*Part 1: from the late 1780s to the late 1940s*

The Exercise of Sovereignty over Taiwan

Examined from a U.S. Legal Perspective

PRELIMINARY HISTORICAL OVERVIEW:

TAIWAN’S STATUS BEGINNING IN THE 1600s

A solid orientation in regard to Taiwan’s legal situation can be achieved by stepping back to the late 1600s. According to the laws applicable to the acquirement of territory in that period, Taiwan became part of the national territory of Qing Dynasty China in 1683.

In North America, thirteen British colonies along the eastern seaboard fought a Revolutionary War in the late 1700s, and founded the United States of America. At this time, under U.S. law, Taiwan was of course recognized as belonging to Qing Dynasty China.

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| U.S. Legal Perspective | In the late 1700s, during the early years after the founding of the United States, Taiwan was recognized as being under the sovereignty of Qing Dynasty China. |
| Conclusion #1 |

In 1895 Taiwan’s legal status changed. Under the terms of the Treaty of Shimonoseki, Taiwan was ceded to Japan. After this cession, there appears no doubt that the United States regarded Taiwan as part of the national territory of Japan.

Nevertheless, a brief review of Chinese objections to the validity of this treaty cession will give us some valuable cross-cultural insight..

Chinese Objections to the Validity of the 1895 Cession of Taiwan to Japan

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| For researchers who take exception to the “conclusion” that Taiwan was ceded to Japan by treaty in 1895, their objections primarily fall in five categories:   1. The 1895 treaty was “unequal” and therefore has no validity. 2. Chinese government officials announced the cancellation of this 1895 treaty at several times during the late 1930s and early 1940s. 3. The cancellation (or “nullification”) of the 1895 treaty by the Chinese would have immediately resulted in a reversion of Taiwan’s territorial sovereignty to China. 4. Historically, Taiwan had always been part of China, and the nature of Japanese control after 1895 was not the exercise of “sovereignty” but merely a temporary “military occupation.” In fact, Taiwan remained under Chinese sovereignty. 5. Taiwan has belonged to China since ancient times. Therefore it is entirely fitting and proper to regard Taiwan as permanent Chinese territory, in line with the legal doctrine of “historical sovereignty.” Any action which purports to take Taiwan away from China amounts to stealing. |

Clarifications of a U.S. Legal Perspective in regard to the above mentioned Chinese Objections

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| 1. Treaties which deal with the disposition of territory are “unequal” by definition. Importantly, no international courts, or courts of leading world nations, have ever determined that any treaty was invalid based on a charge of its containing “unequal” content. 2. Unilateral announcements of the cancellation of a treaty, without any basis or reference to any specific “cancellation clause” in the treaty itself, are not regarded as legally valid. 3. In the situation that a treaty is cancelled, only the “active” clauses would be affected. In the situation of a territorial cession, once the obligations have been fulfilled, the clause of the treaty itself is no longer active, and therefore not subject to retroactive cancellation. 4. The transfer of Taiwan to Japan in 1895 has always been interpreted as a cession of territorial sovereignty, based on the wording in the treaty. This must be distinguished from mere “military occupation.” Beginning in 1895, Taiwan was under Japanese sovereignty. 5. The history of territorial cessions between countries can be traced back to the Middle Ages, if not earlier. A treaty between two countries agreeing to the terms of territorial cession is not “stealing.” In July 2016, in a case decided in the Permanent Court of Arbitration in The Hague, the judges denied the legal validity of the concept of "historical sovereignty." The United States government officials have expressed their respect of this decision. |

TAIWAN AS PART OF THE NATIONAL TERRITORY OF JAPAN

The United States’ recognition of Taiwan as part of the national territory of Japan, (often referred to as an “insular area” of Japan), was further confirmed in the Washington Naval Treaty, which was signed by the governments of the United Kingdom, the United States, France, Italy, and Japan in 1922. This treaty came into force on August 17, 1923.

Admittedly, many Chinese scholars hold that the 1895 treaty must be considered invalid, and Taiwan was reverted to Chinese sovereignty in late 1895, or in the following years of the 19th century, or at some time in the early to mid-20th century. Chinese postage stamps issued in 1939 tell a different story however.

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These postage stamps commemorate the 150th anniversary of U.S. Constitutional governance, counting from the coming into force of the U.S. Constitution in 1789. Notably, on the map shown, Taiwan is colored differently from (mainland) China. The obvious conclusion is that (in truth) Taiwan was not considered part of China’s national territory in 1939. “Revisionist” versions of history promulgated by Chinese officials and academics since the early 1940s are most properly regarded as examples of carefully orchestrated Chinese disinformation.

In summary, it appears beyond doubt that, according to established international law principles, the United States recognized the incorporation of Taiwan into Japan’s national territory as a result of the coming into force of the 1895 treaty. The Compilers are unaware of any U.S. legal scholars, lawyers, jurists, historians, think-tank researchers, etc. who consider that the often-heard Chinese objections to the content of this treaty carry any weight.

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| U.S. Legal Perspective | After the coming into force of the 1895 Treaty of Shimonoseki, Taiwan was part of the national territory of Japan. Hence, Taiwan’s territorial sovereignty belonged to Japan. |
| Conclusion #2 |

Some news sources refer to the period of time when Taiwan belonged to Japan as the “Japanese occupation period.” Such phraseology is incorrect. The 1895 treaty resulted in a transfer of Taiwan’s territorial sovereignty to Japan. This was not a military occupation.

THE REPUBLIC OF CHINA COMES ON THE SCENE

The founding of the Republic of China (ROC) was officially proclaimed on January 1, 1912, in Nanjing, China, with Sun Yat-sen as the first Provisional President. This marked a close of the Qing Dynasty, thus putting an end to thousands of years of imperial rule.

Having been ceded by Qing China to Japan in 1895, Taiwan was not a part of the Republic of China after its founding.

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| U.S. Legal Perspective | Before the ROC’s Declaration of War against Japan on Dec. 9, 1941, and indeed before the ROC military forces arrived in Taiwan in mid-October 1945, no actions of the government officials of Japan, the ROC, or any other country had caused Taiwan to become a part of the Republic of China’s national territory. |
| Conclusion #3 |

Nevertheless, it is commonly known that during the Chinese Civil War period, which continued into the late 1940s, the central government of the ROC was relocated to Taiwan. Different historical summaries give the date of this relocation as somewhere between December 7 to 10, 1949.

What was the legal status of Taiwan at this time? As a foundational premise for the exercise of USA – Taiwan relations, it will certainly be very helpful to ascertain, from the United States’ legal perspective, when Taiwan was legally incorporated into the national territory of the ROC. Below we will provide some important background information which will help us research this issue.

CAIRO AND POTSDAM

In 1941, China proclaimed that all treaties with Japan were abrogated. Though this act was devoid of legality and effect in international law, China pressed its case at meetings of the Allies and succeeded, at last, in having some of its territorial demands merged into the Cairo Declaration of Dec. 1, 1943, which read in part:

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| . . . . all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China |

Certain postwar policies were again enunciated by the three major Allies -- the United States, the United Kingdom, and the Union of Soviet Socialist Republics -- at Potsdam in 1945. The concluding Potsdam Declaration of July 26, 1945, contained, in Section eight, a confirmation of the Cairo Declaration:

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| The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine. |

GENERAL ORDER No. 1

Over 96% of military attacks on the four main Japanese Islands and (Japanese) Taiwan during the early December 1941 through August 1945 period were conducted by United States military forces. The Republic of China military forces did not participate. Hence, in relation to Taiwan, the United States is the "conqueror."

After the dropping of the atomic bombs on Japan in early August 1945, the Japanese Emperor agreed to an unconditional surrender. In relation to the Japanese territory of Taiwan, the specifications of General Order No. 1, issued by General Douglas MacArthur on Sept. 2, 1945, were as follows –

*The senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), Formosa and French Indo-China north of 16 north latitude shall surrender to Generalissimo Chiang Kai-shek.*

After being transported to Taiwan on U.S. ships and aircraft, the ROC military officials accepted the surrender of Japanese forces on Oct. 25, 1945, in Taipei.

An important question arises at this point. Did the conduct of the surrender ceremonies amount in the beginning of ROC sovereignty over Taiwan? Disputes have raged over this issue for more than seven decades. What is the correct interpretation from a U.S. legal perspective?

BEGINNING OF ROC GOVERNANCE OVER TAIWAN

Again, we stress, the legal record is clear that Taiwan became a part of the national territory of Japan in 1895. However, a definitive statement of when Taiwan became part of the national territory of the Republic of China is rarely found in academic papers or online reportage.

We will proceed to analyze several popular theories below, and then dissect them from a U.S. Legal Perspective.

TRANSFER OF THE TERRITORIAL SOVEREIGNTY?

The issue of whether ROC sovereignty over Taiwan began with the Japanese Surrender Ceremonies on Oct. 25, 1945, has been hotly debated since the Presidency of Harry Truman. This is probably the most popular theory regarding the ROC’s alleged exercise of sovereignty over Taiwan.

A summary of the Chinese position can be given as follows –

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| SUMMARY OF CHINESE VIEWPOINT |
| PREFACE The surrender ceremonies of Oct. 25, 1945, are a unique event in world history. Nothing like this has ever happened before. Hence, the Chinese are free to designate the legal significance of the surrender ceremonies any way they wish. Accordingly, they postulate that –  In regard to Japan’s unconditional surrender in 1945, the terms for Japan under the 1943 Cairo Declaration and the 1945 Potsdam Declaration are clear and unambiguous, and they specify that Taiwan must be handed over, consigned, and/or committed to China. The key force of the phraseology here is “restored to,” which implies “return,” necessarily mandating a resumption of sovereignty by China.  The 1943 Potsdam Declaration, and through it the 1943 Cairo Declaration, form part of the instruments of Japan’s unconditional surrender to which Japan and the Allies attached their signatures during Japan’s surrender ceremony aboard the battleship USS Missouri in Tokyo Bay on Sept. 2, 1945. Under international law, whether surrender ceremonies can result in a change in territorial sovereignty is not based on precedents, but is stipulated by the specific terms of the surrender.  Japan and the Allies’ signatures on Sept. 2, 1945, impart to these instruments the status of treaties. Thus the assumption of (or the “resumption of”) sovereignty over Taiwan by the Republic of China is therefore indeed specified or provided by treaty, as is commonly seen in other instances of territorial cession. |

From the vantage point of U.S. law, we will be quite straightforward and unequivocal in saying that the above SUMMARY is erroneous, flawed, defective, ill-considered, and misleading.

Below, the commonly heard Chinese viewpoint (or contention) is contrasted with a U.S. legal perspective. This information is provided as Supplementary Explanations.

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| a | Viewpoint/Contention: The Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents served to transfer the territorial sovereignty of Taiwan to the ROC on Oct. 25, 1945 |
|  | U.S. legal vantage point: In its aide-memoire of Dec. 27, 1950, the US interpreted the Cairo Declaration in these words:  The Cairo Declaration of 1943 stated the purpose to restore “Manchuria, Formosa and the Pescadores to the Republic of China.”  That declaration, like other wartime declarations, such as those of Yalta and Potsdam, was in the opinion of the US government subject to any final peace settlement where all relevant factors should be considered.  In early 1949, a Draft Report by the US National Security Council determined that while Formosa and the Pescadores were under the *de facto* control of the Chinese Nationalists, these islands were still legally a portion of the Japanese Empire.   |  | | --- | | Draft Report by the National Security Council  Date: January 19, 1949  Subject: U.S. policy with respect to Formosa and the Pescadores  3. The present legal status of Formosa and the Pescadores is that they are a portion of the Japanese Empire awaiting final disposition by a treaty of peace. The U.S. position regarding the status of the islands is qualified by the Cairo Declaration by the Chiefs of State of the U.S., U.K. and China and the policy which the U.S. has followed since V-J Day of facilitating and recognizing Chinese *de facto* control over the islands. |   Based on this Report, it is clear that there was no transfer of Taiwan’s territorial sovereignty to China in late Oct. 1945, or at any other time during the 1940s. |

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| b | Viewpoint/Contention: In regard to the assertion that the Cairo Declaration and Potsdam Proclamation qualify to be regarded as binding “treaties” |
|  | U.S. legal vantage point: Under the U.S. constitutional framework, a “treaty” must be ratified by two-thirds of the members of the Senate. However, neither the Cairo Declaration, Potsdam Proclamation, nor the Japanese surrender documents were ever submitted to the U.S. Senate for discussion or debate.  The Formosan Association for Public Affairs (FAPA) has frequently pointed out that the US National Archives and Records Administration does not consider the Cairo Declaration a treaty.  FAPA obtained a letter from the assistant archivist for records services who wrote: “The National Archives and Records Administration has not filed this [Cairo] Declaration under treaties. […] The declaration was a communique and it does not have [a] treaty series (TS) or executive agreement series (EAS) number.”  FAPA’s president has clarified that: “The Cairo Declaration was merely intended as a ‘declaration of intent’ about the world’s affairs among the three leaders — a mere statement of war aims, the territorial reassignments of which had to be solemnized in a formal peace treaty after Japan’s surrender. It has negligible status in international law as a treaty or convention.”   |  | | --- | | **United States Delegation Minutes:** Fourth Session, Preliminary Conversations for the September Foreign Ministers Meetings, Washington  **Date:** August 30, 1950  **Subject:** Formosa  The short-term objective of the U.S. was the military neutralization of Formosa. Long-term possibilities for solution would appear to be (1) incorporation of Formosa with mainland China, (2) restoration to Japan, (3) independence, (4) trusteeship under the U.N. or (5) a U.N. plebiscite to determine which of the foregoing is desired by the Formosan people. Action along these lines might make clear that present measures undertaken by the U.S. with respect to Formosa, far from being directed toward a forcible solution of the question of Formosa's long-term political status, in fact operate to prevent a selection of this question by force and to provide an opportunity for peaceful discussion and settlement of it.  *U.S. Department of State / Foreign relations of the United States, 1950. Vol III* |   If indeed there had been a transfer of Taiwan’s territorial sovereignty to China in late October 1945 (or at any other time in the late 1940s), the above U.S. State Dept. conversations, in preparation for upcoming Foreign Ministers Meetings, would never have been held.  Additionally, with respect to the Cairo Declaration and the Potsdam Proclamation, it is significant to note that in the post-Napoleonic period there is no international precedent to show that a "Declaration" or "Proclamation" has the international force of law to transfer the sovereignty of a geographic area from one government to another. Nor is there any precedent to say that the specifications of Surrender Documents have any such force of law between nations.  Surrender ceremonies mark the end of hostilities, and not the end of the war as many people mistakenly think. Since the close of the Napoleonic era, if not earlier, the end of hostilities have always been interpreted as the beginning of military occupation. U.S. officials, both civilian and military, are required to follow this norm of customary law. |

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| c | Viewpoint/Contention: The effect of the surrender ceremonies must be based on the content of the accompanying declarations, proclamations, and the wording of the surrender documents. A transfer of territorial sovereignty can be affected such an occasion. |
|  | U.S. legal vantage point: In a Memorandum of September 19, 1949 concerning the "Legal Status of Formosa", the Dept. of State Legal Adviser made the following statement:  "It is believed that the statement of the Cairo Conference was at most a declaration of intention with respect to future disposition of certain parts of the Japanese Empire, and that there is nothing in the Potsdam Proclamation, or in its acceptance by the Japanese Emperor, or in the Instrument of Surrender, which purports to make a present cession to China of sovereignty over Formosa. From the language of all of these instruments it appears that future action is contemplated, and the Japanese obligation is to take whatever action which may be required in the future to give effect to the Potsdam Proclamation, and hence to the Cairo Declaration. From the standpoint of accepted international law, any transfer of sovereignty must be upon the basis of a formal treaty or instrument to which the ceding nation is a signatory. 1 Hyde, 358-359; 1 Oppenheim, 500."  A correct interpretation is to say that the Cairo Declaration and Potsdam Proclamation reflected wartime policy of the Allies. However, the Allies subsequently changed that policy, and in the 1952 San Francisco Peace Treaty (SFPT), which overrode the Cairo Declaration, forced Japan to renounce title to Taiwan without designating any transferee. It is ironic that in their repeated claim of title to the island of Taiwan, PRC government officials and ROC government officials rarely mention the SFPT, which is the controlling document.  Notes: The definition of “treaty” under U.S. law is much narrower that that given in the *Vienna Convention on the Law of Treaties.*  This is confusing to many non-US based researchers, who often argue that the Cairo Declaration or Potsdam Proclamation should be regarded as treaties. . At any rate, the SFPT clearly has a higher legal weight under international law. |

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| d | Viewpoint/Contention: After the Japanese surrender ceremonies, there was an immediate return of Taiwan’s territorial sovereignty to the Republic of China. |
|  | U.S. legal vantage point: In fact, the surrender was limited to “Japanese Forces,” and did not contain any wording or instructions regarding Japanese territories.  The Act of Surrender in the China Theatre (held in Nanking on Sept. 9, 1945), and Supreme Commander for the Allied Powers (SCAP) General Order no. 1 (issued in Tokyo on Sept. 2, 1945), authorized the surrender of Japanese forces, not Japanese territories.  These were military directives, establishing procedures for demobilizing Japanese forces. They were not meant to settle political issues. The content of these military directives and in particular the assignment of members of the Allied coalition to disarm Japanese forces in certain areas in no way implied that the members had any rights to permanent possession of those areas in the future.  China did not acquire sovereignty over Indochina north of the 16th parallel, although Chiang Kai-shek was authorized to accept the surrender of Japanese forces there. Based on this fact, it is impossible to justify a claim of sovereignty over Taiwan based on the mere surrender of Japanese forces on Oct. 25, 1945. |

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| e | Viewpoint/Contention: The international community fully recognized Taiwan as port of the national territory of the Republic of China in the late 1940s. |
|  | U.S. legal vantage point: A declassified report on Probable Developments in Taiwan, issued by the CIA on March 14, 1949, (nearly four years after the Oct. 25, 1945, surrender ceremonies in Taiwan) states:  "From the legal standpoint, Taiwan is not part of the Republic of China."  "Pending a Japanese peace treaty, the island remains occupied territory in which the US has proprietary interests," the report further clarified.  A CRS Report for Congress also contains similar analysis:  . . . after Japan's defeat in 1945, Taiwan and the Pescadores were assigned to the Republic of China for purposes of post-war occupation. Taiwan was still under this occupation four years later, when the ROC government fled to Taiwan after the communist victory in the civil war on mainland China . . .  This Congressional Research Service Report for Congress is entitled Sino-Japanese Relations: Issues for U.S. Policy,, and was published on Dec. 19, 2008, in Washington, D.C.  Notably, international law is very clear in specifying that “Military occupation does not transfer sovereignty.” |

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| U.S. Legal Perspective | Multiple statements of US government officials have held that the Japanese surrender ceremonies in Taipei on October 25, 1945, did not result in a transfer of Taiwan’s territorial sovereignty to the Republic of China. |
| Conclusion #4 |

Notes: The views of UK government officials expressed during this period were also very similar. See -- <https://www.civil-taiwan.org/hansard.htm>

CUSTOMARY LAW AND THE “END OF HOSTILITIES”

So-called “customary international law” arises from a general, consistent, and repeated practice of states, which continues to be followed from a sense of legal obligation. Support for customary law is often found in the writings of legal scholars, and in various judicial decisions.

Since the end of the Napoleonic period, the common practice of states has been to recognize that “Territory is considered occupied when it is placed under the authority of foreign military forces.” US government officials have given full respect to this customary law principle for hundreds of years. Instances from the early 1800s are not hard to find. The British conquest of Castine, Maine, in the War of 1812, effective Sept. 1, 1814, is one notable example, and is discussed in the US Supreme Court case of United States v. Rice (1819). In conducting the surrender ceremonies there, the British did not achieve a transfer of the territorial sovereignty of this area of Maine to the U.K. Their actions were recognized as the beginning of a military occupation, which does not result in any transfer of territorial sovereignty.

This customary law principle was later more formally codified in the Hague Regulations of 1907, Article 42. The earliest version of the US Dept. of the Army’s Laws of War Manual, entitled “Rules of Land Warfare,” published Oct. 1, 1940, also contains this Article and many other Articles from the Hague Regulations, all of which are binding on US officials.

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| Article 42.  Territory is considered occupied when it is actually placed under the authority of the hostile army.  The occupation extends only to the territory where such authority has been established and can be exercised. |

The above few paragraphs give a brief overview of the legal significance of “surrender ceremonies,” (more broadly referred to as the “end of hostilities”) during wartime. In summary, the Oct. 25, 1945, Japanese surrender ceremonies in Taipei can only be regarded as the beginning of the military occupation of Taiwan. From a U.S. Legal Perspective, there was no transfer of Taiwan’s territorial sovereignty to China on this date, or on any other date in the late 1940s or early 1950s.

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| **RELATED INTERNATIONAL LAW PRINCIPLES**  **uti possidetis:** a principle that recognizes a peace treaty between parties as vesting each with the territory and property under its control unless otherwise stipulated. (Latin: uti possidetis, ita possideatis -- "as you possess, so may you continue to possess.")  ***Comments:***This principle is not applicable to a discussion of Taiwan's international legal status after the close of hostilities in WWII because (1) the Republic of China was not a party to the SFPT, in which Japan ceded Taiwan; (2) October 25, 1945, only marks the beginning of the military occupation of Taiwan, and the Republic of China (founded in 1912) had never held legal possession of "Formosa and the Pescadores" at any time before the coming into effect of the peace treaty; (3) Furthermore, Article 21 of the SFPT clearly stipulates the benefits to which "China" is entitled under the treaty, and "Formosa and the Pescadores" are not included.  **irredentism:** claiming a right to territories belonging to another state on the grounds of common ethnicity and/or prior historical possession, actual or alleged.  ***Comments:*** Technically speaking, "irredentism" is a doctrine from the sphere of identity politics, cultural & ethnic studies, and political geography. It is not a legal doctrine per se, and hence carries little or no weight in discussing legal claims on territory. |

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| U.S. Legal Perspective | Neither customary international law, established precedent, the 1907 Hague Regulations, or other international law principles support the assertion that the Japanese surrender ceremonies in Taipei on October 25, 1945, resulted in a transfer of Taiwan’s territorial sovereignty to the Republic of China. |
| Conclusion #5 |

Continuing references by Chinese officials to Oct. 25, 1945, as being “Taiwan Retrocession Day” must be regarded purely Chinese disinformation.

TAIWAN’S INCORPORATION VIA THE ROC CONSTITUTION

Article 4 of the ROC Constitution specifies that "The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly." In regard to the alleged incorporation of Taiwan into Chinese territory, there is no resolution of the National Assembly on record.

Moreover, international law specifies that "military occupation does not transfer sovereignty." This means that Oct. 25, 1945, cannot be interpreted as marking the beginning of the ROC’s exercise of sovereignty over Taiwan.

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| U.S. Legal Perspective | Examination of the historical record fails to find any date when Taiwan was legally incorporated into the national territory of the Republic of China via the procedures specified in the ROC Constitution. |
| Conclusion #6 |

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| Comments of the Compilers: Despite the evidence presented in this Report (Parts 1, 2, and 3), there are many people with a strong pro-China stance who continue to maintain, in a very vehement fashion, that the Republic of China holds the sovereignty of Taiwan territory. Their stance is that the data presented in this Report is incomplete, biased, unreliable, non-authoritative, overly-subjective, etc. Not-surprisingly, these people often aspire to reflect their comments, rebuttals, and alternative arguments to the Taiwan Autonomy Foundation (TAF).  However, the Compilers strongly urge that a different course of action be taken. For the people who are unsatisfied with the research results presented here, we advise making direct communication with the appropriate Republic of China government department in Taiwan, such as the Ministry of Foreign Affairs (MOFA). MOFA should be urged to assemble all relevant historical and legal evidence, whereupon ROC officials can arrange a formal meeting with the U.S. Dept. of State (DOS) officials. In this way, all important points and counterpoints regarding the ROC’s sovereign status in Taiwan can be carefully sorted out, approved, and confirmed.  At the end of that meeting, a formal Memorandum on the “Legal Status of Taiwan,” agreed to by both USA and ROC officials, can be issued. No doubt, such a document would be welcomed by many Asian scholars as a long-overdue update to the previous two Memoranda which DOS issued on this subject in 1961 and 1971.   * Taiwan Autonomy Foundation |

*Part 2: from the early 1950s to the present*

The Exercise of Sovereignty over Taiwan

Examined from a U.S. Legal Perspective

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| |  | | --- | | **Chinese Viewpoint:** In fact, both PRC and ROC agree that Taiwan has always been a part of China. Historically, the dispute between CCP (based in Mainland China) and KMT (based in Taiwan) is about the legitimacy of each government to rule the entirety of Chinese territory, which is defined as including Taiwan. |   *Differing opinions on the validity of this Viewpoint will be examined below.*  *The U.S. legal perspective will also be clarified.* |

THE POST WAR TREATIES

WWII in the Pacific ended on April 28, 1952, with the coming into force of the San Francisco Peace Treaty (SFPT), signed by 48 nations. The treaty had been signed in San Francisco, California, on Sept. 8, 1951. China was not invited to sign, due to disagreements on whether the Republic of China or the People's Republic of China represented the Chinese people.

Article 2(b) of the SFPT provided that:

Japan renounces all right, title and claim to Formosa and the Pescadores.

Japanese courts have interpreted this Article as specifying Japan’s renunciation of sovereignty over Taiwan, with no “receiving country” being specified. US government officials have consistently agreed with this interpretation.

Later, a separate treaty of peace was negotiated between the Republic of China and Japan, and came into force on Aug. 5, 1952. This was known as the Sino-Japanese Peace Treaty, or Treaty of Taipei.

**Recognitions in the Treaties**

The SFPT came into force on April 28, 1952. Included in its 27 Articles are many “recognitions.” Among the most important of these are –

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| Recognition | Notes |
| 1. The Allied Powers recognize the full sovereignty of Japan | With the coming into force of this peace treaty, Japan has regained full sovereignty. |
| 2. Japan recognizes the independence of Korea. | Some Taiwan independence advocates stress that the force of Article 2(b) must be that Japan recognizes the independence of “Formosa and the Pescadores” (aka “Taiwan”). However, if this were indeed the case, as in the situation of Korea, the SFPT would certainly contain a clear statement to this effect. |
| 3. Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3. | Military government is defined as “the form of administration by which an occupying power exercises governmental authority over occupied territory.” Hence, the force of this Article is to specify that the Article 2(b) territory of Taiwan, the Article 3 territory of the Ryukyus, etc. are occupied territory of the United States of America. Indeed, considering the record of military attacks against Taiwan and the Ryukyus during the period of WWII in the Pacific, this would be the expected result. |
| 4. The Allied Powers recognize Japan’s the right of individual or collective self-defense, . . . . and agree that Japan may enter into collective security arrangements. | In the world community during the late 1940s, an important point of debate was concerning whether or not Japan would be allowed to “re-arm.” This Article gives important specifications in this regard. |
| 5. Japan recognizes the validity of all acts done during the period of occupation according to directives of the occupation authorities. | During nearly seven years of occupation, there were many instances of disagreement between Japanese and Allied officials. This Article assures that such disagreements did not continue into the future. |

The Treaty of Taipei came into force on Aug. 5, 1952. Included in its 14 Articles are many “recognitions.” The most important of these are –

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| Recognition | Notes |
| 1. It is recognised that under Article 2 of the San Francisco Peace Treaty, Japan has renounced its sovereignty over Taiwan (Formosa) and Penghu (the Pescadores) . . . . . | The Treaty of Taipei contains no Articles whereby Japan renounces its sovereignty over Taiwan, as this renunciation was already completed in the SFPT nearly 100 days previously.  The signatories to this treaty, i.e. the Republic of China and Japan, have agreed to this disposition of Taiwan territory, namely -- Japan renounced its sovereignty over Taiwan, but with no “receiving country” having been specified. |
| 2. It is recognised that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war. | In interpreting this Article, it is very important to consider international precedent regarding the force of the “cancellation” or “nullification” of a treaty. |
| 3. It is recognised that under the provisions of Article 10 of the San Francisco Treaty, Japan has renounced all special rights and its interests in China . . . . | Japan’s special rights in China, and in particular those obtained via bilateral negotiations in Sept. 1901, are hereby nullified. |

For Taiwan, the end of hostilities in WWII in the Pacific came about with the surrender of Japanese troops on Oct. 25, 1945, in Taipei. This date also marked the end of Japanese administration, management, governance, control, etc. (hereinafter "governance") over Taiwan.

However, it is very important to note that neither the San Francisco Peace Treaty (SFPT) nor the Treaty of Taipei is there any recognition that Taiwan territory came under the sovereignty of the Republic of China upon the completion of the surrender ceremonies in Taipei.

Notes: Some scholars also like to advance the theory that as a result of these two treaties, there has been a transfer of Taiwan’s “territorial sovereignty” to the Taiwan people. However, a careful examination of the past 350 years of world history clearly shows that “territorial sovereignty” is always held by a government; it is not held by an arbitrarily specified group of people.

Moreover, it must be understood that “governance” and “sovereignty” are two different (although related) concepts. Japan’s renouncement of its sovereignty over Taiwan only occurred via the specifications given in Article 2(b) of the SFPT, with an effective date of April 28, 1952.

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| U.S. Legal Perspective | In the post-war treaties, there is **no recognition** by Japan that the Republic of China obtained the sovereignty of Taiwan territory as a result of the surrender ceremonies of Oct. 25, 1945. Moreover, after April 1952, there are no records which purport to say that the United States, UK, France, Australia, New Zealand, or any of the other signatory Allies held a different recognition toward this issue. |
| Conclusion #7 |

DETERMINATION OF WHETHER THE ROC IS A GOVERNMENT IN EXILE

~~In order to establish the fundamental parameters for our research,~~

Let us first provide some definitions for the term “government in exile” as follows:

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| A government whose chief executive and other principal officials have fled their state in the face of hostile armed forces but which is recognized as the de jure government of its native country by at least one other state. |

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| A temporary government moved to or formed in a foreign land by exiles who hope to rule when their country is liberated. |

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| A government established outside of its territorial base. |

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| A political group that claims to be a country's legitimate government, but for various reasons is unable to exercise its legal power, and instead resides in a foreign country. Governments in exile usually operate under the assumption that they will one day return to their native country and regain power. |

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| A government which has either been forced out by revolution or usurpation, or invaded and taken over by another nation, and is now taking refuge elsewhere. |

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| A body which claims to be the legitimate government of a state, but which is unable to establish itself in the state in question. |

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* Afternotes
* the conditions of Article 10 of the Sino-Japanese Peace Treaty in regard to "in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan...." have yet to be fulfilled.

Hence, the first question we must address is whether, from a U.S. Legal Perspective, Japan’s sovereignty over Taiwan ended with the Japanese surrender ceremonies of Oct. 25, 1945, in Taipei.

DETERMINING A DATE FOR THE END OF JAPANESE SOVEREIGNTY

* A majority of U.S. State Dept. documents point to the conclusion that Japan’s sovereignty over Taiwan did not end in late October 1945. One notable example is a letter of April 11, 1947, by then-Acting Secretary of State Dean Acheson, written to Senator Joseph Ball, which stated that “the transfer of sovereignty over Formosa to China [had] not yet been formalized.”
* Speaking at a US congressional hearing in May 1951, General Douglas MacArthur said:

“Legalistically Formosa is still a part of the Empire of Japan.”

Commentary: If there had been a transfer of Taiwan's territorial sovereignty to China in late October 1945, General MacArthur would certainly have been aware of it.

Notes: This statement of General MacArthur in May 1951 (nearly seven and half years after the Cairo Declaration, six years after the Potsdam Proclamation, and five and a half years after the Japanese surrender ceremonies) reaffirmed that up to that time there had been no transfer of Taiwan’s territorial sovereignty to China, or to any other country. In other words, legally speaking, Taiwan had remained as Japan's sovereign territory until other arrangements could be made in a post-war treaty concluded by the Allies.

* In his book Mandate for Change 1953-1956, (published in 1963), former President Dwight D. Eisenhower stated:

The Japanese peace treaty of 1951 ended Japanese sovereignty over the islands but did not formally cede them to "China," either Communist or Nationalist.

Commentary: As we know, this peace treaty came into force on April 28, 1952.

We can also examine the customs and usages of nations in the post-Napoleonic period. What we find is that the transfer of territorial sovereignty is accomplished by treaty. For territories transferred or ceded to another country in a treaty, the effective date for the cession is when the treaty comes into force. The ceding country’s sovereignty over the territory only ends at this point.

This has always been the way that territorial cession treaties have been interpreted, from the earliest days of the United States. The Louisiana Purchase Cession is a very early example. The treaty for this cession was negotiated between the United States and France, and according to the book Treaties in Force, published yearly by the U.S. State Dept., it came into force on Oct. 21, 1803.

Further clarification is provided in the ADDENDUM #2, which analyzes Article 2(b) of the San Francisco Peace Treaty.

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| U.S. Legal Perspective | Japanese sovereignty over Taiwan only ended with the coming into force of the San Francisco Peace Treaty on April 28, 1952.  When the ROC central government moved to occupied Taiwan in Dec. 1949, it was moving outside of China’s national territory and immediately became a government in exile. |
| Conclusion #8 |

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| RECOGNITION OF THE SFPT BY MEMBERS OF THE UNITED NATIONS  The United Nations cannot take the position that the island of Taiwan is China's territory. Any collective decision of the United Nations on a position on title to the island of Taiwan different from the territorial disposition of the Peace Treaty of San Francisco would contravene the collective will of its members who signed the Treaty in 1951. All forty-nine Allies that signed the Treaty were U.N. members at the time when the total members of the United Nations numbered only sixty. That means that when the Treaty was signed, more than four-fifths of the U.N. members were parties to the treaty and were therefore bound by it. To abandon the Peace Treaty of San Francisco, an equal proportion of the members would have to disavow the Treaty.  Reference: **One-China Policy and Taiwan**, by Y. Frank Chiang  *Fordham International Law Journal* Vol. 28:1, Dec. 2004 |
| Peace Treaty of San Francisco (aka “San Francisco Peace Treaty”)  United Nations Treaty Series #1832 |

THE MUTUAL DEFENSE TREATY

Certain wording in Article 6 of the ROC – USA Mutual Defense Treaty of 1955 confuses many people, and they interpret this to say that the United States recognizes the sovereignty of the Republic of China over Formosa and the Pescadores.

Article 6

For the purposes of Articles 2 and 5, the terms "territorial" and "territories" shall mean in respect of the Republic of China, Taiwan and the Pescadores; and in respect of the United States of America, the island territories in the West Pacific under its jurisdiction . . . . . .

However, in conjunction with the ratification of the MDT, a report issued Feb. 8, 1955 by the US Senate's Committee on Foreign Relations specified: "It is the view of the committee that the coming into force of the present treaty will not modify or affect the existing legal status of Formosa and the Pescadores."

This is explained by noting that what Article 6 recognizes for the Republic of China, is “effective territorial control” of the areas of Formosa and the Pescadores, and not sovereignty.

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| U.S. Legal Perspective | The ROC – USA Mutual Defense Treaty of 1955 cannot be interpreted to recognize that the Republic of China exercises (or “exercised”) sovereignty over Taiwan. |
| Conclusion #9 |

THE TAIWAN RELATIONS ACT

Many people claim that since the late 1920s, the United States recognized the Republic of China as an independent sovereign nation. They further claim that the United States’ de-recognition of the Republic of China effective Dec. 31, 1978, was a kind of “diplomatic game,” and should never have occurred. This is especially true, in their view, since the ROC in Taiwan strongly appears to meet the Montevideo Convention’s criteria for statehood.

However, the United States original recognition of the ROC as an independent sovereign nation was primarily based on its status as the de facto and de jure government of China. When the ROC moved its central government to occupied Taiwan in December 1949, it had already relocated itself outside of China’s national territory.

Hence, the “diplomatic game” in which the United States was involved was the one beginning in December 1949 whereby the Executive Branch continued to recognize the ROC as the sole legitimate government of China.

This game was finally brought to an end on Dec. 31, 1978. However, during this nearly 20 year period, the United States never recognized the ROC as the legitimate government of Taiwan.

If indeed it could be shown that at some point after Dec. 31, 1978, the United States has recognized that the ROC exercised/exercises sovereignty over Taiwan, then the Taiwan Relations Act (TRA)would represent gross interference in the domestic affairs of another sovereign nation. Under such circumstances, the TRA would have to be cancelled.

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| U.S. Legal Perspective | The Taiwan Relations Act of 1979 cannot be interpreted to recognize that an entity calling itself the Republic of China exercises sovereignty over Taiwan. |
| Conclusion #10 |

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| SUMMARY OF PRC AND ROC OFFICIAL POSITIONS  The PRC's position is that there is one, undivided sovereignty of China, and that the PRC is the sole legitimate representative of that sovereignty (under the PRC Constitution). The position of the ROC Kuomintang (KMT) is that there is one, undivided sovereignty of China, and that the ROC is the sole legitimate representative of that sovereignty (under the ROC Constitution). The position of Taiwan’s Democratic Progressive Party (DPP) is that after martial law was lifted in July 1987, it has recognized the PRC as a country and therefore there is now one country on each side of the Taiwan Strait. Each is a sovereign nation.  Both the KMT and the DPP agree that Beijing should squarely face the reality of the “existence” of the Republic of China and the fact that Taiwan and mainland China are under separate rule.  Notably absent in the discussion of the “PRC and ROC Official Positions” are the facts that (a) Taiwan has never been incorporated into the ROC’s national territory, (b) there are no international legal documents which can show that the ROC or PRC have ever obtained the territorial sovereignty of Taiwan, moreover (c) the ROC is a government in exile and therefore not a legitimate government for Taiwan under international law, etc. |

THE OFFICIAL DEPT. OF STATE MEMORANDA

Important legal perspectives on the San Francisco Peace Treaty and the Treaty of Taipei were given in two official Dept. of State Memoranda in 1961 and 1971.

Excerpt from the Czyzak Memorandum of Feb. 3, 1961:

The question of the status of Formosa and the Pescadores was again discussed on January 24, 1955, before a joint executive session of the Senate committees on Foreign Relations and Armed Services, in connection with the Formosa Resolution. It is understood that during the course of these hearings, Secretary Dulles indicated that sovereignty over Formosa and the Pescadores was not considered to have been transferred to the Republic of China in the Japanese Peace Treaty and that the question of sovereignty over these islands was not yet finally determined.

Excerpts from the Starr Memorandum of July 13, 1971:

By the peace treaty of Sept. 8, 1951, signed with the United States and other powers, Japan renounced "all right, title and claim to Formosa and the Pescadores." The treaty did not specify the nation to which such right, title and claim passed. Starr Memorandum, Dept. of State, July 13, 1971

It is the understanding of the Senate that nothing in the [1955 ROC-USA Mutual Defense] treaty shall be construed as affecting or modifying the legal status or sovereignty of the territories to which it applies.

. . . . . technical sovereignty over Formosa and the Pescadores has never been settled. That is because the Japanese Peace Treaty merely involves a renunciation by Japan of its right and title to these islands. But the future title is not determined by the Japanese Peace Treaty nor is it determined by the Peace Treaty which was concluded between the Republic of China and Japan.

Article 2 of the Japanese Peace treaty, signed on Sept. 8, 1951 at San Francisco, provides that "Japan renounces all right, title and claim to Formosa and the Pescadores." The same language was used in Article 2 of the Treaty of Peace between China and Japan signed on April 28, 1952. In neither treaty did Japan cede this area to any particular entity.

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| U.S. Legal Perspective | Official U.S. Dept. of State Memoranda from 1961 and 1971 confirmed that the Republic of China did not obtain the territorial sovereignty of Taiwan based on the specifications of the post-war treaties. Accordingly, the ROC does not exercise sovereignty over Taiwan. |
| Conclusion #11 |

Notes on the Kinmen and Matsu island groups: Historically, these were never part of “Taiwan” and were always under the rule of one or another Chinese regime. Despite this fact, the Republic of China cannot use the “ownership” of the Kinmen and Matsu island groups to establish statehood in the international community, since these areas fall within the “territorial sea” (12 nautical miles, or 22 km) of the PRC coastline.

UNITED NATIONS RESOLUTION #2758

The United Nations recognized the Chiang Kai-shek's ROC government in exile as the sole legitimate government of China up through late 1971. However, the United Nations never recognized the Republic of China as the legal government of Taiwan. (In other words, "Taiwan" is only a geographic term, and "Taiwan" has never been a member of the United Nations.)

Then on Oct. 25, 1971, United Nations Resolution 2758 expelled the representatives of Chiang Kai-shek from the United Nations and all related organizations, and recognized the representatives of the Government of the People's Republic of China as the only lawful representatives of China to the United Nations. The text of the Resolution is as follows:

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| THE GENERAL ASSEMBLY.  *Recalling* the principles of the Charter of the United Nations.  *Considering* the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter.  *Recognizing* that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council.  *Decides* to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it. |

The world community only recognizes One China, and that is the People's Republic of China (PRC). According to UN Resolution 2758, the PRC is the successor government to the ROC. However, the PRC cannot claim sovereignty over Taiwan based on this UN Resolution, because the ROC never exercised sovereignty over Taiwan in the first place.

The following excerpt from a Congressional Research Service report fully clarifies this.

***Office/Agency:*** Congressional Research Service (CRS)

*title:* China/Taiwan: Evolution of the "One China" Policy  
*date:*July 9, 2007  
[ In the Summary at the beginning of that report the following points were made -- ]  
*quote:*

1. The United States did not explicitly state the sovereign status of Taiwan in the three US-PRC Joint Communiques of 1972, 1979, and 1982.
2. The United States "acknowledged" the "One China" position of both sides of the Taiwan Strait.
3. US policy has not recognized the PRC's sovereignty over Taiwan;
4. US policy has not recognized Taiwan as a sovereign country; and
5. US policy has considered Taiwan's status as undetermined.

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| U.S. Legal Perspective | Careful examination of the historical development of the legal status of the ROC in Taiwan, combined with the content of UN Resolution #2758, fails to provide any legal basis for the People’s Republic of China (PRC) to claim sovereignty over Taiwan. |
| Conclusion #12 |

Some people believe that in the Shanghai Communique of Feb. 28, 1972, the United States recognized the sovereignty of the PRC over Taiwan. This is incorrect. Please refer again to the content of the CRS report given above, or the content of the webpage given below.

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| The final text in the [First] Communique turned out to be, "the U.S. declared: the United States *acknowledges* that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position." In other words, the Nixon Administration only *took notice* of what "the Chinese on either side of the Taiwan Strait" claimed.  See -- <https://www.taiwanbasic.com/lawjrn/onechina-tai4.htm> |

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| DISCUSSIONS WITH THE EXPERTS STORY #1  A New Hampshire based writer who frequently submitted opinion pieces and commentary to US online news sites was invited to visit Taiwan. He spent ten days touring the island, talking both to local people and human rights groups. After returning to the USA he began doing more research on Taiwan issues and attending conferences.  At one conference he was able to speak with a researcher whom the media billed as a “leading Taiwan expert.” Indeed over the previous several years, when new political developments occurred in Taiwan, he had often seen her comments quoted in leading newspapers and news sites. He asked her directly: “I have read a number of your articles online, however I didn’t find any clear statement regarding the Taiwan or ROC sovereignty situation, especially with reference to 1945, or as a result of the post-war treaties, etc.”  She politely nodded and said “Well, you know, there is much disagreement regarding WWII, the Chinese Civil War, the founding of the PRC, and other events during that period, and how they affected the sovereignty of Taiwan. For my own Taiwan research, I begin my focus in 1971 and then continue up to the present day.”  “But, I am not sure I follow that,” the writer said. “The news media frequently refer to you as ‘a leading Taiwan expert,’ . . . . . so wouldn’t it be part of your job description to sort out all of these issues and then be able to provide authoritative commentary?”  “Perhaps you can speak to some of my colleagues,” she said, pointing to a group of people chatting on the other side of the room. “I believe some of them have opinions about those mid-20th century developments.” She smiled broadly and then excused herself. |

MONTEVIDEO CONVENTION CRITERIA

Some persons claim that the Republic of China on Taiwan fully meets the four criteria of the Montevideo Convention for statehood in the international community. These criteria specify that:

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.

However, a close examination of the defined territory and permanent population conditions show that the ROC’s supposed fulfillment of the relevant qualifying criteria is/are bogus. This is explained as follows:

* The military occupation of Taiwan began on October 25, 1945, with the surrender of Japanese troops. International law specifies that "military occupation does not transfer sovereignty."
* Based on the above, a proclamation of "Taiwan Retrocession Day" on Oct. 25, 1945, thus indicating a clear intention and objective (in an occupied area) to annex Taiwan territory is prohibited.
* Although there were some proclamations made in the Fall of 1945, the most commonly quoted reference for the "legal basis" of native Taiwanese persons as having ROC nationality is a Jan. 12, 1946, order issued by the ROC military authorities. However, that order was never ratified by the Legislative Yuan, nor made into a law. In occupied territory, such an order is prohibited.
* Historical research in the current day fails to find any date after 1912 when Taiwan territory was officially incorporated into the national territory of the Republic of China, according to the laws of the ROC.
* The ROC Nationality Law was originally promulgated in February 1929, when Taiwan was a part of Japan. It was revised in February 2000, however there were no Articles addressing the mass naturalization of Taiwanese persons as ROC citizens. Hence, it can be stated unequivocally that there is no *law* in the ROC which authorizes the recognition of native Taiwan persons as ROC citizens.

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| U.S. Legal Perspective | The assertion that the ROC on Taiwan meets the Montevideo Convention criteria for statehood ignores the war crimes perpetrated by the ROC beginning in late October 1945. |
| Conclusion #13 |

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| DISCUSSIONS WITH THE EXPERTS STORY #2  Attending more conferences over the following months, the New Hampshire writer did have a chance to speak to several more people who he had also seen billed in the media as “leading Taiwan experts.” Unfortunately, he didn’t find that their knowledge was much more complete than the lady he had spoken with initially.  Of note, these people all pointed out that for all intents and purposes, “Taiwan” and the “Republic of China” were synonyms. The relationship was straightforward, because the terminology of “Republic of China” was simply the official name of Taiwan. This fact could be verified quite easily by referring to the content of the Constitution used in Taiwan, as several of these experts specifically emphasized.  Moreover, there was an additional interesting twist. More than a few of these experts (including some who had previously served in US Executive Branch positions) maintained that when talking about the subject of Taiwan sovereignty, the historical events of the early to mid-20th century were most likely not really determinative.  This opinion was advanced because, in their view (which they frequently announced to the media), Taiwan/ROC fully met all the Montevideo Convention’s criteria for statehood in the international community. Hence, a detailed discussion or dissection of any other historical or legal data was totally superfluous.    On one occasion, speaking privately with a leading Taiwan researcher, the New Hampshire writer responded to this Montevideo Convention argument by stating: “But what about ‘laws of war’ considerations?”  “What are those?” the expert queried. |

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| International Humanitarian Law  The laws of armed conflict, also known as International Humanitarian Law (IHL), govern both armed conflicts and many of the situations which arise out of those conflicts. They are one of the most important bodies of rules in all of international law, although largely ignored by many civilian researchers. A major concern of IHL is providing protection to those affected by the conduct of war. The rules of IHL have saved lives, reduced suffering, and ensured the dignity and freedom of large numbers of people throughout the world. These laws benefit both civilians and combatants, strengthen efforts to achieve international peace and security, support the rule of law, and promote human dignity, respect, and justice.  Speaking from the vantage point of the 1940s, various sources of IHL can be outlined. Most importantly, beginning from the Napoleonic era, or even earlier, in dealing with the conduct of war and its aftermath, a large body of unwritten international laws had already developed, and was considered binding on all states as evidence of “a general practice accepted as law” or “customary international law”. This was commonly referred to as the “customary laws of warfare.” The Hague Conventions of 1899 and 1907 were the first multilateral treaties that attempted to codify much of this material, (and were largely based on the Lieber Code, which was signed and issued by U.S. President Abraham Lincoln). There are also the Geneva Conventions, and these all carry the status of treaty law.  Hague Convention (IV), and its annex the Hague Regulations governing the Laws and Customs of War, are standard references in this discipline. The United States’ War Dept. (later reorganized as the Dept. of Defense) assisted in editing FM 27-10: Rules of Land Warfare (Oct. 1, 1940), as well as FM 27-5: Army and Navy Manual of Military Government and CIvil Affairs (Dec. 23, 1943). Books written by persons knowledgeable in laws of war studies are also considered to be valuable resource materials. In addition, there are numerous U.S. Supreme Court rulings on the proper conduct of war and related issues, and the opinions of the justices provide many valuable points of reference and clarification.  Examining the content of all of these conventions, regulations, field manuals, codes, court rulings, etc. what is perhaps most important to a discussion in Taiwan in the 1940s is the following –   * There is no existing precedent, rule, or regulation to say that surrender ceremonies in any location can be interpreted to result in a transfer of territorial sovereignty of that location to the country of the troops accepting the surrender. * The condition in which territory is under the effective control of foreign armed forces is called “military occupation.” The Hague Regulations of 1907 specify that territory is considered occupied when it is actually placed under the authority of a foreign military power. * The situation regarding the Battle of Singapore is instructive. As of Feb. 15, 1942, all military troops in Singapore had surrendered, and Japan had taken over the jurisdiction of the island. In other words, as of this date, Singapore was under military occupation by Japan. International law specifies that “military occupation does not transfer sovereignty.”   Notably, the announcement of the annexation of occupied territory and the mass naturalization of the local populace are war crimes, with no statute of limitations.  However, some Chinese scholars disagree with such an assessment and point out that the circumstances in Taiwan and Singapore were different. They stress that in Feb. 1942 WWII in the Pacific was in progress or ongoing, whereas with the Japanese surrender in Tokyo on Sept. 2, 1945, and in Taipei on Oct. 25, 1945, the war was over. Therefore it seems very reasonable to say that new dispositions of territory and the people thereon could be made after the war was over. But this is incorrect. The surrender ceremonies mark the end of hostilities, not the end of the war. The war is only over when the final peace settlement comes into force. |

*Part 3: from the early 1950s to the present*

Re-examining Human Rights in Taiwan with the Eventual Goal of Establishing a “Taiwan Government”

Examined from a U.S. Legal Perspective

*~~Part 3:~~*

~~Does the Republic of China in Taiwan qualify as a Government in Exile?~~

~~Examined from a U.S. Legal Perspective~~

1. In Part 1 of this Report, we established that Taiwan's territorial sovereignty had not been transferred to, awarded to, or returned to the ROC at any date up to the end of the 1940s.
2. In Part 2 of this Report, we established that Taiwan's territorial sovereignty had not been transferred to, awarded to, or returned to the ROC or PRC at any date from the early 1950s up through the first few decades of the 21st century.
3. In the beginning of Part 3 of this Report, we established that when the Republic of China moved its central government to occupied Taiwan in early December 1949. Japan’s sovereignty over Taiwan had not yet ended. This amounts to saying that in early December 1949, the ROC had moved outside of China’s national territory, therefore immediately becoming a government in exile.

MILITARY CONSCRIPTION IN NON-SOVEREIGN COUNTRIES

The Republic of China (ROC) in Taiwan has mandatory military conscription for males aged 19 and above. Estimates of the number of new draftees called up for this mandatory military conscription exceed 155,000 per year. According to the best information available, mandatory military conscription by the ROC regime in Taiwan began in late July 1951.

At that time, Taiwan was still under military occupation. Is it permissible for the governing authorities in occupied territory to impose military conscription policies over the people residing within their territorial boundaries? Examination of Article 45 of the 1949 Hague Regulations, as well as certain Articles of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War strongly suggests that the answer to this question is “No.”

Did Taiwan later become *de jure* Chinese territory? U.S. officials have repeatedly stated that Japanese sovereignty over Taiwan only ended with the coming into force of the San Francisco Peace Treaty (SFPT) of April 28, 1952. However, Taiwan was not awarded to China.

In speaking of the SFPT, U.S. Dept. of State documents of Oct. 14, 1954 stated that:

"Japan has renounced its own right and title to the islands, but their future status was deliberately left undetermined, and the U.S. as a principal victor over Japan has an interest in their ultimate future."

In the Selective Draft Law Cases, 245 U.S. 366 (1918), the U.S. Supreme Court found that the power to institute military conscription policies over a civilian population was one of the attributes of a national sovereign government, and the Justices based their decision on international law.

However, according to the information presented herein, the ROC in Taiwan is not a sovereign nation. Taiwan has never been incorporated into ROC national territory via the procedures in the ROC Constitution (see Article 4), and the ROC/Taiwan does not meet the Montevideo Convention criteria for statehood.

In consideration of the above, an initial premise could be established to say that military conscription laws in Taiwan, based on the authority of the ROC Constitution, are clearly illegal.

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| REPUBLIC OF CHINA vs. TAIWAN GOVERNING AUTHORITIES, Part A  Does the content of the Taiwan Relations Act (TRA) serve to authorize the establishment of a ROC Ministry of National Defense in Taiwan and its implementation of mandatory military conscription policies over the local populace? Based on a quick reading, it appears that the TRA does not recognize the nomenclature of “Republic of China” after Jan. 1, 1979. Or is such an interpretation in error?  The TRA uses the terminology of governing authorities on Taiwan, or simply “Taiwan governing authorities.” But, in fact, is this terminology of “Taiwan governing authorities” just a euphemism or some kind of alternative or substitute nomenclature for “Republic of China”?  To answer this question, let’s look at the situation of a young Taiwan male who receives a military conscription notice. Let’s imagine that for various personal reasons, he does not want to serve in the military, hence he refuses to be drafted.  Question: Will he be considered in violation of the criminal code and military service system laws of the “Taiwan governing authorities?” The answer is “No,” because there is no organization in Taiwan which operates under the title of “Taiwan governing authorities” and has any such laws.  However, this Taiwan male will be in violation of the criminal code and military service system laws of the Republic of China, and he will be prosecuted if he refuses to serve in the ROC military.  Hence, the idea that “Taiwan governing authorities” is actually some kind of alternative or substitute nomenclature for “Republic of China” is incorrect. Currently, in Taiwan, an organization calling itself “Taiwan governing authorities” has not yet been formed. There is only the Republic of China, which is a non-sovereign entity.  *Also see Part B.* |

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| U.S. Legal Perspective | The implementation of mandatory military conscription over the Taiwan populace clearly stands as a serious violation of international law, as well as contravening the letter and the spirit of numerous U.S. Supreme Court cases. Closely related to this is the fact that without an unequivocal international treaty reference for the transfer of Taiwan’s territorial sovereignty to the ROC, the establishment of an ROC Ministry of National Defense on Taiwan soil is without legal basis. |
| Conclusion #14 |

THE LAW OF AGENCY

With the coming into force of the SFPT on April 28, 1952, the Allies (who fought in the Pacific War) have disbanded. Therefore, it is impossible to conclude that the Allies (as a group, a collective, or in the form of a so-called “condominium”) maintain any further authority in regard to territorial disposition issues under the treaty.

A close reading of the SFPT shows that:

1. Under Article 4(b), Taiwan was left under the jurisdiction of a U.S. federal agency – the United States Military Government (USMG), in a similar situation to that of the Ryukyu Island group (Okinawa). .

* Military government is defined as “the form of administration by which an occupying power exercises governmental authority over occupied territory.” Hence, the force of this Article is to specify that the Article 2 territory of Taiwan, the Article 3 territory of the Ryukyus, etc. are occupied territory of the United States of America.
* Article 23(a) of the treaty confirms the continuing status of the United States as “the principal occupying power.”

1. According to the specifications of General Order no. 1, issued by General Douglas MacArthur on Sept. 2, 1945, the Allies directed the ROC regime under Chiang Kai-skek to go to Taiwan in order to accept the Japanese surrender, and then assume temporary governance there. In 1945, there was the anticipation of a post-war treaty that would confirm and finalize these arrangements. However, the international situation changed significantly in the following years. In the final version of the SFPT, the signatories did not award or delegate any role for the ROC to play in the continuing governance of Taiwan after April 28, 1952.
2. While it may be true that a large portion of the international community continued to regard the ROC as the sole legal government of China after April 28, 1952, clearly the ROC cannot be recognized as the legal government of Taiwan after this date. In other words, the content of General Order no. 1 which authorized the ROC regime under Chiang Kai-skek to maintain a presence in Taiwan, including the administration of the island, must be considered to be cancelled by the SFPT.
3. We can examine the legal basis for the ROC to remain in Taiwan after late April 1952 very straightforwardly. First of all, it must be noted that there is nothing in the SFPT to indicate that the ROC is acting as an agent for the Allies. Indeed, as explained above, the Allies have disbanded as of April 28, 1952.
4. Contrastingly, there is strong evidence to suggest that the ROC on Taiwan is acting as an agent for the principal occupying power – the United States of America -- in the continuing governance of Taiwan after April 28, 1952.

* In fact, the Republic of China under CKS is exercising delegated administrative authority for the military occupation of Taiwan, and may be called the subordinate occupying power. This is a principal - agent relationship.
* The law of agency is the body of legal rules and norms concerned with any principal - agent relationship, in which one person (or group) has legal authority to act for another. The law of agency is based on the Latin maxim "Qui facit per alium, facit per se," which means "he who acts through another is deemed in law to do it himself." Hugo Grotius spoke of agency in his treatise On the Law of War and Peace, written in 1625.
* A principal is bound by the acts of an agent if the agent has authority. There are three types of authority: express, implied, and apparent.
* Many researchers claim that the USA and the ROC have never signed any formal agency arrangement in regard to the administration of Taiwan. But such a formal written arrangement is only necessary when granting "express authority." An agent (such as the ROC) can legally operate under the other two types of authority, which do not require a written document.

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| U.S. Legal Perspective | The post-war SFPT does not authorize the continuing presence of the ROC in Taiwan after late April 1952. No Articles in the treaty can be offered as proof that the signatory Allies have consented to ongoing governance of Taiwan by the ROC.  Nevertheless, the ROC’s presence in Taiwan can be explained as an exercise of the **law of agency** between the U.S. and ROC military authorities. Such an agency arrangement can be legally based on *implied authority* and/or *apparent authority*.  In occupied Taiwan territory however, despite the existence of “agency,” any serious violations (past or present) of the Hague Conventions or Geneva Conventions by the ROC military authorities are still subject to prosecution. In other words, the law of agency cannot be used to violate the Hague Conventions or Geneva Conventions. |
| Conclusion #15 |

Under the U.S. constitution, violations of the laws of war are typically adjudicated by an “Article 2 court.” The 1979 case of *U.S. v. Tiede* in occupied West Berlin is one notable example.

~~The relationship between the United States and the CKS' Republic of China in the military occupation of Formosa and the Pescadores is important. The United States is the principal occupying power.~~

COURT CASE: SHENG v. ROGERS, 1959

*Quote --*

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| A Department of State Bulletin, Vol. XXXIX, No. 1017, dated December 22, 1958, which constitutes an official expression of the foreign policy of the United States, contains the following discussion of the problem in which we are interested (pp. 1005 and 1009):  'Since the middle of the 17th century and up to 1895 Formosa was a part of the Chinese Empire. In 1895 under the Treaty of Shimonoseki China ceded Formosa to Japan. In the Cairo conference in November 1943 the United States, United Kingdom, and China declared it was their 'purpose' that Manchuria, Formosa, and the Pescadores 'shall be restored to the Republic of China'. Thereafter in August 1945 in the Potsdam conference the United States, United Kingdom, and China declared that 'the terms of the Cairo Declaration shall be carried out.' This Potsdam declaration was subsequently adhered to by the U.S.S.R. On September 2, 1945, the Japanese Government, in the instrument of surrender, accepted the provisions of the declaration. The Supreme Allied Commander for the Allied Powers then issued Directive No. 1 under which the Japanese Imperial Headquarters issued General Order No. 1 requiring Japanese commanders in Formosa to surrender to Generalissimo Chiang Kai-shek of the Republic of China. Since September 1945 the United States and the other Allied Powers have accepted the exercise of Chinese authority over the island. In Article 2 of the Japanese Peace Treaty, which entered into force April 28, 1952, Japan renounced all 'right, title and claim' to Formosa. Neither this agreement nor any other agreement thereafter has purported to transfer the sovereignty of Formosa to China.'  'In giving the historical background of Formosa it has been pointed out that at Cairo the Allies stated it was their purpose to restore Formosa to Chinese sovereignty and at the end of the war the Republic of China received the surrender of Japanese forces in Formosa. It has also been pointed out that under the Japanese Peace Treaty Japan renounced all right, title, and claim to Formosa. However, neither in that treaty nor in any other treaty has there been any definitive cession to China of Formosa. The situation is, then, one where the Allied Powers still have to come to some agreement or treaty with respect to the status of Formosa.'  From the foregoing official pronouncements of the Department of State, it appears that the United States recognizes the Government of the Republic of China as the legal government of China; that the provisional capital of the Republic of China has been at Taipei, Taiwan (Formosa) since December 1949; that the Government of the Republic of China exercises authority over the island; that the sovereignty of Formosa has not been transferred to China; and that Formosa is not a part of China as a country, at least not as yet, and not until and unless appropriate treaties are hereafter entered into. Formosa may be said to be a territory or an area occupied and administered by the Government of the Republic of China, but is not officially recognized as being a part of the Republic of China. Expressions of the State Department are drawn with care and circumspection to refrain from such recognition. |

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| U.S. Legal Perspective | In the Sheng v. Rogers case (D.C. Circuit, Oct. 6, 1959) the judges clearly stated that Formosa may be said to be a territory or an area occupied and administered by the Government of the Republic of China, but is not officially recognized as being a part of the Republic of China. |
| Conclusion #16 |

Commentary: Many civilians fail to understand the reasoning of the judges in this case because they mistakenly equate an “exercise of jurisdiction” or an “exercise of administration and control” with the “exercise of sovereignty.” Based on such “recognition,” many people quickly assume that since the Republic of China has exercised jurisdiction over Taiwan since late October 1945, Taiwan must be regarded as part of the national territory of the Republic of China.

Even when this analysis is shown to be in error, they then quickly assume that if the ROC’s exercise of sovereignty over Taiwan cannot be dated from late 1945, then it most certainly can be dated from 1955, 1965, or some later date, based on the international law doctrines regarding “prescription” and/or a disposition of “terra nullius.”

However, such recognitions and assumptions are also in error. Under international law principles recognized since the close of the Napoleonic period, and as later codified in the 1907 Hague Conventions, “military occupation” has always been delineated and explained as an exercise of jurisdiction without an exercise of sovereignty. This is in line with the axiom that “Military occupation does not transfer sovereignty.” Necessarily, the implementation of this axiom also excludes the application of the doctrine of “prescription.”

Also important to understand is that territory under military occupation which is separated from its mother country by treaty after war is not “terra nullius.” Such territory continues under military occupation until the “military government” jurisdiction of the (principal) occupying power is legally supplanted.  ~~by a locally-established civil government.~~

~~The proclamation of "Taiwan Retrocession Day" on Oct. 25, 1945, thus indicating a clear intention and objective to annex Taiwan territory, is a war crime.~~

~~For a full analysis, please see our separate Report –~~

*~~The Status of Taiwan~~*  ~~Beginning in Sept. and Oct. 1945~~

CONCLUSIONS REGARDING THE LEGAL STATUS OF THE REPUBLIC OF CHINA IN TAIWAN

1. Proxy occupying forces, beginning Oct. 25, 1945, and
2. Government in exile, beginning Dec. 10, 1949

The ROC government in exile is currently residing in Taiwan, which is not a part of its national territory.

The often-heard terminology of “Chinese Taipei” is simply an abbreviation for “Chinese government in exile in Taipei.”

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| Not surprisingly, for many years the "Taiwan" entry in the U.S. Dept. of State publication Treaties in Force has clearly specified that "The United States does not recognize the Republic of China as a state or a government." |

ADDENDUM #1

THE 1992 CONSENSUS

The "1992 Consensus," is a political term coined by Kuomintang (KMT) politician Su Chi, referring to the outcome of a meeting in 1992 between the semiofficial representatives of the People's Republic of China (PRC) of mainland China and the Republic of China (ROC) of Taiwan.

The term itself was put forth in April 2000 (eight years after the 1992 meetings) by Kuomintang politician Su Chi, who stated in 2006 that he simply made up the term. The "1992 Consensus", as described by some observers, means that, on the subject of the "One China principle", both sides recognize there is only “One China," (although subject to *different interpretations*), therefore both mainland China and Taiwan belong to the same China.

Lee Teng-hui, the ROC president between 1988 and 2000, speaking of the problems involved in making a definition of “One China,” described the 1992 Consensus as a consensus which lacks a consensus. Many of Taiwan's Democratic Progressive Party (DPP) members have pointed out that because there was no agreement on the definition and mutual understanding of the term “China” as well as which government, ROC or PRC, represents "China", the "1992 Consensus" was indeed not a consensus at all.

Ma Ying-jeou, the ROC president between 2008 and 2016, said in July 2020 that the recognition of (or agreement regarding) One “China” under the 1992 Consensus is based on *different interpretations*, and without those *different interpretations* there is no 1992 Consensus.

Notably absent in the discussion of the “1992 Consensus” in Taiwan or the PRC are the facts that (a) Taiwan has never been incorporated into the ROC’s national territory, (b) there are no international legal documents which can show that the ROC or PRC have ever obtained the territorial sovereignty of Taiwan, moreover (c) the ROC in Taiwan is a government in exile, and therefore it can be argued that the ROC is not the legitimate government of Taiwan, etc.

ADDENDUM #2

In relation to Japan’s disposition of Taiwan, a precise interpretation of the relevant wording in the San Francisco Peace Treaty (SFPT) is given as follows.

**Article 2 (b)**

“Japan renounces all right, title and claim to Formosa and the Pescadores.”

* 1. **“Right”**

It is to be noted that the choice of words in Article 2 (b) is limited to “right”, “title” and “claim” to “Formosa and the Pescadores” which Japan has “renounced.” These three words have been used in relation to the “territories” of Formosa and the Pescadores.

The word “right” as used in Article 2 (b) of the Peace Treaty means Japan’s recognized and protected interest over Formosa and Pescadores, the violation of which was a wrong. It was the interest, claim, or ownership that Japan had over the territory of these islands.

A state has rights to territory and property. The state's territory is the physical space over which the state exercises sovereignty. The state's property is the set of tangible and intangible objects over which the state exercises ownership, such as embassies, buildings, vehicles, and documents. A right is "general" if any interference with it gives rise to a cause of action. The state has a general right to territory.

When Japan renounced all “right” to Formosa and the Pescadores under the Peace Treaty, it declared that it formally gave up or abandoned all rights and interests in these islands and that it would no longer institute legal actions at their behest. The word “renounce” means “to give up or abandon formally (a right or interest)” or “to disclaim”.

* 1. **“Title”**

The word “title” is the union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property. It is the legal link between a person who owns property and the property itself.

*"Though employed in various ways, [title] is generally used to describe either the manner in which a right to real property is acquired, or the right itself. In the first sense, it refers to the conditions necessary to acquire a valid claim to land; in the second, it refers to the legal consequences of such conditions. These two senses are not only inter related, but inseparable: given the requisite conditions, the legal consequences or rights follow as of course, given the rights, conditions necessary for the creation of those rights must have been satisfied. Thus, when the word 'title' is used in one sense, the other sense is necessarily implied." --* Kent McNeil, Common Law Aboriginal Title 10 (1989).

According to Article 2(b) of the Peace Treaty, Japan also renounced its “title” to Formosa and the Pescadores. ‘Title’ is used in public international law to show that a territory belongs to a state. Japan was a signatory to the SFPT. Before this peace treaty came into force, Japan had the title to territory of Formosa and the Pescadores, which was ‘a source of its territorial sovereignty’ over these islands. In other words, Japan’s control over these islands was legally justified and other states were required to respect that control. Because of the SFPT, Japan made territorial cession or consensual surrender of its sovereign rights to Formosa and the Pescadores.

* 1. **“Claim”**

According to Black’s Law Dictionary, “claim” is the aggregate of operative facts giving rise to a right enforceable by a court. It is the assertion of an existing right. Japan’s assertion of its existing right over the territories of Formosa and the Pescadores was also renounced or abandoned by it as per Article 2 of the Peace Treaty. This implied that Japan could no longer ask any international court of law for any remedy in regards to the territories of Formosa and the Pescadores. By renouncing “all claim,” Japan gave up both its existing as well as future claims over these territories and henceforth, Japan is now barred from asserting or claiming any right in respect of the same.

* 1. **Does Article 2 (b) include “territorial sovereignty” ?**

Territorial Sovereignty is the exclusive right of a state to exercise its powers within the boundaries of its territory. When Japan renounced all “title”, it in effect abandoned its territorial sovereignty over the island group of “Formosa and the Pescadores.”

* 1. **Is Article 2(b) a territorial cession?**

A definition of cede is:

(1) to renounce possession of, especially by treaty, (2) to transfer control of or sovereignty over specific property or territory, especially by treaty, (3) to relinquish and/or give up something such as land, rights, or power, (4) [noun] cession

1. According to the dictionary definition of cede as given above, there is no strict requirement that a "receiving country" be designated in order to complete the act of ceding, or making a cession.
2. When territory is ceded without the specification of a "receiving country" it may simply be called a limbo cession.

For a detailed Article by Article analysis of the SFPT in relation to Taiwan, please see -- <https://www.twdefense.info/usa/hist/pages/sfpt/>

ADDENDUM #3

REPUBLIC OF CHINA vs. TAIWAN GOVERNING AUTHORITIES, Part B

President Jimmy Carter announced the establishment of formal diplomatic relations with the People's Republic of China as of Jan. 1, 1979, and the break of diplomatic relations with the Republic of China regime in Taiwan effective Dec. 31, 1978.

The U.S. Congress quickly began work on drafting a law "To help maintain peace, security, and stability in the Western Pacific and to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan, and for other purposes."

The nomenclature of "Republic of China Relations Act" was specifically not selected; instead the new law was named the Taiwan Relations Act, commonly abbreviated as TRA. After signing by President Carter, this new law came into force (retroactively) on Jan. 1, 1979.

This law contains 18 sections. A careful review of this law shows that in four separate places, the following phraseology is used --

the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979,

President Carter apparently came to the realization that it was time to end the legal fiction that the Republic of China was the legal government of China, when in fact the ROC was headquartered in Taiwan with a legal status of “undetermined.”

Unfortunately, during that era, and even in later eras, neither the President, Executive Branch officials, or congresspersons who deal with the TRA appear to understand that the simple logic that the legal status of the ROC in Taiwan, at the most basic level, is “proxy occupying forces.”

Then, in the 1990s and into the 21st century, various people began to advance the concept that the terminology of “Taiwan governing authorities” in the TRA simply refers to the Republic of China. However, an examination of the legislative history of the TRA, as well as the content of the law itself, quickly shows that such an assertion is completely false.

Moreover, from a practical standpoint, any person can visit hundreds of government offices in Taiwan, but it will still be difficult to find any office which claims that it is operating under the authority of a so-called “Taiwan governing authorities.”

Contrastingly, it is quickly noticed that all government offices in Taiwan operate under the supposed authority of a Republic of China. Indeed, the ROC in Taiwan currently enforces its own constitution, civil law, administrative law, a nationality law, laws regarding the registration of profit-making enterprises, commercial activities, the payment of taxes, etc. In Taiwan, the violation of many types of these laws is subject to criminal penalties. This entire legal framework is explicitly stated to be under the authority of the “Republic of China,” and indeed the President, Vice-President, and other officials who serve in the ROC government in Taiwan must take an oath of loyalty to the ROC. Additionally, the ROC has a flag, but the Taiwan governing authorities have no flag.

In summary, the “Taiwan governing authorities” should not be regarded as synonymous with the “Republic of China.”

Distressingly of course, for Taiwan, it is certainly true that the human rights of the local people are continually being violated by being forced to live under the Constitution and legal structure of a country which does not hold the territorial sovereignty of their homeland (Taiwan), and which is in fact a “foreign regime,” which issues passports and ID cards in the name of the non-existent country of the Republic of China.

***Office/Agency:***National Security Council (NSC)

*subject:*An Issue Undecided

*date:* August 30, 2007

*quote:*"Taiwan, or the Republic of China, is not at this point a state in the international community. The position of the United States government is that the ROC -- Republic of China -- is an issue undecided, and it has been left undecided, as you know, for many, many years."

(*source:* Statement by Senior Director for Asian Affairs,

National Security Council (NSC), Dennis Wilder)

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| Notes: The terminology of “Taiwan governing authorities” would most appropriately be applied to the civil government formed by the local Taiwan people to provide for their own government. The formation of such a civil government would be a first step in the process of making preparations to draft a local Taiwan constitution.  With the new constitution in place, for the short to medium term, it would be expected that Taiwan would continue to function under the overall administrative authority of USMG. Someday in the future, if Taiwan’s elected representatives wanted move toward formal independence, they would need to urge the U.S. Commander in Chief to establish an appropriate timetable according to his/her personal assessment. |

The U.S. legal perspectives given herein are intended to be of reference to U.S. government officials, political scientists, as well as researchers in think-tanks, universities, and other organizations.

Many competing arguments, primarily collected from those persons with a “Chinese world view” have been collected for contrast and comparison .

DENIAL OF THE TAIWAN PEOPLE’S CIVIL RIGHTS

*With the aid and assistance of the United States*

The population of Taiwan in 1946 was estimated to be approx. 6 million. Historical estimates of the number of “ROC loyalists” who relocated from Mainland China to Taiwan in the late 1940s and early 1950s range from 1.5 million to in excess of 2.1 million. Nevertheless, the native population in Taiwan continued to grow, and in the 1950s the influx of people from the Mainland slowed down dramatically, with the result that over time the population statistics in Taiwan averaged out to approx. 15% “Mainlander,” and 85% “Taiwanese.”

Beginning in 1946 and 1947, ID cards issued to ROC citizens were clearly marked with their “Province of Origin.” Primarily, this categorization was based on the ancestral heritage or the blood-line of one’s father. In most instances, it had very little to do with “Place of Birth,” which is a concept much more familiar to westerners. (ROC ID cards issued by the Ministry of the Interior continued to contain a “provincial origin” designation, even up to the late 1990s.)

Having implemented all of the actions in Chart 2-3, the Republic of China authorities in Taiwan stressed that Taiwan was legally part of China’s national territory, and the ROC was the legal government of all of China. The relocation of all of the ROC government’s bureaus, ministries, agencies, departments, commissions, etc. (hereinafter “departments”) to Taiwan, was explained as a temporary arrangement. The officials in these departments who relocated to Taiwan did, for the most part, continue to serve in their “official positions” in the government. Legislators in the Legislative Yuan were one prominent example, holding their seats from the late 1940s to the mid-1990s, and not subject to re-election or re-appointment.

The ROC Constitution was proclaimed in Taiwan effective Dec. 25, 1947, and certainly appeared to provide a more solid legal framework for the full ROC administration of Taiwan. In any event, it was common knowledge that any persons who disagreed with the view that the ROC exercised full sovereignty over Taiwan beginning Oct. 25, 1945, was subject to arrest, jail, and perhaps even harsher treatment.

According to Article 85 of the ROC Constitution, the ROC government’s officials in charge of “national” qualifying tests for employment as civil servants implemented a quota system based on “provincial origin.” Most historians point its first year of implementation as 1948, although in that era the Taiwan public’s knowledge of the existence of this quota system was only in broad general terms.

Local Taiwanese who wanted to become civil servants in the ROC government could apply to take the tests. Civil servant job openings for all ROC government departments (including judges, doctors in public hospitals, employees in national corporations, etc.) were generally between 500 and 600 each time the test was administered.

Nevertheless, according to records declassified in the 21st century, the quota for “Taiwanese” in the 1948 exams was approx. 1.5% (8 persons out of 548), and by 1988 it had risen to 3.6% (22 persons out of 600).

This treatment of the native Taiwan population by the ROC regime was disproportionate and imbalanced, to say the least. Based on the traditional Chinese value of “provincial loyalty,” this system assured “Mainlanders” would receive the best and most favorable treatment when dealing with the ROC government bureaucracy. In other words, in Taiwan, “Mainlander privilege” was established by law. Not surprisingly, the after-effects of the implementation of such a legal policy framework, along with over 40 years of strict censorship in upholding the “official ROC government view of reality” are still very much felt in Taiwan society in the current era.

Many western commentators praise the democratization of Taiwan which began in Taiwan in the late 1980s, and then gradually picked up steam in the 1990s and then continued into the 21st century. However, these same commentators typically fail to recognize that the original highly-authoritative political structure established in Taiwan beginning in late 1945 was based on false legal premises. The Allies, led by the United States, should have demanded that all of the actions in Chart 2-3 be rescinded after the SFPT came into force.

Historical records show that these quota restrictions were implemented in other fields of activity as well, such as college/university admissions. These types of restrictions, highly discriminatory to the local Taiwan people, continued up into the 1990s.

<https://www.thinkingtaiwan.com/content/7464>

MILITARY OCCUPATION AND THE TAIWAN STATUS

A prevailing norm of customary law in the modern era is that “territory is considered occupied when it is placed under the authority of foreign military forces.” Accordingly, the correct interpretation of the events of Oct. 25, 1945, in Taiwan is to say that the military occupation of Taiwan began on this date.

The legal occupier is the conqueror. Examination of the historical record reveals that over 95% of all military attacks on the four main Japanese Islands and (Japanese) Taiwan during the December 8, 1941 to August 15, 1945 period were conducted by United States military forces. The Republic of China military forces did not participate. Hence, in relation to Taiwan, the United States is the "conqueror."

After a thorough review of the specifications of General Douglas MacArthur's General Order No. 1 of Sept. 2, 1945, the question which must be asked is: "In these Pacific Ocean areas and environs, who is fulfilling the role of *the occupying power* as specified in the customary laws of warfare?"

As we know, President Harry Truman (dates in office: April 12, 1945, to Jan. 20, 1953) approved General Order No. 1 before its promulgation, the United States is the "conqueror" of Taiwan, and General MacArthur is the head of the United States military forces. Hence the strongest presumption would be that United States is *the principal occupying power* of Taiwan. Importantly, Article 23 of the post-war Senate ratified SFPT fully confirms this.

Hence, we can fully describe the legal status of Republic of China in Taiwan, with particular reference to the Oct. 25, 1945 Japanese surrender ceremonies, as follows:

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LEGAL STATUS OF THE REPUBLIC OF CHINA IN TAIWAN

1. Proxy occupying forces, beginning Oct. 25, 1945, and
2. Government in exile, beginning Dec. 10, 1949 \* \* \* \*

Temporary governance over the island was given to the Republic of China (ROC), in accordance with the instructions provided by General MacArthur in General Order #1.

Nearly seven years later, the San Francisco Peace Treaty (SFPT) came into force on April 28, 1952, however this treaty did not transfer (or "grant") the territorial sovereignty of Taiwan to China. Moreover, there is no wording in the treaty to indicate that the signatories recognized any relinquishment of Japan’s sovereignty over Taiwan before this date. After April 28, 1952, Taiwan has remained as occupied territory.

 LEGAL STATUS OF TAIWAN TERRITORY

1. Conquered (aka “liberated”) territory of the United States, beginning Oct. 25, 1945,
2. Territorial sovereignty held by Japan until April 28, 1952,
3. United States is the principal occupying power. Taiwan remains as occupied territory after April 28, 1952.

Notes: The presence of the ROC in Taiwan after April 28, 1952 can be rationalized as a principal – agent relationship between the USA and the ROC. Legally speaking, no other explanation appears to be viable.

A Chart summarizing the important conclusions of our research can be given as follows.

Chart 2-3

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| ACTIONS OF THE REPUBLIC OF CHINA IN OCCUPIED TAIWAN TERRITORY  The implementation of the following actions in occupied Taiwan territory --   * Announcement of "Taiwan Retrocession Day" on Oct. 25, 1945, * Seizure, Expropriation, and Confiscation of Japanese Property * Mass naturalization of the local Taiwan populace as ROC citizens on Jan. 12, 1946, * Trials of local civilians in military courts, * human rights abuses undertaken in a widespread and systematic manner, knowingly directed against the Taiwan civilian population, therefore reaching the threshold for recognition as “crimes against humanity” * Promulgation of ROC Constitution on Dec. 25, 1947, including the establishment of a Judicial Branch, and the implementation of the 1935 ROC Criminal Code in Taiwan * Mass immigration into occupied Taiwan territory, beginning in the late 1940s * Establishment of an ROC Ministry of National Defense on Taiwan soil after ROC central government moved to occupied Taiwan Dec. 10, 1949, * Implementation of ROC military conscription policies over the Taiwan populace on July 25, 1951,   are all serious violations of the laws of war (i.e. “war crimes), and should have all been completely cancelled, rescinded, and/or revoked after the SFPT came into force. (In other words, the above are all “forbidden activities” in occupied territory.)    But the international community, led by the United States, did not demand that this be done! |

The drafting of the SFPT began in \_\_\_\_. Although there were many possibilities discussed, as the drafting proceeded it became apparent that the treaty would only require Japan to renounce all right, claim, and title to Taiwan, without specifying China, or any other nation, as the receiving country.

<https://history.state.gov/historicaldocuments/frus1947v06/d345>

<https://history.state.gov/historicaldocuments/frus1947v06/d245>

The Ambassador of the Republic of China to the United States was well aware of these discussions and their content.

In fact, Article 2 of the Treaty of Taipei, which was signed by the representative of ROC and Japan, it is specifically recognized that the SFPT has made this disposition of “Formosa and the Pescadores”.

Although the US Dept. of Defense, along with General MacArthur, should never have allowed the Chiang Kai-shek regime (i.e. ROC) to implement the actions listed in Chart 2-3 in the first place, early 1950 would have been an excellent time to begin cancelling and rescinding all of these.

In particular, active preparations should have been made for the drafting of a local Taiwan Constitution, and the formation of a local Taiwan Government.

After the promulgation of the Taiwan Constitution, and the formation of the Taiwan Government, one very important item of business would be in regard to the Japanese Property which was seized, expropriated, confiscated, etc. by the ROC authorities to be transferred to the Taiwan Government.

* \* \* \* \* \* *below copied*

A close reading of the SFPT shows that:

(1) Taiwan was left under the jurisdiction of a U.S. federal agency – the  United States Military Government (USMG), in a similar situation to that of the Ryukyu Island group (Okinawa).

(2) the signatories did not award or delegate any role for the ROC to play in the continuing governance of Taiwan after April 28, 1952. To put this in plain language, the ROC cannot be recognized as the legal government of Taiwan after this 1952 date. \*\*\*

The Taiwan Relations Act (TRA) of the United States also supports the assertion that the ROC is not the legal government of Taiwan.

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~~are not being properly dealt with.~~

We hereby call on respected members of the U.S. Congress, according to the authority granted by the “human rights clause” of the TRA, to push for the establishment of a Taiwan Human Rights Commission, where all human rights violations of the ROC regime on Taiwan, including war crimes, from the mid-1940s to the present, can be thoroughly investigated.

Under international law, there is no statute of limitations on war crimes.

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| *Afternote*  The Six Assurances were agreed to by the U.S. Reagan administration, which subsequently informed the United States Congress of them in July 1982. Among the most important of these was the assurance that the United States did not accept China's claim to sovereignty over the island.  Additionally, the U.S. Department of State informed the Senate that " . . . the United States takes no position on the question of Taiwan's sovereignty."  Comments by the Compilers: Importantly, the SFPT is the highest ranking document of international law in regard to the disposition of Taiwan in the post-WWII era, and it is still in force. The SFPT contains complete specifications for the disposition of Taiwan. Most significantly, Taiwan was not awarded to, ceded to, or transferred to the Republic of China in this treaty. Not surprisingly, for over 70 years, the local Taiwan people have been extremely puzzled regarding the legal basis for the following:  1) Maintenance of a Republic of China government structure on Taiwan soil?  2) Use of the Republic of China Constitution in Taiwan?  3) Issuance of “Republic of China” passports to native residents in Taiwan by an ROC Ministry of Foreign Affairs?  4) Issuance of “Republic of China” Identity Cards to native residents in Taiwan by an ROC Ministry of the Interior?  5) Implementation of mandatory military conscription policies over the local populace in the name of the Republic of China?  Human rights protections for any people must begin with the holding of an internationally recognized nationality. What is the situation of the people in Taiwan. A 2008 court case in Washington, D.C. found that “ . . . . . (Native Taiwanese) Plaintiffs have essentially been persons without a state for almost 60 years.” (Roger C. S. Lin et al. v. United States, D.D.C. March 18, 2008).  As most people are aware, the “Republic of China” is not included in the U.S. Dept. of State’s listing of Independent States in the World, nor is “Taiwan.” The Dept. of State’s failure to examine these fundamental human rights questions in their Country Reports on Human Rights Practices: Taiwan, and failure to coordinate with the Congress to establish a Taiwan Human Rights Commission (which could receive written reports of grievances from the general Taiwan public) is abundant proof that the “human rights clause” of the Taiwan Relations Act is being totally ignored, and no consideration of the war crimes of the ROC regime, beginning in the mid-1940s and continuing up to the present day, is being made.  Under US Constitution’s supremacy clause (Article VI, clause 2) the Senate-ratified SFPT is part of the supreme law of the land, and US government officials are required to take care that the Laws be faithfully executed (Article II, section 3, clause 5). Accordingly, the long term failure of US government officials to enforce the provisions of the SFPT should properly be considered as recurring violations of their oaths of office. |

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| THE MILITARY OCCUPATION OF TAIWAN AND THE RYUKYU ISLAND GROUP   1. After the surrender ceremonies of June 22, 1945, the Ryukyu island group (Okinawa) came under U.S. military occupation. Later, US military government under the formal nomenclature of “United States Civil Administration of the Ryukyus” (USCAR) was established. Residual sovereignty of Japan over the Ryukyus was recognized, however residual sovereignty of Japan over Taiwan was not.  * Some groups of the Ryukyu island chain were returned to Japan as early as 1953. In the following years, the United States began returning additional island groups in this chain to Japan. The last island group was returned effective May 15, 1972. * Both USCAR and the Office of US High Commissioner on Okinawa (Ryukyus) also ceased on May 15, 1972. The end of military government jurisdiction over the Ryukyus were confirmed by an official announcement of President Richard Nixon.  1. Under the US Constitution’s supremacy clause (Article VI, clause 2), the Senate-ratified SFPT is part of the supreme law of the land. The geographical scope of the Ryukyu island group is specified in SFPT Article 3. However, the “United Nations trusteeship proposal” for the Ryukyus as specified in this Article was never implemented. Importantly, Article 4(b) gives important specifications for the governance of the Article 3 territory of the Ryukyus, and the Article 2(b) territory of Taiwan. 2. For the Ryukyus, Article 4(b) affirms the legal authority for the establishment of USCAR. Additionally, for Taiwan, this Article also serves to affirm the establishment of US military government under the nomenclature of “United States Civil Administration of Taiwan” (USCAT).  * In other words, in order to understand the scope of governance authorized by Article 4(b) over Taiwan, the best comparison is to examine what actions the US military authorities, under the Dept. of Defense and overseen by the Commander in Chief, took in the Ryukyu island group.  1. To date, the U.S. Executive branch has completely ignored its responsibility toward Taiwan under the SFPT to establish USCAT, in direct violation of U.S. Constitution’s faithful execution clause (Article II, section 3, clause 5). 2. Some persons like to advance the argument that the US military authorities’ “SFPT obligations” to Taiwan have already *expired* at some time in the last 50 years. However, it is important to note that to date, there has been no U.S. Presidential announcement regarding the end of SFPT Article 4(b) “US military government” jurisdiction over the areas of Formosa and the Pescadores. Nor has the U.S. Executive Branch recognized the establishment of a local “civil government” in Taiwan which could supplant such military government jurisdiction.  * The normal procedure in territory conquered by US military forces would be for the US authorities to nurture local groups to come together to form a government structure which would then draft a local constitution, and initiate other organizational measures necessary for the formation of a fully-fledged “civil government.” This civil government could then supplant military government jurisdiction. * This is exactly the procedure followed in the former Mexican territories of California, Nevada, and Colorado, (all “conquered territory” of the United States) which drafted their local constitutions in Sept. 1849, July 1864, and March 1876 respectively. * Admittedly, the above three areas of California, Nevada, and Colorado were part of the territory ceded to the United States in the Mexican American War Peace Treaty of May 30, 1848. Nevertheless, the same procedure was followed after the Spanish American War, in regard to the cessions of Guam, Philippines, Puerto Rico, and Cuba. This is despite the fact that in the post-war treaty of April 11, 1899, Cuba was **not** ceded to the United States.  1. Our conclusion must be that in the present day, USMG jurisdiction over Taiwan is still active, although arguably “dormant.” 2. Establishment of a local civil government would be the normal legal procedure for territory “acquired” by the USA via conquest, and held under military occupation until final determination of status. Such territory would normally be described as “undetermined.” Comparatively speaking, the civil government formed in Cuba in 1902 could have been called “Cuban governing authorities.” A civil government in Taiwan could properly be called “Taiwan governing authorities.” 3. The military occupation of Taiwan and the Ryukyu island group after the close of hostilities in WWII, and indeed Cuba after the close of hostilities in the Spanish American War, all have many parallels and useful points of comparison. This is an excellent subject for further research. |

Regarding the legal status of Taiwan, the judges’ conclusion in the Sheng v. Rogers case mentioned in Part 2 corresponds to the Republic of China continuing to serve in the role of subordinate occupying power (aka “proxy occupying forces”) in Taiwan.

Notes: The above discussion draws parallels between the military occupation of the Ryukyu island group and Taiwan. Military occupation is conducted under “military government,” which in *Ex Parte Milligan (1866)* the US Supreme Court identified as one of three kinds of military jurisdiction under the US Constitution. An understanding of the functioning of United States military government in overseas areas is crucial to obtaining an understanding of the US – Taiwan relationship.

US military government jurisdiction over both the Ryukyu island group and Taiwan are specified in SFPT Article 4(b).

Unfortunately, however, “military government” is outside the scope of US constitutional principles recognized by most civilians. For example, the online “The Heritage Guide to the Constitution,” compiled with the assistance of over 100 scholars under the auspices of The Heritage Foundation, Washington D.C., and including nearly 500 pages of information, does not discuss military government.

Not surprisingly, the subject of the US constitutional rights of persons in territory under USMG jurisdiction is totally overlooked as well.

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| (I)  Draft Message to Commanding General, United States Forces, China Theater, Shanghai, China March 11, 1946  (Citing the Cairo Declaration of Dec. 1, 1943; the Potsdam Proclamation of July 26, 1945; and the Instrument of Surrender of September 2, 1945, . . . )  d. In view of the foregoing, it would appear that Japan has lost sovereignty over Formosa.  e. By virtue of the assumption and exercise of governmental authority by the Republic of China in Formosa pursuant to the Cairo Declaration and the signature of the representatives of the governments of China and Japan, the State Department considers that Formosa has been restored to the Republic of China but that this transfer may eventually have to be formalized by appropriate treaty arrangements.  [Approved by SWNCC on March 25 and transmitted by State  Department's instruction 511, March 28, 1946, to Chungking.]  (II)  Clarification by President Harry Truman, January 5, 1950  Speaking of the Cairo and Potsdam declarations, President Harry Truman stated:  . . . . . in keeping with these declarations, Formosa was surrendered to Generalissimo Chiang Kai-shek, and for the past 4 years the United States and other Allied Powers have accepted the exercise of Chinese authority over the island.  (III)  Many people point to official U.S. Executive Branch records (such as those given above) as proof that the US government recognized the transfer of Taiwan’s territorial sovereignty to the ROC in late October 1945. They next make the charge that the evidence presented in this Report (Parts 1, 2, and 3) has been selectively assembled to create a false impression, and is, at the most fundamental level, incomplete, biased, unreliable, non-authoritative, overly-subjective, etc.  **Comments of the Compilers:** Frankly speaking, in regard to WWII in the Pacific and its aftermath, after reading large amounts of assembled data from the mid-1940s to the present, it seems abundantly clear that most US government officials, along with the majority of outside researchers in academia and elsewhere have a very poor grasp of the overall subject matter. This is very much apparent in their writings on the conduct of the war, and the legal significance of various events, both before and after the end of hostilities. In particular, they are unfamiliar with the legal implications of military conquest, surrender ceremonies, or even making a determination of when the war “has ended.” They exhibit an almost total lack of knowledge of customary law principles, US military regulations, the conduct of military occupation, the interpretation of peace treaties, or US Supreme Court decisions on these and related topics, including the 1907 Hague Conventions/Regulations.    This is exactly the problem with the content of the Memorandum by the State-War-Navy Coordinating Subcommittee for the Far East of March 1946, President Truman’s remarks of January 1950, and some other related remarks by US Executive Branch officials during this period. Taiwan is an issue left-over from WWII in the Pacific, and these people were not knowledgeable about the conduct of war, and its aftermath, including the legal procedures regarding the cession of territory and the transfer or territorial sovereignty.  The Taiwan Autonomy Foundation (TAF) is acutely aware of this problem. Therefore, the evidence which TAF has assembled for inclusion in this Report (Parts 1, 2, and 3) are exactly those items which do correspond with a correct interpretation of the historical events and a correct orientation toward the legal repercussions. (Worthy of mention is that President Truman’s remarks of June 27, 1950, were much more authoritative.)  However, for those people who are still unsatisfied with the research results presented here, we strongly advise making direct communication with the appropriate Republic of China government department in Taiwan, such as the Ministry of Foreign Affairs (MOFA). MOFA should be urged to assemble all relevant historical and legal evidence, whereupon ROC officials can arrange a formal meeting with the U.S. Dept. of State (DOS) officials. In this way, all important points and counterpoints regarding the ROC’s sovereign status in Taiwan can be carefully reviewed, sorted out, verified, approved, and confirmed.  At the end of that meeting, a formal Memorandum on the “Legal Status of Taiwan,” agreed to by both USA and ROC officials, can be issued. No doubt, such a document would be welcomed by many think-tank researchers as a long-overdue update to the previous two Memoranda which DOS issued on this subject in 1961 and 1971. |

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| Taiwan is in No Way US Territory | | |

<https://www.taipeitimes.com/News/editorials/archives/2006/06/15/2003313673>

Let’s see how the author’s analysis breaks down based on a failure to understand military jurisdiction under the US Constitution.

22 USC 611 (m)

The term “United States”, when used in a geographical sense, includes the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, and all other places now or hereafter subject to the civil or military jurisdiction of the United States;

https://en.wikipedia.org/wiki/Territories\_of\_the\_United\_States

===Unincorporated Territories under Military Jurisdiction===

[[22 USC 611 (m)|thumb|right|The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, and all other places now or hereafter subject to the civil or military jurisdiction of the United States;]]

The specifications of 22 USC 611 (m) show that the United States may have additional territories under military jurisdiction.

Chicago Convention ?

In the SFPT, Japan renounced its sovereign rights over Taiwan without naming a receiving country. (April 28, 1952)

The Treaty of Taipei recognized this renunciation. (Aug. 5, 1952) This treaty cannot be interpreted to implement a transfer of the territorial sovereignty of Taiwan from Japan to the ROC, because after April 28, Japan no longer held that terr. Sov., and therefore could not make any further disposition of it.

~~Taiwan was incorporated into the ROC’s national territory based on the~~ ~~events of October 25, 1945, and this marked the .~~

Accordingly, the most commonly mentioned dates

must necessarily depend on a legal status determination for Taiwan itself. of whether Taiwan (aka “Formosa and the Pescadores”) is

(Get summaries from Starwars films) Various pronouncements should be cancelled . . . . .

Hence, the property seized in Taiwan by the ROC authorities beginning late October 1945, should be transferred to the legal government of Taiwan.

What has happened to the military occupation of Taiwan after the coming into force of the peace treaty on April 28, 1952?

Where is the legal government of Taiwan?

<https://www.nyulawglobal.org/globalex/Taiwan1.html>

<https://www.csis.org/programs/international-security-program/isp-archives/asia-division/cross-strait-security-initiativ-0>

<https://project2049.net/wp-content/uploads/2018/04/P2049_Stokes_Tsai_Alternate_Future_Policy_Options_In_The_Taiwan_Strait_020116.pdf>

<https://www.cfr.org/backgrounder/china-taiwan-relations>

https://taiwaninsight.org/2017/10/17/ascertaining-the-status-of-taiwan-from-treaties-and-the-roc-constitution/

Write for taiwan Insight

https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-75-2-Carolan.pdf

https://www.aei.org/articles/what-the-one-china-policy-really-means/

(This is pretty good)

https://www.civil-taiwan.org/roc-exile.htm

Chinese Taipei Chinese government in exile in Taipei

SFPT signed by large majority of UN members

Later transfer of sovereignty

Mutual Defense Treaty

SFPT

Sheng v. Rogers

* uti possidetis

*We have compiled a series of lectures, dialogues, stories, discourses, commentary, etc. on the legal status of Taiwan under U.S. law, and edited these into a comprehensive ebook. For further explanations/theories regarding Taiwan's legal status after April 28, 1952, please see Chapter 10.*

*We have compiled a series of lectures, dialogues, stories, discourses, commentary, etc. on the legal status of Taiwan under U.S. law, and edited these into a comprehensive ebook. For further analysis of both the 1895 treaty and the 1952 treaties, please see the “Overall Summary” in Chapter 15.*

THINK-TANKS’ VIEWS ON THE END OF JAPANESE SOVEREIGNTY

A listing of twelve leading think tanks in the United States can be assembled as follows.

The websites of all of these think-tanks have commentary and reportage about Taiwan, including historical summaries. Surprisingly, however, the attempt to find a precise statement of when Japanese sovereignty over Taiwan ended is very very difficult. Fpri.org

Significant Taiwan Historical Events

Late 1890s to late 20th century

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| --- | --- | --- | --- |
| Date | Event | Legal Status of Taiwan | |
| 1895 | Treaty of Shimonoseki comes into force | Sovereign territory of Japan | |
| 1912 | Republic of China is founded |  | |
| 1941.08.14 | Atlantic Charter |  | |
| 1941.12 - 1945.08 | World War II in the Pacific |  | |
| 1943.12.01 | Cairo Declaration |  | |
| 1945.07.26 | Potsdam Proclamation |  | |
| 1945.08.15 | Japan's Emperor Agrees to Surrender |  | |
| 1945.09.02 | Japan surrenders aboard USS Missouri in Tokyo Bay. General MacArthur directs "representatives of Chiang Kai-shek" to come to Taiwan to accept Japanese surrender |  | |
| 1945.10.24 | United Nations is founded |  | |
| 1945.10.25 | Japanese troops in Taiwan surrender | Conquered territory of the USA  Sovereign territory of Japan | |
| 1947.02.28 - 1950.04.30 | The 228 Incident |  | |
| 1949.10.01 | People's Republic of China is founded |  | |
| 1949.12.10 | Republic of China central government relocates to Taiwan |  | |
| 1952.04.28 | San Francisco Peace Treaty (SFPT) comes into force | Conquered territory of the USA | |
| 1952.08.05 | Treaty of Taipei comes into force |  | |
| 1955.03.03 | ROC - USA Mutual Defense Treaty comes into force |  | |
| 1971.10.25 | Republic of China is expelled from United Nations | |  |
| 1978.12.31 | United States breaks diplomatic relations with ROC | |  |
| 1979.01.01 | Taiwan Relations Act comes into force | |  |

When the historical flow of events during these years is discussed at all, the writers merely “talk around” the important issue of the end of Japanese sovereignty, without making a definitive determination. Such phrasing as “the period of Japanese colonial rule over Taiwan lasted from 1895 to 1945” is often seen.

Representative examples of this “talk around” form of narrative, collected from the webpages of academic organizations, think-tanks, historical commentators, etc. have been compiled for reference, and are presented herewith. Note than in in each case, a definitive date for the end of Japanese sovereignty over Taiwan is not given.

*(However, typically, the reader is lead to believe that the end of Japanese sovereignty in Taiwan occurred when the Republic of China military forces assumed administration over the island in late October 1945.)*

RECENT TAIWAN HISTORY *in brief*

*Comparative Versions of Events by Five Different Authors*

Compiled with an attempt to determine a date

for the end of Japanese Sovereignty over Taiwan

Selection #1

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| After the Qing dynasty fell, the mainland of China became the Republic of China (ROC) in 1912, however Taiwan was still under Japanese rule. In 1945, the Japanese surrendered in WW2 and the ROC took control of Taiwan.  Later, in 1949, four years after the Japanese had left Taiwan, the ROC government was forced to flee from the mainland China to Taiwan as Communist rule was established throughout all areas of mainland China, which had witnessed the founding of the People’s Republic of China (PRC) on Oct. 1, 1949. |

Selection #2

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| Taiwan became an overseas territory of Japan in 1895 when the Qing dynasty of China ceded Taiwan Province in the Treaty of Shimonoseki after Japanese victory in the First Sino-Japanese War.  After Japan’s defeat in World War II, Japan relinquished control of Taiwan and the government of the Republic of China (ROC), led by Chiang Kai-shek’s Chinese Nationalist Party (KMT), re-established Chinese control over the island. After the Chinese Communists defeated ROC government forces in the Chinese Civil War (1945-1949), the KMT-led ROC regime retreated to Taiwan and established the island as a base of operations to fight back to the Chinese mainland. |

Selection #3

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| The Japanese, who had had designs on Taiwan since the late 16th century, succeeded in gaining control of the island after China was defeated in the First Sino-Japanese War (1894-1895). When China lost the war with Japan in 1895, Taiwan was ceded to Japan as a colony. The Japanese governed Taiwan from 1895 to 1945.  The ROC had been an independent nation from its point of establishment in 1912. Taiwan was liberated from colonial rule by ROC in 1945, and the ROC had restored Taiwan as part of its territory in late October of that year. |

Selection #4

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| Taiwan was under Chinese control for over 200 years until 1895. At that time, as part of the settlements of the Sino-Japanese war, the island was ceded to Japan. Japanese control ended with the close of fighting in WWII, and the Chinese Civil War flared up again. Chairman Mao´s forces defeated the ROC which retreated to Taiwan in 1949.  The CCP, after taking control of the continental territories of the ROC, started to further advance its land claims and sent its troops to annex inner Mongolia, Tibet and XinJiang. However, it failed to conquer Taiwan.  At present, the land claimed by both the ROC and CCP is basically equal to the maximum extent China ever reached in its history and then some more. After all, China never controlled the whole South China Sea. Notably, the only truly undisputed part of the ROC right now that is definitely part of “China” is the Kinmen and Matsu island groups. These were never part of “Taiwan” and were always under the rule of one or another Chinese regime.  The CCP has several reasons not to give up upon the Taiwan issue. Of course, technically speaking, the PRC cannot inherit the ownership rights to Taiwan, since the ROC never had those ownership rights in the first place. However, the PRC officials ignore these technical details and continue to push their One China narrative. |

Selection #5

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| In truth, various empires of China may have claimed some kind of theoretical “domain” over Taiwan, but they did not actually settle, control, or govern the island for the vast majority of human history. Does simply declaring a claim to territory make it yours? Was a treaty negotiated between all concerned parties? What are the legal details? We might want to ask the kings of Spain, France, England, and Portugal about that. Does conquering a territory, claiming it, or colonizing it validate a perpetual right of ownership over that territory? In fact, it seems the Portuguese, the Spanish and the Dutch had more physical presence and control over Taiwan during the 15th to 17th centuries than the empires of China ever had.  Weren’t the Dutch actually the first people to have any meaningful controlling or ruling presence in Taiwan, outside of the random tribal structure of the original aboriginal settlers? Wasn’t it through the efforts of the Dutch that the first large scale Han Chinese immigration occurred? Question #1: Here today, do the Dutch have a valid claim to the island, because they colonized it for a period of time? After all, at that time the Han Chinese on the island were not ruling it. They were primarily just an immigrant labor force.  Next, let’s rule out claims by pirates, regardless of their DNA. After all, where does a pirate’s allegiance lie? That means that the first relevant imperial Chinese presence in Taiwan did not happen until 1662 when Koxinga (Ming dynasty) ended Dutch colonial rule in Taiwan. Question #2: Did Koxinga actually rule Taiwan in the name of the Emperor of China? The historical record indicates that he was ruling it for himself, so that probably shouldn’t count as falling under China’s domain. Then, in 1683, the Qing Dynasty (not the ethnic Han Chinese) took control of Taiwan, thoroughly displacing the remnants of Dutch and Koxinga forces. Significantly, that did not last long as the Qing ceded Taiwan to the Empire of Japan in 1895. For many years various pro-China academics claimed that Japan ceded it back to the political entity of the Republic of China in late October 1945, and then later confirmed this arrangement in the “Treaty of Taipei.”  After the ROC arrived, for the most part they were viewed by the local residents in that era as a foreign government imposed on Taiwan by the invading forces of President Chiang Kai-shek (CKS), effectively filling a vacuum created by the departing Japanese. CKS brought an occupying army to Taiwan and enforced the KMT’s rule over the island. However, looking back to the early years of the war, beginning in December 1941, the historical record shows that it was the actions of the US military that resulted in the “liberation” of Taiwan from Japan. China’s military did not make any forays into the four main Japanese islands or Japanese Taiwan during that period. Hence, the KMT’s arrival in Taiwan and subsequent “governance” would not have been possible without the intervention of the US Air Force and US Navy, so who really controlled Taiwan, the ROC or the USA? That is the question really worthy of debate, since the post-war Treaty of San Francisco did not award Taiwan to China, however it did confirm the status of the United States of America in Taiwan as the principal occupying power, and stipulated that United States Military Government (USMG) jurisdiction over both Taiwan and the Ryukyu island group was active.  The key point is this -- The fact that both the PRC and ROC, each political entities, claim “domain” over Taiwan does not mean they actually have that authority, legally or morally. In order to sort all of this out, it is best to examine the terms of the post-WWII treaties. |

~~The above selections are quite typical. In nearly all of the historical descriptions offered, we see that the authors are (only) offering strong hints to the effect that the Japanese surrender ceremonies of Oct. 25, 1945 marked the end of Japanese sovereignty. There are many problems with such an assumption. Two of the most obvious are (1) no detailed and authoritative legal explanations or references are offered, (2) no comparative data on “new territorial disposition as the result of war” is presented.~~

*Afternote*

UNDER WHAT CONDITIONS COULD U.S. LEGAL SCHOLARS ACCEPT THE “CHINESE ARGUMENTS” REGARDING THE EXERCISE OF SOVEREIGNTY OVER TAIWAN BY THE REPUBLIC OF CHINA?

The answer to this question is provided by customary international law.

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| We must remember that before 1895, as explained earlier in this Report, we know that the territorial sovereignty of Taiwan was held by Qing China. Then, we know that Japan obtained the territorial sovereignty of Taiwan via the 1895 Treaty of Shimonoseki.  However, after this date, we have found no date whereby it can be convincingly shown that the territorial sovereignty of Taiwan was “awarded to,” “transferred to,” or “returned to” China. This conclusion is of course based on the information presented so far in our series of Reports entitled The Exercise of Sovereignty over Taiwan, both (1) from the late 1780s to the late 1940s, and (2) from the early 1950s to the present. |

POPULAR EXPANATIONS

For the purpose of review, several very popular explanations for when the territorial sovereignty of Taiwan was “returned to” China could be summarized as follows:

1. In consideration that the 1895 Treaty was “unfair” and “unequal,” beginning in the late 1930s, Chinese government officials announced the cancellation of this treaty on several occasions. These facts clearly provide a legal basis for a “retroactive” reversion of Taiwan to China.

2. In consideration that the Japanese surrender documents, in accompaniment with the Cairo Declaration and Potsdam Proclamation, clearly stipulated that Japan would return Taiwan to China. .

3. In consideration that neither the ROC the PRC (i.e. “China”) was a signatory to the SFPT, hence it is clear that the content of the SFPT has no validity under Chinese legal norms, based on the rationale that “We didn’t sign it, hence we are not affected by it.”

4. In consideration that the Treaty of Taipei was a bilateral treaty, hence the renunciation of Taiwan’s territorial sovereignty by Japan must be interpreted as “transferring” that territorial sovereignty to the Republic of China.

5. In consideration that after the ROC central government re-located to the island of Taiwan in late 1949, there was no strong objection to this action by members of the United Nations. Clearly the majority of world nations recognized that Taiwan was already Chinese sovereign territory at that time.

GIVING FULL LEGAL VALIDITY TO A “POPULAR EXPLANATION”

In order to prove that any one of these popular explanations has full legal validity from a U.S. legal perspective, it would be necessary to give SIMILAR EXAMPLES from the world historical record, where similar events or circumstances have occurred before, and the world community agreed that they resulted in this legal effect (as specified).

For example, in relation to item #1 above, what other examples from world history are there to show that a particular treaty involving territorial cession was regarded as “unfair” and “unequal,” later announced as cancelled by one party to the treaty, whereupon the world community agreed that the territorial cession in question had been retroactively returned to its original owner?

In relation to item #2 above, what other examples from world history are there to show that the surrender documents, in accompaniment with one or more declarations or proclamations, can effect a cession of territory upon the same day as the surrender ceremonies, and the specifications of Article 42 of the 1907 Hague Regulations are suspended?

In relation to item #3 above, what other examples from world history are there to show that treaties which Chinese government representatives have not signed, are not recognized as valid? How does one explain the fact that no Chinese government representatives signed the 1867 Alaska cession treaty, but today give full respect to the U.S. claim that Alaska is part of the United States?

In relation to item #4 above, what other examples from world history are there to show that after a country has ceded a piece of territory in one treaty, it can legally make a further disposition of this same territory in another treaty several months later?

In relation to item #5 above, what other examples from world history are there to show that tacit acceptance by a majority of UN members of the existence of administration over a piece of territory by one country amounts to an affirmation of that country holding full territorial sovereignty? And that such an affirmation of territorial sovereignty would be recognized by an international court?

Etc.

Without the listing of numerous examples for each circumstance, there is no way to determine their validity or applicability in the modern world. Hence, they cannot be considered as “binding criteria” for the disposition of territory.

CONCLUSION: DOES TAIWAN BELONG TO CHINA?

The statement that “Taiwan belongs to the Republic of China” is often heard in Taiwan. However, in this series of Reports, we have given numerous pieces of data to show that this statement is incorrect.

This conclusion will potentially have wide-ranging ramifications.

In particular, it is hoped that a firm resolution of the following disputed viewpoints (some of which are, admittedly, mutually incompatible at the outset) can be achieved.

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| HISTORICAL OR LEGAL POINT OF VIEW |  |
| 1. Taiwan was “returned to China” upon, or shortly after, the Japanese surrender in WWII. This amounted to a transfer of territorial sovereignty. 2. The Republic of China on Taiwan meets all of the internationally specified criteria for statehood. 3. Based on all assembled historical and legal evidence, the Republic of China has an indisputable claim as the legitimate government of Taiwan. 4. The official name of Taiwan is “Republic of China.” 5. The use of the Republic of China Constitution in Taiwan up to the present day is fully legitimate. Taiwan is part of the ROC’s national territory. 6. The ROC is the “Taiwan governing authorities” as mentioned in the Taiwan Relations Act of the United States. 7. The ROC has a rightful claim for being the legal government of China. 8. The governments on the two sides of the Taiwan Strait are equally legitimate. Negotiations between the two sides should be conducted on an equal footing. 9. Military conscription by the ROC in Taiwan is fully legal. 10. The mainland and Taiwan belong to the same one China, although it is currently divided. 11. The legal status of Taiwan is undetermined. 12. The Republic of China in Taiwan is a “foreign regime.” 13. The Republic of China is currently located outside of The national territory. 14. The national territory of the PRC does not include Taiwan. 15. The “One China Policy” of the United States recognizes the PRC as the sole legitimate government of China. | False  False  False  False  False  False  False  False  False  False  True  True  True  True  True |