares independence surely constitute violation of Article 2(4) of the *U.N. Charter.* The *Anti-secession Law* of Beijing passed in 2004 legalizes the use of force in regard to Taiwan. Also see Charney and Prescott (2000): "Arguments by the P.R.C. that force was necessary to protect its territorial integrity would be wrapped in the pretext of a technical legal argument, but in reality such integrity has not existed for the entire duration of the P.R.C. and hardly for China for over a hundred years. The use of force by China in this circumstance would be intended to change the long-term status quo by extending P.R.C. governance to Taiwan. It would certainly not fall within the single express exception to the prohibition on the use of force found in Article 2(4)—the right of self-defence under Article 51 of the Charter-especially if the Taiwanese claim to statehood or other form of independence were made merely by diplomatic communications unaccompanied by the use of force."

practice. Precedents to this can be seen from the United States of America to the Republic of Montenegro, the 192nd and youngest member of the U.N. But Taiwan's situation is an exception. Without such a Declaration, recognition cannot easily follow. Also there was no rigid requirement in international law, which made recognition a condition of statehood, a state could exist without recognition. In ideal conditions, it would be recognized and welcomed as a state by the international community wholeheartedly.

It is vivid that the Taiwan Government acts as a sovereign of the territory it rules. The naked military threats of the P.R.C. alone are the reason, which precludes an official declaration by Taiwan. The P.R.C. declared many a times that an official declaration would result in an immediate invasion of the Island. All states and other global actors should consider such a special situation. Taiwan's regular U.N. applications itself shows its intention. No province or territory under a State can apply for a U.N. Membership, we also encounter none in the global scene. Whether China can be allowed to enjoy the undue advantage arising from this situation, which is solely due to its actions committed in violation of the Charter. That needs to be carefully considered by all involved in dealing with the issue at the national as well as international level.

Options before U.N.

By The Security Council

The Security Council was intended to operate as an efficient executive organ of limited membership, functioning continuously. It was given primary

responsibility for the maintenance of international peace and security.[33] The Security Council acts on behalf of the members of the Organization as a whole in performing its functions, and its decisions not recommendations are binding upon all member states.[34] Its powers are concentrated in two particular categories, the peaceful settlement of disputes and the adoption of enforcement measures. By these means, the Council conducts its primary task, the maintenance of international peace and security (Shaw, 2003: 1085-86).

In the Scheme of the Charter it is the Security Council that is charged with the primary responsibility for the maintenance of international peace and security. It is accordingly the Security Council that is charged with the primary responsibility for the settlement of disputes, which cannot be settled by other peaceful means chosen by the parties to a dispute. In Chapter VI the Charter lays down various procedures for the settlement of disputes and the adjustment of other situations by the Security Council. Two are instituted by the parties to the dispute, the others by the Security Council itself, one on its own initiative, the others on the initiative of the members, the General Assembly, or the Secretary-General (Kelson, 1966: 511-12).

To every impartial observer, there is crisis in the Taiwan Strait, which have the potential to erupt into a major war with catastrophical consequences not only regional but globally in this interdependent world. Such a situation surely engages the responsibility of the United Nations Security Council to concretely act upon and do its primary duty under Article 24(1)[35] of the *U.N. Charter* to

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33 Articles 23, 24, 25 and 28 of the *U.N. Charter*.

34 Article 25 of the Charter.

35 Article 24(1) states, “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

maintain international peace and security. Even non-members have certain obligations in this regard when the UNSC steps in for maintaining peace.[36] The presence of a party to the dispute (P.R.C.) in the UNSC cannot and shall not be a valid ground to absolve or shirk from its critical responsibility entrusted by the Charter. The primary responsibility to maintain global peace and security shoulders on UNSC as mandated by the Charter though the word "primary" does not mean "sole" as expounded by the International Court of Justice in the celebrated "*Nicaragua Case*."[37] That naturally means, other agencies, regional mechanisms can play a legitimate role in this situations. Unfortunately it has not happened so far in the Taiwan issue. So the UNSC is bound to deal with this issue.

The principle that the Security Council shall interfere in a dispute only after the parties have tried in vain to settle it by means of their own choice is not maintained in the Charter. There are other procedures for the settlement of disputes, which are determined by the opposite principle. Thus there is the procedure to be instituted on the initiative of the Security Council itself and which is regulated by Articles 34,[38] 33(2) and 36.[39] Although Article 34 is not

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[36] Article 2(6) of *U.N. Charter* which states, "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

[37] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*) (Merits) [1986] ICJ Rep 14 at 92.

[38] Article 34 reads "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."

[39] Article 36: "(1) The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. (2) The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. (3) In making recommendations under this Article the Security Council should also take into consideration

without ambiguity, it has been interpreted to practice to confer upon the Security Council the competence to intervene in any dispute-and any other situation of the nature determined in this Article-even before the parties had an opportunity of settling the dispute by peaceful means of their own choice or of adjusting, by themselves, the situation. All that is required is that the intervention be carried out as an "investigation." The Council may "investigate" a dispute or another situation by examining and discussing written or oral statements submitted by the parties. The Council is free to undertake investigation through a special organ, which may be a commission, authorized to carry out the investigation (Kelson, 1966: 514-15).

Taiwan can also bring this matter to the attention of UNSC under Article 35(2)[40] of the Charter which provides, "a State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the present Charter." Taiwan can request the Security Council, in accordance with Article 36(1)[41] of the *United Nations Charter*, to investigate the Taiwan question, in particular, the merits of the complaint, and to recommend appropriate procedures or methods of adjustment. Article 35(1)[42] is interpreted

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that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

40 Article 35(2) states, "A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter." Since the General Assembly only have a subsidiary or secondary role in this regard, Security Council is the proper forum.

41 Article 36(1) states, "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment."

42 Article 35(1) reads "Any Member of the United Nations may bring any dispute, or any

in practice to permit the Security Council to recommend substantive terms of settlement.

The Hawaiian Kingdom filed a similar complaint against the United States of America concerning the prolonged occupation of the Hawaiian Islands since the Spanish-American War of 1898 with the UNSC in 2001.[43] Taiwan of course has a right to be heard before the UNSC under Article 32.[44] It can rely upon the precedent of the Security Council when it accepted the P.R.C.'s complaint in the 1950s against the U.S. when the Seventh fleet was dispatched to Taiwan Strait to ward off any Communist's attack on Taiwan. The P.R.C. complained that it was an act of aggression challenging its territorial sovereignty. The Security Council invited a representative of P.R.C. when discussing the matter since P.R.C. was not a member of U.N. at that time under Article 32 of the *U.N. Charter*.

The Question can also be solved by mutual negotiations between Taiwan and P.R.C. with or without mediators. That would be in the best interests of both the parties. But before that, the U.N., the most accepted global organization with very good repute among all peoples and nations that vows to adhere to the values of peace, respect and equality couldn't arbitrarily sideline with the stance canvassed by P.R.C. The Council's inaction bears ample

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situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly."

43 Complaint filed with U.N. Security Council against the United States on July 5, 2001 by the Agent for the Hawaiian Kingdom, H.E. David Keanu Sai, Acting Minister of Interior.

44 Article 32 states, "Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state, which is not a Member of the United Nations." The Security Council shall lay down such conditions as it deems just for the participation of a state, which is not a Member of the United Nations.

testimony to this. That would clearly run counter to international justice and law. That is totally unbecoming of an international society based upon rule of law.

Recently the Secretary-General returned Taiwan's application for U.N. membership without forwarding it to the Security Council. The Taiwan President Chen Shui-bian formally submitted application to the U.N. Secretary-General Ban Ki Moon in July last year seeking to initiate membership procedures. The U.N. Office of Legal Affairs refused to forward the application to the Security Council as is the established practice for new membership applications but strangely OLA itself dismissed the application. Ban said the matter "was very carefully considered by the Secretariat" and that "it was not legally possible to receive" the application based on U.N. Resolution 2758. "By Resolution 2758 of 1971, the General Assembly decided to recognize the representatives of the People's Republic of China (P.R.C.) as the only legitimate representatives of China to the United Nations. This has been the official position of the United Nations and has not changed since 1971," Ban said.[45] The Secretary-General itself disposed the application. Such a practice is uncalled for and beyond his mandate under the Charter. It is grossly illegal and runs counter to the ideals, principles and norms of U.N. The real reason for the Secretary-General's action is obviously due to Peoples Republic of China's political pressure.

It came as a stunning surprise for international lawyers. According to the Rule 58 (Chapter X) of the Rules of Procedure Security Council, any State, which desires to become a Member of the United Nations, shall submit an application to the Secretary-General. The rule insists that the application shall

[45] Statement posted on the U.N. Web site by the U.N. Office of Legal Affairs on July 23, 2007. See also *China Post* (2007).

contain a declaration made in a formal instrument that it accepts the obligations contained in the Charter. Then as per Rule 59 the Secretary-General shall immediately place the application for membership before the representatives on the Security Council. Then it is for the Security Council to recommend the applicant for membership and forward to the General Assembly if it forms an opinion that the applicant state is peace-loving and is able and willing to carry out the obligations contained in the Charter as mandated by Rule 60. R.60 says "The Security Council shall decide whether in its judgment the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter and, accordingly, whether to recommend the applicant State for membership."

Even the Security Council is held in hostage. It is Security Council's Charter mandated function to recommend or not to recommend the Applicant State for membership to the General Assembly. Here the duly filed application of Taiwan is being withheld from the attention of Security Council. The Security Council's credibility is at stake, which ought to function as an effective international political executive. The Security Council should not remain as a disinterested mute spectator whose inaction has the effect of an unjustified abdication of its powers. It has become absolutely necessary for the Security Council; the august body whose edicts enjoy the 'highest legislative dignity in contemporary human history' maintain its majesty and grandeur. The Security Council or its President should immediately require the Secretary-General to transfer to it Taiwan President's application for U.N. membership, which was delivered, to Ban on July 19,2007 in accordance with Rule 59 of the Rules of Procedure of the Security Council.

By The General Assembly

The U.N. General Assembly is the principal representative and deliberative organ of the organization composed of all member states.[46] It is the parliamentary body of the U.N. Organization and consists of representatives of all the member states, of which there are currently 192. It shoulders the responsibility to maintain international peace and security along with the Security Council.[47] Even though its determinations have the force of law, its resolutions and declarations simply do not become binding rules.[48] In the international system, GA creates a unique type of legitimacy. An organ that fully embodies the principle of sovereign equality of its members has wider acceptance in the international arena.

It was the GA, in 1971 via resolution 2758 (XXVI), ousted the representatives of the Taiwan authorities and restored the seat and all the lawful rights of the government of the P.R.C. in the United Nations without discussing the "Taiwan Question"[49]. Thereafter PRC took the China seat at the United

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[46] Dealt upon under Chapter IV of the *U.N. Charter.*

[47] It is vivid from the wording of Article 11. Some scholars hold the view GA has secondary responsibility in regard to matters concerning maintenance of global peace and security, the primary and first duty always rest upon SC. It is pertinent to look at the Acheson Resolution (Uniting for Peace Resolution, A/RES/377 (V), adopted on 3 November 1950) of GA wherein the GA itself taken responsibility to deal with these matters on account of SC's failure to act upon. The Resolution allows the General Assembly to take over the responsibilities of the Security Council, in the event that the Security Council "fails to exercise its primary responsibility for the maintenance of international peace and security."

[48] By application of its own Rules of procedure. But customary international law is making good inroads into this area so as to make *GA Declarations* binding on a variety of situations.

[49] UNGAR 2758 (XXVI) 26th Session at 358 U.N. Doc. A/L.630 was adopted by 76 votes in favor, 35 against, and 17 abstentions, on a draft introduced by Albania and 20 other states, over the opposition of the United States, and without a formal recommendation of the Security Council, as required by Article 4(2) of the *U.N. Charter*. See Tanner (1971). The resolution decided "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

Nations. They ended up just in a few lines. It never endows the P.R.C. any right to represent the people of Taiwan. No doubt, the resolution of General Assembly is based on a sound proposition of international law that whoever in effective occupation, control and administration of a territory is the sovereign of that territory. The Nationalist government of Chiang Kai-shek ruling only Taiwan and the outlying Islands are by no stretch of imagination deems to rule China. Yet the Nationalist regime canvassed so. That is nothing less of a fiction. That fiction was set aside by the General Assembly vide resolution 2758. The Peoples Republic of China has shown its permanence in effectively controlling Mainland China for more than 20 years. In addition, international law never allows one state to be represented by two governments.

The GA has to ensure that this Resolution should not be wrongly used as a pretext to exclude Taiwan from the U.N. system. The same law applied by the U.N. to admit P.R.C. is squarely applicable in the matter of Taiwan now. Resolution 2758 had done away with a fiction of representation. Now the P.R.C. claims to represent Taiwan in the U.N., which is untrue and runs counter to naked realities. On that basis, Taiwan is excluded, that is unjust and deplorable. The 23 million people of Taiwan should not be allowed to continue as politically isolated and remain as international nomads without due acknowledgement.

Taiwan has no sort of representation in the U.N. since then. The GA has a historical responsibility to discharge regarding this issue. The GA has the right

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United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the U. N. and in all the organizations related to it." Id., para. 3. The resolution declared nothing, however, concerning the status of Taiwan in relation to the P.R.C.'s sovereignty claims. See U.N. Report Representation of the People's Republic of China within the Organizations of the United Nations System, XI International Legal Materials 3, 561 (May 1972).

to discuss all matters within the scope of the *United Nations Charter.* It can establish a working group to study this problem. Then based on their report and further debates they should suggest measures as to what can be done. They may refer the matter to Security Council. Taiwan is also legally entitled to approach the GA since it can discuss any question relating to the maintenance of international peace and security, which is brought even by a non-member in accordance with article 35 Para 2 of the Charter.[50] Situations, which endanger international peace and security when come to its attention, GA can call the attention of Security Council under article 11(3).[51]

The exceptional situation in the Taiwan Strait can aptly be a matter of concern of GA. The doctrine of effectivities consistently upheld by International Court of justice and other international judicial tribunals lends strong support to Taiwan.[52] That very same principle helped the P.R.C. to gain the right to represent China internationally in the seventies because the whole of Mainland China is effectively controlled by it, not the R.O.C. whose territorial jurisdiction is limited only to Taiwan and the outlying small Islands by that time.

The very same International legal doctrine of effective occupation is squarely applicable in the present situation of Taiwan. From 1949, the P.R.C. did not exercise jurisdiction over Taiwan and the outlying Islands even for one

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50 Article 35(2) reads as "A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter."

51 Article 11(2) says "The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security."

52 *Island of Palmas Arbitration Case* (*Netherlands v. United States*) 2 R.I.A.A 829 (1928), Ford v. Surget, 97 U.S.594 (1878), Fisheries (*United Kingdom v. Norway*), 1951 I.C.J.116, Legal Status of Eastern Greenland (*Norway v. Denmark*), 1933 P.C.I.J (Ser. A/B No.53).

day. Taiwan government has effective control to regulate the movement of goods, capital, people and ideas across its borders. It has the autonomy of domestic authority structures—that is, the absence of authoritative external influences. In the classic *Island of Palmas Arbitration Case*, Justice Huber observed "Sovereignty in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state." Who discharges the functions of a state in Taiwan? The facts speak for itself. No can differ in the matter as to the realities.

Questions such as "who owns the title to Taiwan in international law" needs to be decided on merits since Republic of China on Taiwan is a de facto state, discharging all usual governmental functions including foreign relations independently for more than half a century[53] (Charney & Prescott, 2000: 476). Also no nation is entitled to scuttle self-determination movement as it conflicts with binding customary public international law.[54]

It is covered by erga omnes: that is, any nation can judicially complain

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[53] The P.R.C. did not exercise sovereignty on Taiwan even for a moment since 1949. Charney and Prescott says, "Taiwan has not been governed by Beijing for decades. Despite contrary claims and ambiguous characterizations, the long-term status quo is that Taiwan has been independent of China. No change in actual governance or control would result if Taiwan claimed its own statehood separate from China. The claim would be diplomatic only."

[54] The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations. Earlier it was explicitly embraced by U.S. President Woodrow Wilson, by Lenin and others, and became the guiding principle for the reconstruction of Europe following World War I. The principle was incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals, which evolved into the *United Nations Charter*. Its inclusion in the *U.N. Charter* (Article 1(2)) marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognized as a right of all peoples in the first article common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which both entered into force in 1976. 1 Paragraph 1 of this Article provides: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

against this.[55] We saw it in *East Timor Cases* before the ICJ.[56] Self-determination is one of the main philosophical foundations for world peace. It is the right of a people to determine its own destiny. In particular, the principle allows the people to choose their own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice. In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by the people or a nation. Nevertheless, the right to self-determination is recognized in international law as a right of process and not of outcome belonging to peoples and not to states or governments.

The GA should focus its eyes to the outsized reality in the Taiwan Strait. The factual situation itself calls for a just, reasonable and equitable solution to the problem. The international community has a stake in the matter (Chang & Lim, 1997: 393; Chen, 1998: 255; Carolan, 2000: 429; Charney & Prescott,

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55 Erga Omnes connotes obligations owed by States towards the community of states as a whole. An erga omnes obligation exists because of the universal and undeniable interest in the perpetuation of critical rights. Consequently, any state has the right to complain of a breach. The concept was recognized in the International Court of Justice's decision in the *Barcelona Traction Case*: "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."

56 International Court of Justice has recognized that the right to self determination also posesses an erga omnes character in the *Case Concerning East Timor* at paragraph 29 East Timor (*Port. v. Austl.*), 1995 I. C. J. Judgment of 30 June 1995.

2000: 453)[57] which will surely reflected in the discussions in GA. The GA can recommend possible terms of settlement. Precedents are there, for instance in 1948, in a recommendation addressed to the incipient Arab-Israeli struggle, the Assembly set out an elaborate plan for the future of Palestine (Merrils, 1998: 223). Another example is the Special Committee on Balkans constituted by GA in 1947, which combined fact-finding activities in the region with elements of mediation and conciliation (Merrils, 1998: 223).

The GA should rise to the spirit of article 14.[58] Under article 96(1)[59] of the

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[57] See Angeline G. Chen (1998: 255) states "Taiwan cannot acquire its deserved recognition as a nation state unless it is given the express support from the international community. If the principles of self-determination, Human Rights and democratic governance are to have any meaning, then Taiwan's right to choose and declare independence-if it so desires-should be handed over to the Taiwanese people unfettered and with open hands."

Christopher J. Carolan (2000: 429) writes that "Not to recognize Taiwan's claim (of self-determination, statehood and other rights) would be to dilute the product of decades of international legal development, something that states would be hesitant to do. Further, a realist argument exists that not to recognize Taiwan's legitimate claim would undermine the stability of all nations by discouraging a peaceful, legal framework in which to consider questions of self-determination and independence, exacerbating the fault line between the concepts of sovereignty and self-determination. Thus, there is state interest in acknowledging that Taiwan has a legally legitimate aspiration to declare independence."

Paris Chang and Kok-ui Lim (1997: 393) conclude "There can be no peace in Asia as long as there is instability across the Taiwan Strait. And instability across the Taiwan strait will persist as long as the world community continues to deny Taiwan representation in the most important forum for conflict resolution. The world cannot ignore the reality of Taiwan any longer."

Charney and Prescott (2000: 453) states" It is irrefutable that under contemporary international law the population of Taiwan holds rights that cannot be unilaterally set aside. Settlement of the cross-strait dispute calls for an amicable resolution by the parties themselves. In solving the issue, not only is the use of force undesirable, but its initiation by either parties side would violate international law".

[58] Article 14 says "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."

Charter, the GA can ask advisory opinion from International Court of justice on any legal question. In a similar vein, like those requested by GA regarding the international legal status of South West Africa and Western Sahara, it can request the ICJ to render its advisory opinion on this issue.[60] It will make the current legal position of parties clearer; they can see where they stand. There is no impropriety in seeking an advisory opinion from the International Court of Justice. The Court will give the opinion only if all the conditions and its own jurisprudence, rules and statute allows granting of such opinions. The GA can also resort to its own "Uniting for Peace" resolution[61] (1950) if necessary. It is recently utilized by the GA in seeking ICJ's opinion on the legality of the construction of Israeli wall in the occupied Palestinian territory.[62]

By Secretary-General

Equal parts diplomat and advocate, civil servant and CEO, the

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59 Article 96(1) creates the regime of seeking advisory opinion from ICJ. The Article states "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

60 The question concerning the International Status of South West Africa had been referred for an advisory opinion to the Court by the General Assembly of the United Nations (G.A. resolution of 6 December 1949) and court rendered the opinion on 11 July 1950. Regarding Western Sahara also, the court gave the Advisory Opinion of 16 October 1975 upon referral from the General Assembly. Both bears resemblance to the current situation in the Taiwan Strait which having implications regarding sovereignty over a territory and self-determination of peoples.

61 Acheson Resolution (Uniting for Peace Resolution, A/RES/377 (V), adopted on 3 November 1950) of GA wherein the GA itself taken responsibility to deal with these matters on account of SC's failure to act upon. The Resolution allows the General Assembly to take over the responsibilities of the Security Council, in the event that the Security Council "fails to exercise its primary responsibility for the maintenance of international peace and security."

62 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004. The GA requested the Advisory Opinion through its Resolution ES-10/14 adopted on 8 December 2003 at its Tenth Emergency Special Session convened pursuant to Res.377 A (V) ("Uniting for Peace").

Secretary-General is a symbol of United Nations ideals and a spokesman for the interests of the world's peoples, in particular the poor and vulnerable. The Charter describes the Secretary-General as "chief administrative officer" of the Organization, who shall act in that capacity and perform "such other functions as are entrusted" to him or her by the Security Council, General Assembly, Economic and Social Council and other United Nations organs.[63]

The Secretary-General has a proactive role to play in the current international order esp. in keeping the global peace and general welfare among nations. In practice, the role of the Secretary-General has extended beyond the various provisions of the Charter. He is in an important position to mark or possibly to influence developments. The work of the Secretary-General in the field of dispute settlement falls into two distinct parts. On the one hand there are the functions delegated by the Security Council and General Assembly under Article 98, on the other the various actions undertaken at the request of interested parties, or on the Secretary-General's own initiative by virtue of his powers under Article 99.[64] He can engage in informal discussions and dialogue with the players and use his persuasive capacity to solve problems, which concerns or of likely concern to U.N. in the future. Due to the high respectability, standing and wide acceptance enjoyed by him, he can do a lot in this seemingly intractable problem also. The General Assembly and the Security Council in numerous occasions mandated the Secretary-General to

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63 As mandated by Article 98 which reads "The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization."

64 Article 99 reads "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."

step in and lend his good offices for the solutions of problems in many parts of the globe. In the crisis caused by the detention of United States diplomatic and consular staff in Teheran, the detention of U.S. airmen in China, Soviet invasion of Afghanistan, Indo-Pak war in 1965 over Kashmir, in Falkland Islands hostilities between U.K. and Argentina, Iran-Iraq war etc, the Secretary-General stepped in to solve the problem. The good offices role of the Secretary-General has rapidly expanded (Franck, 1988: 143).

The Secretary-General has power to bring situations likely to lead to a breach of peace to the Security Council's attention under article 99 of the Charter. The essence of the Secretary-General's authority is contained in this article which empowers him to bring to the attention of the Security Council any matter which he feels may strengthen the maintenance of international peace and security. The Secretary-General has considerable discretion and much has depended upon the views of the person filling the post at any given time, as well as the general political situation (Shaw, 2003: 1106). Regarding the Taiwan Strait crisis, he has the power to appoint a special rapporteur to study and assess the situation and then to initiate steps on the basis of the report. In many cases, the Secretary-General will appoint a Special Representative to assist in seeking a solution to the particular problem (Shaw, 2003: 1107). He can also place it before the appropriate agencies for perusal and follow up. A fact-finding mission or international commission of inquiry is also a good option, which can be looked into as precedents are there.

The ability of the Secretary-General to take action to promote the settlement of disputes on his own initiative or under Article 98 does not, of course, bring with it any guarantee that such intervention will be successful. For example, following the invasion and occupation of Kuwait in 1990 Secretary-General Perez de Cuellar twice sought to engage Iraq in discussions

designed to bring about its withdrawal. However, neither the contacts at the beginning of the crisis in august 1990, nor those on the eve of conflict between Iraq and the U.S.-led Coalition in January 1991 were fruitful, owing to Iraq's intransigence on both occasions (Freedman & Karsh, 1995: 268-70, 274; Merrils, 1998: 223). The possibilities of a solution can only be identified if they are first explored. There can be no doubt that a willing and able Secretary-General who undertakes that task must regarded as a major asset to the United Nations system (Bercovitch, 1996: 75). "Situations can, and do, arise when the Secretary-General has to exercise his powers to the full, as the bearer of a sacred trust, and as guardian of the principles of the Charter" (Pérez de Cuéllar, 1988: 124,126).

However unassuming it may seem, Taiwan—the Republic of China—does exist on this planet, with a definite geographic space of its own and a much wider international living space. Throughout the twists and turns of the past 56 years, it has continued to exist as a distinct political entity and made its presence felt on the international scene. Since it became a liberal multiparty democracy, its international profile has risen and is naturally destined to become still more prominent. The expression "Taiwan miracle" aptly describes not only its economic triumph, but its progressive political transition as well.

The international community needs to be more outspoken and proactive in seeking to ensure that Taiwan can enjoy the international living space to which it is entitled. Multilateral forums should show the backbone and the will to face up to this issue. Their failure to do so will bring into question their relevance and credibility. Inertia on the part of the United Nations, in particular, threatens to undermine the very foundation of the current international order, with disastrous consequences for humanity. The Secretary-General as the bearer of the sacred trust endowed to him by the international community should help

Taiwan gain its rightful due position in the international scene. Up to this date none has occurred. We can hope the new Secretary-General Ban Ki moon will focus on this flashpoint, which is nearer to his home.

Conclusion

The "Republic of Taiwan" is under no legal fetter to become a member of the United Nations. The U.N. General Assembly Resolution 2758 (XXVI)[65] is not at all concerned with Taiwan's membership, it doesn't even mention Taiwan or Republic of China. Rather it only states as expelling representatives of Chiang Kai shek from the U.N. seat. Taiwan's membership problem is not all considered by the General Assembly. The resolution declared nothing, however, concerning the status of Taiwan in relation to the P.R.C.'s sovereignty claims. The General Assembly has to ensure that this Resolution should not be wrongly used as an excuse to exclude Taiwan from the U.N. system. The Taiwanese Government can submit an application to the Secretary-General under Chapter X Rule 58[66] of the Rules of Procedure Security Council. The rule insists that the

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65 UNGAR 2758 (XXVI) 26th Session at 358 U.N. Doc. A/L. 630 was adopted by 76 votes in favor, 35 against, and 17 abstentions, on a draft introduced by Albania and 20 other states, over the opposition of the United States, and without a formal recommendation of the Security Council, as required by Article 4(2) of the *U.N. Charter*. See Tanner (1971). The resolution decided "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 U.N. and in all the organizations related to it." Id., para. 3. The resolution declared nothing, however, concerning the status of Taiwan in relation to the P.R.C.'s sovereignty claims. See U.N. Report, Representation of the People's Republic of China within the Organizations of the United Nations System, XI International Legal Materials 3, 561 (May 1972).

66 PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL CHAPTER X. ADMISSION OF NEW MEMBERS Rule 58 reads "Any State which desires to become a

application shall contain a declaration made in a formal instrument that it accepts the obligations contained in the Charter. Then as per Rule 59[67] the Secretary-General shall immediately place the application for membership before the representatives on the Security Council. Then it is for the Security Council to recommend the applicant for membership and forward to the General Assembly if it forms an opinion that the applicant state is peace-loving and is able and willing to carry out the obligations contained in the Charter as mandated by Rule 60.[68] The formation of the opinion is a political assessment of the Security Council and it can't go far against the established practices,

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Member of the United Nations shall submit an application to the Secretary-General. This application shall contain a declaration made in a formal instrument that it accepts the obligations contained in the Charter."

67 Rule 59: "The Secretary-General shall immediately place the application for membership before the representatives on the Security Council. Unless the Security Council decides otherwise, the application shall be referred by the President to a committee of the Security Council upon which each member of the Security Council shall be represented. The committee shall examine any application referred to it and report its conclusions thereon to the Council not less than thirty-five days in advance of a regular session of the General Assembly or, if a special session of the General Assembly is called, not less than fourteen days in advance of such session."

68 Rule 60 states: "The Security Council shall decide whether in its judgement the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter and, accordingly, whether to recommend the applicant State for membership.

If the Security Council recommends the applicant State for membership, it shall forward to the General Assembly the recommendation with a complete record of the discussion.

If the Security Council does not recommend the applicant State for membership or postpones the consideration of the application, it shall submit a special report to the General Assembly with a complete record of the discussion.

In order to ensure the consideration of its recommendation at the next session of the General Assembly following the receipt of the application, the Security Council shall make its recommendation not less than twenty-five days in advance of a regular session of the General Assembly, nor less than four days in advance of a special session.

In special circumstances, the Security Council may decide to make a recommendation to the General Assembly concerning an application for membership subsequent to the expiration of the time limits set forth in the preceding paragraph."

relevant rules stated in the Charter, public opinion and the outsized realities. The United Nations can't continue the grave injustice perpetuated upon the 23 million people of Taiwan forever.

Since, a war in the Strait inevitably bring U.S. and its allies such as Japan to the scene, we can imagine what will follow. Already we witnessed Three Taiwan Strait crises—First, 1954-1955 Taiwan Strait Crisis or the 1955 Taiwan Strait Crisis**,** then the Second Taiwan Strait Crisis, also called the 1958 Taiwan Strait Crisis and the Third Taiwan Strait Crisis, also called the 1995-1996 Taiwan Strait Crisis on the eve of Presidential elections in Taiwan when P.R.C. beefed up its armed forces and fired live missiles near Taiwan's territory and the U.S. dispatched Seventh fleet to disperse the situation. The U.S.-P.R.C. relations worsened after the last event. In the First Taiwan Strait crisis itself, the U.S. Joint Chiefs of Staff recommended the use of nuclear weapons against the mainland. The British Prime Minister Winston Churchill warned the U.S. against using nuclear weapons. But United States Secretary of State John Foster Dulles stated publicly that the U.S. was seriously considering a nuclear strike. That is the potentiality of the Taiwan issue in erupting into a full-fledged war between major global powers. The U.S. and Japan in their recent summit declared the security situation in Taiwan Strait to be their common strategic concern. The normative foundations of U.N. will be wrecked having wide reaching consequences in such an event. The U.N. should not be complacent. U.N. should intervene before it is too late. Its universal membership, stature and wide acceptance among the international community should be employed to bring about a resolution of the "Taiwan Question" so that a potential situation likely to lead to international friction is removed. It would be in the best interests of both the parties and the wider international community as a whole. The Taiwan issue is the most serious Human Rights problem in the world

affecting 23 million of humanity. The inherent worth and dignity of the human person is at stake here on a wider footing.

The United Nations, as pointed out by Ramesh Thakur (2007), the former Assistant Secretary-General of the U.N., is respected today more for what it represents and symbolizes than for what it actually does and accomplishes. It is preposterous to believe that such inaction can continue without any detriment forever.

No one can turn blind eyes to the statement made by the great Mao-Tse tung that "It is the immediate task of China to regain all our lost territories, not merely to defend our sovereignty below the Great Wall. This means that Manchuria must be regained. We do not, however, include Korea, formerly a Chinese colony, but when we have re-established the independence of the lost territories of China, and if the Koreans wish to break away from the chains of Japanese imperialism, we will extend them our enthusiastic help in their struggle for independence. The same thing applies for **Formosa**. As for Inner Mongolia, which is populated by both Chinese and Mongolians, we will struggle to drive Japan from there and help Inner Mongolia to establish an autonomous State" (Snow, 1968: 88-89). Even the founder of the People's Republic of China acknowledges the truth. Then what is need for the U.N. to stay back in dealing with this issue to the point of questioning even its very legitimacy?

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台灣糾葛——公然違背『聯合國憲章』及其基本原則

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摘　要

台灣的問題在國際法和全球政治上爲一無解事件；是一個影響國際社區、並破壞國際關係的潛在問題製造者。第一次的海峽危機，美國參謀首長聯席會議建議使用核武防禦大陸，當時的美國國務卿杜勒斯也曾公開表示，美國會認真考慮核武攻擊。聯合國擔負國際社會所賦予的神聖信任，需要更積極地履行其任務。在國際法、判例、慣例和規範的大量支持下，聯合國可以開始從事和尋找關於台灣問題的友好解決方案。但當前「不做事」、特別是威脅破壞當前國際秩序的不同規範基礎，造成人道悲慘結果的政策，對聯合國而言並非好事。

關鍵字：台灣糾葛、聯合國會員、國際爭端解決、宣布獨立、承認