

1998

Taiwan's Current International Legal Status

Lung-chu Chen

New York Law School, lungchu.chen@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters



Part of the [International Law Commons](#)

Recommended Citation

Chen, Lung-chu, "Taiwan's Current International Legal Status" (1998). *Articles & Chapters*. 689.
http://digitalcommons.nyls.edu/fac_articles_chapters/689

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

Taiwan's Current International Legal Status

Lung-chu Chen*

I. INTRODUCTION

The forthcoming summit between Bill Clinton and Jiang Zemin in Washington has once again spotlighted the issue of Taiwan. Earlier, the return of Hong Kong to China on July 1, 1997 had aroused the curiosity as to "After Hong Kong, will Taiwan be next?"

Since 1895 when Taiwan (Formosa) was legally ceded in perpetuity to Japan by China by virtue of the Sino-Japanese Peace Treaty of Shimonoseki, Taiwan has come under the rule of two successive foreign regimes. From 1895 to 1945, Taiwan was a Japanese colony. Since the Japanese surrender to the Allied Powers in 1945, Taiwan has experienced a post-World War II military occupation by nationalist Chinese authorities, which includes four decades of Chiang Kai-shek and his son's authoritarian Kuomintang rule under perpetual martial law. The demise of the Chiangs' reign of "white terror" in 1988 ushered in a decade of profound transformation toward democratization and

* Dr. Lung-chu Chen is Professor of Law at New York Law School and Research Affiliate in Law at Yale Law School. He is a Vice President of International League for Human Rights, and a former President of North America Taiwanese Professors' Association. A Director of the American Society of Comparative Law, he serves on the Board of Editors of *American Journal of Comparative Law*. He is also a member of the Executive Council of the Society for the Policy Sciences. Formerly, he was Chairman of the Section on International Law of The Association of American Law Schools, and he also served on the Executive Council of American Society of International Law.

He received his Bachelor of Laws (LL.B.) degree from National Taiwan University with highest honors (1958), his Master of Laws (LL.M.) degree from Northwestern University (1961), and his Doctor of the Science of Law (J.S.D.) degree from Yale University (1964). In 1957, he ranked first of 4000 participants in the National Examination for judgeship and other high governmental posts in Taiwan.

At New York Law School, Professor Chen teaches International Law, Human Rights Law, Foreign Affairs and the Constitution, and the United Nations and World Order.

Taiwanization.

With impressive political transformation and economic growth, the Taiwanese people have demanded to play an active role in the world community. But their rising demands for participation in the United Nations and other international organizations have been met with intensifying objections and threats from the People's Republic of China (PRC), which asserts with characteristic arrogance that "there is only one China" and "Taiwan is an integral part of China." The Chinese threat was dramatized to the world in March 1996—while Taiwan was peacefully holding its first ever direct election of its President, China responded by taking provocative and blatant acts of military threat and aggression against Taiwan.

It has been fifty-three years since the end of World War II. Thanks to the continuing and industrious efforts of the Taiwanese people, Taiwan has evolved and existed as a sovereign, independent state in every sense of the word. But under the shadow of China, the controversy concerning Taiwan's international legal status has not disappeared. After the return of Hong Kong to China, a great deal of attention has been focused on Taiwan. Taiwan differs fundamentally from Hong Kong in international legal status, but will Taiwan be able to withstand China's pressures exerted in the name of "one country, two systems"? Does the world community clearly understand and recognize that Taiwan is Taiwan, and China is China?

II. TAIWAN'S INTERNATIONAL STATUS

In reality, Taiwan has existed as a sovereign, independent country for more than forty years. The question today is whether to recognize Taiwan as an independent state in name, as well as in fact. Taiwan's independent existence is well known in the world community; what is increasingly at issue is whether to call this sovereign, independent state—"the Republic of China" (ROC), "the Republic of China on Taiwan," "the Republic of Taiwan," "the Nation of Taiwan," or simply "Taiwan."

Taiwan is an island nation, separate from continental China. Taiwan is Taiwan and China is China. By China, I mean the PRC, not the ROC. Taiwan and China are two separate sovereign states, diverging fundamentally in their political, economic, social, and cultural systems. Taiwan is not part of China; it is not "a renegade province of China." Taiwan's present and future destiny is not an internal affair of China.

Despite all of its rhetoric of Taiwan being part of China, the PRC has never, since its founding in 1949, extended actual jurisdiction and effective control over Taiwan—not for a single day. The PRC's territo-

rial claim to Taiwan is as unfounded as Iraq's territorial claim to Kuwait.

III. HISTORICAL, LEGAL AND POLITICAL CONSIDERATIONS

Historically, Taiwan was once better known internationally as Formosa—"a beautiful island"—a name given by Portuguese navigators. In the late fifteenth and early sixteenth centuries, migrators from South-eastern China came to Taiwan in substantial numbers in order to escape political oppression, to preserve life, and to seek new opportunity. For most of its history, Taiwan's relationship with the Chinese empire was tenuous at best, while such Western powers as Holland and Spain vied for colonial control of the island.

In 1895, Taiwan was ceded in perpetuity to Japan by treaty as a result of the Sino-Japanese war, and Taiwan became a colony of Japan until 1945. At the end of World War II, after the Japanese surrender, General MacArthur instructed Chiang Kai-shek, then Generalissimo of the Republic of China, to administer Taiwan pending the resolution of its ultimate disposition. Thus Chiang's Kuomintang (KMT) regime acquired de facto control of the island as a form of military occupation on behalf of the Allied Powers.

Several significant events ensued: the mass massacre of Taiwanese leaders from all walks of life by KMT's occupation forces during the 228 Incident of 1947 to suppress Taiwanese protests against the Chinese atrocities; Chiang Kai-shek's exile to Taiwan after being expelled from the Chinese mainland as a result of the establishment of the PRC in 1949; and the drastic increase in strategic importance of Taiwan for the United States in the Western Pacific after the outbreak of the Korean War in June 1950.

To terminate the technical status of hostility toward Japan, the Allied Powers concluded the San Francisco Peace Treaty with Japan in September 1951. The Peace Treaty made Japan renounce all of her "rights, title and claim" to Taiwan, but did not specify any beneficiary state. The Peace Treaty with Japan was the authoritative instrument that formally terminated Taiwan's status as a colony of Japan and delimited its new status; the Peace Treaty superseded, under international law, the war-time declarations made by the Allied Powers at Cairo and Potsdam, insofar as the disposition of Taiwan (Formosa) was concerned. Thus, Taiwan was legally detached from Japan but was not attached to China or any other country. The shared expectations of the parties to the Peace Treaty were that Taiwan's legal status, though temporarily left undetermined, would be decided at an opportune time in accord with the principles of the United Nations Charter—notably the principles of

self-determination of people and non-use of force in settling territorial or other disputes.

Such an opportune time came and went some twenty-six years ago, when the United Nations failed to adopt a "one China, one Taiwan" formula to resolve the Chinese representation question in the United Nations. According to the "one China, one Taiwan" formula, both China and Taiwan would have been seated as separate states in the United Nations, with the PRC occupying China's permanent seat in the Security Council. However, in October 1971, the United Nations General Assembly, by Resolution 2758, voted to seat the People's Republic of China and to "expel" the Representatives of Chiang Kai-shek.

Thus, the tables were turned: the PRC was in and the ROC was out. An old myth was replaced by a new myth. The old myth was that Chiang's KMT regime represented China as well as Taiwan in the United Nations. And the new myth was that the PRC represented Taiwan as well as China in the United Nations. The international status of Taiwan (a colony of Japan from 1895 to 1945), which was the crux of the Chinese question in the United Nations, was not addressed at all. In other words, General Assembly Resolution 2758 decided to seat the PRC in place of the ROC in the United Nations and later, in the related United Nations specialized agencies. The Resolution did not in any way constitute an explicit or implicit recognition of the PRC's territorial claim to Taiwan. From October 1970 to September 1995, only 33 of 123 countries formally "recognized" Taiwan as part of China in their joint diplomatic communique with China, while the remaining ninety countries either made no reference to Taiwan, or simply "took note," "understood," "respected," or "acknowledged" China's asserted position about Taiwan in their communique with China.

Although Taiwan has been kept outside the United Nations for the past twenty-six years and its formal diplomatic relations with other countries has greatly shrunk, Taiwan has not ceased to exist. Thanks to the tireless efforts of its intelligent, hardworking people Taiwan has evolved into a country that is economically prosperous and politically democratic. Instead of an internationally supervised plebiscite, the Taiwanese people have achieved effective self-determination through their collective efforts in the political, economic, social, and cultural spheres.

Judged by the international legal standard of statehood, Taiwan is a sovereign, independent state in every sense of the word. According to this standard, an independent state must have a permanent population, control over a defined territory, and a government capable of governing effectively in internal processes and acting responsibly in external relations. Taiwan has more than fulfilled all of these requirements. The

sovereignty of Taiwan rests upon the people of Taiwan.

With a population of twenty-one million, Taiwan has more people than over three-quarters of the 185 member states of the United Nations. It has more people than Australia or Venezuela. Taiwan has more people than Norway, Sweden, and Finland combined. With a \$250 billion GNP and an annual per capita income exceeding U.S. \$12,000, Taiwan is a prosperous trading state and has been a leading holder of foreign exchange reserves for years. Taiwan is the fourteenth largest trading nation in the world and the sixth largest trading partner of the United States.

In addition to economic development, Taiwan is an island nation that has undergone a profound political transformation through the processes of democratization and Taiwanization. The tempo for democratization in Taiwan has greatly accelerated in recent years, beginning with the 1987 termination of the thirty-nine year martial law and the creation of a major opposition party, the Democratic Progressive Party (DPP). The Taiwanization process has been further enhanced by the forced retirement of the aged parliamentary members who were elected on the Chinese mainland in the late 1940s while Chiang Kai-shek was still in power. With the subsequent democratic elections of all members of the National Assembly in 1991 and in 1996 and the democratic elections of all members of the Legislative Yuan in 1992 and in 1995, Taiwan at last has had an equivalent of a parliament that represents the present population and reflects the political realities of Taiwan. This continuing process of Taiwanization and democratization reached a new milestone in March 1996 when the people of Taiwan, for the first time in their history, directly elected their President.

With all of its shortcomings, inadequacies, and tensions, this remarkable political transformation toward democracy, along with impressive economic development, is what the Taiwan experience is all about. This is self-determination in action for the people of Taiwan. Both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights, in their respective paragraph one of Article 1, define the right of self-determination in these identical words: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹ Indeed, thanks to their common efforts in recent decades, the people of Taiwan,

1. International Covenant on Civil and Political Rights, Dec. 16, 1996, U.S.-H.K., Art. 1, 999 U.N.T.S. 171.

both at home and abroad, have become the master of their own political destiny and have developed a distinctive economic, social, and cultural system of their own in the shaping and sharing of democracy and other human dignity values. The overwhelming majority of the Taiwanese people do not wish to be part of China.

In the continuing process of nation-building and democratization, the people of Taiwan are seeking to enhance their international position through membership in the United Nations and in other international organizations. They seek human dignity, justice, and active participation in international arenas and stand ready to make positive contributions to the world community.

IV. POLICY IMPLICATIONS

With this background in mind, let me quickly highlight the policy implications for countries concerned with the future of Taiwan—especially the United States. Three basic goals underlie the United States policy toward Taiwan and China: (1) the peace goal—to maintain peace and security in the East Asian region; (2) the economic goal—to foster free market economy and prosperity for the region and for the United States; and (3) the democracy and human rights goal—to enhance democracy and human rights through comprehensive engagement and peaceful evolution.

First, regarding the pursuit of peace in East Asia, it is imperative that China make a "No Force Pledge." The PRC's refusal to renounce threat or use of force in settling disputes with Taiwan has been a continuing source of insecurity, instability, and anxiety in the Taiwan Strait area, as dramatized by China's recent military campaigns of terror against Taiwan. Solving Taiwan's future by peaceful means has been the cornerstone of the U.S. "Once China Policy," as emphasized in the Taiwan Relations Act of 1979 and in the three joint communiques between the U.S. and the PRC. Whenever the U.S. reaffirms its "one China—but not now" policy, the U.S. should simultaneously reaffirm its policy for a peaceful solution. The firm response of the U.S. in dispatching carrier groups of the Seventh Fleet to deter China's aggression against Taiwan was crucial in restoring peace and security in the Taiwan Strait area in March 1996. When Taiwan and China can interact within such a peaceful framework with the stability of peaceful expectations it would serve the common interests of all parties concerned. A treaty of friendship, commerce and navigation between Taiwan and China on the basis of equality and mutual benefits according to international law and practice, would also contribute to such peaceful interaction and competition. Furthermore, multilateral security arrangements

within the larger Pacific community context that embrace both Taiwan and China would be helpful. The Taiwanese people desire and stand ready to maintain friendly and equal relations with China but will strongly oppose and resist any forcible Chinese takeover.

Second, Taiwan remains very much in the mainstream of global trade and the free market economy, despite developing close economic ties with China in recent years. As a leading holder of foreign exchange reserves and one of the largest trading states in the world, Taiwan ranks sixth as a trading partner of the United States. It is important that the United States does not expand economic relations with China at the expense of Taiwan.

In the same vein, it would serve the best interests of the United States and the world economy at large to facilitate the free flow of goods and services globally, rather than to contribute—wittingly, or unwittingly—to the formation of a “Greater China” trade bloc. Hence, applications for World Trade Organization (WTO) membership by Taiwan and by China, respectively, should be decided on their individual merits and should not be treated as a package deal. China’s demands for concession in obtaining WTO membership should be carefully considered on merits area by area.

Third, human rights have become a salient feature of contemporary international law and affairs. Human rights, as expressed in the Universal Declaration of Human Rights and the two International Covenants on Human Rights, have become the yardstick by which the legitimacy of a government is judged. Human rights have become matters of international concern. No country should be immune from international human rights scrutiny.

Human rights should continue to be an integral part of U.S. foreign policy. After the delinkage of human rights from Most Favored Nation (MFN) treatment, the United States should continue a consistent, even-handed human rights policy as part of overall foreign policy. Whenever there are gross violations of human rights—whoever the violators may be—the U.S. must speak up. Steadfastness and consistency in the formulation and execution of human rights policy are essential. Quiet diplomacy is no substitute for public expression of disapproval or condemnation.

Such an even-handed human rights policy takes on special significance for Hong Kong, as it was returned to China on July 1, 1997. Given China’s declared policy to replace the existing Hong Kong Legislative Council, which was democratically elected, there is a cause for real concern as to how China is going to carry out its treaty promise for according the people of Hong Kong a high degree of autonomy,

democracy, and human rights. The United States, together with the United Kingdom and other countries concerned with democracy and human rights for the people of Hong Kong, should be especially vigilant. While the future of "one Country, two systems" is highly uncertain regarding Hong Kong, the policy is definitely inapplicable to Taiwan. Unlike Hong Kong, Taiwan has existed as a sovereign, independent state for decades, and the Taiwanese people overwhelmingly do not wish to be part of China.

Finally, Taiwan's membership in the United Nations and in other international governmental organizations is a matter of fundamental human rights for twenty-one million Taiwanese people. It is a matter of simple justice. To support Taiwan's membership in the United Nations and in other international organizations is the right thing to do.

Not only can Taiwan contribute to the United Nations and other international governmental organizations financially, but it can also share the Taiwan experience with other member states. The Taiwan experience has two dimensions: the economic dimension; and the political dimension, in terms of democracy and the protection of human rights. Taiwan has amply demonstrated that economic development can go hand in hand with democracy and the protection of human rights. In other words, political oppression—which is often exploited by tyrannical rulers—is not necessary to economic growth at all.

Those who are genuinely concerned about the future of the Chinese people should pay particular attention to the political dimension of the Taiwan experience. Promoting democracy and human rights for the Chinese people would serve the long-term interests of China. Thus, it is high time that the "one China" policy of the Cold War era be subjected to a careful and critical reappraisal in light of the fundamentally changed circumstances.

There are many different perceptions about what "one China" really means. One popular view holds that "China" means the PRC. Another view maintains that "China" refers to the ROC. A third view asserts that "China" refers neither to the PRC nor to the ROC, but to a China that is free, democratic and prosperous, which is to be created in a remote future. The fourth view maintains that "China" represents a long Chinese cultural heritage, rather than a particular political entity. Finally, there is a view stating simply "one China, but not now" without defining China. Thus, the so-called "one China" policy appears to be, at least, a "four Chinas" policy full of ambiguity and confusion.

The "one China" policy was the product of the Cold War, gaining in popularity at a time when the Taiwanese people were denied their voice under the "reign of white terror" of perpetual martial law, as

imposed by the authoritarian Kuomintang regime of the Chiang Kai-shek family. The United States and its allies then found it expedient, as part of their global Cold War strategy, to treat Chiang Kai-shek's Kuomintang regime, the ROC, as the only lawful government of China in the United Nations and in other international arenas, while refusing to recognize the existence of the PRC. This was the policy of the United States and its allies during the decades of the 1950s, 1960s, and early 1970s.

The situation changed drastically in the 1970s. Many countries of the free world severed diplomatic relations with Taiwan and established formal relations with China. Throughout most of the decade, the United States found and used the "China card" by playing China against the Soviet Union. Consequently, the PRC was seated in the United Nations in place of Taiwan, and the United States recognized and established formal diplomatic relations with the PRC in 1979, treating the PRC as the only lawful government of China. At the same time, the United States de-recognized Taiwan, and the Taiwan-U.S. relationship changed from official to non-official relations.

Today, in the mid-1990s, there has been a fundamental change in circumstances regarding the world community in general and Taiwan in particular. With the disintegration of the Soviet Union and the end of the Cold War, the United States, the European countries, and other countries must come to grips with the realities of a new Taiwan that is both politically democratic and economically prosperous. They must reshape their policies toward Taiwan and China accordingly. The European Parliament's adoption in July 1996 of a resolution urging its member states to support greater representation for Taiwan in international organizations is highly significant.

The myth of "one China" must be debunked. Yes, there is one China. But, there is also one Taiwan. Reality, not myth, should guide the new policy. A fresh thinking, not a stereotypical thinking, should shape the future relations of Taiwan, China, and other countries.

To support a "one China, one Taiwan" policy is the right thing to do for the United States and for other countries. Let all of the people who are concerned with the future of Taiwan in the world community work together—with vision, understanding, and good will—to achieve the common good for all.

