ANCHOR 1: For over seventy years, the history books compiled in Taiwan have stressed that Taiwan belongs to the Republic of China. Is there any flaw with that argument? From 1993 to 2008, Taiwan made formal applications to participate in the United Nations as a member country, either under the name of “Taiwan,” “Republic of China,” “Chinese Taipei,” etc. However, our reporters in New York talked to a retired official from the United Nations’ Legal Affairs Office, and uncovered a major problem. Specifically, none of those applications included any international legal documentation or evidence that the territorial sovereignty of Taiwan has ever been transferred any governing authority on the island.

As most people know, here in the 21st century the US Secretary of State and other officials have made pointed comments about Taiwan’s lack of sovereignty. Those comments are nothing new. Over fifty years ago, President Eisenhower also made similar comments about Taiwan and its adjacent islands. He stated that the post-WWII San Francisco Peace Treaty: “ . . . . . ended Japanese sovereignty over the islands but did not formally cede them to ‘China,’ either Communist or Nationalist."

Yet, this war of words regarding Taiwan’s legal status continues up to the present day. Can a solution be found which fulfills the demands of international law? A new study by a group of students at some prestigious east-coast universities says that there is. They have concluded that the post-war treaty provisions need to be fully re-examined. With that premise in mind, they also conclude that United States Executive Branch officials have numerous unfulfilled obligations to Taiwan.

Stay tuned for full details.

ANCHOR2: We have arranged interview with some of the US students who participated in his recent research project on Taiwan’s history and legal issues. Our audience members would be interested in more details on what the research questions were, what was accomplished, and whether you actually travelled to Taiwan for fact finding.

STUDENT 1: Let me give some background information first. Over the past few years, there have been numerous student-led movements in Taiwan objecting to all types of government actions. Those include many decisions made by the Executive Yuan and Legislative Yuan regarding trade arrangements, labor policies, investment policies, etc. between Taiwan and the People’s Republic of China. The student groups charged that these decisions were essentially made in a black-box fashion. Other government policies, such as the implementation of a very Chinese-centric bias in the teaching of history courses, and the compilation of textbooks in the schools, and the editing of study guides used by teachers, government employees, etc. have also aroused much student anger. There have been many instances of mass sit-ins, rallies, parades, etc. In response to this, a number of American students in east-coast universities decided to look at these issues in greater detail, and see what the real problems were. We were also interested to see if we could obtain any new insights on the BIG PICTURE, which is of course the entire topic of Taiwan’s correct position in the international community. In the end, we found over forty people willing to participate. Approximately ten of those people later travelled to Taiwan for on- the-site fact finding. The others stayed in North America to do research in the libraries, on the internet, and to conduct interviews with knowledgeable people.

STUDENT 2: The Taiwanese students have been protesting about all of these issues, and anytime you want to discuss these things, you always come back to the question of the legitimacy of the Republic of China government structure existing in Taiwan. The Chinese like to say that based on various meetings of the wartime Allies, and the resulting declarations which were issued, the transfer of Taiwan’s territorial sovereignty became effective with the surrender of Japanese troops on October 25, 1945. But after a thorough overview of the historical record, and interviews with Pentagon officials, we determined that there are no examples in the past 200 years or more to say that the "surrender" of local troops results in a transfer of territorial sovereignty to the country of the troops accepting the surrender. So, this kind of rationale by the Chinese is clearly wrong.

STUDENT 3: We looked at this aspect in much detail, and developed a basic table of data. This shows the possible descriptions of territories as a result of attacks by foreign military forces, the conduct of war, and then a surrender or end of hostilities. So these are the possible descriptions of such territory.

|  |  |  |
| --- | --- | --- |
| overrun | liberated | invaded |
| captured | conquered | appropriated |
| seized | occupied | sequestered |
| wholly annexed | tentatively annexed  | temporarily annexed  |
| taken over | retro-ceded | provisionally ceded |
| transferred | preliminarily transferred | conditionally reassigned |
| newly possessed | confiscated | unconditionally surrendered |
| impounded | under bailment | consigned  |
| ceded | surrendered to  | newly possessed |

 etc.

But the question is: Which descriptions have the most significance and validity under international law?

ANCHOR 2: When I spoke to you last week, I recall that you mentioned this entire topic can be directly related to “military jurisdiction under the US Constitution.” But I am not exactly sure how that relates.

STUDENT 3: Right. All of this relates together. First we have to recognize that when you have a surrender or a cessation of hostilities, the result is that the territory is best described with the adjectives of “conquered” and “occupied.” Then we need to understand that the occupation of territory is conducted under “military government.” In other words, the exercise of military government jurisdiction over the territory is the default status, and the basic formulation.

ANCHOR 1: How can this analysis help us to better understand the legal situation of the Republic of China in Taiwan?

STUDENT 2: Here is another table.

[ SCREEN: TABLE of Sp – Am War cessions

 Surrender, Treaty, end of Military Gov., Final Status ]

STUDENT 2 [continued]: These examples from United States history are very representative. The sequence of events follows firmly established international precedent.

STUDENT 4: I coordinated most of the research on this table by interviewing retired military officers. These are the Spanish American War cessions. The only possible explanation for the significance of the surrender ceremonies is to say that such an event marks the beginning of the military occupation. So, that would mean it is the beginning of the conqueror’s military government jurisdiction. Under international law, the conqueror will be the legal occupier.

ANCHOR 1: So, as I understand it, “military government” is the government of occupied territory. But this is completely different from “annexation,” is that correct?

STUDENT 4: In the post Napoleonic period, there is no “annexation” at this stage. That is not allowed. With reference to Taiwan, the announcement of “Taiwan Retrocession Day” on Oct. 25, 1945, is a clear violation of the customary laws of warfare. Prohibitions against this type of announcement are also found in the Hague and Geneva Conventions. In simple language, “military occupation does not transfer sovereignty.”

ANCHOR 2: Our legal correspondent has confirmed that the post-war San Francisco Peace Treaty was signed by 48 nations and ratified by the United States Senate. That treaty did not award Taiwan to China. Accordingly, US Executive Branch officials continually state that the legal status of Taiwan is undetermined. However, the officials of the Republic of China governing structure in Taiwan simply ignore all of this. They are adamant in proclaiming that Taiwan was annexed by China on October 25, 1945, the date of the Japanese surrender ceremonies in Taipei.

ANCHOR 1: Many interviews that I have conducted have given me the impression that the local Taiwanese people have serious grievances against the Republic of China administration of Taiwan. They would like to launch petition drives or to have dialogue with the appropriate “people in power” in international political circles. Hopefully, this would enable them to get their entire situation straightened out. However, they don’t know where to turn. The students in Taiwan are complaining about the overly “Chinese centric” bias in government policy making, the editing of school textbooks, and even the content of tests given to people applying to be government employees, etc. But where should such grievances be taken? As we know, Taiwan is not a member of the United Nations, so there will be no help coming from the UN or any of its associated agencies.

STUDENT 3: There is a solution, but it can only be found by more thoroughly researching the subject of military occupation. Most of the so-called Asian experts, or even the Taiwan experts, totally ignore this subject entirely in their supposed scholarly writings on Taiwanese affairs. Indeed, this is one of the reasons that our student group came together to research this entire matter. Our interviews with former US Department of Defense officials convinced us that there are many hidden aspects of this entire “Taiwan Question” that no one ever delves into or talks about.

ANCHOR 2: We will discuss more of the details in Part 2, coming up next.

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ANCHOR 3: Why is a report compiled by students at several leading east coast universities attracting so much news attention? Is it just because the students are advancing a new explanation regarding Taiwan's undetermined legal status?

ANCHOR 4: Well, as I understand it, the report was a very low budged project, and was commissioned by a prominent Washington D.C. think-tank. Several of the younger analysts there asked the students to find some sort of "fresh perspective" to look at the Taiwan question. They asked the students to try to develop some sort of "framework" whereby it would be possible to talk about Taiwan in a more logical and more comprehensive fashion.

ANCHOR 3: So, no one was really expecting any substantial results. It was just supposed to be something for the students to put on their resume. In the future they would be able to say I worked on an important project for this think-tank.

ANCHOR 4: Something like that. It was a very small project to get rid of some extra budget they had on the books. They didn’t realize that the students would be able break some new ground. But in this age of the internet, there are all kinds of collaborative software which can be utilized to bring together groups of people to work on projects. There is a real synergy which develops. Interestingly, what the students found out was that in order to fully understand Taiwan’s legal situation, we need to gain a more in-depth knowledge of the subject of military occupation.

ANCHOR 3: We talked to a number of researchers knowledgeable in this area, both in North America and Europe, and produced the following film clip.

[ FILM CLIP ]

 Military Occupation Introduction

From the second half of the eighteenth century onwards, international law came to distinguish between the (1) military occupation of a country and (2) territorial acquisition by invasion and annexation. The difference between the two concepts was originally expounded upon by Emerich de Vattel in his opus The Law of Nations (1758). The distinction then became clear and was widely accepted by diplomats, scholars, and military personnel throughout the world. As a result, since the end of the Napoleonic wars in the early 1800s, the concept of military occupation has become firmly recognized among the important principles of international law which must be respected by all peoples and all nations.

To put this another way, after the close of the Napoleonic period, when military troops entered any area, it was no longer legally permissible for the outright confiscation, expropriation, annexation, etc. of the territory. Such actions ceased to be recognized by international law as a legitimate means of territorial acquisition. These rules were more formally codified in the Convention respecting the Laws and Customs of War on Land of 1907, which is commonly called “Hague IV.” This Convention also contains explicit provisions concerning the protection of civilians and their property in occupied territories.

In relation to the military occupation of a particular area, we are faced with three central questions. These are

1. When did the military occupation begin?
2. Who is "the occupying power," aka “the legal occupier”?
3. When did the military occupation end?

In order to answer the first question, it is necessary to have a definition of “military occupation.”

Military occupation may be defined as:

(1) invasion, conquest, and control of a nation or territory by foreign armed forces, or

(2) a condition in which territory is under the effective control of foreign armed forces.

In order to answer the second question, it is necessary to understand which party in the conflict has the right and the responsibility to conduct the military occupation. There are many U.S. Supreme Court cases which discuss such topics, and the following quotation from a 1901 case is representative.

"The right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war, and flows directly from the right to conquer. ….. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world and confirmed by the writings of publicists and decisions of courts,- in fine, from the law of nations. . . .

Dooley v. United States of America (1901)

U.S. Supreme Court

A close reading of this excerpt clearly shows that it is the “conqueror” that has jurisdiction over the conquered territory. The conqueror has the right, and indeed the obligation, to conduct the military occupation. We should also note that the surrender ceremonies and the ensuing military occupation are two different things. Arrangements for the surrender ceremonies may be delegated to allies.

Next, we must understand that military occupation is conducted under “military government.”[[1]](#footnote-1) The first sentence of paragraph 362 of U.S. Army Field Manual FM 27-10 provides a definition in modern language. Arguably, the earliest clarification of this concept was made by the U.S. Supreme Court justices in the 1866 case of Ex Parte Milligan.

Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory.

The book Military Government and Martial Law, written by William E. Birkhimer,further clarifies this to say that –

The US Constitution has placed no limit upon the war powers of the government, but they are regulated and limited by the laws of war. One of these powers is the right to institute military governments.

Finally, in order to answer the third question, we need to understand that

Military government continues until legally supplanted.

How is military government legally supplanted?

[ SCREEN: TABLE of Sp – Am War cessions

 Surrender, Treaty, end of Military Gov., Final Status

 ADD Mexican American War cession data ]

In each case, military government is legally supplanted by a civil government structure fully recognized by the legal occupier.

We must note several important points.

First, for territories separated from the “motherland” via the specifications of a peace treaty after war, the military occupation does not end with the coming into force of the treaty, but continues until legally supplanted (by a recognized civil government for the territory.

Second, it is easily seen that there are only two possible outcomes for the “final political status” of the occupied territory. In the first case, the territory becomes a sovereign nation in its own right, otherwise, the territory becomes "part" of another sovereign nation.

ANCHOR 5: According to US government pronouncements, Taiwan fits neither of these classifications.[[2]](#footnote-2) Since the end of the Second World War, it has been the official policy of the United States government that the status of Taiwan is "an unsettled question . . . . " This is clear proof that the military occupation of Taiwan has not ended. It is also a confirmation that Taiwan has not yet reached a final political status, hence, Taiwan remains in interim status under the law of occupation.

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ANCHOR 3: Well, some of this is pretty technical. What are our conclusions for Taiwan?

STUDENT 5: We overview the history of Taiwan, and put all of this information together by looking at some Charts which our group developed.

1945 beginning of military occupation.

Japanese sovereignty continued until 1952

USA legal occupier ( all military attacks )

USA delegation of administrative authority

Chart USA ROC two tiers

 with the coming into force of the SFPT, the only possible conclusion which can be reached is that the ROC in Taiwan is fulfilling two roles: (1) it is a proxy occupying force for the USA in the continuing military occupation of Taiwan, and (2) it is a government in exile.

While the surrender ceremonies may be said to have been delegated to CKS on behalf of the Allies, neither the Geneva nor Hague Conventions recognize any special "rights or privileges" that the TROOPS ACCEPTING THE SURRENDER may obtain.  After the surrender ceremonies are completed, there are various administrative duties which must be attended to.  This is the most important aspect of dealing with conquered territory, and is the aspect which we must analyze.

To repeat this, the surrender ceremonies were held on behalf of the Allies, but the ensuing military occupation of Taiwan was undertaken on behalf of the “conqueror,” who by definition fulfills the role of “the occupying power.” (In other words, the surrender ceremonies and the ensuing military occupation are two different things.)

Examining this situation, and looking at the relationship between the US military forces and the ROC military forces, we can see that there has been a delegation of administrative authority for the military occupation of Taiwan to "co-belligerents."

This is because we are aware that the term "co-belligerents" is simply military-talk for "Allies."  As we know, the USA and the ROC were Allies in WWII.

Now, with the delegation of the administrative authority for the military occupation to co-belligerents, it is then most proper for us to clarify this relationship more exactly by speaking of "the principal occupying power" and his "agent" (or "proxy").  In other words, General Douglas MacArthur gave instructions to Chiang Kai-shek, and CKS accepted them.   This has created a principal - agent relationship.

Of course, CKS could have refused these instructions.  But he accepted them.

Next, with the coming into force of the SFPT in late April 1952, the Allies have, for all intensive purposes, disbanded.  However, the role of the principal occupying power continues.  This is because the US Supreme Court has held that --

for territories separated from the mother country via a peace treaty after war, the military occupation does**not** end with the coming into force of the peace treaty, but continues until legally supplanted by a recognized civil government.

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[ UNUSED ]

, all of which must be answered based on the laws of war, (and its subset, the laws of occupation):

 of the conquered territory. Further US Supreme Court references may be found on this webpage –

<http://www.taiwanbasic.com/key/dc/conqudm6.htm>

ANCHOR 2: We have collected some dates here which most people say are quite important in modern Taiwan history.

1. In the situations of the Spanish American War, Mexican American War, the Pacific War, etc. we commonly see that military occupation before the peace treaty came into effect is termed “belligerent occupation.” Contrastingly, in current terminology, military occupation after the peace treaty has come into effect may be referred to as “the civil affairs administration of a military government,” or simply “civil affairs administration.” [↑](#footnote-ref-1)
2. See the CRS Report to Congress at <http://www.taiwanbasic.com/nstatus/crs-report.htm> [↑](#footnote-ref-2)