Taiwan Perspectives (3): Lessons from the War of 1812

From the second half of the eighteenth century onwards, international law came to distinguish between the military occupation of a country and territorial acquisition by invasion and annexation, the difference between the two being originally expounded upon by Emerich de Vattel in his opus The Law of Nations (1758). The distinction then became clear and has been recognized among the principles of international law since the end of the Napoleonic wars (circa 1820). Many countries, such as the United States and the United Kingdom, recognized the legal concept of military occupation even earlier.

Sir William Blackstone, in his treatise Commentaries on the Laws of England, originally published 1765 - 1769 by the Clarendon Press at Oxford, also gave emphasis to this legal formulation. All of the territories Blackstone lists as dominions are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on.

To apply Blackstone's reasoning to the United States, we need merely substitute "federal government" for "Crown," and the meaning becomes clear.

However, again, we have to recognize that in speaking of the sovereign territory of the Crown, there is a technical legal distinction between mere “jurisdiction” and actual “sovereignty” – the two are not always the same thing.

Accordingly, in the first two videos of this series, we have illustrated a variety of circumstances where exercising jurisdiction and exercising sovereignty are not identical. We overviewed situations of Kuwait, Belgium, Singapore, Cuba, Puerto Rico, Guam, Philippines, Taiwan, and the Ryukyu island group. However, many civilians still have trouble understanding these concepts which are related to the laws of war and military occupation.

Let’s give an additional example from the War of 1812, which was fought between the British and the Americans, from June 18, 1812, to Feb. 18, 1815.

On Sept. 1, 1814, all U.S. military troops in Castine, Maine, surrendered, and military forces of the British army (commonly known as “Redcoats”) took over jurisdiction of the city. Within a week, the British flag is flying, and portraits of King George III are hanging in all public buildings, and the local police are wearing British uniforms. The question arises: Does the sovereignty of Castine now belong to the U.K.?

Several large groups of British loyalists are now loudly proclaiming that “Castine is now under the sovereignty of the British Empire!” In addition to the obvious fact that Castine is now under the exclusive jurisdiction of U.K. officialdom, they also assert the following points, which we will number as 2, 3, and 4:

2) It is commonly known that Massachusetts and Maine, including the port city of Castine, have belonged to the U.K. since colonial times.

3) In June 1812, when the war originally broke out, many politicians in the Parliament urged that all treaties between the United Kingdom and the “United States of America” should be considered abrogated. This of course included the 1783 “Treaty of Paris” signed on Sept. 3, 1783, and which came into force on Jan. 14, 1784, in which the American colonies had been granted independence in the first place.

4) Reputedly, before the commencement of the war on June 18, 1812, there were several proclamations and declarations, saying that all the northeastern American colonies which the American colonists had stolen from the King of Great Britain, such as New Hampshire, Massachusetts, and Maine, shall be restored to the United Kingdom of Great Britain and Ireland.

Our question is: Based on the above rationale, can we now say that the U.K. has sovereignty over this city?

Again, the answer is No. Under the laws of war of the modern era, the surrender of the U.S. troops in Castine, Maine, only marks the beginning of the military occupation. International law states that military occupation does not transfer sovereignty.

This military occupation is not changed by such rationale as noting that this particular area has belonged to the U.K. since colonial times. Indeed, with the coming into force of the Treaty of Paris on Jan. 14, 1784, all previous British claims regarding the ownership of the territory of the American colonies, whether based on history, culture, language, race, geography, geology, etc., have become null and void.

In regard to the abrogation of treaties, it is important to note that even when such an abrogation occurs, the only clauses which are affected are those which are still “active.” So, for example, from the perspective of the year of 1812, looking back at the Jan. 14, 1784, Treaty of Paris, the clauses regarding the recognition of the independence of the American colonies, having been fully completed, are no longer “active” clauses, and therefore are not subject to any sort of retroactive cancellation.

Additionally, although there may have been some proclamations and declarations in the years before the war, saying that all the northeastern American colonies which the American colonists had stolen from the King of Great Britain, shall be restored to the United Kingdom of Great Britain and Ireland, etc. However, such proclamations, declarations, etc. and indeed even the surrender ceremonies on Sept. 1, 1814, in Castine, Maine, did not create a legal procedure to actually accomplish a transfer of territory. Such a territorial transfer would have to be accomplished by treaty.

5) But there is still another rationale which the British can advance. Namely, with the coming into force of the Treaty of Ghent on Feb. 18, 1815: “Our troops are in Castine, Maine, and so therefore that city belongs to us, and is under our sovereignty.”

However, having watched this far in this series of videos, we should immediately be able to recognize the illogic of this argument. “Jurisdiction over territory” is not directly equal to “possession of sovereignty.” This is especially true in situations which are the outgrowth of the conduct of war. More specifically, there were no clauses in the Treaty of Ghent which stated that Castine was being ceded to the U.K.

WWII in the Pacific and Taiwan

The above discussion of the War of 1812 is directly comparable to the conduct of WWII in the Pacific, the surrender ceremonies in Taiwan, and the ensuing legal and historical developments. We can clarify five items of confusion as follows.

1. On Oct. 25, 1945, all Japanese troops in Taiwan surrendered, and military forces of the Republic of China army took over jurisdiction of the island. Within a week, the ROC flag is flying, and portraits of President Chiang Kai-shek are hanging in all public buildings, and the local police are wearing Chinese uniforms. The question arises: Does the sovereignty of Taiwan now belong to the Republic of China? The answer is No.

But, wait a moment, let’s look at some additional rationale.

1. It is commonly known that Formosa and the Pescadores, which we collectively refer to as “Taiwan,” have belonged to China since ancient times.
2. In July 1937, when clashes between Chinese and Japanese troops initially occurred outside Beijing, many Chinese politicians urged that all treaties between China and Japan should be considered abrogated. This of course included the 1895 “Treaty of Shimonoseki,” in which Taiwan had been ceded to Japan in the first place.
3. There was a Cairo Declaration of Dec. 1, 1943, and a Potsdam Proclamation of July 26, 1945, saying that all the territories which Japan had stolen from China, including Formosa and the Pescadores, shall be restored to the Republic of China.

Based on the above rationale 2, 3, and 4, can we now say that the Republic of China has sovereignty over Taiwan?

Again, we must stress that the answer is No. Under the laws of war of the modern era, the surrender of the Japanese troops in Taiwan only marks the beginning of the military occupation. International law states that military occupation does not transfer sovereignty.

This military occupation is not changed by such rationale as noting that this particular area has belonged to China since ancient times. Indeed, with the coming into force of the Treaty of Shimonoseki in 1895, all previous Chinese claims regarding the ownership of the territory of Taiwan, whether based on history, culture, language, race, geography, geology, etc., have become null and void.

In regard to the abrogation of treaties, it is important to note that even when such an abrogation occurs, the only clauses which are affected are those which are still “active.” So, for example, in the 1895 Treaty of Shimonoseki, the clauses regarding the cession of Taiwan to Japan, having been fully completed, are no longer “active” clauses, and therefore are not subject to any sort of retroactive cancellation in the 1930s, 1940s, or any other period.

Additionally, we know that there were the Cairo Declaration and the Potsdam Proclamation, saying that various territories including Taiwan shall be restored to the Republic of China. However, such proclamations, declarations, etc. and indeed even the surrender ceremonies on Oct. 25, 1945, in Taiwan, did not create a legal procedure to actually accomplish this transfer. Such a territorial transfer would have to be accomplished by treaty.

1. Finally, the rationale can be advanced that with the coming into force of the San Francisco Peace Treaty on April 28, 1952, Chinese troops are in Formosa and the Pescadores, and so therefore those islands belong to the Chinese, and are under Chinese sovereignty.

However, as we have seen from the analysis in this series of three videos, “jurisdiction over territory” is not directly equal to “possession of sovereignty.” This is especially true in situations which are the outgrowth of the conduct of war. Related to this is the international law principle of

Uti possidetis:

a principle in international law 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.")

Is this principle relevant to a discussion of Chinese sovereignty over Taiwan? Our analysis can proceed as follows:

(A) It is true that in the SFPT, Japan ceded “Formosa and the Pescadores,” however according to Article 2(b), the ROC was not the recipient of this territorial cession.

(B) Taiwan had been ceded to Japan in 1895, and since its founding in 1912 the ROC had never held legal possession of "Formosa and the Pescadores" at any time before the coming into effect of the SFPT.

(C) Under the customary laws of warfare, Oct. 25, 1945, only marks the beginning of the military occupation of Taiwan, and there could be no transfer of sovereignty on that date.

Based on these criteria, upon the coming into force of the SFPT the doctrine of “uti possidetis” is not applicable to Taiwan, and cannot be invoked by “China,” however “China” may be defined.

In summary, after watching this series of three videos, the members of the viewing audience should be much more capable of differentiating when “jurisdiction” includes “sovereignty,” and when it does not.

In closing, we can pose two more important questions:

1. Can the People’s Republic of China claim sovereignty over Taiwan based on the successor government theory? The answer is No, because the Republic of China has never held sovereignty over Taiwan in the first place.
2. Can the cross-strait relations between the Republic of China on Taiwan and the People’s Republic of China be described as “state to state?” The answer is No, for the simple reason that the ROC on Taiwan is not a state. The ROC is a government in exile residing on Taiwan, which is occupied territory.

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