

World of Knowledge

Future Possibilities for the Relation between Taiwan and the UN

Lin Man-Houng

Research Fellow

Institute of Modern History

This article was titled on a seminar given on the same topic, organized by the Chinese (Taiwan) Society of International Law (中華民國國際法學會) on September 22, 2007. In the lecture I delivered in the seminar, I used a powerpoint file with images, that have already been published on the website of the organization. This article provides a more elaborate explanation of the texts with the pictures, to give a more complete account of what I presented in the lecture.

Only States Can Join the UN

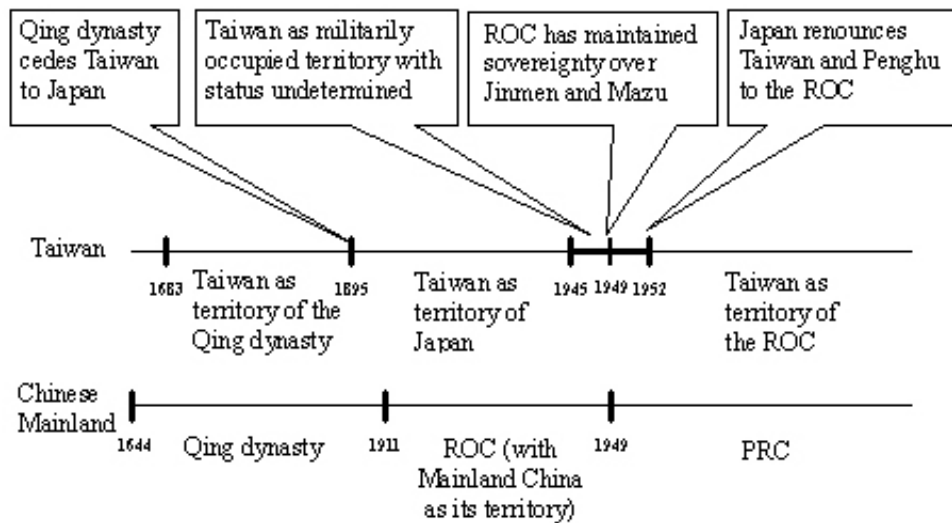
The first chapter of the United Nations (UN) Charter states how the organization's purpose is to “maintain international peace and security” among others. Article 4 in chapter 2 explains that membership to the UN is open to “all other peace-loving states which accept the obligations contained in the present Charter.” If the international legal status of Taiwan is, as many people say, “undetermined,” then Taiwan is just not in a position to join the UN, and it is useless to elaborate on a topic like the future possibilities for the relation between Taiwan and the UN. There are also those who say that the international legal position of Taiwan used to be undetermined, but after more than 50 years of effective governance, its position is now determined. But the premise of this reasoning is that before these 50 years of effective governance, Taiwan was uninhabited territory -- *terra nullius*. This Latin term has long been misunderstood as meaning “land without master.” But in 1945, Taiwan had a population of approximately 6 million people, so it could not be termed as *terra nullius*. Another argument states that the status of Taiwan is “already determined” and that the sovereignty of Taiwan lies with its people. Popular sovereignty is of course an important part of a state's sovereignty, but a more crucial factor regards territorial sovereignty. This relates to the ownership and control of an area of land and both natural and legal persons and property on it. Up to this day, those who talk about sovereignty of the people have not explained the basis Taiwan's sovereignty over its territory has in international law.

Two Theories about the Essential Factors for a State

In international law, there are two theories about what is the essential factor for being a state: the declarative and the constitutive theory of statehood. The latter theory says that diplomatic recognition by other states is a necessary condition for being a state. The former says diplomatic recognition is just that country A says that country B is a state, and that statehood is independent of recognition by other states. Of these two theories, only a few academics advocate the constitutive theory of statehood, while what most international organizations use in practice is the declarative theory. The Montevideo Convention, that was signed in 1933 by 19 states, including the US and South American countries, is the first example of the declarative theory being written into an international convention. The first article of the Montevideo Convention defines a state as having a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. Article 3 states that statehood is independent of recognition by other states. The definition used by the European Union (EU) for what constitutes a state is based on this convention. To find out whether the Republic of China (ROC) which includes Taiwan, Penghu, Jinmen and Mazu fulfills the conditions of a state, according to the Montevideo Convention, we need to look into the history of the changes in sovereignty over Taiwan.

Sovereignty over Taiwan in History

In the course of its history, Taiwan has been ruled by the Qing (清) dynasty and Imperial Japan. Some people think that Qing rule over Taiwan was tenuous, and that the dynasty did not effectively rule over the entire island. In 1895 in the Treaty of Shimonoseki which concluded the Sino-Japanese War, the Qing government ceded full sovereignty over Taiwan to Japan in perpetuity. This meant that legally, the Qing dynasty had sovereignty over all of Taiwan. From 1945 to 1952, Taiwan was, according to international law, a military occupied territory of which the status was undetermined. Furthermore, Taiwan was not part of the government transition of mainland China in 1911 and 1949. When the central government of the ROC left the Chinese Mainland for Taiwan, it continued its rule over Jinmen and Mazu. According to international law, after 1952 Taiwan was renounced to the ROC, and the ROC's territory included Taiwan, Penghu, Jinmen and Mazu. The chart below illustrates all these changes:



The Sovereignty Changes of Taiwan and Chinese Mainland

International Legal Documents on the Transfers of Sovereignty over Taiwan

According to international law, when sovereignty over a territory changes because of war between states, the victors can only legally take effective control of the newly seized territory if the change is laid down in a peace treaty signed by both sides involved in the war. In 1895, after the Qing dynasty lost the Sino-Japanese war with Japan, it signed the Treaty of Shimonoseki to end the war between the two states. After the Second World War, the Peace Treaty between the ROC and Japan, the official peace treaty (see picture) between the defeated Japan and the ROC, was finally signed on April 28, 1952, at the Taipei Guest House. The treaty was in accordance with the San Francisco Peace Treaty that had been signed on September 8, 1950.



The Peace Treaty between the ROC and Japan Kept in the ROC's Ministry of Foreign Affairs

Article 2 of the San Francisco Peace Treaty stipulates that Japan renounce all rights, titles and claims to Korea, Taiwan, Penghu, the Kurile Islands, the Antarctic area, and the Spratly Islands. Article 4 of the treaty also ruled that any claims and debts between Japan and its residents and occupied states and their residents “shall be the subject of special arrangements between Japan” and the authorities of the respective territories that Japan had renounced. The official peace treaty between Korea and Japan was signed and became effective in 1965.

The reason the Peace Treaty between the ROC and Japan, was signed only seven hours before the San Francisco Peace Treaty became effective on April 28, 1952, was because of the Cold War. With Japan becoming a party of the treaty, the US agreed that the San Francisco Treaty would become effective, and Japan’s sovereignty could be restored.

Article 2 of the Peace Treaty between the ROC and Japan states that it acknowledges and is in accordance with article 2 of the San Francisco Treaty. Only when we go back to articles 2 and 5 of the Treaty of Shimonoseki, we understand “all rights, titles and claims” that Japan renounced in these articles is full sovereignty over the territory and the legal and natural persons of Taiwan and Penghu. The moment the Peace Treaty between the ROC and Japan came into effect on May 8, 1952, was also the moment that the sovereignty over Taiwan and Penghu was legally renounced to the ROC.

In 1972, Japan established diplomatic relations with the People’s Republic of China (PRC) and broke off official relations with the ROC. At the press conference, the minister of foreign affairs Masayoshi Ohira declared that Japan unilaterally terminated the peace treaty between the ROC and Japan. But just like the Cairo Declaration, that was a remark made in a news report, and could not unilaterally terminate the Treaty of Shimonoseki which gave Japan sovereignty over Taiwan. After the sovereignty over Taiwan was decided in the Peace Treaty between the ROC and Japan, only the ROC has the right to transfer Taiwan’s sovereignty. This is also the reason that Taiwan is not mentioned in the Treaty of Peace and Friendship that Japan and the PRC signed in 1978.

Taiwan’s Status is Now Determined

From the Peace Treaty between the ROC and Japan, a few things become clear:

First, the ROC government that signed the treaty with Japan was the old government that was established in 1911. In the first stage of the treaty talks between the ROC and Japan, the Japanese government was of the opinion that it had not been at war with the ROC, that was by that time established in Taiwan, and so there was no need to sign a treaty to end such a war. Hence, in the first stage of the meetings about the peace treaty between the ROC and Japan, Japan referred to it as a “treaty between the ROC and Japan” instead of a “peace treaty.” But eventually, Japan adopted the term “peace treaty between the ROC and Japan.” This was because it said in the Cairo Declaration that the ROC had declared war against Japan, and fought together with the Allied Forces in the Second World War, and that after the war Taiwan and Penghu would be returned to the ROC. If it were not for these factors, there would have been no need for Japan to sign this treaty. Moreover, the ROC government on Taiwan was a continuation of the ROC government on the Chinese mainland. A party that signs state to state international treaties has to be a state. This shows that the ROC government, that had held on to Jinmen and Mazu, was still exercising the sovereign rights of the ROC, and was thus in the position to sign a peace treaty with Japan as a state Japan had been at war with.

Secondly, the peace treaty between the ROC and Japan determined that the territory of the ROC is the territory that its government exercises effective control over. Article 3 of the treaty about property, article 10 about nationality and Note no.1 on this issue all clearly state this principle. Japan insisted on including this principle, first because it is the basic meaning of territory, and second because Japan wanted to keep open the possibility of normalizing relations with the PRC later.

Thirdly, according to international law, Taiwan (including Penghu, Jinmen and Mazu) on one hand and the Chinese

mainland on the other have belonged to different states from 1895 on. Therefore, the relation between ROC and PRC is not similar to that between East and West Germany, or that between North and South Korea.

So if the status of the ROC is determined, and it is in fact a state, then why did the ROC's Council of Grand Justices say in its interpretation number 328 that "the national territory of the Republic of China is ... a significant political question and thus it is beyond the reach of judicial interpretation"? And why is it that current history textbooks for senior high school still teach about the "undetermined status of Taiwan" ?

There are many reasons for this. An important reason is that the US, with the Cold War in mind, did not want the PRC to enter the UN to form a stronger communist front together with the Soviet Union. It wanted the ROC, that at that point was established at Taiwan, Penghu, Jinmen and Mazu, to continue representing all of China in the UN. In 1953, US Secretary of State John Foster Dulles, who had helped draft the San Francisco Peace Treaty and the Peace Treaty between the ROC and Japan, advocated dual representation by the states on both sides of the Taiwan Strait. Later other states and American academics and officials also started backing a similar plan. But it was only after president Richard Nixon wanted to normalize relations with the PRC in 1965 that the US government started moving towards dual representation. But, until 1970 the US still wanted the question whether the PRC should enter the UN to be an "important question" that required a two-thirds majority in the General Assembly to pass. Only on the eve of the last critical vote in 1971, with strong persuasion from US, the ROC government told its diplomatic allies that if the matter was not accepted as being an important question, it could force itself to accept the idea of dual representation. But by then it was already too late. Under heavy lobbying from the PRC, resolution 2758, which expelled the representative of Chiang Kai-shek from the UN, passed with a majority. Without UN membership, many states terminated their diplomatic recognition of the ROC. Because many people do not fully understand the meaning of the declarative and the constitutive theory of statehood in international law, they believed that when the ROC was no longer a member of the UN, and henceforth no longer a state.

Revisiting Resolution 2758 to Restore ROC to the UN

As the ROC has full sovereignty over Taiwan, Penghu, Jinmen and Mazu, UN resolution 2758 goes against the principle of the sovereign equality of all its member states, as laid down in article 2 of the UN Charter. It squanders the rights of a small country – the ROC – in order to protect a big country – the PRC, leaving an unresolved and controversial issue for the East Asian region.

Article 1 of the UN Charter states that the UN aims "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." As the sovereignty of the ROC has been determined by international law, it is crucial that resolution 2758 be revised.

To revisit resolution 2758, discussion could take place in the UN General Assembly. On the other hand, an attempt to become a new member of the UN while holding the position that Taiwan's status is undetermined might turn Taiwan into a trustee of the UN which might be entrusted to the PRC as a permanent member of the Security Council. According to article 4 in chapter 2 of the UN Charter, the admission of a new member state "will be effected by a decision of the General Assembly upon the recommendation of the Security Council." If Taiwan tries to apply for membership as a new country, the "Republic of Taiwan," it would meet the veto of the PRC, a permanent member of the Security Council.

A Crucial Decision for the Cross-strait Relations

Although the two sides of the Taiwan Strait have been under different sovereignty for over a hundred years, nowadays most people in Taiwan are still related to the people on the mainland by blood, and many rich aspects of Chinese culture are

preserved in Taiwan. Although the regime on mainland China has still not given up the idea of retaking Taiwan by force, contact between the people on both sides of the strait is developing fast. Against this background, the PRC's promise of a peaceful rise is a hopeful development. In accordance with the Peace Treaty between the ROC and Japan, the Montevideo Convention, the UN Charter, and other international legal documents, the ROC should share in the rights and obligations of a UN member state, which have been discontinued since 1971. To restore ROC as a member state of the UN would be a crucial decision to benefit both sides of the Taiwan Strait, perpetuate peace in East Asia, and facilitate the peaceful rise of the PRC.

(Translated by Anna Stiggelbout with the author's revision)