

# The Yale Law Journal

Volume 81, Number 4, March 1972

## Who Owns Taiwan: A Search for International Title\*

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The question of sovereignty over Taiwan (Formosa) and Penghu (the Pescadores),<sup>1</sup> avoided for nearly thirty years, can no longer be deferred, for the radical shifts and sudden realignments in Far Eastern politics have thrust the controverted status of the island-state into the political foreground.<sup>2</sup> The international legal issue has been joined

\* The authors wish to acknowledge the criticism and comments of their colleagues, Myres S. McDougal, Harold D. Lasswell and Arie E. David.

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1. Unless otherwise specified, Taiwan includes Penghu (the Pescadores) and the other isles of the Taiwan archipelagic system, and is used interchangeably with Formosa. The island of Taiwan was better known internationally as Formosa in both governmental and popular usage. For example, Formosa, not Taiwan, was used in the Cairo Declaration of 1943, 9 DEP'T STATE BULL. 393 (1943), the Potsdam Declaration of 1945, 13 *id.* 137 (1945), the Treaty of Peace with Japan, Sept. 8, 1951, [1952] 3 U.S.T. 3169, T.I.A.S. No. 2490, and the Formosa Resolution adopted by the United States Congress in 1955, H.J. Res. 159, 69 Stat. 7 (Jan. 29, 1955). It was in the late 1950's, when proposals for "one China, one Formosa" were put forward, that the Nationalist Chinese regime became very insistent on using Taiwan instead of Formosa. The Nationalist Chinese elite seem to be opposed to the usage of Formosa primarily because: (1) Formosa, Portuguese in origin, tends to connote the non-Chinese legacy of the Taiwanese people; (2) Formosa underscores the fact that Taiwan's international legal status remains undetermined; and (3) Formosa has been closely identified with the Formosan independence movement. Thus, there was a conspicuous shift in changing Formosa to Taiwan in the 1960's, both in governmental and non-governmental circles.

2. See generally L. CHEN & H. LASSWELL, *FORMOSA, CHINA, AND THE UNITED NATIONS* (1967) [hereinafter cited as CHEN & LASSWELL]; W. BUELER, *U.S. CHINA POLICY AND THE PROBLEM OF TAIWAN* (1971); D. MENDEL, *THE POLITICS OF FORMOSAN NATIONALISM* (1970); G. KERR, *FORMOSA BETRAYED* (1965); *FORMOSA TODAY* (M. Mancall ed. 1964); L. CHEN, *TAI-WAN E TOK-LIP KAP KEN-KOK* (The Independence and Nation-Building of Taiwan) (1971); J. COHEN, E. FRIEDMAN, H. HINTON & A. WHITING, *TAIWAN AND AMERICAN POLICY* (1971); A. BARNETT, *A NEW U.S. POLICY TOWARD CHINA* (1971); R. MOORSTEEN & M. ABRAMOWITZ, *REMAKING CHINA POLICY* (1971); *Hearings on the United States Security Agreements and Commitments Abroad, Republic of China, Before the Subcomm. on United States Security Agreements and Commitments Abroad of the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. (1970); *Hearings on the United States Relations with the People's Republic of China Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971); *Hearings on the United States-China Relations: A Strategy for the Future Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970); Bueler, *Taiwan: A Problem of International Law or Politics?*, 30 *WORLD TODAY* 255 (1971); Cohen, *Recognizing China* 50 *FOREIGN AFFAIRS* 30 (1971); Ravenal, *Approaching China, Defending Taiwan*, *id.* at 44.

Regarding the controversy over Taiwan's international legal status, see CHEN & LASSWELL,

over the sufficiency of China's claim to the islands. Despite an intervening civil and domestic ideological war, that claim has been remarkably consistent, whether pressed by adherents of the Nationalist or Communist cause.<sup>3</sup> Indeed, Nationalist and Communist Chinese

*supra* at 82-140; 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 477-591 (1964) [hereinafter cited as WHITEMAN DIGEST]; J. COHEN, E. FRIEDMAN, H. HINTON & A. WHITING, *supra* at 156-77; Dai, *Recognition of States and Governments under International Law With Special Reference to Canadian Postwar Practice and the Legal Status of Taiwan (Formosa)*, 3 CANADIAN Y.B. INT'L L. 290 (1965); Harvey, *The Legal Status of Formosa*, 30 WORLD AFFAIRS Q. 134 (1959); Jain, *The Legal Status of Formosa*, 57 AM. J. INT'L L. 25 (1963); Kirkham, *The International Legal Status of Formosa*, 6 CANADIAN Y.B. INT'L L. 144 (1968). See also F. MORELLO, THE INTERNATIONAL LEGAL STATUS OF FORMOSA (1966); O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT'L L. 403 (1956); Phillips, *The International Legal Status of Formosa*, 10 WESTERN POL. Q. 276 (1957); Wright, *The Chinese Recognition Problem*, 49 AM. J. INT'L L. 318 (1955).

We do not address ourselves to the question of the status of Quemoy and Matsu, offshore islets of the Chinese mainland. China's title, it is generally agreed, seems quite unclouded there. In 1954, Secretary of State John Foster Dulles drew a sharp distinction between the status of Formosa and the Pescadores, as opposed to that of Quemoy and Matsu. For the text of the statement, see pp. 644-45 *infra*. Distinguishing Formosa from the offshore islands (Quemoy and Matsu), Mr. Lester Pearson, then Minister of External Affairs, made clear the Canadian position on January 25, 1955, in the following terms:

In this area of tension and danger a distinction, I think, can validly be made between the position of Formosa and the Pescadores and the islands off the China coast now in Nationalist hands: the latter are indisputably part of the territory of China; the former Formosa and the Pescadores which were Japanese colonies for fifty years prior to 1945 and had had a checkered history before that are not.

Pearson, *Statement of the Canadian Minister of External Affairs*, 26 CURRENT NOTES ON INTERNATIONAL RELATIONS 56, 57 (1955). A similar view was also expressed by the Australian government. See Casey, *Statement by the Minister for External Affairs*, *id.* at 127, 176. For a survey of other viewpoints, see pp. 644-47 *infra*.

The total area of the fourteen Quemoy islets is sixty-nine square miles. Matsu consists of nineteen islets whose total land area is merely 10.5 square miles. The shortest distance from Quemoy to the Mainland Chinese territory is 1.44 miles, from Quemoy to Formosa (Kaoshung) it is 174.9 miles. Quemoy and Matsu have a total civilian population of 67,000. The total military population, is, of course, a matter of strict secrecy, but is estimated at around 150,000. On the specific question of Quemoy and Matsu, see generally D. COPP & M. PECK, THE ODD DAY (1962); Lewis, *Quemoy and American-China Policy*, 2 ASIAN SURVEY 12 (1962); Tsou, *The Quemoy Imbroglia: Chiang Kai-shek and the United States*, 12 WESTERN POL. Q. 1075 (1959); Clubb, *Formosa and the Offshore Islands in American Policy, 1950-55*, 74 POL. SCI. Q. 517 (1959); Tsou, *Mao's Limited War in the Taiwan Strait*, 3 ORBIS 332 (1959).

3. For the Communist Chinese position, see THE CHINESE PEOPLE'S INSTITUTE OF FOREIGN AFFAIRS, OPPOSE U.S. OCCUPATION OF TAIWAN AND "TWO CHINAS" PLOT (1958); IMPORTANT DOCUMENTS CONCERNING THE QUESTION OF TAIWAN (Foreign Language Press ed. 1955); *China's Sovereignty over Taiwan Brooks No Intervention*, People's Daily, May 12, 1964, reprinted in PEKING REV., May 15, 1964, at 6-8; *The Chinese People are Determined to Liberate Taiwan*, People's Daily, June 27, 1965, reprinted in PEKING REV., July 2, 1965, at 9-10. For the most recent statements, see *Interview with Chou En-lai*, BULL. OF CONCERNED ASIAN SCHOLARS, Summer-Fall 1971, at 31, 43-44; *Official Transcript of James Reston's Conversation with the Chinese Premier in Peking*, N.Y. Times, Aug. 10, 1971, at 14, cols. 2-3; *id.*, Aug. 6, 1971, at 1, col. 2; *id.*, Nov. 10, 1971, at 17, col. 1; *Midnight Thoughts of Premier Chou*, The Sunday Times (London), Dec. 5, 1971, at 4-5. See also N.Y. Times, Nov. 16, 1971, at 1, col. 8 and at 16, col. 3; PEKING REV., Nov. 19, 1971, at 5-9; Renmin Ribao, Commentator, *Fresh Evidence of U.S. Government's Hostility Toward Chinese People*, PEKING REV., May 7, 1971, at 13-17; *Flagrantly Pushing "Two Chinas" Plot*, *id.*, Aug. 6, 1971, at 26-27; Renmin Ribao, Commentator, *Resolutely Oppose U.S. Scheme of Creating "Two Chinas"*, *id.*, Sept. 30, 1971, at 5-6; *A Victory for World's People: Crushing Defeat for U.S. Imperialism*, *id.*, Oct. 29, 1971, at 6-9.

The Nationalist view on the issue was expressed annually before the General Assembly during the debates on the Chinese participation question. See also President Chiang Kai-shek's address on February 8, 1955 in FREE CHINA REV., March 1955, at 49-54; LIU-WU

## Who Owns Taiwan: A Search for International Title

share an identity of interest here: Nationalist China has supported Communist China's pretensions to territory,<sup>4</sup> while Peking has confirmed Nationalist aspirations, if only to claim benefit as the successor state.<sup>5</sup>

### I. International Decision and the Control of Territory

Territorial organization has had a slower metabolism of change in international law than the movements of peoples and the fashions of ideology and legal theory. A comparatively high degree of stability for political boundaries has been considered necessary for effective resource exploitation and, more generally, for the continuing viability of an international political system organized primarily in territorial, nation-state units. Hence the tendency of international decision makers to sustain through time an almost stereotypic stability in territorial control, despite the often discordant anachronism between such holdings and current political myth and social reality.<sup>6</sup>

HAN, TAIWAN TODAY 1-25 (1951); LIN WEN, WO-MEN TE TAI-WAN (Our Taiwan) (1965). For a most recent statement, see Tan, *Representation of China in the United Nations, Proceedings of the American Society of International Law 1971*, AM. J. INT'L L., Vol. 65, No. 4, 1971, at 20-25.

But for the contrary view on the part of Formosans, see YUZIN CHIAOTONG NG, HISTORICAL AND LEGAL ASPECTS OF THE INTERNATIONAL STATUS OF TAIWAN (FORMOSA) (1971); Chen, *Legal Status of Formosa*, 4 PHILIPPINE INT'L L.J. 99 (1965); Ko, *The Legal Status of Formosa from the Viewpoint of International Law*, 1 FORMOSAN Q. 37 (1962); Li, *The China Impasse: A Formosan View*, 36 FOREIGN AFFAIRS 437 (1958).

4. Aside from the identical territorial claim to Taiwan, both Nationalist China and Communist China have taken the same territorial position with regard to the Sino-Indian border disputes, the status of Tibet, and the title over the Senkaku islands (Tiao Yu Tai islands).

5. Since the People's Republic of China has never had control and jurisdiction over Taiwan, its claim to Taiwan is in large part based on the theory that it is a successor to the "benefits" belonging to the "Republic of China." Implicit in Peking's claim is that, by defeating the Nationalist Chinese regime headed by Chiang Kai-shek, it automatically inherits all that belonged to "the Republic of China." For a discussion of which China, Nationalist or Communist, is to be considered the original China, see McDougal & Goodman, *Chinese Participation in the United Nations*, 60 AM. J. INT'L L. 671, 699-718 (1966).

6. An extremely recent example of this trend is provided by the Temple of Preah Vihear case. The International Court there said that

[i]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, should be completely precarious.

Temple of Preah Vihear Case, [1962] I.C.J. 6, 34. On the other hand, the court has manifested flexibility in fixing outer limits for territorial waters. See *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116. See also *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 639 (1846). For a policy analysis of these problems, see M. REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 245-47 (1971).

Four novel international factors now challenge this older pattern of decision:

First, international decision has been increasingly homocentric rather than state-centered. The change, manifested in the proliferation of human rights norms and, more diffusely, in international public policies of human rights, has had a direct impact on the law of territorial sovereignty.<sup>7</sup> The transformation of a monarch's "estate," devolving through varying systems of geniture and legacy, to a nation-state, deemed the common patrimony of the people and not of a single owner, implied basic changes in determining ownership or title. As the notion of "people" shed its penumbral mysticism and was related with greater clarity to an aggregate of individuals, the wishes of this group came to be recognized as a particularly salient factor in determining title. The development is not yet complete, but its necessary contours are now apparent.

Second, the doctrine of *jus cogens* has achieved an international consensus.<sup>8</sup> A *jus cogens* or peremptory norm is a fundamental normative demand in a legal system which operates to override any contravening arrangement or practice but cannot itself be changed or terminated other than by inclusive community procedures. Over the long run, peremptory norms serve as unifying and stabilizing factors within an authority system. Nonetheless, tensions can result when they require changes or reconstructions in social situations estab-

7. The relevant provisions of the U.N. Charter are: the preamble; art. 1(2) and (3); art. 55; art. 56; ch. XI; ch. XV. Of the various human rights conventions, see in particular, the Universal Declaration of Human Rights (1948), International Covenant on Economic, Social, and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), and Optional Protocol to the International Covenant on Civil and Political Rights (1966), in U.N. Doc. A/CONF. 32/4 (1967). See also BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed. 1971).

The literature chronicling this major development in international policy is, of course, vast. On the international protection of human rights, see generally J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970); A. DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1971); M. GANJLI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1962); H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN (1945); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); M. MOSKOWITZ, THE POLITICS AND DYNAMICS OF HUMAN RIGHTS (1968); E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY (1964); V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY (1970); UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS (1968); UNITED NATIONS EDUCATIONAL, SOCIAL AND CULTURAL ORGANIZATION, BIRTHRIGHT OF MAN (1969); INTERNATIONAL PROTECTION OF HUMAN RIGHTS (A. Eide & A. Schou eds. 1968); THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (E. Luard ed. 1967); McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969).

8. See Vienna Convention on the Law of Treaties, art. 53, U.N. Doc. A/CONF. 39/27 (1969). See also CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPERS AND PROCEEDINGS (1967); Schwelb, *Some Aspects of International Jus Cogens*, 61 AM. J. INT'L L. 946 (1967). But cf. G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 27 *et seq.* (1971).

lished before the emergence of the peremptory norm. Such tensions may prove extremely acute in territorial arrangements contravening a *jus cogens*. Hence much legal ingenuity will be required in designing transitional regimes which achieve change with minimum sacrifice of public order and value use.

Third, the world community has established an international organization whose authority is plenary in cases of a "threat to the peace."<sup>9</sup> While it would be misleading to speak of a right of international eminent domain, there can be no question of the competence of the United Nations Security Council and, in appropriate circumstances, the General Assembly, to initiate and supervise territorial revisions when in the view of the organization this would best secure minimum world order.<sup>10</sup> Institutional patterns of inter-state collaboration also provide a degree of effective power which can be mobilized by a central organization. This new potential competence changes the dynamics of the international regime of title.

Fourth, a global economy has emerged and in many ways has changed, indeed made obsolete, continuing political structures. A common feature of the contemporary world is the proliferation of territorial and non-territorial groups which are politically discrete but factually integrated. Any type of *solidarité social* generates complex authority demands in which the interests of an interdependent whole require changes in the activities of component parts.<sup>11</sup> One consequence of increasing global interdependence is that territorial claims, like other assertions, may often be challenged by claims of common economic or other interest.<sup>12</sup>

The introduction of these new dynamic factors raises fascinating "intertemporal" questions. The legal time-space frame of a territorial

9. See U.N. CHARTER art. 39. In cases in which the plenary powers of the Security Council prove inoperable, a secondary, contingent competence of the General Assembly for the maintenance of peace comes into operation: G.A. Res. 377. 5 U.N. GAOR Supp. 20, U.N. Doc. A/1775 (1950). See also *Certain Expenses Case*, [1962] I.C.J. 151.

10. Since the interests of the general community must precede those of component members and since the primary function of the United Nations is the maintenance of international minimum order without which no other objective can be fulfilled, the appropriate organ of the U.N. must have a competence to introduce territorial changes in those circumstances in which such changes promise the most economic and just means for maintaining or restoring the peace, U.N. CHARTER art. 2(4), notwithstanding. Obviously, such a competence would be used sparingly, since a coordinate goal of the organization is the maintenance of the territorial integrity of member states.

11. For judicial recognition of this process, see *Advisory Opinion on Tunis Morocco Nationality Decrees*, [1923] P.C.I.J., ser. B, No. 4, at 23-24.

12. See C. JENKS, *LAW, FREEDOM AND WELFARE* 71-82 (1963); M. McDUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 134-37 (1963); R. FALK, *THIS ENDANGERED PLANET* (1971).

regime is often different from the culturally conditioned time-space frames of participants in a changing social process. Virtually every controversy over territory involves one or more past claims, allegedly perfected in periods during which different substantive and procedural norms were in force.<sup>13</sup> Hence every authoritative response to a claim of international title must apply a set of intertemporal principles, balancing (1) patterns of resource use inherited from the past and shaped by prescriptions which may no longer be in force or which may now be repugnant to contemporary demands but which, nonetheless, condition some contemporary expectations and the good faith value investments made thereon, with (2) claims for resource use conforming to contemporary norms. Because the public order system puts a premium on stability and the avoidance of disruptions in resource use, a delicate balance must be struck in each case. Optimum decisions must invent programs for applying policies in each idiosyncratic case, sustaining minimum order as well as approximating whatever happen to be the contemporary demands for preferred public order.

We note five general intertemporal principles relevant to the regime of international legal title:

1. Unless a challenge to territorial title has been lodged, a presumption of local prescriptive and applicative competence and of valid title is enjoyed by those acting under color of authority, in all legal international activities.<sup>14</sup>
2. In cases of direct or ancillary challenge, there is a strong presumption in favor of upholding perfected titles from the past, which have been held effectively and continuously to the present.<sup>15</sup>
3. If, however, such title runs contrary to a peremptory international norm (*jus cogens*) which has since emerged, decision-

13. See M. REISMAN, *THE ART OF THE POSSIBLE* 3-9 (1970).

14. A challenge over time may, of course, act to bar consolidation or perfection of a claimed title. Nonetheless, the general principle of law common to almost all legal systems accords a presumption of ownership to the possessor, as a means of maintaining stability for value exploitation. In international law, the presumption extends to a general prescriptive and applicative competence. See Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9. The principle comes closest to express doctrinal formulation in the Latin American regional practice of *uti possidetis*. The Roman doctrine from which *uti possidetis* was allegedly derived was a Praetorian edict ordering parties to refrain from seeking to change possession of property while the question of its title was being litigated.

15. See Temple of Preah Vihear Case, [1962] I.C.J. 116, 130. Also pertinent is the famous dictum in the Grisbadarna case: "[I]t is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible . . ." Grisbadarna Case (Norway v. Sweden), HAGUE COURT REPORTS (Scott) 121, 130 (Perm. Ct. Arb. 1909).

makers will require modifications in the challenged title to bring it into conformity with contemporary law.<sup>16</sup>

4. Inchoate titles from the past which remain unperfected and which are challenged in the present must perfect themselves in conformity with contemporary law. Claimants cannot seek to perfect title under earlier, superseded norms, even though part of title *pro futuro* may rest on such obsolesced norms.<sup>17</sup>

5. In circumstances in which prior title has lapsed or no international title has ever been established, a title to territory can only be established in conformity with the fundamental postulates of *contemporary* international law. These include not only peremptory norms (*jus cogens*) but all other authoritative principles of procedure and content relevant to the establishment of a territorial community.<sup>18</sup>

Inevitably, the application of these principles and the dynamics of territorial control in the world political process result in a legal

16. Note the distinction between title to territory and treaty rights in general. In regard to treaties in general, a *jus cogens subsequens* and a *jus cogens emergens* will render unlawful *pro futuro* a treaty regime which was lawful until the intervention of the new peremptory norm. See also the Vienna Convention on the Law of Treaties, art. 53, *supra* note 8. The gradualistic tone of LEAGUE OF NATIONS COVENANT art. 20 indicates the social and political difficulties which such changes entail and may be compared with U.N. CHARTER art. 103, which vaults the parties by directing *decisionmakers* to give supremacy to the Charter in cases in which its provisions conflict with treaty provisions. In regard to territorial regimes, in contrast, a subsequent peremptory norm will not *eo ipso* nullify a title which vested under norms formerly lawful but now discredited by a new *jus cogens*. However, if title is challenged, decisionmakers will be obliged to take account of the contemporary *jus cogens* which now mandates them. This is precisely the meaning of *jus cogens*. However, they may not re-examine the lawfulness of the title in terms of normative changes which do not involve peremptory norms. Some aspects of these problems are intimated in Judge Huber's award in Island of Palmas Case (United States v. Netherlands), 2 U.N.R.I.A.A. 829 (1928). A sensitive examination of many of the problems which *Palmas* raises in this regard is found in Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735 (1928).

17. In contrast to our third principle, see pp. 604-05 *supra*, a title which did not vest or one which remained "inchoate" must perfect itself under contemporaneous norms rather than under the superseded norms. See, e.g., Delagoa Bay Case, 3 G. DE MARTENS, NOUVEAU RECUEIL GENERAL DE TRAITES 517 (2d Ser. 1878); 5 J. MOORE, INTERNATIONAL ARBITRATIONS 4984 (1878), and Island of Palmas Case (United States v. Netherlands), 2 U.N.R.I.A.A. 829 (1928).

18. The proposition requires little illumination. New acts take effect under contemporaneous law. The distinction between principles four and five is that in five, all components of an older regime have obsolesced whereas, in four, parts of it continue to be legally effective. Consider the following hypothetical example. An atoll in the Pacific which is inhabitable was discovered and claimed by France in 1938, but French intentions of occupying it were postponed by the outbreak of the war. It is arguable that France acquires an "inchoate title" for a reasonable period of time (see note 93 *infra*) though perfection of title in 1946 must take account of the law as of that date and cannot rely on the somewhat more lenient standards which might have applied in 1938. In contrast, if an inhabitable atoll which is thrust above the waves by volcanic activity in 1949 is claimed by the United States, any title which the United States secures is based only on international law as of 1949. A third example is of an atoll occupied and administered by France for fifty years, at the end of which time it is abandoned as a matter of intention and fact. Thereafter, the Soviet Union moves to secure title over it. Soviet title must fulfill the title requirements of international law in 1972 and not any of those in effect in 1922, at the time when France occupied the atoll.

patchwork of dramatic temporal disjunctions and applications, side by side, of laws from entirely different time periods with only jagged approximations to contemporary demands for justice.<sup>19</sup> Much of this *mélange* is attributable to the social and economic need for stability as well as to the rather haphazard, disorganized and often dysfunctional way in which challenges to international title are brought to the attention of international decisionmakers.<sup>20</sup> Thus, much that is desirable cannot be expected from the regime of international territorial control. While the regime must contribute, in its own sphere, to improvement of international public order, it is only one instrument for amelioration. A wide range of other international legal modalities are available which may, in certain circumstances, be more economical and effective. This does not, of course, discharge the law of territorial sovereignty from its own responsibility to world public order.

## II. Historical Perspective

Taiwan (Formosa) is an island about 110 miles off the southeast coast of mainland China.<sup>21</sup> With a population of fifteen million, the

19. Thus, one may find three contiguous states, one of which has secured title by conquest, another by prescription and the third by secession and self-determination. At a subsequent instant in time, only the third means of acquisition would have been lawful under international law if title were to be secured at that moment. Nonetheless, all of the three titles would be recognized if they had been perfected in periods in the past during which each particular means of acquisition sufficed.

20. On the general problem of invocation, see McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403, 426-29 (1967).

21. Taiwan is about 700 miles south of Japan and 200 miles north of Luzon, the Philippines. The Pescadores (Penghu) consist of sixty-four isles, covering some fifty square miles. See Pi, *A Try on the Explanation About the Local Name of the Pescadores* [*sic*], TAIWAN WEN SHIEN (Report of Historic Geographical Studies on Taiwan), vol. 21, No. 2, 1970, at 22-28. In addition, there are thirteen adjacent islets (of which only six are inhabited) surrounding Taiwan proper. Regarding the geographical and physical features of Taiwan, see generally the excellent comprehensive study by CHENG-SIANG CH'EN, TAIWAN TI-CHIH (A Geography of Taiwan) (1959-61) (three vols.) [hereinafter cited as CH'EN]. See also CHENG-SIANG CH'EN, PENGCHAYU (The Agincourt Island) (1954); C. HSIEH, TAIWAN—ILHA FORMOSA (1964); Ch'en, *The Geographical Change of Taiwan in the Past Three Hundred Years*, TAIWAN WEN SHIEN, vol. 12, No. 1, 1954, at 67-92; Wu, *A Study on Ryuch'iu Yu*, TAIWAN WEN SHIEN, vol. 20, No. 3, 1969, at 1-44.

Tiao-yu Tai, known in Japanese as the Senkaku islands, have recently assumed major importance after geological surveys indicated that the area is rich in oil deposits. Japanese, Communist Chinese, Nationalist Chinese and Taiwanese all claim ownership of the islands. Taiwanese and Chinese dispute Japan's claim that they are part of the Ryukyu Islands which are to be returned to Japan in May 1972. See N.Y. Times, Dec. 6, 1970, at 32, col. 3; *id.*, Jan. 30, 1971, at 8, col. 3; *id.*, June 13, 1971, at 7, col. 1; Editorial, *The Senkaku Islands Deal—A Diplomatic Sell-Out*, THE INDEPENDENT FORMOSA, Winter 1970, at 2; Editorial, *Our Position with Regard to the Tiao-yu Tai Islets*, TAIWAN CHENGLIAN, May 1971, at 5-6. See also *Hearings on Okinawa Reversion Treaty Before the*

## Who Owns Taiwan: A Search for International Title

island-state has more people than ninety-seven of the 132 member states of the United Nations.<sup>22</sup> The Taiwanese, with the solid industrial foundation laid by the Japanese before the end of World War II and the massive inflow of post-war economic aid (totalling \$1.5 billion from 1950 to 1965),<sup>23</sup> have created an economically self-sustaining and viable entity. Taiwan was never integrated into the economy of the mainland of China and since the Communist revolution, the island-state, having had no economic contact with China, has developed an economic system completely distinct and different from its neighbor. As a result, Taiwan's economy is a part of the aggregate market economy of the non-communist world.<sup>24</sup> In general, comparisons of China and Taiwan are instructive. Taiwan has fifteen million people and an area of less than 14,000 square miles while mainland China has 800 million people and an area of 3.7 million square miles. Yet Taiwan's annual external trade is \$4 billion, the same as China's.<sup>25</sup> While

*Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. (1971); Annex to Hearings on Okinawa Reversion Treaty Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. (1971).*

22. As of July 1971, Taiwan's population was 14,852,882. DIRECTORATE-GENERAL OF BUDGETS, ACCOUNTS & STATISTICS, EXECUTIVE YUAN, MONTHLY STATISTICS OF THE REPUBLIC OF CHINA, Aug. 1971, at 10-11. Of this number, approximately thirteen million are Taiwanese, *i.e.*, born in Taiwan. The remainder are, for the most part, mainlanders who came to Taiwan after 1949. For a historical survey concerning the change of Taiwan's population, see 2 T'AI-WAN SHENG WEN HSIEN WEI YUAN HUEI, T'AI-WAN SHENG T'UNG CHIH KAO: ZEN MIN CHIH, ZEN KOU PIANG (The General History of Taiwan Province: People, Population) (1964).

23. For a comprehensive appraisal of the effects of U.S. aid to Taiwan, see N. JACOBY, U.S. AID TO TAIWAN: A STUDY OF FOREIGN AID, SELF-HELP, AND DEVELOPMENT (1966). Concerning Taiwan's recent economic growth, see OFFICE OF ECONOMIC RESEARCH, BANK OF TAIWAN, T'AI-WAN CHIN-CHI HUA-TSAN CHIH YEN-CHIU (A Study of Taiwan's Economic Development) (1970); T. SHEN, AGRICULTURAL DEVELOPMENT ON TAIWAN SINCE WORLD WAR II (1964); ECONOMIC DEVELOPMENT IN TAIWAN (K. Chang ed. 1968). For Taiwan's economic development during Japanese rule, see G. BARCLAY, COLONIAL DEVELOPMENT AND POPULATION IN TAIWAN (1954).

Official sources of statistics concerning Taiwan's economy include INDUSTRY OF FREE CHINA (a monthly in both English and Chinese, published by the Minister of Economic Affairs); STATISTICAL ABSTRACT OF THE REPUBLIC OF CHINA (published annually in both English and Chinese by the Directorate-General of Budgets, Accounts, and Statistics, Executive Yuan); TAIWAN STATISTICAL DATA BOOK (published annually by the Council for International Economic Cooperation and Development, Executive Yuan). Other valuable sources are: UNITED NATIONS ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST, ECONOMIC BULLETIN FOR ASIA AND THE FAR EAST (published in Bangkok); FAR EASTERN ECONOMIC REVIEW (published in Hong Kong). A series of Taiwan Studies (in Chinese) published by the Bank of Taiwan offer the most scholarly analysis available on the island of Taiwan's economy.

24. International investment in Taiwan, particularly by Japanese and Americans, is quite substantial. See J. SCHREIBER, UNITED STATES CORPORATE INVESTMENT IN TAIWAN (1970).

25. N.Y. Times, Jan. 24, 1972, at 39, col. 1, and at 40, col. 1 (city ed.). Regarding the import-export trade of Taiwan, see CHINESE MARITIME CUSTOMS, THE TRADE OF CHINA (TAIWAN), 1970 (compiled and published by Statistical Dep't, Inspectorate General of Customs, 1971). As regards Mainland China's foreign trade, see A. ECKSTEIN, COMMUNIST CHINA'S ECONOMIC GROWTH AND FOREIGN TRADE (1966).

size and economic viability do not automatically vindicate a claim to separate statehood under international law, they do establish the factual plausibility of such a claim.<sup>26</sup>

The striking political and economic distinctions between China and Taiwan are not of recent vintage. Historically, the relations between the two states were intermittent and, for the most part, quite tenuous. While it is uncertain whence the first inhabitants came to Taiwan, its first natives were aborigines of Malay stock.<sup>27</sup> The island was originally known by the Chinese as Liu Ch'iu, and was probably regarded by the Chinese emperors as a tributary similar to Thailand (Siam), Nepal, Burma, Vietnam (Annam), Laos, Korea and other foreign lands.<sup>28</sup>

In the late fifteenth and early sixteenth centuries, dissident Chinese began to cross the 110-mile Formosa Straits and settle in Taiwan in substantial numbers. When, in the seventeenth century, the Dutch and Spanish established settlements in Taiwan, Imperial China was neither disposed nor able to prevent them. Based in Taiwan, the Dutch East India Company controlled and exploited the southern coast of the island for about forty years.<sup>29</sup>

26. Regarding Taiwan's value-institutional development and viability as compared to other countries, see B. RUSSETT, H. ALKER, K. DEUTSCH, & H. LASSWELL, *WORLD HANDBOOK OF POLITICAL AND SOCIAL INDICATORS* (1964). See also CHEN & LASSWELL, *supra* note 2, at 399-418.

27. See C. CHAI, *TAIWAN ABORIGINES; A GENETIC STUDY OF TRIBAL VARIATIONS* (1967); 2 CH'EN, *supra* note 21, at 27, 909-1010 (1960). For the early history of Formosa, see generally W. CAMPBELL, *FORMOSA UNDER THE DUTCH* (1903); W. CAMPBELL, *SKETCHES FROM FORMOSA* (1915); J. DAVIDSON, *THE ISLAND OF FORMOSA, PAST AND PRESENT* (1903); W. PICKERING, *PIONEERING IN FORMOSA: RECOLLECTIONS OF ADVENTURES AMONG MANDARINS, WRECKERS, & HEAD-HUNTING SAVAGES* (1898). A classic in Chinese, HENG LIEN, *T'AI-WAN T'UNG-SHIH* (The General History of Taiwan), first published in 1921, was reprinted by the Committee of Chinese Collections, Taipei, in 1955.

For a brief account of Formosa's history by a Nationalist official (former Minister of Education), see CHI-YUN CHANG, *AN OUTLINE HISTORY OF TAIWAN* (1953). See also CHUN-CHANG CHIANG, *T'AI-WAN LI-SHIH KAI-YAU* (A General History of Taiwan) (1970); T'ING-I KUO, *T'AI-WAN SHIH-SHIH KAI-SHUO* (A General History of Taiwan) (2d ed. 1958).

For an account by a Communist Chinese, see CHIH-FU LI, *TAI-WAN JEN-MIN KO-MING TOU-CHENG CHIEN-SHIH* (A Brief History of the Revolutionary Struggle of the Taiwanese People) (1955).

Formosans' perspectives about their past are comprehensively presented by: JOKTIK ONG, *TAIWAN: KUMON SURU SONO REKISHI* (Taiwan: Its Agonizing History) (1964); MEI SHI, *TAIWANJIN YONHYAKUNENSHI* (The Four Hundred Year History of the Taiwanese) (1962); YUNGH-SIANG LAI, *TAIWAN SHIH YEN-CHIU* (Studies on History of Taiwan), series I (1970) [hereinafter cited as LAI].

28. Cf. NG, *supra* note 3, at 16-22; Fairbank & Teng, *On the Ch'ing Tributary System*, 6 HARV. J. ASIATIC STUDIES 135 (1941); THE CHINESE WORLD ORDER: TRADITIONAL CHINA'S FOREIGN RELATIONS (J. Fairbank ed. 1968). For a bibliography concerning the debate on Taiwan's original name, Liu Chiu, see Y. LAI, *supra* note 27, at 227-30.

29. See W. CAMPBELL, *supra* note 27; A. WIRTH, *GESCHICHTE FORMOSAS BIS ANFANG 1898* (1898); C. IMBRAUET-HUART, *L'ILE FORMOSA, HISTOIRE ET DESCRIPTION* (1893); W. GODDARD, *FORMOSA* 49-62 (1966); Chuang, *The Dutch Rule in Taiwan*, TAIWAN WEN SHIH, vol. 10, No. 3, 1953, at 1-26.

## Who Owns Taiwan: A Search for International Title

In 1662, eighteen years after the Ming dynasty was overthrown by the Manchus, Koxinga (Cheng Cheng-kung) led the remnants of the Ming from China to refuge on Taiwan, expelling the Dutch and making Taiwan his personal kingdom and a base from which to harass the Manchu (Ch'ing) dynasty. In response, the Manchus cleared a ten-mile wide strip of coastline on the mainland to prevent any contact with the Ming "traitors."<sup>30</sup>

In 1683, an expedition force sent by Manchu Emperor Kang Hsi and assisted by the Dutch succeeded in asserting nominal authority over Taiwan. For nearly two centuries, however, the Ch'ing government did virtually nothing to govern or develop Taiwan. Local administration fell to the mandarins and, probably, to family organizations. To an extraordinary degree, aboriginal tribes in large sectors of the island retained control and even negotiated certain agreements with European representatives.<sup>31</sup> A popular Taiwanese saying referred drily to the prevalence of riot and rebellion and was indicative of the state of affairs on Taiwan during that period.<sup>32</sup>

In 1871 the crew of an Okinawan vessel wrecked on the south coast of Formosa was murdered by the aborigines. When Japan protested the incident, the Chinese government in Peking disclaimed responsibility on the ground that the outrages had been committed outside its jurisdiction. Japan then sent a punitive expedition to Formosa.<sup>33</sup> The multilateral diplomatic exchanges that preceded and followed this

30. See Chuang, *An Account of the Measure of Prohibiting People along South-East Coast of Mainland to Migrate to Taiwan in early Ching Dynasty* [sic], TAIWAN WEN SHIEN, vol. 15, no. 3, at 1-20, no. 4, at 40-62 (1964).

31. S. YEN, TAIWAN IN CHINA'S FOREIGN RELATIONS, 1836-1874, at 136-39 (1965). Thomas Wade, the British Minister in Peking, seemed to feel that this situation meant that China "did not have complete sovereignty over the entire island." *Id.* at 215.

32. The popular Taiwanese saying was "Every three years a small revolt; every five years a big one." See OFFICE OF ECONOMIC RESEARCH, BANK OF TAIWAN, CH'ING-TAI TAI-WAN MIN-PIEN-SHIH YEN-CHIU (A Study on the History of Taiwanese Rebellions during the Ch'ing Dynasty) (1970); Chang, *Factors Causing Taiwan People's Resistance Against Ch'ing Dynasty Marked by Their Successive Uprising and Quick Subdual* [sic], TAIWAN WEN SHIEN, vol. 15, No. 4, 1964, at 17-39; Chang, *The Internal Disorders and External Troubles Under the Ch'ing Government in Taiwan*, TAIWAN WEN SHIEN, vol. 19, No. 2, 1958, at 131-38; Ng, *The Identity of Taiwanese vis-à-vis the Ch'ing Dynasty—On the Eve of Japanese Occupation of Taiwan*, TAIWAN, vol. 2, No. 1, 1968, at 19-27.

33. See E. HOUSE, THE JAPANESE EXPEDITION TO FORMOSA (photocopy made in 1963 by Yale University Library Photographic Services of the original edition published in 1875); J. DAVIDSON, *supra* note 27, at chs. 10-13. See also NAORICHI TANAKA & TIEN-SHOU TAI, BEIKOKU NO TAIWAN SEISAKU (United States Policy Toward Taiwan) 63-84 (1968); S. YEN, *supra* note 31; Gordon, *Japan's Abortive Colonial Venture in Taiwan, 1874*, 37 J. MOD. HIST. 171 (1965); Koh, *The Taiwan Incident*, 2 NIHON GAIKOSHI NO SHOMONDAI (Some Problems in Japanese Diplomatic History) (Nihon Kokusai Seiji Gakkai ed. 1965). YEN, *supra*, is a very comprehensive recent study with many useful diplomatic citations, but the author is rather inconsistent in many of her interpretations and conclusions.

expedition brought home to the Ch'ing government the necessity of actually securing control over the territory. No one, it seemed, was about to recognize a title which the claimant itself could not make effective.<sup>34</sup>

It was not until 1887 that Taiwan was made into a province of China by the Ch'ing, with Liu Ming-ch'uan as its governor.<sup>35</sup> This occupation lasted only eight years, for China, defeated in the Sino-Japanese War of 1894-1895, ceded Formosa to Japan by the Treaty of Shimonoseki of 1895.<sup>36</sup> The Treaty itself provided for an interesting test of the development of the political perspectives of the population of Taiwan. Taiwanese were allowed a two year period during which they might opt for Chinese nationality and move to the Chinese mainland.<sup>37</sup> Almost all of the population opted to remain in Taiwan.<sup>38</sup> It was clear that this did not indicate the absence of any political identification. On the contrary, the local Taiwanese elite sought to prevent the cession to Japan. Unable to influence the Manchu government, the Taiwanese revolted and established the Republic of

34. For a survey of European interests and intrigues in Taiwan, see Gordon, *Taiwan and the Powers, 1840-1895*, in *TAIWAN: STUDIES IN CHINESE LOCAL HISTORY* 93 (L. Gordon ed. 1970) [hereinafter cited as GORDON]; cf. YEN, *supra* note 31, at 125 *et seq.*

35. See Chu, *Liu Ming-ch'uan and Modernization of Taiwan*, 23 *J. ASIAN STUDIES* 37 (1963). There are a number of datings of this event. The discrepancies, which are not germane to our study, may be attributed to different translations from the Manchu calendar year and also to the arrival of the future governor, Liu Ming-ch'uan, before Taiwan was actually made a "province" by the Manchus.

36. Article II of the Peace Treaty of Shimonoseki between Japan and China reads as follows:

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications thereon:

(b) The Island of Formosa, together with all the islands appertaining or belonging to said island of Formosa.

(c) The Pescadores Group—that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 24th degrees of north latitude.

See 1 *AM. J. INT'L L.* 378 (Supp. 1907).

37. Article V of the Treaty of Shimonoseki read as follows:

The inhabitants of the territory ceded to Japan, who wish to take up their residence outside the ceded districts, shall be at liberty to sell their real property and retire.

For this purpose a period of two years from the date of the exchange of the ratifications of the present act shall be granted. At the expiration of that period those of the inhabitants who shall not have left said territories shall, at the option of Japan, be deemed Japanese subjects.

Each of the two Governments shall immediately upon the exchange of the ratifications of the present act send one or more commissioners to Formosa to effect a final transfer of that province, and within the space of two months after the exchange of the ratifications of this act such transfer shall be completed.

1 *AM. J. INT'L L.* 378, 380 (Supp. 1907).

38. Only 0.16 per cent of the Taiwanese population opted for Chinese nationality. Ng, *supra* note 3, at 2-3. See also Ng, *Japan's Occupation of Taiwan: Her Internal and International Measures* (1), 69 *KOKUSAIHO GAIKO ZASSHI* (The Journal of International Law and Diplomacy) 63, 89-90 (1970).

Taiwan. Within a year, the Republic was suppressed by an invading Japanese force.<sup>39</sup> From 1895 to 1945, Formosa was a colony of Japan,<sup>40</sup> this formal status continuing until 1951.<sup>41</sup>

Japanese rule all but obliterated lingering Taiwanese ties with China and initiated a fifty-year span of fantastic social and economic development that left a permanent imprint on the culture and perspectives of the Taiwanese people. By 1939, Taiwan's per capita value of foreign trade was thirty-nine times greater than China's.<sup>42</sup>

At the conclusion of World War II, the Supreme Commander of the Allied Command in the Pacific, General Douglas MacArthur, authorized the Nationalist Chinese authorities to accept the surrender of Formosa from the Japanese and to undertake temporarily military occupation of the island as a trustee on behalf of the Allied Powers.<sup>43</sup>

39. For an excellent study on this first, though short-lived, Republic in Asia, see YUZIN CHIAUTONG NG, *TAIWAN MINSHUKOKU NO KENKYU* (A Study on the Republic of Taiwan) (1970). The author concludes that this was the decisive crystallization of the Taiwanese political identity and its nationalism. See also H. LAMLEY, *THE TAIWAN LITERATI AND EARLY JAPANESE RULE, 1895-1915: A STUDY OF THEIR REACTIONS TO THE JAPANESE OCCUPATION AND SUBSEQUENT RESPONSES TO COLONIAL RULE AND MODERNIZATION*, pt. 2 (1964); Lamley, *The 1895 Taiwan Republic: A Significant Episode in Modern Chinese History*, 27 *J. ASIAN STUDIES* 739 (1968); Lamley, *The 1895 Taiwan War of Resistance: Local Chinese Efforts against a Foreign Power*, in GORDON, *supra* note 34, at 23-77; Morse, *A Short Lived Republic*, *THE NEW CHINA REVIEW*, March 1919, at 23-37; Woodside, *T'ang Ching-sung and the Rise of the 1895 Taiwan Republic*, 17 *PAPERS ON CHINA* 160 (1963).

40. For the Formosans' resistance against Japanese rule in the early period, see Koh, *The Formosan Resistance during the Course of Establishing Japan's Rule, 1895-1902*, 81 *KOKKA GAKKAI ZASSHI* (The Journal of the Association of Political and Social Sciences) 193-264, 359-407, 503-47 (1968); Ng, *supra* note 38, at 63-93, 190-213.

As regards Taiwan under Japanese rule, see generally J. BALLANTINE, *FORMOSA* 22-49 (1952); G. BARCLAY, *supra* note 23; TADAO YANAIHARA, *TEIKOKUSHUGIKA NO TAIWAN* (Taiwan under Imperialism) (1929); YOSABURO TAKEKOSHI, *JAPANESE RULE IN FORMOSA* (G. Braithwaite transl. 1907); TZU-WEI HSU & KUNG-CHAO P'AN, *CHIN-JIH TI T'AI-WAN* (Taiwan Today) (1945); J. ONG, *supra* note 27, at 97-136; M. SHI, *supra* note 27, at 279-436. For an interesting comparative study of Japanese colonial policies in Formosa and Korea, see Chen, *Japanese Colonialism in Korea and Formosa: A Comparison of the Systems of Political Control*, 30 *HARV. J. ASIATIC STUDIES* 126 (1970).

41. The reference is to the conclusion of the Peace Treaty with Japan signed at San Francisco on September 8, 1951. [1952] 3 U.S.T. 3169, T.I.A.S. No. 2490. It went into effect on April 28, 1952. See pp. 641-47 *infra*.

42. G. BARCLAY, *supra* note 23, at 33.

43. Note that Chiang's forces accepted surrender in accord with and on behalf of the orders of the Supreme Allied Commander. Japan did not surrender to any separate ally, but to the allies as a group. Thus, Article 1(a) of General Order No. 1 (dated September 2, 1945) reads:

The senior Japanese Commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), and Formosa and French Indo-China north of sixteen degrees north latitude, shall surrender to Generalissimo Chiang Kai shek.  
Directive by the Office of the Supreme Commander of the Allied Powers to the Japanese Imperial General Headquarters, 3 *WHITEMAN DIGEST*, *supra* note 2, at 487, 488 (1964). Indeed, the orders themselves emphasized the delegatory and representative role of the individual officers who actually took control of Japanese forces and Japanese territory. Thus section 1(f) stated that "[t]he above indicated Commanders are the only representatives of the Allied Powers empowered to accept surrender . . . ." *Id.* For these reasons,

Chinese occupation proved unfortunate; maladministration, corruption, atrocities, and deprivations of human rights ensued.<sup>44</sup> Formosan rage exploded on February 28, 1947, in an island-wide popular uprising, after the Chinese police killed a Formosan woman for selling untaxed cigarettes. In suppressing the "2-28 Incident," as the event is remembered by Formosans, as many as 20,000 Formosan leaders from all walks of life were seized, tortured and then brutally massacred in March 1947 by the occupation forces and reinforcements from the Chinese mainland sent by Chiang Kai-shek.<sup>45</sup> The Formosan leaders who survived the cephalocide by the Chinese occupation forces went abroad or underground to continue their struggle for the self-determination and independence of their state.<sup>46</sup>

Many contemporary factors contribute to the transformation of a

Professor Schwarzenberger and others went so far as to argue that Japan's surrender created a condominium over Taiwan in favor of the allies jointly and that this condominium, reinforced by the Peace Treaty with Japan, continues to the present. G. SCHWARZENBERGER, *supra* note 8, at 272, reprinting Letter to the Editor, *The Times* (London) Feb. 2, 1955, at 9, col. 5.

44. See J. BALLANTINE, *supra* note 40, at 57-62; G. KERR, *supra* note 2, at 61-183; M. SHI, *supra* note 27, at 465-521; ITSU-SHU YO, TAIWAN TO SHO KAI-SEKI: NI-NIHACHI MIN-HEN O CHUSHIN NI (Taiwan and Chiang Kai-shek: A Focus on the 2-28 Uprising), pt. 1 (1970). According to the Bank of Taiwan wholesale price indexes, based on June 1937, the advances from November 1945 to January 1947 were as follows: foodstuffs, 634 per cent; clothing, 426 per cent; fuel, 1463 per cent; fertilizers, 27,021 per cent; and building materials, 1434 per cent. U.S. DEP'T OF STATE, UNITED STATES RELATIONS WITH CHINA 924 (1949) (Pub. No. 3573). Known as the China White Papers, these documents were, together with the original Letter of Transmittal to President Truman from Secretary of State Dean Acheson, a new introduction by Lyman P. Van Slyke and an index, reissued in paperback in two volumes by Stanford University Press in 1967.

45. The precise death tolls may never be known. Estimates range from 5,000 to 20,000; 10,000 has been a widely accepted figure. See J. BALLANTINE, *supra* note 40, at 63; G. KERR, *supra* note 2, at 310.

A solidly documented account of the tragic incident is in G. KERR, *supra* note 2, pt. 3. Mr. Kerr, as a United States consular officer in Taipei, witnessed the entire incident. M. Mancall, *Book Review*, N.Y. Herald Tribune, Jan. 23, 1966 (Book Week), at 3.

See also M. SHI, *supra* note 27, at 524-73; I. YO, *supra* note 44; various February issues of TAIWAN CHENGLIAN (Taiwan Youth), e.g., No. 75 (February 1967); Memorandum on the Situation in Taiwan, submitted by Ambassador John Leighton Stuart to President Chiang Kai-shek, April 18, 1947, as reprinted in UNITED STATES RELATIONS WITH CHINA, *supra* note 44, at 923-38.

46. Documentation of the Taiwan independence movement may be found in numerous press releases and in THE INDEPENDENT FORMOSA (Quarterly), TAIWAN CHENGLIAN (Taiwan Youth) (Monthly in Taiwanese and Japanese), and TAI-TO (Taiwan Independence) (Monthly in Taiwanese)—all published by the World United Formosans for Independence (WUFI). See *Hearings on the United States Relations with the People's Republic of China*, *supra* note 2, at 347-61, 463-70; *World United Formosans for Independence, The Question of Self-Determination for Formosa—Taiwan*, 116 CONG. REC. E9345-46 (1970); Visa for Professor Ming-min Peng, Leader in Formosan Independence Movement, 116 CONG. REC. S17098 (1970); N.Y. Times, Jan. 23, 1970, at 6, col. 4; *id.*, Apr. 21, 1970, at 3, cols. 1-4; *id.*, Apr. 25, 1970, at 1, col. 5; *id.*, Aug. 3, 1971, at 2, col. 3; *id.*, Oct. 19, 1971, at 37; *id.*, Nov. 14, 1971, at 15, col. 1. See also CHEN & LASSWELL, *supra* note 2, at 185-200; G. KERR, *supra* note 2, at 451-72; D. MENDEL, *supra* note 2, at 146-71. For a brief earlier account, see Ong, *A Formosan's View of the Formosan Independence Movement*, in M. MANCALL, *supra* note 2, at 163-70; Meisner, *The Development of Formosan Nationalism*, in *id.* at 147-62.

loosely organized ethnic, language or cultural group into a people in search of political community: the increasing self-identity of peoples about the globe, the surge of nationalism of groups which are distinct but for many reasons politically dormant, the burst of anti-colonialism, the codification in international law of principles and ideologies of self-determination and, indeed, the rapid proliferation of new states. Many of these factors must have acted on the traumatic experience of massacre and political repression. Taiwanese political consciousness, dormant since the suppression of the Republic in 1895, was indelibly marked by the "2-28" massacre and a renewed, necessarily secretive, search for national identity accelerated.

Nationalist Chinese deprivation of all Taiwanese civil and political rights was effected in stages. Initially, the Kuomintang in early 1947 unilaterally declared Formosa to be one of the thirty-five provinces of the Republic of China, an act in violation of allied accords and, as will be shown, of no legal effect under international law.<sup>47</sup> On January 21, 1949, at the height of the Chinese civil war between the Communists and the Nationalists, Chiang Kai-shek legally resigned as the President of the Republic of China, a post he assumed on May 20, 1948, in Nanking, and was succeeded by then Vice President Li Tsung-jen. On October 1, 1949, the Chinese Communists led by Mao Tse-tung defeated the Nationalist Chinese (Kuomintang or KMT) forces headed by Chiang Kai-shek and proclaimed the establishment of the People's Republic of China.

Chiang Kai-shek fled with the remnants of his military and civilian personnel to Formosa in the autumn of 1949. On March 1, 1950, Chiang, by a constitutionally irregular, if not illegal act, implanted himself on Formosa as the "President" of the "Republic of China" and the actual ruler of Formosa. He installed in power as many government officials and representatives of Kuomintang China as he had been able to transport, replicating on Taiwan the Nationalist Chinese constitutional structure designed to govern China. Chiang declared a permanent state of siege under martial law on Formosa, and, despite the non-involvement of the local population in the Chinese civil war, sought to justify his rule by the fiction of fighting the Chinese Communist rebellion.<sup>48</sup>

47. See pp. 639-41 *infra*.

48. For a detailed documentation of political repression in Taiwan see Congressman Donald M. Fraser's speech, Political Repression in "Free China," 116 CONG. REC. E7953-56 (1970). An excellent study on the subject is Peng, *Political Offences in Taiwan: Laws*

Chiang's vast bureaucratic pack, which had formerly ruled 500 million Chinese, now ruled eight million Taiwanese. Under the myth that the Nationalist government still ruled China, the Taiwanese were only allowed representation proportional to their percentage of the 500 million people of China, giving them three per cent representation in their own homeland.<sup>40</sup> Taiwanese who protested this

and Problems, 47 THE CHINA QUARTERLY 471 (1971). See also CHEN & LASSWELL, *supra* note 2, at 132-40, 159-74, 185-200, 250-95; Axelbank, *Chiang Kai-shek's Silent Enemies*, HARPER'S, Sept. 1963, at 46-53; Butterfield, *When the Crunch Comes, Can Taiwan Hold Together?*, N.Y. Times, Jan. 18, 1970, § 6 (Magazine), at 14-15 *et seq.*; Ginsburg, *Repression in Taiwan*, THE NEW REPUBLIC, July 17, 1971, at 15-16; Uhalley, *The Taiwanese in Taiwan*, in UNDERSTANDING MODERN CHINA 163 (J. Kitagawa ed. 1969); McLeod, *Martial Law in Free China*, 83 CHRISTIAN CENTURY 1040 (1966); Young, *Formosa; Solidarity of Gloom*, 206 NATION 294 (1968).

49. The Constitution of the "Republic of China" as currently applied in Taiwan went into effect in December 1947, while the Nationalist government was still in power on the mainland. According to the Constitution, the national administration is divided into three levels: (1) the Central Government, (2) the Provincial Governments, and (3) the County (City) Governments.

The Central Government consists of the following organs:

- (1) The National Assembly: its prime responsibility is to elect (and recall) the President and the Vice President, and to amend the Constitution;
- (2) The President: the President is the Head of the State and the Commander-in-Chief of the Armed Forces;
- (3) The Five Yuans (a term unique to Chinese political theory, but roughly equivalent to a "branch" of government):
  - a. The Executive Yuan: it is "the highest administrative organ";
  - b. The Legislative Yuan: its prime responsibility is legislation, including appropriation;
  - c. The Judicial Yuan;
  - d. The Examination Yuan: it deals with matters pertinent to public functionaries, ranging from examination and employment to promotion and protection;
  - e. The Control Yuan: its authority is to censure, to impeach high governmental officials (including the President and the Vice President), to audit, and to give consent to certain key Presidential appointments.

Viewed in terms of their aggregate functions, the National Assembly, the Legislative Yuan, and the Control Yuan together constitute a "Congress," as commonly understood in other political systems. The members of these organs are directly or indirectly elected. The President and the Vice President are chosen by the National Assembly. The highest officials of the Executive, Judicial and Examination Yuan are appointed by the President with the consent of either the Legislative or Control Yuan.

In the early part of 1947, while acting in the capacity of belligerent occupier on behalf of the Allied Powers at a time when, from the legal point of view Formosa remained Japanese territory, the Nationalist regime *unilaterally* declared Formosa to be one of the thirty-five provinces of the Republic of China for the convenience of administration. Thus when the "Congressional" elections were held by the Nationalist government under the new Constitution in late 1947 and early 1948, Formosa joined in the process. According to the election laws then in existence, the quota of Taiwan's representation was 19 of 3045 members of the National Assembly, 8 of 773 members of the Legislative Yuan, and 5 of 223 members of the Control Yuan.

When the Chinese Communists took over the mainland, the Nationalist regime sought exile in Taiwan in December 1949 and proclaimed Taipei as the new Capital of the "Republic of China." Suddenly, the effective domain of the Nationalist regime was reduced from a land of 3,691,502 square miles and of 500 million people to an "occupied territory" (Formosa) of 13,885 square miles and of 8 million people (plus the tiny off-shore islands, Quemoy and Matsu).

There were altogether 2296 "Congressional" representatives—1643 in the National Assembly, 551 in the Legislative Yuan, and 102 in the Control Yuan—who reported for duty to the Nationalist regime during the first years of its exile in Formosa (excluding mainly those who stayed behind on the mainland). These representatives who were

## Who Owns Taiwan: A Search for International Title

deprivation of the most minimal of political rights could find themselves kidnapped, tortured, tried without due process by a military tribunal and sentenced to death or to incarceration in a concentration camp.<sup>50</sup> This systematic suppression of civil liberties by the Kuomintang and the state of martial law which Chiang introduced as a permanent feature of Taiwanese political life all but paralyzed domestic opposition to Nationalist Chinese rule by the Taiwanese.

When the Chinese Nationalists fled to Formosa in late 1949, most observers felt that their regime would disintegrate rather quickly. The declared policy of the United States at that juncture was to let events take their course.<sup>51</sup> On January 5, 1950, President Truman stated:

In keeping with these declarations [Cairo and Potsdam], Formosa was surrendered to Generalissimo Chiang Kai-shek, and for the past 4 years, the United States and the other Allied powers have accepted the exercise of Chinese authority over the Island.<sup>52</sup>

The eruption of the Korean war in June 1950, however, changed the American attitude. On June 27, 1950, two days after the war broke out, President Truman declared the "neutralization of Formosa" and dispatched the United States Seventh Fleet to the Formosa Straits area in order to prevent any attack on Formosa and to restrain any military operations from Formosa against mainland China. He further stated that "the determination of the future status of Formosa

elected in 1947 or 1948 for a term of three or six years by the constituencies on the mainland (except the handful of Formosan representatives) found themselves without constituencies as a result of the Nationalist exile to Formosa. Nevertheless, the "Central Government" in Taipei remains as it was in Nanking in 1949. Hence up to now they have continued to hold their official positions and to exercise authority in Formosa, though neither re-elected by, nor responsible to, any constituency whatsoever.

The "Republic of China," as it is styled, has under its effective control only Taiwan, with a population of fifteen million, of which thirteen million are native Taiwanese and two million are mainland Chinese. The public will of these fifteen million people has supposedly been reflected during the past twenty-two years by the "Congressional" representatives elected more than two decades ago by the electorate on the Chinese mainland. The eighty-seven per cent majority of native Taiwanese are allowed only a three per cent token representation: thirty-two out of 1448 in the National Assembly, seventeen out of 447 in the Legislative Yuan, and six out of seventy-four in the Control Yuan. (These were the figures in 1970 after a token increase of the Taiwanese representation in 1969). For a more detailed analysis of the political system in Taiwan, see CHEN & LASSWELL, *supra* note 2, at 132-37, 250-82.

50. For a most recent example, see the letter written in a Taiwan prison by T.M. Hsieh to friends in the Taiwanese Independence Movement, *From a Taiwan Prison*, N.Y. Times, Apr. 24, 1972, at 35, col. 2 (city ed.). See also Fraser Speech, *supra* note 48; Peng, *supra* note 48; Ginsburg, *supra* note 48.

51. See generally UNITED STATES RELATIONS WITH CHINA, *supra* note 44.

52. White House Press Release (Jan. 5, 1950), 22 DEP'T STATE BULL. 79 (1950).

must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations."<sup>53</sup>

In the peace treaty with Japan, signed in San Francisco in September 1951, Japan formally renounced "all right, title, and claim to Formosa and the Pescadores." The treaty did not, however, specify to whom Formosa was to be delivered.<sup>54</sup> The same formulation was adopted by the peace treaty concluded between the "Republic of China" and Japan in April 1952.<sup>55</sup>

Shortly after he took office, President Eisenhower proclaimed that the United States Seventh Fleet would no longer be "employed to shield Communist China."<sup>56</sup> The Nationalist forces made no attempt to mount a large-scale invasion of the China mainland, but the People's Republic of China in September 1954 initiated artillery shelling against the offshore islands held by the Nationalists. In the midst of the crisis, the United States and the Republic of China signed a mutual defense treaty, in December 1954, by which the United States committed itself to the defense of Formosa and the Pescadores and "such other territories as may be determined by mutual agreement."<sup>57</sup> Mindful of controversies over the legal status of Formosa and the Pescadores, the United States Senate in ratifying the mutual defense treaty noted that "nothing in the present treaty shall be construed as affecting or modifying the legal status or the sovereignty" of Formosa and the Pescadores.<sup>58</sup> In the atmosphere of crisis, the United States Congress passed the "Formosan Resolution" even before the ratification of the mutual defense treaty. The Resolution authorized the President to employ United States armed forces "as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack," including "the securing and protection of such related positions and territories of that area now in friendly hands."<sup>59</sup>

53. 23 DEP'T STATE BULL. 5 (1950).

54. [1952] 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45, 25 DEP'T STATE BULL. 349 (1951).

55. 138 U.N.T.S. 3 (1952). Neither the Chinese Nationalist nor the Communist regime was invited to participate in the San Francisco Peace Conference. Hence the Nationalist regime entered into a bilateral peace treaty with Japan subsequent to the conclusion of the San Francisco Peace Treaty.

56. 28 DEP'T STATE BULL. 207, 209 (1953).

57. For the text of the Mutual Defense Treaty between the United States and the Republic of China, see [1954] 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213, 31 DEP'T STATE BULL. 899 (1954).

58. SENATE COMM. ON FOREIGN RELATIONS, MUTUAL DEFENSE TREATY WITH THE REPUBLIC OF CHINA, S. EXEC. REP. NO. 2, 84th Cong., 1st Sess. 6 (1965).

59. H.J. Res. 159, 69 Stat. 7 (Jan. 29, 1955). The text of the Resolution reads as follows:

## Who Owns Taiwan: A Search for International Title

Chinese Communist attacks on the offshore islands were renewed in August 1958 by artillery barrages against Quemoy and Matsu. In response, the United States extended its defense commitment to the offshore islets.<sup>60</sup> Peking has maintained a policy of "ceremonial" shelling of Quemoy on odd days of the month, symbolizing the continued existence of the "civil war" between the Chinese Communist and Nationalist regimes.<sup>61</sup>

The United States policy of non-recognition and containment of mainland China was, of course, tempered by a subdued and often secretive realism.<sup>62</sup> Necessary diplomatic contacts were maintained,

"Whereas the primary purpose of the United States, in its relations with all other nations, is to develop and sustain a just and enduring peace for all; and

"Whereas certain territories in the West Pacific under the jurisdiction of the Republic of China are now under armed attack, and threats and declarations have been and are being made by the Chinese Communists that such armed attack is in aid of and in preparation for armed attack on Formosa and the Pescadores,

"Whereas such armed attack if continued would gravely endanger the peace and security of the West Pacific Area and particularly of Formosa and the Pescadores; and

"Whereas the secure possession by friendly governments of the Western Pacific Island chain, of which Formosa is a part, is essential to the vital interests of the United States and all friendly nations in or bordering upon the Pacific Ocean; and

"Whereas the President of the United States on January 6, 1955, submitted to the Senate for its advice and consent to ratification a Mutual Defense Treaty between the United States of America and the Republic of China, which recognizes that an armed attack in the West Pacific area directed against territories, therein described, in the region of Formosa and the Pescadores, would be dangerous to the peace and safety of the parties to the Treaty: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.

"That the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores.

"This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, and shall so report to the Congress."

In his memoirs President Eisenhower sheds some light on steps that led to the passage of this historic resolution. D. EISENHOWER, *THE WHITE HOUSE YEARS: MANDATE FOR CHANGE, 1953-1956* ch. 19 (1963).

On February 23, 1971, Senators Church and Mathias and a number of other Senators introduced a Resolution to repeal the 1955 Formosa Resolution before the Senate. S.J. Res. 48, 92d Cong., 1st Sess. (1971). After public hearings held on June 24, 25, 28 and 29, and July 20, 1971, the Committee on Foreign Relations reported it favorably to the Senate without amendment. SENATE COMM. ON FOREIGN RELATIONS, *REPEAL FORMOSA RESOLUTION*, S. REP. NO. 363, 92d Cong., 1st Sess. (1971). To date, the plenary Senate has not acted upon it.

60. D. EISENHOWER, *THE WHITE HOUSE YEARS: WAGING PEACE, 1956-1961*, ch. 12 (1965).

61. See note 2 *supra*.

62. For an official exposition of this policy, see *Dep't of State Memorandum to Missions Abroad, United States Policy on Nonrecognition of Communist China*, 39 DEP'T STATE BULL. 385 (1958). A shifting emphasis on "containment but not isolation" was evident in the 1966 Senate hearings on China. *Hearings on U.S. Policy with respect to Mainland China Before the Senate Comm. on Foreign Relations*, 89th Cong., 2d Sess. (1966). The literature on U.S. policy toward China is vast. Useful citations include: A. BARNETT, *A NEW POLICY TOWARD CHINA* (1971); A. BARNETT, *CHINA AFTER MAO* (1967); A. BARNETT, *COMMUNIST CHINA AND ASIA* (1960); R. BLUM, *THE UNITED STATES AND CHINA IN WORLD AFFAIRS* (1966); CHINA AND OURSELVES (B. Douglass & R. Terrill eds. 1970); J.

notably through the United States and Chinese Embassies in Warsaw, though the content of the communications was guarded by both sides.<sup>63</sup> After 1969, the frequency and intensity of these diplomatic exchanges increased markedly.<sup>64</sup> In July 1971, Dr. Henry Kissinger, the presidential assistant for National Security Affairs, slipped secretly into China to conduct direct negotiations with Premier Chou En-lai. Upon Kissinger's return, President Nixon announced a "journey for peace" to Peking in February of 1972.<sup>65</sup> The global political implications were obvious and other state elites scrambled to realign themselves.

In the United Nations, where the Chiang Kai-shek regime had continued to hold the China seat, a swift and dramatic change ensued.<sup>66</sup> On October 25, 1971, the General Assembly voted 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."<sup>67</sup>

Meanwhile, the full extent of the United States policy change was gradually revealed. In December 1971, Dr. Kissinger stated in a news conference that "The ultimate disposition, the ultimate relationship

FAIRBANK, *THE UNITED STATES AND CHINA* (3d ed. 1971); J. FAIRBANK, *CHINA: THE PEOPLE'S MIDDLE KINGDOM AND THE U.S.A.* (1967); R. MOORSTEEN & M. ABRAMOWITZ, *supra* note 2; *POLICIES TOWARD CHINA: VIEWS FROM SIX CONTINENTS* (A. Halpern ed. 1965); A. STEELE, *THE AMERICAN PEOPLE AND CHINA* (1966); *THE UNITED STATES AND CHINA: THE NEXT DECADE* (A. Barnett & E. Reischauer eds. 1970); R. TERRILL, *800,000,000: THE REAL CHINA* (1972); *Hearings on the United States Relations with the People's Republic of China*, *supra* note 2; *Hearings on United States-China Relations*, *supra* note 2.

63. See generally K. YOUNG, *NEGOTIATING WITH THE CHINESE COMMUNISTS: THE UNITED STATES EXPERIENCE, 1953-1967* (1968); Young, *American Dealings with Peking*, 45 *FOREIGN AFFAIRS* 77 (1966).

64. See *UNITED STATES FOREIGN POLICY FOR THE 1970'S: THE EMERGING STRUCTURE OF PEACE, A REPORT BY PRESIDENT RICHARD NIXON TO THE CONGRESS 28-41* (1972). See also A. BARNETT, *supra* note 2, at 15-24; W. BUELER, *U.S. CHINA POLICY*, *supra* note 2, at 63-79.

65. See *N.Y. Times*, July 16, 1971, at 1, col. 3 (city ed.).

66. Concerning the question of Chinese participation in the United Nations, see CHEN & LASSWELL, *supra* note 2, at 7-81; *Panel on Chinese Participation in the United Nations*, *supra* note 3, at 1-30. See also R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 131-66* (1963); *THE INTERNATIONAL POSITION OF COMMUNIST CHINA* (L. Tondel ed. 1965); *UNA-USA, CHINA, THE UNITED NATIONS AND UNITED STATES POLICY* (1966) (A Report of a National Policy Panel); *id.* (1967) (A Second Report); McDougal & Goodman, *Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution*, 60 *AM. J. INT'L L.* 671 (1966); Schick, *The Question of China in the United Nations*, 12 *INT'L & COMP. L.Q.* 1232 (1963). For earlier treatments, see S. APPLETON, *THE ETERNAL TRIANGLE? COMMUNIST CHINA, THE UNITED STATES AND THE UNITED NATIONS* (1961) and T. LIE, *IN THE CAUSE OF PEACE: SEVEN YEARS WITH THE UNITED NATIONS* (1954).

67. G.A. Res. 2758, 26 *U.N. GAOR Supp.* 29, at 2, *U.N. Doc. A/8429* (1971). See *N.Y. Times*, Oct. 26, 1971, at 1, col. 8; *U.N. MONTHLY CHRONICLE*, Nov. 1971, at 34-61; 26 *U.N. GAOR* (provisional), *U.N. Docs. A/PV. 1966-76* (1971).

## Who Owns Taiwan: A Search for International Title

of Taiwan to the People's Republic of China should be settled by direct negotiations between Taiwan and the People's Republic of China."<sup>68</sup> On February 9, 1972, President Nixon, in his oratorical innovation, "The State of the World" message, stated:

The ultimate relationship between Taiwan and the mainland is not a matter for the United States to decide. A peaceful resolution of this problem by the parties would do much to reduce tension in the Far East. We are not, however, urging either party to follow any particular course.<sup>69</sup>

At the conclusion of Mr. Nixon's eight-day tour of China, the joint Chinese-United States communique issued in Shanghai on February 27, 1972 stated, in addition to the usual Chinese assertion of sovereignty over Taiwan, that:

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.<sup>70</sup>

Although the Administration expended considerable subsequent efforts to dispel the impression gained in Congress that there had been a change of policy regarding the status and disposition of Taiwan,<sup>71</sup> the change was deemed patent in chanceries about the world.<sup>72</sup>

The political *volte face* has had an extraordinary impact within Taiwan itself. Academics, students, clergymen and business leaders suddenly began to voice political opinions which would have been condemned as seditious and treasonous scant months before. Always skirting the delicate and dangerous question of the legitimacy of the Chiang family on Taiwan, this new political chorus has reiterated two points: First, the people of Taiwan, including the small minority of exiled mainlanders who have sought refuge on the island-state,

68. N.Y. Times, Dec. 2, 1971, at 19, col. 1.

69. UNITED STATES FOREIGN POLICY FOR THE 1970's, *supra* note 64, at 39; N.Y. Times, Feb. 10, 1972, at 20, col. 5 (city ed.).

70. *Id.*, Feb. 28, 1972, at 16, col. 5 (city ed.).

71. *Id.*, Mar. 1, 1971, at 1, col. 8 (city ed.).

72. See, e.g., *id.*, Feb. 29, 1972, at 1, col. 6, and at 16, cols. 2-3 (city ed.). In addition, Britain and China agreed on March 13, 1972 to establish full diplomatic relations after the British government had acknowledged that Taiwan was "a province" of China, reversing its long-standing position that Taiwan's international legal status remained undetermined. *Id.*, Mar. 14, 1972, at 1, col. 6 (city ed.). See also *id.*, Feb. 29, 1972, at 17, col. 3 (remarks of Premier Sato of Japan regarding Taiwan's status immediately following the issuance of the Shanghai communique).

want to control their own destiny and do not want to be delivered to the People's Republic of China. Second, participation in all branches of the government must in fact become representative and realistically reflect the true aspirations of the present population of Taiwan rather than the fictional aspirations of the population of China in 1947.<sup>73</sup>

There seems to be a certain international reluctance to address these demands squarely. Inexplicably, the fifteen million people of Taiwan seem to have dropped below a threshold of international political visibility. While the United Nations has resolved the question of which government represents China in the United Nations, it has not resolved the controversy about the status of Taiwan.<sup>74</sup> Though the Chinese Nationalist regime continues to control Taiwan, the question of who owns Taiwan and who represents the people of Taiwan remains to be solved.

In the sections that follow, the international law of territorial control, as it evolved at different periods, will be correlated with the political history of Taiwan, in order to determine which states, if any, had perfected sovereignty over the island-state and the subsequent tenability and validity of such claims under the intertemporal principles unique to this form of international community control.

### III. The Status of Taiwan Before 1887

International law drew on Roman law for its theory of territorial control, designating occupation, prescription, cession, annexation, and accretion as modes of acquisition.<sup>75</sup> Because international decision has encountered many situations for which there were no patent ana-

73. *E.g.*, the statement issued on December 29, 1971 by the Taiwan Presbyterian Church. *The Christian Tribune* (in Chinese, Taipei), Jan. 2, 1972, at 1. See also *N.Y. Times*, Feb. 19, 1972, at 14, col. 6; *id.*, Feb. 20, 1972, at 32, col. 1; *id.*, Mar. 12, 1972, at 3, col. 5 (city ed.).

74. The General Assembly did not express an opinion on the question of title to Taiwan. The Albanian Resolution, G.A. Res. 2758, 26 U.N. GAOR Supp. 29, at 2, U.N. Doc. A/8429 (1971) called for the expulsion of "the representatives of Chiang Kai-shek from the place which they unlawfully occupy." Nor can the Assembly's rejection at the same session of a United States' motion for a separate vote on the question of expulsion of Chiang's representatives be construed as a vote about Taiwan, for the U.S. motion was completely *ultra vires*, the Charter. The General Assembly may decide representation questions, as it did in this case, but it may not admit a new member without a prior recommendation by the Security Council. Such a recommendation is a necessary preliminary to Assembly action, as held by the International Court of Justice in the *Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] I.C.J. 4. Since the U.S. motion was, perforce, for admission, it was quite out of order and was properly rejected by the Assembly.

75. H. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 139 *et seq.* (2d ed. 1952); R. LEE, *ELEMENTS OF ROMAN LAW* 105 *et seq.* (1944); A. WATSON, *THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC* 16 *et seq.* (1968).

## Who Owns Taiwan: A Search for International Title

logues in the law of the Roman *municipium*,<sup>76</sup> new doctrines have been adduced or innovated over time. Although some of these have been rejected by international decision, a number have been incorporated either as claim categories or relevant considerations in title determinations. Where even faintly relevant, they must be examined in any international title search. Therefore we shall test the historical record for congruence to every possible claim, even those the claimants themselves may not have lodged.

### A. *Prescriptive Title*

Numerous political and legal statements uttered by both Communist and Nationalist Chinese representatives state as self-evident fact that Taiwan has always been part of China.<sup>77</sup> It is not clear from these statements what the reference, through time, to China really is, but assuming that proponents of this view mean that Taiwan has always been under the direct political control of a centralized government on the mainland or, less rigorously, that for a long time it was widely accepted that mainland governments owned and ruled Taiwan, we are presented with a claim of title by prescription.<sup>78</sup>

International prescription confirms stable control as title. In *Grisbadarna*, for example, the tribunal held:

[I]t is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.<sup>79</sup>

No specific period of time is required and indeed certain arbitral tribunals have set quite short time intervals for the establishment of prescriptive title.<sup>80</sup> The requisite components of prescriptive title

76. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 99 ff. (1927); 1 OPPENHEIM'S INTERNATIONAL LAW 545 (8th ed. H. Lauterpacht 1955) [hereinafter cited as OPPENHEIM]. Professor O'Connell develops a different explanation for the inapplicability of Roman *termini technici* to the contemporary international law of acquisition. According to him the fact of physical control, coupled with a claim which was often sufficient to secure title at Roman Law, has in international law "never been recognized in practice to suffice for sovereignty." 1 D. O'CONNELL, INTERNATIONAL LAW 406 (2d ed. 1970).

77. See note 3 *supra*.

78. On international prescription in general, see 2 GROTIUS, DE JURE BELLI AC PACIS ch. 4; 1 OPPENHEIM, *supra* note 76, at 575; 1 C. HYDE, INTERNATIONAL LAW 330 *et seq.* (2d ed. 1945); 1 D. O'CONNELL, *supra* note 76, at 422; 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 139 (1949).

79. *Grisbadarna* (Norway v. Sweden) 11 U.N.R.I.A.A. 155 (1908); J. SCOTT, HAGUE COURT REPORTS 121 (publ. 1916). A more refined policy statement was offered in *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 639 (1846): "For the security of right, whether of states or individuals, long possession under a claim of title is protected." See *also* note 6 *supra*.

80. Thus, in the British Guiana-Venezuela Boundary Dispute (U.S. v. Great Britain), the *compromis* stipulated as the criterion for title a period of fifty years of adverse

include effective and manifest control in which others acquiesce. Acquiescence will not be inferred unless control can be shown to have been notorious enough to provide a signal and reasonable opportunity for protest, a point emphasized by Judge Huber in the *Island of Palmas* case.<sup>81</sup> In assessing the appropriate degree of control required in each case, international tribunals have taken the milieu into account. An uninhabited atoll, for example, would require minimum control, the requirement perhaps being met by an annual visit of naval officials.<sup>82</sup> On the other hand, an inhabited territory would require continuous and open public administration in order to establish a prescriptive title.<sup>83</sup> Without regard to the density of inhabitants, the requisite level of administration might be considerably lower if the territory in question were part of a larger domain already under control or were hinterland or otherwise contiguous with controlled territory and not readily accessible to outsiders.<sup>84</sup>

possession; 89 BRITISH AND FOREIGN STATE PAPERS 57 (1896). In *Sarropoulos v. Bulgarian State*, Greco-Bulgarian Mixed Arbitral Tribunal (1927-1928), Ann. Dig. 263 (No. 173), a period of twenty years was specified in the *compromis*. For a survey of doctrinal opinion, see Y. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 52-54 (1964).

Lauterpacht writes that "[N]o general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription." 1 OPPENHEIM, *supra* note 76, at 576.

81. 2 U.N.R.I.A.A. 829, 839 (1928). See also *Delagoa Bay*, 5 J. MOORE, *INTERNATIONAL ARBITRATIONS* 4984, 4985 (1898). In *Clipperton Island*, lack of notification of French occupation was invoked as a defect in title, but the arbitrator concluded that publication in English in a journal in Hawaii of the French claim was sufficient. Though the language of the award suggests that this publication in itself constituted sufficient notoriety, many other factors clearly influenced the outcome, not the least of which was the lapse of seventy-three years from the original claim to the moment of arbitral award. 26 AM. J. INT'L L. 390, 391, 394 (1932). For other contextual features of which judicial notice has been taken in regard to the requirement of notification for purposes of allowing an opportunity to protest, see *Delagoa Bay*, *supra*, and *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116, 138.

82. *Island of Palmas*, 2 U.N.R.I.A.A. 829, 840 (1928). See also *Clipperton Island*, 26 AM. J. INT'L L. 390 (1932). Note, however, that under the strict application of the statement of law rendered there, France probably did not secure title. The arbitrator stated that in the case of an uninhabited territory, actual occupation might not be necessary "if a territory, by virtue of the fact that it was completely uninhabited, is from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed." *Id.* at 394. *Clipperton* was certainly not at the absolute and undisputed disposition of France after 1858, as the precipitating events of the case showed.

83. Even that might not be sufficient in special circumstances, as was held by the International Court of Justice in the *Case Concerning Sovereignty over Certain Frontier Lands*, [1959] I.C.J. 209, 229. *But cf.* the declaration of Judge Lauterpacht, *id.* at 231-32. In a dissenting opinion, Judge Armand-Ugon concluded that venerable treaties notwithstanding, the fact that the Netherlands exercised preponderant governmental functions in the contested plots and that Belgium acquiesced "created an indisputable right of sovereignty in favour of the Netherlands Government." *Id.* at 250.

84. *Legal Status of the South Eastern Territory of Greenland Case*, [1932] P.C.I.J., ser. A/B, No. 48, at 264. *But cf.* *Case Concerning Sovereignty over Certain Frontier Lands*, [1959] I.C.J. 209. In a note on *Clipperton Island*, Edwin Dickinson abstracted as "re-

Prescription as a sole ground for territorial acquisition is probably inadequate under contemporary international law, for it fails to take account of certain peremptory norms which have arisen in this century and which affect all territorial regimes.<sup>85</sup> Nonetheless, prescription was a valid mode of territorial acquisition through the nineteenth century, since it was an expression of contemporaneous policies of control, stability of expectation and maximum resource use. Hence a Chinese assertion of prescriptive title perfected in this period would under intertemporal principles vindicate part of their general claim to Taiwan.<sup>86</sup>

The available historical record does not, however, support a Chinese claim for prescriptive title. By unequivocal behavior, China recognized Dutch control over Formosa in the seventeenth century and made no claim of sovereignty.<sup>87</sup> The Dutch were driven out by Koxinga in 1662, whose independent regime in Formosa survived until 1683. For the next two centuries, there were periodic uprisings and public order was in effect the prerogative of local clans and extended families. Shortly after the 1871 incident involving the Okinawan vessel, the Ch'ing government stated to Japan that large sections of Formosa were outside its jurisdiction, averring it could not be held responsible for injuries inflicted by Formosans.<sup>88</sup> Claims for prescriptive title are

alistic and altogether satisfactory" the principle that "the occupation which is required is such an occupation as is appropriate and possible under the circumstances. It is a question of fact." Dickinson, *The Clipperton Island Case*, 27 AM. J. INT'L L. 130, 133 (1933). In a different context, Hersch Lauterpacht wrote that "effectiveness is not a magic formula which can be applied with mathematical precision. It is effectiveness relative to the situation and the circumstances." Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 429 (1950).

85. See pp. 654-60 *infra*.

86. International prescription is less rigorous than the older doctrine of historic title or special custom. See Y. BLUM, *supra* note 80, at 99 *et seq.* In the light of available Taiwanese history, such an older doctrine would not sustain a Chinese title. See pp. 603-12 *supra*. International prescription can also be distinguished from Roman *usucapio* and *possessio longi temporis*, which always involved possession for a determinate number of years. See H. JOLOWICZ, *supra* note 75, at 152. A third method akin to prescriptive acquisition at Roman law—*vetustas*—did not specify time; however, it conveyed no more than a rebuttable presumption of title *erga omnes* rather than title itself.

Whether such principles can be applied in international law is mooted in the present case, for China did not, as a matter of fact, exercise adequate control for a sufficiently extended time period.

87. See note 29 *supra*.

88. Chinese legal formulations in this period are quite revealing in that they simultaneously claimed Taiwan and yet conceded absence of control. For a sensitive perception of the Chinese dilemma, see GORDON, TAIWAN AND THE POWERS, *supra* note 34, at 93. One attempt to escape from this dilemma was to insist that different principles applied to the Mandate of Heaven. Another was to distort Western legal notions so that they seemed to support the Ch'ing position. See S. YEN, *supra* note 31, at 220-21. Still a third rationalization was to claim that the lack of control in Taiwan was a matter of policy. Thus the Ch'ing Foreign Office (*Tsungli Yamen*) communicated to Japan in 1874 that

Taiwan is an island lying far off in the sea and we did not yet restrain the aborigines inhabiting it by any legislation nor establish any government over them,

also marred by the vigorous protest of the inhabitants of Formosa themselves throughout these two centuries.<sup>89</sup>

Given the density of inhabitants, the low level of administration, the Chinese government's own unwillingness to assume international responsibility, Formosan protests, and China's own admission against interest, the more cautious position would require rejection of a Chinese claim for prescriptive title over Taiwan, even under the more lenient intertemporal standards of earlier centuries.

### B. *Occupative Title*

Occupation as a means of acquiring title in international law took form in the period of European expansion. It required two components: an intention to secure sovereignty and the exercise of continuously effective control, the former being derivable from the latter.<sup>90</sup> The leading arbitral and judicial controversies turn on the question of control, for declarations of ownership are easily made by all parties.<sup>91</sup> Control is the critical factor because international law's concern with title involves establishing responsibility for areas and,

following in this a maxim mentioned in *Li-chi (The Book of Rites)*: Don't change the usage of a people but keep their proper ones. But the territories inhabited by the aborigines are truly within the jurisdiction of China.

*Id.* at 217. One might note that proper usages in question here involved beheading foreign seamen. The Japanese position had been stated in an earlier communication: "The land of the aborigines is not under the administration and culture of China. They live by themselves." *Id.* at 327.

89. See note 32 and p. 609 *supra*. While there are venerable natural law doctrines insisting on the volition of the population as a component of sovereignty, we are not, in this context, stating or implying that such a norm was operative at some critical moment in the past and that Chinese claims to title over Taiwan founder on it. In subsequent discussion (p. 660 *et seq. infra*), we note that the natural law doctrine related, in previous centuries, primarily to consent to form of government rather than title. The shift of emphasis to popular volition as a component of title began to acquire force in the 19th century. See F. DEMARTENS, *TRAITE DE DROIT INTERNATIONAL* 469 (Léo trans. 1883) and authorities cited. Since the focus here is on the protest of the Taiwanese themselves, we assimilate the islanders to any other group of protestors.

90. On occupation, see generally 1 OPPENHEIM, *supra* note 76, at 554-63; 1 D. O'CONNELL, *supra* note 76, at 408 *et seq.*; R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 20-23 (1963). The formulation we have used in the text gives more overt emphasis to the *animus* component than is found in earlier formulations. While *animus* to possess was implicit in these earlier formulations, successive patterns of control, such as protectorates, mandates, trusts, etc., require a more explicit reference to the psychological component; in cases such as these, "possession and administration," to use Lauterpacht's formulation (1 OPPENHEIM, *supra* note 76, at 557-58), did not secure a title *occupationem*.

91. See, e.g., *Island of Palmas*, 2 U.N.R.I.A.A. 829 (1928); *Clipperton Island*, 26 AM. J. INT'L L. 390 (1932); *Delagoa Bay (Portugal v. Great Britain)*, 5 J. MOORE, *supra* note 81, at 4984 (1898); 3 G. DE MARTENS, *NOUVEAU RECUEIL GENERAL DE TRAITES* 517 (2d ser. 1878); *British Guiana Boundary Arbitration*, H. LA FONTAINE, *PASICRISIE INTERNATIONALE* 556 (1902).

at least in the nineteenth century, ready access to resources.<sup>92</sup> The cases indicate that there is no fixed quantum of control, but rather that in each case a measure of control appropriate to the circumstances will be determined by authoritative decision. Although claims of title on account of discovery were made in the past, modern writers suggest that this was never firm law.<sup>93</sup>

From the sixteenth century onward, the Chinese population of Taiwan increased at the expense of the aboriginal indigenes, until the latter assimilated almost entirely into the newer wave; this and other

92. The extent to which territorial sovereignty came to be viewed as an inclusive technique for assuring the access of all peoples to resources in the exclusive sphere cannot be overemphasized. Some intimations of this idea may be found in Judge Huber's award in *Island of Palmas*, *supra* note 82. The idea was central in intellectual discussions of the lawfulness and morality of forcing Western entry into Japan. Consider the following example: "The compulsory seclusion of the Japanese is wrong not only to themselves, but to the civilized world. . . . The Japanese undoubtedly have an exclusive right to the possession of their territory; but they must not abuse that right to the extent of debarring all other nations from a participation in its riches and virtues. The only secure title to property, whether it be a hovel or an empire, is, that the exclusive possession of one is for the benefit of all." 96 *EDINBURGH REVIEW* 196, *quoted in* W. BEASLEY, *THE MODERN HISTORY OF JAPAN* 43 (1963).

93. Grotius argued that discovery secured no title unless followed by possession: *See* GROTIUS, *FREEDOM OF THE SEAS* ch. 2 (R. Magoffin trans. 1916). According to Pufendorf, "The bare seeing a thing or the knowing where it is, is not judged a sufficient Title of Possession." S. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* IV, VI, VIII (1688). A contrary view in I. T. TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES* 162 (2d ed. 1884) is that there was a doctrine of discovery. Twiss purported to base his argument on language in Wolff. Lindley, however, notes that a careful reading of Wolff reveals a peremptory demand for possession in addition to the claim of discovery. M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 131-32 (1928). Vattel seems to have believed that discovery gave an "inchoate title" which would be respected if it were followed by occupation. E. DE VATTEL, *THE LAW OF NATIONS*, bk. I, § 207 (1760). This is a perplexing doctrine which would be meaningful only if a usage or custom attended it, according to which a certain interval of time was assured the discoverer by all other states to allow it to crystallize its inchoate title through occupation. For cases and doctrine purporting to support such a view, see I. OPPENHEIM, *supra* note 76, at 559. *See particularly*, *Island of Palmas*, 2 *U.N.R.I.A.A.* 829, 869 (1928).

Nonetheless, Chief Justice Marshall, in *Johnson v. M'Intosh*, 21 *U.S.* (8 *Wheat.*) 543, 573 (1823), stated that "[d]iscovery gave title to the government by whose subjects or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *See also id.* at 576. Both Marshall and Story in I. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 2 (4th ed. 1873) suggested that the policy behind this was an inter-European accord to avoid friction over conflicting claims. Such friction does not appear to have been avoided. Hence it is submitted that the minority view presented by Marshall and Story is incorrect. The contrary policy argument, forwarded by Judge Huber in *Island of Palmas*, emphasized the purpose of the territorial regime of international law as order and effectiveness. For this reason, discovery alone, he stated, could not confer sovereignty.

By the nineteenth century, the doctrine that title might be obtained by discovery alone had been completely abandoned. *See, e.g.*, *Delagoa Bay (Portugal v. Great Britain)*, *supra* note 81 and I. OPPENHEIM, *supra* note 76, at 558: "Although even in the age of discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations, the taking of possession was frequently in the nature of a mere symbolic act. Later on, a real *taking possession* was considered necessary."

factors created a new Taiwanese ethnic identity.<sup>94</sup> In the light of this increase, one would expect the quantum of effective control required for purposes of occupative title to be considerably higher than the liberal standards adopted in the authoritative *Island of Palmas*,<sup>95</sup> *Clipperton Island*,<sup>96</sup> and *Eastern Greenland* cases.<sup>97</sup> In each of these instances, the lands in question were comparatively uninhabited, if inhabitable at all. In *Palmas*, for example, the litigants contended over a small island in the Pacific, thousands of miles from each of their administrative centers. Judge Huber observed that "[a]part from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period."<sup>98</sup> Taiwan is not sufficiently removed from China to justify adopting the *Palmas* standard. On the other hand, whatever the standard adopted, it should approximate and not exceed the level of public administration common and contemporaneous in the metropolitan area. Thus effective control in Taiwan should have been as high but not higher

94. If the Chinese who migrated from Fukien province to Taiwan had gone as settlers over whom the Chinese Empire continued to claim personal authority, one might argue for the development of coordinate Chinese sovereignty over Taiwan. See, e.g., M. LINDLEY, *supra* note 93, at 85; 1 OPPENHEIM, *supra* note 76, at 544. But "if, although all or a large majority of the settlers were subjects of the same State, that State definitely refuses to accept, or after a reasonable time has not assumed, international responsibility for the settlement, then, when the settlers have developed an efficient government of their own, a new State will have been born." M. LINDLEY, *supra* at 90. The record indicates that not only did the Empire not take responsibility or seek control over migrants, but it prohibited migration and punished it severely. Thus, the Ch'ing dynasty imposed capital punishment on those who "clandestinely proceed to sea to trade, or who remove to foreign islands for the purpose of inhabiting and cultivating same." V. PURCELL, *THE CHINESE IN SOUTHEAST ASIA* 26 (2d ed. 1965). See also note 30 *supra*. Nor was any diplomatic protection extended. Responding to a massacre of Chinese in the Dutch East Indies, Emperor Chien Lung said: "In order to go abroad to make a profit, these heavenly-court-abandoned people even deserted their ancestors' tombs. The Court does not care what happened to them." Jan, *Nationality and Treatment of Overseas Chinese in Southeast Asia*, 1960, at 46 (unpublished New York University doctoral dissertation, University Micro-films, Inc.), quoted in D. Clark, *Overseas Chinese in Southeast Asia: Nationality Laws and Economic Nationalism*, 1971 (unpublished student paper in Yale Law Library). During the negotiation of the Sino-American Treaty of Tien-Tsin of 1858, see 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967, at 763-76 (F. Israel ed. 1967), Ting-Hsiang Tan said, "When the emperor rules over so many millions, what does he care for the few waifs that drifted away to a foreign land?" Jan, *supra*, at 48. Nor was there any economic interest in the emigrants: "The Emperor's wealth is beyond computation; why should he care for those of his subjects who have left their home or for sands they have scraped together?" *Id.* It was not until December 1859 that the government of Kwangtung Province began to issue permits to Chinese laborers to go abroad. Nonetheless, the Ch'ing dynasty's anti-emigration law was not repealed until 1894. *Id.* at 13. Thus, there can be no Chinese claim of sovereignty over Taiwan by virtue of the fact that Chinese "nationals" settled there in the past.

95. *Island of Palmas*, 2 U.N.R.I.A.A. 829 (1928).

96. *Clipperton Island*, 26 AM. J. INT'L L. 390 (1932). See also notes 82-84 *supra*.

97. *Greenland case*, [1932] P.C.I.J., ser. A/B, No. 48, at 264.

98. *Island of Palmas*, 2 U.N.R.I.A.A. 829, 840, 868-70 (1928).

than that exercised in, for example, Fukien province, allowing for lapses in administration in Taiwan because of disruptions which might have occurred in a comparable metropolitan area.

By this more lenient standard, a case for Chinese title *occupationis* over Taiwan might be made. During much of this period, the mainland was troubled by disruptions which would account for and exonerate the sporadic and inefficient control exercised over Taiwan. There is, nevertheless, a problem of intention, for the evidence strongly suggests that China did not intend to acquire sovereignty over Taiwan. We have noted the Ch'ing practice of prohibiting emigration and, in effect, of denationalizing emigres. In the early 1870's, it will be recalled, the Ch'ing government stated to Japan that large sections of Formosa were outside its jurisdiction and that China could not be held internationally responsible for damages inflicted by Formosans.<sup>99</sup>

Thus, as in the case of prescriptive title, China's claim to title to Taiwan on the basis of occupation remains at best quite clouded.

### C. *Contiguous Title*

From time to time, claims of title *jure gentium* have been made on the basis of contiguity. Taiwan lies about 110 miles off the mainland, making China, in purely geographic terms, the closest major state.<sup>100</sup> Taiwan shares the continental shelf of mainland China, a geographical fact recently invested with title implications.<sup>101</sup> The island system of which Taiwan is a part, however, is held for the most part by Japan, and there are Japanese islands quite close by. Thus, from a purely factual standpoint, one cannot establish with certainty that China is most intimately contiguous with Taiwan.

As a matter of law, the question of a legal title by reason of contiguity is controversial. In *Island of Palmas*,<sup>102</sup> Judge Huber said:

99. See pp. 609-10 *supra*.

100. Although geographical proximity may be an important variable for certain matters, it is only one variable. Cf. N. HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 53-80 (1945). The more critical factor may be the degree of integration in all value processes. In this respect, Taiwan may be geographically proximate to China, but worlds away from it in social and economic terms. See generally Wright, *Territorial Proximity*, 12 AM. J. INT'L L. 519 (1918) and pp. 606-08 *supra*.

101. North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark: Federal Republic of Germany/Netherlands), [1969] I.C.J. 4-54. But cf. Article 6, Convention on the Continental Shelf, 1958, U.N. Doc. A/Conf. 13/L.55. See also note 21 *supra*.

102. *Island of Palmas*, 2 U.N.R.I.A.A. 829 (1928).

Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma.<sup>103</sup>

In an earlier period, Grotius argued for the delimitation of defensible boundaries<sup>104</sup> and subsequent commentators have suggested that this might be applied to islands.<sup>105</sup> The most that can be inferred from those cases in which the notion of contiguity was invoked, however, is that an inchoate right may exist but must be perfected through the usual modalities.<sup>106</sup> Under contemporary conditions, the *ratio legis* of contiguity is all but obsolescent, changes in weapons technology now having minimized the importance of space and time in territorial security.

#### D. *Claims of Colonial Protectorate*

A unique quasi-proprietary form recognized in international law until the last century, and perhaps still enjoying some authoritative

103. *Id.* at 854. Judge Huber introduced much confusion by failing to note that prior cases of title by contiguity dealt with islands quite close to the respective mainland. Bulama Island, for example, was, in President Grant's words, "so near it [the African mainland] that animals cross at low water." Bulama Island Case (Great Britain v. Portugal, 1870), 61 BRITISH AND FOREIGN STATE PAPERS 1103, 1104. In that case many other factors were considered before Portuguese title was recognized. The famous dictum in *The Anna*, 5 Ch. Robinson's Reports 371, 165 Eng. Rep. 809, 815 (1805) referred to silt islands at the mouth of the Mississippi. Other cases of contiguity refer to the hinterland rather than islands beyond the territorial sea. Furthermore, the context is usually one of comparatively uninhabited areas, rather than densely populated and politically organized islands situated at great distances from the coast. Thus, the Lobos Islands claimed by Peru were uninhabited and were twenty to thirty miles from the coast. 1 J. MOORE, A DIGEST OF INTERNATIONAL LAW 265-66, 575 (1906). But the Falkland Islands, claimed by Argentina, were 250 miles from the coast and were uninhabited. 20 BRITISH AND FOREIGN STATE PAPERS 314 (1831); J. MOORE, *supra*.

104. 2 H. GROTIUS, *supra* note 78, at ch. 3, § 16.

105. 1 T. TWISS, *supra* note 93, § 131. Lauterpacht may have had some sympathy with this position: H. LAUTERPACHT, *supra* note 84, at 425-27. Professor O'Connell cites Judge Huber in *Island of Palmas* but closes his discussion somewhat ambiguously by stating that "the persuasiveness of the notion of propinquity is demonstrated by the evolution of the continental shelf conception." 1 D. O'CONNELL, *supra* note 76, at 421. See Wright, *supra* note 100, at 519-21; 1 OPPENHEIM, *supra* note 76, at 560. Professor Waldock rejects the doctrine of contiguity. Waldock, *The Legal Basis of Claims to the Continental Shelf*, 36 TRANSACTIONS OF GROTIUS SOCIETY 115, 120 (1950). Professor Jennings follows Waldock. "Contiguity is an aspect of possession. It cannot be a root of title independent of possession." R. JENNINGS, *supra* note 90, at 74. Professor Blum seems to reject the doctrine: Y. BLUM, *supra* note 80, at 176-77. See also *The Anna*, 165 Eng. Rep. 809 (1805). *But cf.* *The Minquiers and Ecrehos Case* (France v. United Kingdom), [1953] I.C.J. 47. On the thorny question of contiguity and self-defense, see p. 653 *infra*.

106. Thus, Professor Wright, summarizing practice, concluded that contiguity of an uninhabited island gave rise to a claim of constructive possession, which in itself did not establish a right of sovereignty; title was perfected, in the words of Mr. Webster in the Lobos Island controversy, by "unequivocal acts of absolute sovereignty and ownership." 1 J. MOORE, *supra* note 103, at 575, cited in Wright, *supra* note 100, at 521, n.10.

## Who Owns Taiwan: A Search for International Title

status in contemporary law under other names,<sup>107</sup> was the colonial protectorate. According to this institution, a more powerful state could acquire exclusive authority over many of the internationally relevant activities of smaller states or territorial entities without incorporating those states or precipitating a *debellatio* of their partial or plenary international legal personality.<sup>108</sup> Although the term "colonial protectorate" has been used for the most part in regard to the relations of European colonizers or international charter companies purportedly acting under their authority,<sup>109</sup> functional equivalents may be found in the international relations of the non-Western world *inter se*. A case in point is the expansion of Imperial China which, on a number of occasions, established hegemonial control over peripheral territories without actually incorporating them. Striking examples of this practice occurred in Burma, Vietnam, Nepal, Korea, and, probably, Formosa.<sup>110</sup> Significantly, Mao Tse-tung is reported to have said in 1936:

It is the immediate task of China to regain all our lost territories, not merely to defend our sovereignty below the Great Wall. This means that Manchuria must be regained. We do not, however, include Korea, formerly a Chinese colony, but when we have re-established the independence of the lost territories of China and if the Koreans wish to break away from the chains of Japanese imperialism, we will extend them our enthusiastic help. *The same thing applies for Formosa*. As for Inner Mongolia, which is populated by both Chinese and Mongolians, we will struggle to drive Japan from there and help Inner Mongolia to establish an autonomous state.<sup>111</sup>

Thus the external practices of the Chinese empire allowed for a range of relationships of less than diadic equality with other states. Many of these seemingly unique practices were parallel to the colonial refinements of imperial Europe. As regards Taiwan, the available evidence, reinforced by subsequent authoritative commentaries, points strongly to a status for that island-state which confirmed its inde-

107. The contemporary notion of "sphere of influence," for example, seems to receive some recognition in exceptions which may have been made for the U.S. and the U.S.S.R. in the Western hemisphere and in Eastern Europe, respectively. One might compare, for example, such seemingly disparate doctrines as The Brezhnev Doctrine, N.Y. Times, Sept. 27, 1968, at 3, col. 1, and The Selden Resolution, H.R. Res. 560, 89th Cong., 1st Sess., 111 CONG. REC. 24347 (1965). Sphere of influence, so understood, is to be distinguished from the more traditional notion. *But cf.* M. LINDLEY, *supra* note 93, at 206 *et seq.*

108. For a comprehensive discussion, see 1 C. HYDE, *supra* note 78, at 44-90. *See also*, M. LINDLEY, *supra* note 93, at 181 *et seq.*; 1 OPPENHEIM, *supra* note 76, at 194-96.

109. M. LINDLEY, *supra* note 93, at 91-113.

110. *See* note 28 *supra*.

111. E. SNOW, *RED STAR OVER CHINA* 88-89 (rev. ed. 1938) (emphasis added).

pendence but subjected it to a type of heteronomic control, recognized in international law.

In terms of the law contemporaneously in force at the different times from the termination of Dutch suzerainty until 1887,<sup>112</sup> it seems doubtful that China ever perfected a title over Taiwan. Arguably, China developed an inchoate title which might have been perfected in a subsequent period if certain other acts had transpired within a sufficient time interval.<sup>113</sup> But the record does not warrant the conclusion that there was such perfection under any of the grounds of acquisition recognized by the pertinent international laws then prevailing.<sup>114</sup> At most, a relationship may have come into force between China and Formosa which was functionally equivalent to a colonial protectorate.

#### IV. Taiwan Annexed and Ceded: 1887-1895

Commercial and strategic circles close to the Ch'ing throne, increasingly aware of the potential value of Formosa, pressed for a real annexation of the island and in 1887 Formosa was proclaimed a province of China.<sup>115</sup> The annexation, as noted earlier, was short-lived. War broke out between China and Japan in 1894 and, within a year, China was defeated. In the Treaty of Shimonoseki of 1895, China agreed to the euphemistic "independence" of Korea and to the outright cession of Formosa to Japan.<sup>116</sup> It is possible to argue that the period of annexation—only eight years—was insufficient for consolidat-

112. P. 610 *supra*.

113. The *Delagoa Bay* case between Portugal and Great Britain is a useful and still relevant precedent for the components additional to discovery which are necessary to change an "inchoate title" into a secure title *erga omnes*. In that case, there were additional findings of occupation, the forceful exclusion of other contenders from occupation and the exercise of authority there, exclusive trading, the absence of protest by other states in the area, the attitude of the indigenes, and express and tacit admissions of Portuguese title by the English themselves. 5 J. MOORE, *supra* note 81.

The point of emphasis is that international law employs a variety of quite refined indices to determine whether there has been sufficient and appropriate activity to render an inchoate title into firm title.

114. An alternate characterization of the history of Taiwan might argue that the inchoate title, if it vested at all in the Chinese Empire, was abandoned and hence Taiwan was in fact *territorium derelictum*; both Pufendorf and Vattel confirmed this institution in international law, and the doctrinalists discuss a number of cases some of which bear striking similarity to Taiwan in the period before the Treaty of Shimonoseki. See generally M. LINDLEY, *supra* note 93, at 48ff.

115. See note 35 *supra*.

116. Articles 1 and 2 of the Treaty of Shimonoseki. For the text in Chinese, see *Lieh Ch'iang Ch'in-Lueh* (The Aggression of Foreign Powers), in CHUNG-HUA MIN-KUO K'AI-KUO WU-SHIIH NIEN WEN-HSIEN (Documents on the Fiftieth Anniversary of the Republic of China), pt. 1, bk. 5, at 408-12 (1964). For the English text see 1 AM. J. INT'L L. 378 (Supp. 1907). For an extensive account of the conclusion of the Treaty of Shimonoseki and the relevant documents, see *Lieh Ch'iang Ch'in-Lueh*, *supra* at 335-442.

## Who Owns Taiwan: A Search for International Title

ing title under international law, since it did not provide sufficient time for adequate notice and protest, actions which might have impaired China's otherwise perfected title over the island by annexation.<sup>117</sup> It is clear also that by this time there were concurrent claims to Taiwan, as the Japanese, for example, felt that they had certain historical interests in the island.<sup>118</sup>

These questions were mooted, however, by the cession of Formosa to Japan. While the Treaty of Shimonoseki would be of dubious legality in the post-Charter period, since it involved a transfer of territory by coercive means without regard for other preemptory normative requirements,<sup>119</sup> from an intertemporal standpoint there can be no question of its full efficacy. For according to the law prevailing at the time, peace treaties and, more generally, coerced treaties were not *eo ipso* invalid and transfers of territory such as were involved were common in international law.<sup>120</sup> Since there is no factual controversy over the plenary administration of Formosa which the Japanese thereafter introduced into the island, the Treaty of Shimonoseki marks a total alienation by China of the island of Formosa. The behavior of the Chinese government in the post-1895 period provides extrinsic evidence of the Chinese belief that Formosa was in fact fully and legally alienated.<sup>121</sup> Behavior of this sort has since been inter-

117. The length of time necessary for permitting other states to protest is, of course, a matter of context, as was noted above. The critical point, as stated by Judge Huber in the *Island of Palmas*, is a period of time affording other states a "reasonable possibility" to react. *Island of Palmas*, 2 U.N.R.I.A.A. 829, 867 (1928).

118. See, e.g., S. YEN, *supra* note 31, at 154-295; TING-I KUO, *supra* note 27, at 11-17.

119. See pp. 654-55 *infra*.

120. See generally 1 OPPENHEIM, *supra* note 76, at 566 *et seq.* and the numerous older authorities cited there. See also M. McMAHON, *CONQUEST AND MODERN INTERNATIONAL LAW* (1940); I D. O'CONNELL, *supra* note 76, at 431 *et seq.* It should be noted that Japanese title did not derive directly from conquest or subjugation but from a treaty of peace. The treaty did not involve the *debellatio* of its adversary, but rather the cession of certain peripheral territories. In this respect, Shimonoseki was quite a common and ordinary international event.

121. There may be some significance in the fact that Chiang Kai-shek's special envoy, Ch'en Yi (then Governor of the Fukien Province and ten years later the first governor general of Taiwan), congratulated the Taiwanese at the celebration of the fortieth anniversary of Japanese rule of Taiwan on their good fortune in being Japanese citizens. YU-HSIANG FENG, WU SO JEN SHIH TE CHIANG CHIEH-SHIH (The Chiang Kai-shek I Knew) 42 (1949). Before his diplomatic mission to Taiwan in 1935, Ch'en Yi had sent a delegation of twenty-two headed by Ch'en Ti-ch'eng, Commissioner of Construction and Development of the Fukien Province, to pay an official visit to Taiwan to study Japan's operations and achievements on the island. In the report submitted to Ch'en Yi, TAI-WAN K'AO-CH'A PAO-KAO (The Report on the Visit to Taiwan) (1935), Japan's success in Taiwan was highly acclaimed as a model for building China. The report is particularly revealing in its candid characterizations of the nationalities of the diverse groups on Taiwan. According to the report, the total population of the island-state at that time was about 4,900,000. Of that number, five per cent were Japanese, ninety per cent were native Taiwanese, four per cent were aborigines, and one per cent were overseas Chinese. *Id.* at 18. In short, even at that time, the Chinese government itself distinguished Taiwanese from Chinese.

preted by the International Court of Justice as estopping subsequent claims to title.<sup>122</sup> In fact, no such claims were lodged by the Ch'ing government, nor by the Republic of China for nearly thirty years.<sup>123</sup>

Subsequent norms of international law may, of course, be characterized as retroactive even in a legal area such as territorial title in which, as we have seen, a high premium is placed on stability of expectations.<sup>124</sup> Thus, the doctrine of unequal treaties<sup>125</sup> might be invoked retroactively to invalidate Chinese alienation of Formosa in the Treaty of Shimonoseki and thus to break the chain of title thereafter. We overlook for the moment the questions of the existence, meaning and scope of application of the doctrine of unequal treaties in international law and the question of whether, at the time of Shimonoseki, sufficient "inequalities" characterized the relations of China and Japan to justify invocation of the doctrine. The salient point with regard to the doctrine of unequal treaties is that according to the intertemporal principles of international territorial law, a claim *lodged subsequently*, invoking inequalities at the time of the conclusion of the treaty, must also validate itself according to *subsequent* international norms which may have emerged.<sup>126</sup>

Even if a claim of unequal treaties were tenable as law and could be established as fact, it would probably fail because of intervening events. In May of 1895, the Taiwanese successfully revolted and estab-

122. Temple of Preah Vihear (Cambodia v. Thailand), [1962] I.C.J. 6, 19-21, 25, 27, 29, 32-33.

123. See pp. 633-35 *infra*.

124. See, e.g., United States v. Altstoetter (The Justice Case), 3 TRIALS OF WAR CRIMINALS 974 (1951).

125. The term "unequal treaties" is used rather loosely in the recent literature to refer to all cases in which there were disparities in the relative negotiating positions of the parties. One notes a tendency to assimilate all of these treaties to the category of leonine agreements and to characterize them as voidable. Actually the doctrinal reference of the term "unequal treaties" as used by Chinese international legal scholars was, for the most part, to the commercial capitulations by China in favor of mercantile powers and particularly to cessions of extra-territorial jurisdiction. See, e.g., KAISENG WOO, LA POLITIQUE ETRANGERE DU GOUVERNEMENT NATIONAL DE CHINE ET LA REVISION DES TRAITES INECAUX (1931); see especially the Sino-Japanese Accord of May 6, 1930, *id.* at 100-01. Cf. G. SCELLE, MANUEL DE DROIT INTERNATIONAL PUBLIC 245 (1948). Scelle refers to the unequal treaties of China in the same sense. For a review of China's unsuccessful efforts before the League of Nations, see C. ROUSSEAU, PRINCIPES GENERAUX DU DROIT INTERNATIONAL PUBLIC 621-22 (1944). *But cf.* W. TUNG, CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES (1970); *Lieh Ch'iang Ch'in-Lueh* (The Aggression of Foreign Powers), *supra* note 116, pt. I, bks 3-6.

As to the more substantial question of the legality of the Treaty of Shimonoseki at the time of its conclusion, there can be little controversy over the fact that such agreements were then common and lawful. See, e.g., 2 PRADIER-FODERE, TRAITE DE DROIT INTERNATIONAL PUBLIC 496 (1885). For a more contemporary statement, see 1 G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 147-48 (4th ed. 1960) [hereinafter cited as SCHWARZENBERGER MANUAL].

126. See pp. 604-06 *supra*.

lished a Republic. Though the Republic was suppressed by the Japanese within a year, its existence before performance of the Treaty of Shimonoseki would break Chinese claims according to the perspective of post-Charter international law by interposing a stronger claim based on self-determination.<sup>127</sup> The principle of self-determination and the emergent peremptory norm of anti-colonialism would thus retroactively defeat China's claim to Taiwan. While these principles will be discussed in greater detail below, it suffices to mention them here to indicate the failure of the doctrine of unequal treaties to establish Chinese title to Taiwan.

The conclusion of this portion of our search must then be that the Treaty of Shimonoseki of 1895 constitutes an effective alienation of any Chinese rights which might have been acquired in Formosa, and their transfer to the Japanese Empire.

## V. Taiwan Through the World Wars

From the Treaty of Shimonoseki in 1895 until the Second World War, Japan's sovereignty over Formosa was not internationally contested. Diplomatic correspondence and practice indicate a general

127. Indeed, even according to contemporaneous norms, the interposition of the Republic of Taiwan in 1895 probably acted to terminate all Chinese claims to Taiwan. The factum of abandonment, and then formation of a government by the indigenous settlers, vests sovereign title in those settlers. Consider Vattel:

If a number of free families, scattered over an independent country, come to unite for the purpose of forming a nation or state, they altogether acquire the sovereignty over the whole country they inhabit: for, they were previously in possession of the domain—a proportional share of it belonging to each individual family; and since they are willing to form together a political society, and establish a public authority, which every member of the society shall be bound to obey, it is evidently their intention to attribute to that public authority the right of command over the whole country.

E. DE VATTEL, *supra* note 93, at § 206. To the same effect, Lindley believed that "a political society may be formed by the union, for the purposes of government, of a number of individuals already living in a country with a sovereign." M. LINDLEY, *supra* note 93, at 88. "[I]f, although all of a large majority of the settlers were subjects of the same state, that State definitely refuses to accept or after a reasonable time has not assumed, international responsibility for the settlement, then, when the settlers have developed an efficient government of their own, a new State will have been born." *Id.* at 90. (See also 1 J. WESTLAKE, INTERNATIONAL LAW ch. 10 (2d ed. 1910)). "If the settlers were not subjects of an existing state, *a fortiori* they will have set up a new one." M. LINDLEY, *supra* at 90.

Since Japan took control by conquest, suppressing the national uprising, the brief intervention of the Taiwan Republic may seem of small import. It is extremely important in that it sundered Chinese title without regard to the Treaty of Shimonoseki. Thus, the denunciation of the Treaty of Shimonoseki by the Kuomintang in 1941 (*see* p. 634 *infra*) could not in itself have revived whatever title China may have had before 1895, because China forfeited its title by abandonment and the formation of an indigenous Taiwanese Republic. Under this construction, Shimonoseki was a semantic event, Japan acquiring a title *jure gentium* by conquest.

expectation that Formosa was Japanese.<sup>128</sup> Japan, for its part, exercised an efficient and complete administration on the island. With the outbreak of the war, however, having aligned itself with the Allied Powers against Japan, China gradually clarified a set of territorial grievances which the Kuomintang hoped to requite, with the help of the Allies. In 1941, China proclaimed that all treaties with Japan were abrogated.<sup>129</sup> Though this act was devoid of legality and effect in international law,<sup>130</sup> China pressed its case at meetings of the Allies and succeeded, at last, in having some of its territorial demands incor-

128. For example, Article 19 of the Treaty of Washington (February 6, 1922) between the United States, the British Empire, France, Italy and Japan, limiting naval armament provides:

The United States, the British Empire and Japan agree that the status quo at the time of the signing of the present Treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder:

...  
(3) the following insular territories and possessions of Japan in the Pacific Ocean, to wit: the Kurile Islands, the Bonin Islands, Amami-Oshima, the Loochoo Islands, Formosa and the Pescadores, and any insular territories or possessions in the Pacific Ocean which Japan may hereafter acquire.

16 AM. J. INT'L L. 41, 46 (Supp. 1922). See also NAOKICHI TANAKA & TIEN-SHOU TAI, *supra* note 33, at 109-41; A. GRISWOLD, *THE FAR EASTERN POLICY OF THE UNITED STATES* 305-32 (1st ed. 1938).

129. In its Declaration of War on Japan dated December 12, 1941, China stated: "The Chinese Government hereby formally declares war on Japan. The Chinese Government further declares that all treaties, conventions, agreements and contracts concerning the relations between China and Japan are and remain null and void." For the full text, see 5 DEP'T STATE BULL. 506 (1941).

130. The most obvious limitation on unilateral denunciation of a treaty derives from those international legal norms affecting the party which are juridically independent of the treaty even though formally incorporated within it. See Vienna Convention on the Law of Treaties, art. 43, *supra* note 8. This provision is obviously a codification of a general, indeed a necessary, principle of international law. Title vested in Japan at the time of, and/or because of, the Treaty of Shimonoseki, as the language of the Treaty clearly indicated. Such title, insofar as it is title, ceases to be a bilateral contractual relationship and becomes a real relationship in international law. Though contract may be a modality for transferring title, title is not a contractual relationship. Hence once it vests, it can no longer be susceptible to denunciation by a party to the treaty. In fact, war probably does not abrogate treaties of territorial settlement. In *Society for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464, 494-95 (1823), the Supreme Court held that "treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as the case of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts . . . ."

A contemporary French view is offered by Rousseau: "[L]a guerre survenant entre les parties contractantes à un traité de règlement territorial reste sans influence sur les cessions territoriales antérieurement intervenues en vertu dudit traité." C. ROUSSEAU, *supra* note 125, at 571. After a detailed survey, Lord McNair summarizes British practice to the same effect: "[I]n the British view State rights of a permanent character, connected with sovereignty and status and territory, such as those created or recognized by a treaty of peace (including rights of independence), a treaty of cession, a boundary treaty, and so forth, are not affected by the outbreak of war between the contracting parties." A. MCNAIR, *LAW OF TREATIES* 705 (1961). *Accord*, 2 RIVIER, *PRINCIPES DU DROIT DES GENS* 133 (1896); J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 408-09 (5th ed. 1963). 1 SCHWARZENBERGER *MANUAL*, *supra* note 125. *Contra*, H. BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 588-89 (3d ed. Frauchille 1901); 2 L. CAVARE, *LE DROIT INTERNATIONAL PUBLIC POSITIF* 175-76 (1962).

## Who Owns Taiwan: A Search for International Title

porated in the Cairo Declaration of December 1, 1943,<sup>131</sup> which read in part:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan.<sup>132</sup>

The Cairo Declaration is not, in the formal sense, a "legal" document. It was not ratified and, indeed, the missions of the three declarants probably did not have authorizations to conclude a policy revision of such scope. The factual errors in the document indicate that the declarants had not even fully briefed themselves. More importantly, the interpretations attached to the Declaration subsequently by the United States and the United Kingdom reinforce the impression that the Declaration was merely a perorative conclusion to what had been a planning session for a complex military campaign.<sup>133</sup>

131. The Declaration was issued by President Franklin D. Roosevelt, Prime Minister Winston Churchill, and Generalissimo Chiang Kai-shek.

132. 9 DEP'T STATE BULL. 393 (1943).

133. In its *aide memoire* of December 27, 1950, the United States 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 United States Government subject to any final peace settlement where all relevant factors should be considered. The United States cannot accept the view, apparently put forward by the Soviet government, that the views of other Allies not represented at Cairo must be wholly ignored. Also, the United States believes that declarations such as that issued at Cairo must necessarily be considered in the light of the United Nations Charter, the obligations of which prevail over any other international agreement.

DOCUMENTS ON INTERNATIONAL AFFAIRS 1949-1950, at 622-23 (M. Carlyle ed. 1953); 3 WHITEMAN DIGEST, *supra* note 2, at 511-12 (1964).

The British view was even more unequivocal. Prime Minister Winston Churchill stated that the Cairo Declaration "contained merely a statement of common purpose." 536 PARL. DEB., H.C. (5th ser.) 901 (1955). See also Lauterpacht, *The Contemporary*

In general, international lawyers are reluctant to attach enduring legal significance to wartime declarations precisely because they are framed as propaganda instruments for short range mobilizations of support and are rarely attended by intentions of permanent policy change. The form of an international document is not, however, the decisive determinant of its validity. The critical question is always the expectations of the framers which the document is to signify.<sup>134</sup> On the other hand, formal factors should not be minimized because the manifest purpose for which they are introduced is to indicate, through maximum ceremonialization, that the participants did indeed intend to commit themselves to a new policy program henceforth deemed authoritative. Thus the absence of legal formalities in the Cairo Declaration may itself be taken as a communication of an intention not to create a prescription.

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 Pots-

*Practice of the United Kingdom in the Field of International Law: Survey and Comment*, 8 INT'L COMP. L.Q. 146, 186 *et seq.* (1959). For general discussion and appraisal, see Jain, *supra* note 2, at 27 *et seq.*; Chen, *supra* note 3, at 131-36; Ng, *supra* note 3, at 26-36. George F. Kennan observed:

No one seems to know from what deliberations this declaration [Cairo] issued; it was apparently drafted, at the moment, by Harry Hopkins, after consultation only with the President and the Chinese visitors. Of all the acts of American statesmanship in this unhappy chapter, the issuance of this declaration, which is so rarely criticized, seems to me to have been the most unfortunate in its consequences. The other direct results of this phase of American statesmanship have either been erased by subsequent events or seem to have produced, at least, no wholly calamitous after effects to date; but this thoughtless tossing to China of a heavily inhabited and strategically important island which had not belonged to it in recent decades, and particularly the taking of this step before we had any idea of what the future China was going to be like, and without any consultation of the wishes of the inhabitants of the island, produced a situation which today represents a major embarrassment to United States policy, and constitutes one of the great danger spots of the postwar world.

G. KENNAN, *RUSSIA AND THE WEST UNDER LENIN AND STALIN* 376-77 (1960).

George H. Kerr also wrote:

This [the Cairo Declaration] was not a carefully prepared State Paper but rather a promise to divide the spoils, dangled before the wavering Chinese. It was a declaration of intent, promising a redistribution of territories held by the Japanese. None of the territories mentioned in the document were at that moment in Allied hands. The Allied leaders had to show a bold face before the world, but in truth no one then knew what ultimate course the war might take. . . . It is difficult now to understand the offhand manner in which the Conference produced the document. . . . For whatever reason, the Cairo Declaration is as noteworthy for historical inaccuracies within the text as for its rhetorical flourishes. The latter made good propaganda, but the former set a dangerous trap. Some of the damage to American interests will never be repaired.

G. KERR, *supra* note 2, at 25-26.

134. M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, PRINCIPLES OF CONTENT AND PROCEDURE* 39 *et seq.* (1967).

## Who Owns Taiwan: A Search for International Title

dam Declaration of July 26, 1945, contained, in Section eight, a confirmation of the Cairo Declaration:

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.<sup>135</sup>

Most of the reservations raised in regard to the Cairo Declaration would apply once again here.

The Cairo and Potsdam Declarations are not, of course, meaningless, for they patently communicated something. It remains to assess, for our purposes, the content and intensity of that communication, and whether the expectations generated thereby may be said to have created an international title. In particular, we must ask whether or not they conformed to temporally relevant international norms. A number of lines of reasoning press us to the conclusion that Cairo and Potsdam did not, indeed could not, create an international title, but at most a sort of *jus ad rem*, a claim on other Allies to participate at some future time in the perfection of a title in conformity with the law.

The primary reasons why Cairo and Potsdam could not create international title stem from (i) the capacity of the declarants and (ii) the enviroing international norms which prevailed at the time. As to the capacity of the declarants, three states were simply not empowered under the principles and peremptory procedures of the Covenant of the League of Nations then in force, to decide that the territory held, and formerly recognized as validly so held by another, could now be forcibly removed from that state.<sup>136</sup> Such incapacity could not be cured by the allegation that the territories to be transferred were in fact "stolen," unless and until that allegation was estab-

135. 13 DEP'T STATE BULL. 137 (1945).

136. See LEAGUE OF NATIONS COVENANT, preamble: "[T]he maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another." Note also that the Covenant in its inventory of penalties for non-compliance, makes no mention whatsoever of territorial disruptions. *Id.* art. 16. See J. KNUDSON, A HISTORY OF THE LEAGUE OF NATIONS 373-83 (1938). See also LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 101, at 87-88 (1932). Even prior to the Covenant, a conspiracy among two or three states to dismember another state could not *eo ipso* be a ground for title. If title vested at all, it vested by a subsequent successful conquest. Cf. I OPPENHEIM, *supra* note 76, at 566 *et seq.* As to the purported lawfulness of such an act after 1919, see Briggs, *Non-Recognition of Title by Conquest and Limitations on the Doctrine*, 1940 PROCEEDINGS AM. SOC. INT'L L. 72 *et seq.*

lished authoritatively under the principles and procedures of the Covenant. It follows that while Cairo might have validly established longer range trilateral territorial intentions, it could not establish title, because under international law the parties to it lacked the capacity to do this.

As to enviroing international norms, it is sufficient to note that the doctrines of self-determination<sup>137</sup> and the prohibition of use of force for territorial changes,<sup>138</sup> as embodied in many resolutions of organs of the League of Nations,<sup>139</sup> had transformed the component of acquiescence of the indigenous people into a peremptory aspect, and a virtual requirement of lawful transfers of territorial title.<sup>140</sup> Hence, even assuming that the Cairo Declaration, as reinforced by the Potsdam Declaration, had been intended by the parties to it to create new international rights, such an intention would have been limited by international law. *Jure gentium*, the Cairo Declaration could mean only that the participants agreed to recognize a Chinese acquisition of Formosa if the inhabitants of Formosa indicated that

137. See generally Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971); H. JOHNSON, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS* (1969); T. Mensah, *Self-Determination Under the Auspices of the United Nations*, 1964 (unpublished J.S.D. dissertation in Yale Law Library); R. EMERSON, *SELF-DETERMINATION REVISITED IN THE ERA OF DECOLONIZATION* (Harvard University Occasional Papers in International Affairs, No. 9, 1964); Emerson, *Colonialism, Political Development and the United Nations*, 19 INT'L ORG. 484 (1965); M. SHUKRI, *THE CONCEPT OF SELF-DETERMINATION IN THE UNITED NATIONS* (1965); UNITED NATIONS INSTITUTE FOR TEACHING AND RESEARCH, *STATUS AND PROBLEMS OF VERY SMALL STATES AND TERRITORIES* (UNITAR Series No. 3 1969); Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 25 U.N. GAOR, Supp. 19, at 41-52, U.N. Doc. A/8018 (1970); P. BLAIR, *THE MINISTATE DILEMMA* (Carnegie Endowment for International Peace Occasional Paper No. 6, 1967); W. BRISK, *ANGUILLA AND THE MINI-STATE DILEMMA* (New York Univ. Center for International Studies Policy Paper, No. 5, 1969); CHEN & LASSWELL, *supra* note 2, ch. 2; Connor, *Self-Determination: the New Phase*, 20 WORLD POLITICS 30 (1967); UNITED NATIONS, *PROTECTION OF MINORITIES* (1967); V. VAN DYKE, *supra* note 7, at 77-102; I. CLAUDE, *NATIONAL MINORITIES, AN INTERNATIONAL PROBLEM* (1955); Jessup, *Self-Determination Today in Principle and in Practice*, 33 VA. Q. REV. 174 (1957); UNITED NATIONS OFFICE OF PUBLIC INFORMATION, *THE UNITED NATIONS AND DECOLONIZATION* (1965); R. EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF ASSERTION OF ASIAN AND AFRICAN PEOPLES* (1960); J. PLAMENATZ, *ON ALIEN RULE AND SELF-GOVERNMENT* (1960); Rivlin, *Self-Determination and Dependent Areas*, 501 INT'L CONCILIATION (1955); L. SNYDER, *THE NEW NATIONALISM* (1968); Eagleton, *Excesses of Self-Determination*, 31 FOREIGN AFFAIRS 592 (1953).

138. Such a prohibition is expressed in: The Treaty for the Renunciation of War (Kellogg-Briand Pact), 46 Stat. 2343 (1928), 94 L.N.T.S. 57; the Stimson Doctrine, U.S. Dep't State pub. 2008, 1 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, JAPAN: 1931-1941 at 76 (1943). Cf. R. LANGER, *SEIZURE OF TERRITORY* (1947); Briggs, *supra* note 136, at 72-82, 82-99.

139. For example, on March 11, 1932, the Assembly of the League of Nations resolved that "it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris." LEAGUE OF NATIONS OFF. J., Spec. Supp. 101, at 87-88 (1932).

140. See pp. 601-04 *supra* and pp. 654-59 *infra*.

## Who Owns Taiwan: A Search for International Title

they desired to be part of or to be governed by China. In short, Japan remained the sovereign of Formosa despite the declarations of Cairo and Potsdam. All the while, of course, Japan continued to govern Taiwan.

### VI. Taiwan Under Post-War Occupation

According to pre-agreements, the Japanese forces in Formosa and China, except Manchuria, surrendered to the forces of Chiang Kai-shek, who acted as the trustee of the Allied Forces under the direction of General MacArthur.<sup>141</sup> Nationalist Chinese have since intimated that this gave rise to title by conquest. Even if conquest survived the emergent doctrine of self-determination, the Chinese claim would be factually ludicrous.

A large scale Formosan uprising against Chiang's forces in 1947 dramatized the depth of Formosan hostility to the new invaders.<sup>142</sup> In 1949, the remnants of Chiang's army, decisively defeated by the Communists, fled across the Formosa Straits to Taiwan. Chiang, though no longer President of China,<sup>143</sup> declared himself President of the Republic of China and spoke grandly of "recovering" the mainland from the rebels. In addition to Chiang's claim, an authorized representative of the People's Republic of China asserted before the Security Council that taking control of Taiwan in 1945 rendered it "not only *de jure*, but also *de facto*, an inalienable part of Chinese territory."<sup>144</sup> Hence the juridical effect of Chiang's actions as regards title must be scrutinized.

Cairo and Potsdam, as we have seen, could not, even if they so intended, have effected a transfer of sovereignty of Taiwan *jure gentium*, because the parties lacked the capacity to perform such an act and because such an act would itself have been contrary to the international norms then prevailing. Indeed, there was no such intention on the part of the United States. Hence one cannot argue, as China has done, that title was transferred *de jure* in 1943, and was perfected by securing effective control in 1945. Title was not transferred in 1943; Japan continued to hold it.

141. See p. 611 and note 43 *supra*.

142. See p. 612 and notes 44-46 *supra*.

143. See pp. 612-15 *supra*.

144. 5 U.N. SCOR, 527th meeting 2, 6 (1950) (remark of Wu Shiu-Chuan).

The fact that Japan did not suffer *debellatio* (confirmed by Allied and Japanese behavior after 1945), the Peace Treaty itself in 1951 and the writings of doctrinalists<sup>145</sup> render moot the question of whether Taiwan would have become a *res nullius* in international law, available to whomever could secure it first. Even if Japan *had* suffered a *debellatio*, peremptory international norms which had already been prescribed would have terminated the concept of *res nullius* in international law *as regards any populated territory*.<sup>146</sup> Finally, Japan surrendered to the Allies and not to China; Chiang occupied Taiwan only as their agent.<sup>147</sup> Hence the mere fact that China seized control of Taiwan could not secure it a title *jure gentium*.

That the act of securing control of Taiwan in 1945 was a mandate of trust by the Allied Powers is clear from contemporaneous documents, from authentic interpretations of them by the drafters themselves in the following years, and from the terms of the Peace Treaty with Japan. Governmental agencies of the Allied Powers at a number of levels consistently confirmed by word and deed the continuation of Japanese sovereignty over Taiwan.<sup>148</sup> Consistent with that position, allied officials also affirmed Chinese "authority" over Taiwan,<sup>149</sup> but did not state *ex cathedra* or otherwise that China had "sovereignty" over Taiwan. The significance of this consistency is heightened by the fact that, throughout this period, Chiang's government pursued a major propaganda and lobbying campaign in order to secure an overt recognition of sovereignty from the Allied Powers.<sup>150</sup> None was

145. On *debellatio* in general, see 1 D. O'CONNELL, *supra* note 76, at 441-42. Professor Scelle argued that *debellatio* was little more than belligerent occupation and rejected the more general theory, as being based on uncertain practice; G. SCELLE, *supra* note 125, at 141-43. This seems to have been the sense in which the term was used in regard to the unconditional surrender of the Third Reich. *But cf.* Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945). For specific discussion of the alleged *debellatio* of Japan, see 1 D. O'CONNELL, *supra* note 76, at 447.

146. See pp. 655-60 *infra*.

147. See p. 611 *supra*.

148. For an extremely clear example see *Civil Air Transport Inc. v. Chennault*, 17 I.L.R. 173 (Hong Kong Supreme Court 1950). See also *Cheng Fu Sheng and Lin Fu Mei v. Rogers*, 177 F. Supp. 281 (D.D.C. 1959); *United States v. Ushi Shiroma*, 123 F. Supp. 145 (D. Hawaii 1954); G. SCHWARZENBERGER, *supra* note 8, at 272-73; O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT'L L. 405 (1956); 1 D. O'CONNELL, *supra* note 76, at 446.

149. See, e.g., Remarks by Secretary of State Acheson, January 5, 1950, 22 DEP'T STATE BULL. 79 (1950). Note that Acheson's statement used the word "authority" and not "sovereignty."

150. For a penetrating account of Chiang's intensive and extensive lobbying activities and blackmail tactics in connection with the Cairo Declaration, see B. TUCHMAN, *STILWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-45*, at 396-414 (1971). Concerning Chiang's China lobby in the U.S., see CHEN & LASSWELL, *supra* note 2, at 200-05; *ACTIVITIES OF NON-DIPLOMATIC REPRESENTATIVES OF FOREIGN PRINCIPALS IN THE UNITED STATES, REPORT ON*

## Who Owns Taiwan: A Search for International Title

forthcoming. Thus, the Chinese argument of quasi-estoppel or prescriptive acquisition, to the effect that title was secured through the absence of protest, is factually incorrect. Every rebuff to Chiang's efforts showed clearly that the understanding and expectation of members of the international community were that China had not acquired Taiwan *jure gentium*. Moreover, while the continuous martial law within the island did indeed suppress overt dissent, by its very operation it indicated the hostility of the Taiwanese to the Chinese government.

### VII. The Peace Treaty with Japan and Suspension of Taiwan's Status

The Peace Treaty with Japan was concluded at an international conference in San Francisco in 1951, after eleven months of discussion.<sup>151</sup> Some mention of intervening political events must first be made, however, for without such references a number of trends cannot be comprehended.

After Mao Tse-tung's forces secured control over the Chinese mainland and Chiang fled with the remnants of his army to Formosa, a number of states in the West, including some former Allies, refused to recognize the finality of the Communist victory. Others, accommodating themselves to change, still sought to extend some form of credence to Chiang's continuing pretensions without actually intervening in the civil conflict.<sup>152</sup>

With the outbreak of the Korean War and the roughly symmetrical commitments of Communist China and the United States on opposing sides, it suddenly became inexpedient for Western states to jeopardize Chiang's position on Formosa. The new military theatre ascribed

A HEARING BEFORE THE COMMITTEE ON FOREIGN RELATIONS, 86th Cong., 1st Sess. (1963); Wertenbaker, *The China Lobby, Part I*, THE REPORTER, Apr. 15, 1952, at 4-24, and Apr. 29, 1952, at 19-22 and Horton, *China Lobby, Part II*, THE REPORTER, Apr. 29, 1952, at 5-19; F. GREENE, A CURTAIN OF IGNORANCE (1964); A. STEELE, THE AMERICAN PEOPLE AND CHINA (1966). The pro-Chiang interests were able to accomplish the singular feat of suppression of a book exposing their activities. A comprehensive study entitled THE CHINA LOBBY IN AMERICAN POLITICS, written by Dr. Ross Koen and published by Macmillan in 1960, was officially withdrawn for unexplained reasons after distribution of some advance copies. For details of the entire episode see Koen, *Two Postscripts to the McCarran Hearings*, BULLETIN OF CONCERNED ASIAN SCHOLARS, May 1969, at 27-31.

151. See CONFERENCE FOR THE CONCLUSION AND SIGNATURE OF THE TREATY OF PEACE WITH JAPAN: RECORD OF PROCEEDINGS (Dep't of State Pub. 4392, 1951) [hereinafter cited as JAPANESE PEACE CONFERENCE RECORD].

152. See CHEN & LASSWELL, *supra* note 2, at 28-33; Erasmus, *General de Gaulle's Recognition of Peking*, 18 CHINA Q. 195 (1964); Slawicki, *The Two Chinas in Africa*, 41 FOREIGN AFFAIRS 398 (1963); Yu, *Peking Versus Taipei in the World Arena: Chinese Competition in Africa*, 3 ASIAN SURVEY 439 (1963).

some strategic relevance to Chiang's battered and persistently ineffective army. Hence his claims to legitimacy, which might otherwise have bordered on the ridiculous, were transformed into a useful international strategy for other states in a number of different arenas. U.N. characterization of Communist China as an aggressor further improved Chiang's stature.<sup>153</sup> This concatenation of factors produced a strange stabilization. Surprisingly, no state was willing to go so far as to concede Chinese sovereignty over Formosa, despite an intense lobbying campaign carried on by Chiang's government in a number of capitals. On the other hand, these same states were unwilling to pursue the inexorable conclusions which should have followed the absence of sovereignty. Instead, the general policy became one of simply "freezing" the issue.

The pattern was set in the Japanese Peace Treaty of 1951.<sup>154</sup> Article 2 of that instrument recorded, *inter alia*, that

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

While Article 2 unquestionably alienates Japanese sovereignty over Taiwan, it does not indicate to whom sovereignty then passed. The

153. G.A. Res. 498, 5 U.N. GAOR, Supp. 20A, at 1, U.N. Doc. A/1775/Add. 1 (1951) read in part: "The General Assembly . . . finds that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea."

154. [1952] 3 U.S.T. 3169; T.I.A.S. No. 2490, 136 U.N.T.S. 46 (1952); JAPANESE PEACE CONFERENCE RECORD, *supra* note 151, at 313-90. The legal significance of the Peace Treaty with Japan in regard to the status of Taiwan cannot be overemphasized:

The initial desire of the four major Allied powers (China, U.S., U.K., U.S.S.R.) to restore Formosa and the Pescadores to China, expressed in the Cairo Declaration of 1943, the Potsdam Declaration of 1945, and the Japanese Term of Surrender of 1945, was made at a time when a full-scale war was in progress and Formosa was ruled by Japan. It is surely too much to expect decision makers acting in such circumstances to take a balanced view of all relevant contextual factors, particularly long-term considerations. To be authoritative and effective, a preliminary commitment of this kind would have to be crystallized and incorporated into the peace treaty that terminates hostilities. Here the pertinent agreement is the peace treaty with Japan of 1951, which authoritatively formulates the common policies of Japan and the Allied powers regarding their mutual relations after the termination of war. International law has long recognized the fundamental importance of peace treaties to delimit the state of affairs between victorious and defeated powers. Only commitments made in an atmosphere free of active violence can consider other than military necessities and hence provide a reasonable basis for peace and stability. Despite the numerous declarations made by the major Allied powers in the heat of war, the adjustment of the new structure of relations must be based on the relevant provisions in peace treaties in which both defeated and victorious nations participated. In a peace treaty the territorial clauses are drafted with particular care to prevent subsequent allegations of ambiguity. Since territorial claims are among the principal sources of conflict in world affairs, it is well recognized that who renounces what, to whom, and when is to be stated in unequivocal terms.

CHEN & LASSWELL, *supra* note 2, at 127-28.

## Who Owns Taiwan: A Search for International Title

amalgam of legal and political considerations which accounted for this anomaly was quite candidly analyzed by the representative of the United Kingdom at the Conference:

The treaty also provides for Japan to renounce its sovereignty over Formosa and the Pescadores Islands. The treaty itself does not determine the future of these islands. The future of Formosa was referred to in the Cairo Declaration but that declaration also contained provisions in respect to Korea together with the basic principles of non-aggression and no territorial ambitions. Until China shows by her action that she accepts those provisions and principles, it will be difficult to reach a final settlement of the problem of Formosa. In due course a solution must be found, in accord with the purposes and principles of the Charter of the United Nations. In the meantime, however, it would be wrong to postpone making peace with Japan. We therefore came to the conclusion that the proper treatment of Formosa in the context of the Japanese peace treaty was for the treaty to provide only for renunciation of Japanese sovereignty.<sup>155</sup>

Communist bloc states at the Conference insisted that Formosa was *de jure* and *de facto* Chinese territory because of the Cairo and Potsdam Declarations and because of the effective control exercised there by Chinese since 1945.<sup>156</sup> One answer to this, put in the record by Nicaragua, implied that Chinese action in Korea, whose independence had also been assured by the Cairo Declaration, involved a frustration or at least suspension of the Cairo Declaration, that instrument being construed as "indivisible per se."<sup>157</sup> Other nations chose to construe the suspensive effect of Article 2 differently. The Egyptian representative, for example, stated:

My government trusts that the reason behind this omission is to afford the opportunity to deal with this question in accordance with the United Nations Charter, taking into consideration the principle of self-determination and the expressed desire of the inhabitants of these territories.<sup>158</sup>

While the candor of certain participants at the Peace Conference provides a whiff of the exotic blend of political motives, this latter position correctly expressed the international legal position. Even

155. JAPANESE PEACE CONFERENCE RECORD, *supra* note 151, at 93.

156. *Id.* at 175-78, 270-71.

157. *Id.* at 212-13.

158. *Id.* at 144.

assuming that Cairo and Potsdam were "law creating instruments" as regards Formosa, they could not be used to perfect an incomplete title after 1945 unless they conformed to the obligations assumed under the United Nations Charter. For the intervention of the Charter, with its supremacy clause in Article 103,<sup>159</sup> introduced intertemporal normative requirements which Cairo and Potsdam did not fulfill.<sup>160</sup> The post-Charter principles will be considered in the following section. For the moment, we note only that the correct international legal interpretation of Article 2 of the Peace Treaty was until recently confirmed by the subsequent practice of states.

Until the Nixon-Kissinger *démarche*, United States practice followed the Peace Treaty scrupulously. Thus, Article VI of the Mutual Defense Treaty between Nationalist China and the United States stipulates that "the terms territorial and 'territories' (in Articles II and V) shall mean in respect of the Republic of China, Taiwan and the Pescadores" and "such other territories as may be determined by mutual agreement."<sup>161</sup> In order to avoid creating the misconception that this defense treaty constituted in any way an implied recognition of China's sovereignty over Formosa and the Pescadores, the United States Senate, in the course of ratification, stated that

it is the understanding of the Senate that nothing in the present treaty shall be construed as affecting or modifying the legal status or the sovereignty of the territories referred to in Article VI [i.e., Formosa and the Pescadores].<sup>162</sup>

The legal status of Formosa, as understood by the Senate, had on a previous occasion been clarified by Secretary of State John Foster Dulles. At the signing of the defense treaty during the first offshore islands crisis, he said:

[T]echnical 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

159. Article 103 provides that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Cf. Vienna Convention on the Law of Treaties, art. 30, *supra* note 8.

160. See pp. 603-05 *supra*.

161. See note 57 *supra*.

162. See note 58 *supra*.

## Who Owns Taiwan: A Search for International Title

concluded between the Republic of China and Japan. Therefore, the juridical status of these islands, Formosa and the Pescadores, is different from the juridical status of the offshore islands [Que-moy and Matsu] which have always been Chinese territory.<sup>163</sup>

This position was reaffirmed as recently as April 28, 1971,<sup>164</sup> though the Shanghai Communique of February 27, 1972, would seem to signal a change in the American stance.

Shortly after French recognition of the People's Republic of China on January 27, 1964, President Georges Pompidou, then premier, took pains to make clear that the act of recognition in no way implied French acquiescence in Peking's territorial claim over Formosa. In Pompidou's view, "Formosa (Taiwan) was detached from Japan, but it was not attached to anyone" under the Peace Treaty with Japan. Hence Formosa's undetermined status "must be decided one of these days, taking the wishes of the Formosa population into consideration."<sup>165</sup>

In recent years, when voting to seat Peking in the U.N., the British delegation had made it a practice to reiterate simultaneously its position on Formosa:

Sovereignty over the island of Formosa is undetermined. It therefore follows, in our view, that the question of who should represent Formosa in the United Nations is also undetermined. The vote which I shall cast in favour of the substantive draft resolution does not prejudice the position of my Government on this point.<sup>166</sup>

Both the Canadian and Italian governments merely "took note" of Peking's claim over Taiwan in their respective joint diplomatic communiques with the People's Republic of China, despite Peking's insistence that they "recognize" Taiwan as a part of China.<sup>167</sup> An in-

163. 31 DEP'T STATE BULL. 896 (1954).

164. Washington Post, Apr. 29, 1971, at A14, col. 1. See also N.Y. Times, Apr. 29, 1971, at 4, col. 4.

165. N.Y. Times, Apr. 24, 1964, at 4, col. 4. See also Editorial, *Self-Determination for Taiwan*, N.Y. Times, May 19, 1964, at 36, col. 2 (supporting Pompidou's statement).

166. 21 U.N. GAOR, U.N. Doc. A/PV.1481, at 9 (1966). But see the radical reversal of the British position regarding Taiwan's status after the Shanghai communique. N.Y. Times, Mar. 14, 1972, at 1, col. 6 (city ed.).

167. The full text of the joint communique between China and Canada issued on October 13, 1970 reads as follows:

The Government of the People's Republic of China and the Government of Canada, in accordance with the principles of mutual respect for sovereignty and territorial integrity, non-interference in each other's internal affairs and equality and mutual benefit, have decided upon mutual recognition and the establishment

creasing number of governments have recently adopted this position.<sup>168</sup>

The official position of the Japanese government conforms to the terms of the Peace Treaty, *i.e.*, that sovereignty over Taiwan was relinquished but not authoritatively transferred to another state.<sup>169</sup> The Indian position, in contrast, has leaned toward the cession of Formosa to China.<sup>170</sup> It is possible that this position may have changed, because there are serious historical errors in statements made by Nehru and Menon, to which Indian scholars have brought attention.<sup>171</sup> Ireland has consistently stated that Taiwan's international status remains undetermined.<sup>172</sup> A perusal of the voting record of the Afro-Asian bloc on the Chinese representation question in the United Nations suggests, by its very lack of pattern, that the views of African and Asian states on this matter are quite fluid, dictated by transient international

of diplomatic relations, effective 13 October 1970.

The Chinese Government reaffirms that Taiwan is an inalienable part of the territory of the People's Republic of China. The Canadian Government takes note of this position of the Chinese Government.

The Canadian Government recognizes the Government of the People's Republic of China as the sole legal government of China.

The Chinese Government and the Canadian Government have agreed to exchange ambassadors within six months, and to provide all necessary assistance for the establishment and the performance of the functions of diplomatic missions in their respective capitals on the basis of equality and mutual benefit and in accordance with international practice.

Renmin Ribao, *Welcome the Establishment of Diplomatic Relations Between China and Canada*, PEKING REV., Oct. 16, 1970, at 12-13. *See also id.*, Nov. 13, 1970, at 6 (China and Italy).

168. This position was adopted by Chile, Belgium and Lebanon when they established diplomatic relations with China. *See* PEKING REV., Jan. 8, 1971, at 3 (China and Chile); *id.*, Oct. 29, 1971, at 4 (China and Belgium); *id.*, Nov. 19, 1971, at 3 (China and Lebanon).

Another formula adopted recently makes no mention of Taiwan in joint communiques: "The Government of the Federal Republic of Nigeria recognizes the Government of the People's Republic of China as the sole legal Government representing the entire Chinese people." PEKING REV., Feb. 19, 1971, at 5. This formula was followed in the following cases: Kuwait, *id.*, Apr. 2, 1971, at 16; Cameroon, *id.*, Apr. 9, 1971, at 9; Austria, *id.*, June 4, 1971, at 11; Sierra Leone, *id.*, Aug. 6, 1971, at 22; Turkey, *id.*, Aug. 13, 1971, at 6; Iran, *id.*, Aug. 20, 1971, at 4; Rwanda, *id.*, Nov. 19, 1971, at 4.

169. The Japanese government has phrased with particular care its official position on Formosa's status. For example, in 1966 its representative to the U.N., Akira Matsui, stated:

At the end of the last century, Taiwan was ceded from China to Japan by virtue of the Sino-Japanese Peace Treaty of 1895, and remained under Japanese jurisdiction for half a century. In the peace treaty signed at San Francisco between Japan and the Allied Powers on 8 September 1951, Japan renounced all rights, title and claim to Taiwan and the neighbouring Pescadores Islands. In 1952 a peace treaty was concluded at Taipei between Japan and the Republic of China, the representative of which had signed the Charter of the United Nations, and a close and friendly contact has been maintained between the two countries ever since. At the present time, Taiwan, with a population of over 12 million people, is the seat of the Government of the Republic of China. The People's Republic of China has never extended its control to the island of Taiwan.

21 U.N. GAOR, U.N. Doc. A/PV.1479, at 2 (1966). *But see* N.Y. Times, *supra* note 72 (remarks of Premier Sato).

170. *See* Jain, *supra* note 2, at 39-42.

171. *Id.*

172. *E.g.*, 21 U.N. GAOR, U.N. Doc. A/PV.1479, at 1 (1966).

## Who Owns Taiwan: A Search for International Title

political issues rather than by a considered position on the Taiwan question.<sup>173</sup> The reasoning of the Communist states has followed that of China.<sup>174</sup> Of late, however, there have been rumors of diplomatic contacts between the Nationalist Chinese and the Soviet Union and a change in Soviet policy should not be ruled out.<sup>175</sup>

### VIII. Current Chinese Claims to Title

A number of other material claims to Chinese sovereignty over Taiwan can be abstracted from recent press statements of Chinese political leaders.<sup>176</sup> Claims based on three implicit doctrines have been presented, as well as a procedural claim invoking domestic jurisdiction. We consider the jurisdictional point first and then the material claims.

#### A. Domestic Jurisdiction

Statements attributed in the past year to Premier Chou En-lai assert that the disposition of Taiwan is a matter of domestic jurisdiction, to be decided among the parties themselves.<sup>177</sup> After Dr. Kissinger's first

173. See CHEN & LASSWELL, *supra* note 2, at 30-33, 47-49.

174. In the course of the debates on the question of Chinese participation in the United Nations, various delegations have touched upon the issue of Taiwan's legal status, but in a terse, curt and selective manner. Many of Peking's supporters have tended to play up the importance of the Cairo and Potsdam Declarations, but have failed to mention, deliberately or otherwise, the Japanese Peace Treaty of 1951 as well as the Atlantic Charter. See, e.g., the U.S.S.R.'s statement: "As far as the island of Taiwan is concerned, as is well known, it is an inalienable part of the People's Republic of China; it is a province of China. The fact of the return of Taiwan to China after the Second World War is enshrined in the most important international documents: in the Cairo and Potsdam Declaration." 26 U.N. GAOR (provisional), U.N. Doc. A/PV.1971, at 8 (1971); Chile's statement: "Taiwan is a province of China and the great allied Powers at the end of the Second World War resolved that Taiwan should be returned to China. That was confirmed in the Cairo Declaration of 1943 and in the Potsdam Declaration of 1945." *Id.* at 56; Algeria's statement: "[T]he island of Formosa is an integral part of Chinese national territory, and for that, it would not even be necessary to recall the declarations of Cairo in 1943 and Potsdam in 1945 in which the Allies of the Second World War confirmed that Formosa belongs to China." 26 U.N. GAOR (provisional), U.N. Doc. A/PV.1966, at 31 (1971). See also F. MORELLO, *supra* note 2, at 32-35.

175. Most recently, *Pravda* charged that China had encouraged expansion of U.S. aggression in Indochina through a deal in which "Washington would 'find a form of recognition' of Chinese sovereignty over Taiwan while Peking would help to 'pacify' Vietnam." N.Y. Times, Dec. 23, 1971, at 2, col. 3 (city ed.). On the other hand, Peking accused the Soviet Union of "stepping up flirtation and collusion" with the Chinese Nationalist regime in Taiwan. *Id.*, Mar. 27, 1972, at 11, col. 1 (city ed.).

176. See note 3 *supra*.

177. A typical statement runs as follows:

Taiwan is a province of China and it is an inalienable part of China's territory. And after the Second World War Taiwan had already been restored to China. And the liberation of Taiwan by the Chinese people is an internal affair of China which brooks no foreign intervention.

*Interview with Chou En-lai, supra* note 3, at 43-44. See also N.Y. Times, Dec. 1, 1971,

secret visit to China, White House personnel began to adhere to this construction of the problem. In December 1971, Dr. Kissinger announced that the ultimate disposition of Taiwan was to be a matter for China and Taiwan to decide.<sup>178</sup> President Nixon adopted the same position in his "State of the World" message on February 9, 1972,<sup>179</sup> and in the Shanghai communique of February 27, 1972, the United States and China agreed to the artful formulation 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. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.<sup>180</sup>

The claim of domestic jurisdiction is an assertion of national elites that a particular matter in which another state or states or an international organization has taken an interest is nonetheless solely a concern of their own state. Both the Covenant of the League of Nations as well as the United Nations Charter include express provisions for domestic jurisdiction.<sup>181</sup> Procedures for establishing whether a matter is one of domestic jurisdiction involve perusal of normative expectations and inclusive community requirements. In the *Tunis Morocco Nationality Decrees* case, the Permanent Court of International Justice concluded:

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.<sup>182</sup>

The conclusion that the status of Taiwan is a matter of international concern and not of domestic jurisdiction is based on many grounds.

First, a matter which involves the interpretation of a treaty is always a matter of international concern. In the *Right of Passage* case, the International Court of Justice perfected its jurisdiction and re-

at 1, col. 6 and at 5, col. 3 (statement by Dr. Kissinger); *id.*, Dec. 2, 1971, at 14, col. 4; Mike Mansfield, *The Mission to Peking*, N.Y. Times, Dec. 19, 1971, § E, at 11, col. 3 (city ed.). *But see* Letter to the Editor by Chen, The Christian Science Monitor, Dec. 22, 1971, at 14, col. 6; Chicago Tribune, Dec. 20, 1971, § 1, at 18, col. 5.

178. See pp. 618-19 *supra*; N.Y. Times, Dec. 1, 1971, at 1, cols. 3, 5 & 6; Dec. 2, 1971, at 19, col. 1.

179. See note 69 *supra*.

180. *Id.*, Feb. 28, 1972, at 16, cols. 3 & 5 (city ed.).

181. COVENANT art. 15(8); CHARTER art. 2(7).

182. [1923] P.C.I.J., ser. B, No. 4, at 23-24.

## Who Owns Taiwan: A Search for International Title

jected India's claim of domestic jurisdiction, because Portugal invoked a treaty which India controverted. The court held that

to invoke, whether rightly or wrongly, such principles is to place oneself on the plane of international law . . . . To decide upon the validity of those principles . . . does not fall exclusively within the jurisdiction of India.<sup>183</sup>

Since the disposition of Taiwan turns on the construction of the Japanese Peace Treaty and the Charter of the United Nations, it is perforce a matter of international concern and not of domestic jurisdiction.

Second, a case of territorial conflict is always a matter of international concern. Territorial disputants invariably assert domestic jurisdiction as a means of winning their case procedurally, though the claim is never sustained.<sup>184</sup> Taiwan is in great part a territorial issue. The claim of Chinese domestic jurisdiction, therefore, begs the entire question, for if the issue is title over Taiwan, one cannot invoke domestic jurisdiction until one has affirmatively established that Taiwan is part of China.

Third, any case which might "threaten the peace," in the language of the Charter, is assimilated to the category of international concern and ceases to be a matter of domestic jurisdiction.<sup>185</sup> Since the disposition of Taiwan can indeed threaten the peace, it must be a matter of international concern.<sup>186</sup>

Fourth, according to the most recent decision of the International Court of Justice, matters involving self-determination of peoples

183. [1957] I.C.J. 125, 150.

184. In these contexts, the claim of domestic jurisdiction is synonymous with the assertion of sovereignty over the disputed territory; the matter is internationalized by the very fact of the dispute. Note, however, that even if one disputant's claim over the territory in question is upheld, the conflict itself may nonetheless constitute a "threat to peace" and thus a matter of international concern.

185. This express proviso is an authentic component of Article 2(7) of the U.N. Charter, but even if it had not been included, it necessarily would have been implied as a requisite component of community order. Article 2(7) concludes with the phrase that the principle of domestic jurisdiction "shall not prejudice the application of enforcement measures under Chapter VII." The enforcement measures of Chapter VII, in turn, have required, under the strict language of the Charter, a finding by the Security Council of a "threat to the peace, breach of the peace or act of aggression."

186. The implications for overt violence in the forced transfer of a state of fifteen million people, who are industrialized and in a state of intense military readiness, require no further explication. The grievous human rights deprivations which would be involved in the forced transfer of such a community may also constitute a threat to the peace and as a result comprise a matter of international concern. See generally McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

are of international concern.<sup>187</sup> Because this is a central issue of the Taiwan problem, a claim of domestic jurisdiction cannot be sustained.<sup>188</sup>

Fifth, cases of nationality of individuals and groups are now considered matters of international concern. In 1923, to be sure, the Permanent Court of International Justice held that nationality questions were reserved for domestic jurisdiction,<sup>189</sup> but the Universal Declaration of Human Rights,<sup>190</sup> the International Covenant on Civil and Political Rights,<sup>191</sup> the International Court's decision in the *Nottebohm* case<sup>192</sup> and the *Flegenheimer* case<sup>193</sup> indicate that questions of nationality have been internationalized. Because much of the Taiwanese question turns on nationality assertions, the case must be considered one of international concern.

There are, to be sure, domestic issues involved in the Taiwan question. Chiang Kai-shek identifies himself as Chinese and is so perceived by his enemies on the mainland. Certain agreements between Mao and Chiang might thus be considered domestic matters. While there are doubtless many issues which Mao and Chiang could settle in private, the disposition of Taiwan itself could not be one of them. This, as we have seen, is a matter of international concern.

### B. *Claims of Racial Suzerainty*

Another argument made by and on behalf of China asserts that the thirteen million Taiwanese are really Chinese and hence are subject to Chinese sovereignty. In 1971, for example, Chou En-lai stated:

We are resolutely opposed to the so-called "Taiwan Independence movement." Because the people in Taiwan are Chinese. Taiwan was originally a province of China. And a thousand years ago it had already become a part of China. The dialect spoken in Taiwan is the same dialect spoken in the area around Amoy in Fukien province.<sup>194</sup>

187. [1971] I.C.J. 16, especially at 32-34.

188. See notes 209-14 *infra*.

189. [1923] P.C.I.J., ser. B, No. 4, at 24.

190. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

191. G.A. Res. 2200, 21 U.N. GAOR Supp. 16, U.N. Doc. A/6316 (1966).

192. [1953] I.C.J. 111; [1955] I.C.J. 4.

193. *United States ex rel. Flegenheimer v. Italy*, Italian-United States Conciliation Comm'n, 14 U.N.R.I.A.A. 327 (1958).

194. *Interview with Chou En-lai*, *supra* note 3, at 44. The facts are somewhat different from that represented in this statement. The Nationality Act of 1929 of the Republic of China (ROC) which is still in force in Taiwan extends citizenship *jure sanguinis* and makes it extremely difficult for a Chinese to divest himself of his nationality. UNITED NATIONS LEGISLATIVE SERIES, LAWS CONCERNING NATIONALITY 94 (1954). See also CONSTITUTION OF THE REPUBLIC OF CHINA, in 1 A COMPILATION OF THE LAWS OF THE REPUBLIC

## Who Owns Taiwan: A Search for International Title

A comparable position was adopted in the United States-Chinese communique of February 27, 1972. The United States there "acknowledged" that "all Chinese on either side of the Taiwan Straits maintain there is but one China and that Taiwan is a part of China."<sup>195</sup> This formulation can readily be seen as nothing more than an artful variant of the domestic jurisdiction argument, invoking a racial instead of a territorial community.

In the mid-nineteenth century, a doctrine of racial nationality surfaced in international law as a complement to the jurisprudence of historicism.<sup>196</sup> It seems obvious that where oppressive conditions force the contraction of identifications to racial and linguistic groups, racial claims for political status can be expected<sup>197</sup> and positive international responses to them may be the only fair solution. Attributions of nationality and hence political subjection by others, however, conflict sharply with the increasingly vigorous democratic trend in international law.<sup>198</sup> For this reason, there is no contemporary doctrine of racial suzerainty, no theory which allows self-selected leaders

OF CHINA 3 (1967). The 1954 Constitution of the People's Republic of China (PRC) follows the same pattern, referring in Article 98 to "Chinese residents abroad" who would, under Article 23, elect deputies to the National People's Congress. V. PURCELL, *supra* note 94, at xiii-xiv. We have not been able to determine the extent to and manner in which Article 98 has been implemented. According to a statement made by Chou En-lai on September 23, 1954, the PRC seemed to continue to view overseas Chinese as PRC nationals until bilateral treaties with each host country had been made. The Nationalist Chinese countered this move a month later by announcing that overseas Chinese were not considered Chinese nationals if they acquired the citizenship of another country. *Id.* at 482-83. In fact, both the PRC and the ROC have been quite erratic in protesting and acting on behalf of oppressed Chinese in Southeast Asia. See generally V. PURCELL, *supra*; CHENG-MING HUANG, *THE LEGAL STATUS OF THE CHINESE ABROAD (1954)*; SHIH-JU CH'IU, HUA-CHIAO KUO-CHIH WEN-TI (*The Question of Nationality of the Overseas Chinese*) (1966); L. WILLIAMS, *THE FUTURE OF THE OVERSEAS CHINESE IN SOUTHEAST ASIA* (1966); and D. WILLMOTT, *THE NATIONAL STATUS OF THE CHINESE IN INDONESIA, 1900-1958* (rev. ed. 1961).

195. See note 180 *supra*.

196. For a survey and critique, see McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 227 (1968). The leading international work was P. MANCINI, *DELLA NAZIONALITA COME FONDAMENTO DEL DIRITTO DELLE GENTI* (1851); a vast literature grew up around Mancini's theoretical formulation.

197. For some hypotheses, see M. REISMAN, *supra* note 13, at 81-82.

198. From the standpoint of international law, however, the racial claim is clearly no longer accepted. See, e.g., G. SCELLE, *supra* note 125, at 152-54. For a precise discussion of the abuses to which this doctrine has lent itself and pertinent commentary, see Harvard Research in International Law, *Draft Convention on Nationality*, 23 AM. J. INT'L L. 1, 26 (Supp. 1929); Mallison, *The Zionist-Israel Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership in it; Appraisal in Public International Law*, 32 GEO. WASH. L. REV. 983, 1050-60 (1964). See also Y. ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 21 (1961).

There is some irony in the fact that the claim most comparable to the Chinese ethnicity argument is South Africa's. On November 4, 1946, General Smuts argued that in light of the physical contiguity and ethnological kinship of South West Africa with South Africa, South Africa might legitimately annex the territory. U.N. Doc. A/C.4/41 (1946). The claim has, of course, been rejected by the international community.

of a "race" to claim and enforce the allegiance of their overseas ethnics and to claim the territory on which their kinsmen happen to live. In addition to its incompatibility with democracy, racial suzerainty would be quite pernicious in a world in which all races are widely dispersed. Claims to irridenta in the past have often brought grief to all concerned.<sup>199</sup>

The critical factual question is whether the people of Taiwan view themselves as Chinese and choose to associate themselves with the People's Republic of China. This is obviously a question which only the Taiwanese can answer.<sup>200</sup> Until they have been consulted, the international lawyer cannot accept the *ipse dixit* of Premier Chou En-lai on the matter, even with the concurrence of President Nixon.

### C. *Claims of Third World Imperialism*

From time to time claims for the restitution of third world empires in a selectively mystical type of self-determination have been put forward. Sukarno's *Mahapajit* Empire, for example, was to include Malaya and the Philippines, regardless of what Malays and Filipinos might have thought about it. Comparable sentiments have of late

199. The limitation of nationality claims based on purported racial or ethnic grounds must not be confused with the customary international legal right of quasi-diplomatic protection on behalf of ethnic, kin, speech and dialect and skill groups, for this is a phenomenon which is a necessary corollary of the very notion of the international protection of human rights. Thus, the People's Republic of China might lawfully protest and even intervene in situations in which overseas Chinese were subjected to gross deprivations of human rights, in much the same manner that Western Christendom intervened into the dar-al-Islam when Christians were allegedly being persecuted. See generally M. GANJI, *supra* note 7. For discussion of the impact of the United Nations Charter on the customary institution of humanitarian intervention, see M. REISMAN, MEMORANDUM UPON HUMANITARIAN INTERVENTION TO SAVE THE IBOS (1968).

200. The racial suzerainty claim is ultimately posited on a mystical *volksgeist* which dismisses both law and social fact if they interfere. Yet Chou's published remarks were sufficiently ambiguous to create the impression that the Taiwanese were also citizens or nationals of China. This is far from clear. From the time of the Treaty of Shimonoseki until the Peace Treaty of 1951, the Taiwanese were not Chinese nationals, but were Japanese. See Tameike, *Nationality of Formosans and Koreans*, 1958 JAPANESE ANNUAL OF INTERNATIONAL LAW 55 *et seq.* (1958) and citations therein. Article 5 of the Treaty of Shimonoseki provided for a two year period after exchange of ratifications during which inhabitants of Taiwan could sell their property and leave the ceded districts. "At the expiration of that period those of the inhabitants who shall not have left said territories shall, at the option of Japan, be deemed Japanese subjects." Note 37 *supra*. When the deadline expired, only 0.16 per cent opted for Chinese nationality. Note 38 *supra*. From the standpoint of Japanese courts, the Peace Treaty sundered Japanese contacts with both Taiwan and the Taiwanese. Even assuming, contrary to fact, that Chiang secured lawful title to Taiwan, he could not impose a nationality on the Taiwanese against their will, which would be recognized in international law. *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943). Hence Nationalist China's Law Concerning the Nationality of Overseas Formosans of Chinese Origin of 1946 is not internationally valid, as Professor Tameike correctly observes. Tameike, *supra* at 56. The better construction would seem to be that the Peace Treaty's reference to Taiwan includes the Taiwanese, whose nationality status will be determined in accord with international law.

## Who Owns Taiwan: A Search for International Title

been attributed to Premier Chou En-lai.<sup>201</sup> Colonialism, however, is not restricted to the domination of non-whites by whites. It is a pervasive evil in which any heterarchical group uses official power to subjugate and impose its will on another identity group. The international principles and resolutions condemning colonialism are unequivocal. No Third World exceptions can be written in.

### D. *Claims of Self-Defense*

Can China argue for title over Taiwan *jure gentium* as an essential condition for its territorial defense? Sections in Grotius would seem to support such a claim and there is certainly no dearth of examples in diplomatic history for arguments of defensive territorial acquisition.<sup>202</sup> Furthermore, there is a current doctrine allowing for a pre-emptive self-defense which might, under certain circumstances, have territorial implications.<sup>203</sup> The claim is relevant to China, for the Nationalist regime continues to threaten to recapture the mainland, sizable Nationalist forces are kept on Quemoy and Matsu and, in certain projected contexts, *e.g.*, war between Peking and Moscow, the Nationalist threat could grow in menacing credibility.<sup>204</sup>

Although unequivocal cases are few, authoritative expectations seem to be as follows: China may agitate to secure a change in the policies of Chiang, but may not annex Taiwan by force. A precedent can be drawn from United States-Cuban relations, where there seems to have been a general acceptance of the use of United States force to secure removal of the Soviet missiles but total condemnation of efforts to do more than this.<sup>205</sup> Hence China's claim vis-à-vis Formosa can be restricted to a demand for change in policy, but not for title.

201. See note 176 *supra*.

202. H. GROTIUS, *DE JURE BELLI AC PACIS* bk. II, ch. 3, § 16 (1655). See also *The Anna*, 5 C. Rob. 373, 165 Eng. Rep. 809 (1805). But cf. *Island of Palmas Case* (Netherlands v. United States) 2 U.N.R.I.A.A. 829, 854 (1928). As regards application of this doctrine to maritime areas, see the dissent of Judge Drago in *North Atlantic Coast Fisheries*, 11 U.N.R.I.A.A. 167, 206 (1910); *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116; *Gulf of Fonseca Case*, 11 AM. J. INT'L L. 700 (1917) (Central Amer. Ct. of Justice). For a general survey of doctrinal views, see Y. BLUM, *SECURE BOUNDARIES AND MIDDLE EAST PEACE IN THE LIGHT OF INTERNATIONAL LAW AND PRACTICE* 177-88 (1971).

203. Editorial Comments, *What Weight to Conquest*, 64 AM. J. INT'L L. 344 (1970); Y. BLUM, *supra* note 202. See also 2 OPPENHEIM (7th ed. 1952), *supra* note 76, at 432.

204. For a current comparison, see H. BALDWIN, *STRATEGY FOR TOMORROW* 254-55 (1970).

205. See McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963); Meeker, *Defensive Quarantine and the Law*, *id.* at 515; Christol & Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962*, *id.* at 525; Wright, *The Cuban Quarantine*, *id.* at 546; Fenwick, *The Quarantine Against Cuba: Legal or Illegal?*, *id.* at 588; MacChesney, *Some Comments on the 'Quarantine' of Cuba*, *id.* at 592. For a survey of earlier practice, see Wright, *Territorial Propinquity*, 12 AM. J. INT'L L. 519, 532-34 (1918).

To summarize the recent developments, it would seem that the international legal title over Taiwan is currently suspended; a perfected title vests in no state of the world. The suspension is a product of formal agreement by a significant number of states, deriving from the Peace Treaty with Japan and references, of varying degrees of clarity, to the norms of the United Nations Charter. For the Communist states, a suspensive effect is brought about by operation of law. These states insist that title belongs to the People's Republic of China. But since Taiwan is unlawfully held by Chiang, post-1945 principles of international law, operating intertemporally in this conflict, suspend this claim of title. The third position, advanced here, is that sovereignty over Taiwan was suspended as of 1951 and will not vest *jure gentium* until there is substantial conformity to contemporary norms of territorial sovereignty.

#### IX. Contemporary International Norms

The establishment of the United Nations and the United Nations Charter have precipitated major changes in the international law of territorial acquisition. In addition to the normative framework of the Charter, the organs of the United Nations charged with the implementation thereof have also played a signal role in the prescriptive process of international law. We are not concerned here with the often logomachous question of whether organs such as the Security Council, the General Assembly and the International Court of Justice "make" international law or merely "declare" law which has already been customarily made. The frequency and intensity of the reiteration of the principles which we will discuss indicate, without regard to their origin, that they constitute basic authoritative expectations of the international legal order. In a number of instances, principles which we have abstracted from practice represent specific responses to the problem of territorial acquisition and sovereignty. We submit that the specifications are innovative in formulation but not in content. Virtually all of these prescriptive principles can be traced to the fundamental changes in international society which have been adverted to earlier.

We note six normative changes:

a. *The Principle of Non-Acquisition of Territory by Force.* The more traditional doctrine of the acquisition of territory by conquest has been completely terminated by a prohibition of the use of force

## Who Owns Taiwan: A Search for International Title

to change territorial allocations.<sup>206</sup> This prohibition is one of the founding principles of the United Nations and a working principle of the organization. Further, the prohibition antedates the Charter and was a critical policy for the League of Nations.<sup>207</sup>

b. *The Principle of Self-Determination.* This is a basic principle of international law, given prominence in the United Nations Charter and in a flow of resolutions by the General Assembly,<sup>208</sup> whose extended authority for matters concerning self-determination is now authoritatively recognized.<sup>209</sup> The Charter proclaims self-determination in Article 1 (2) to be a major purpose of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."<sup>210</sup> Though the Universal Declaration of Human Rights is silent on the subject, the International Covenant on Economic, Social and Cultural

206. Article 2(4) of the U.N. Charter reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." See generally M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961); I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* (1968); D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* (1958); CHEN & LASSWELL, *supra* note 2, at 104-06; L. Chen, *The Legal Regulation of Minor International Coercion*, May, 1964 (unpublished J.S.D. dissertation in Yale Law School Library); L. BLOOMFIELD, *EVOLUTION OR REVOLUTION? THE UNITED NATIONS AND THE PROBLEM OF PEACEFUL TERRITORIAL CHANGE* (1957); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *HAGUE ACADEMY RECUEIL DES COURS* 455 (1952); J. STONE, *AGGRESSION AND WORLD ORDER* (1958); M. REISMAN, *supra* note 6, at 836-59.

207. THE COVENANT OF THE LEAGUE OF NATIONS art. 10.

208. This Resolution has been reaffirmed annually by the General Assembly. See, e.g., G.A. Res. 1654, 16 U.N. GAOR Supp. 17, at 65, U.N. Doc. A/5100 (1961); G.A. Res. 1810, 17 U.N. GAOR Supp. 17, at 72, U.N. Doc. A/5217 (1962); G.A. Res. 1936, 18 U.N. GAOR Supp. 15, at 8, U.N. Doc. A/5515 (1963); G.A. Res. 1970, 18 U.N. GAOR Supp. 15, at 49, U.N. Doc. A/5515 (1963); G.A. Res. 2105, 20 U.N. GAOR Supp. 14, at 3, U.N. Doc. A/6014 (1965); G.A. Res. 2189, 21 U.N. GAOR Supp. 16, at 5, U.N. Doc. A/6316 (1966); G.A. Res. 2326, 22 U.N. GAOR Supp. 16, at 4, U.N. Doc. A/6716 (1967); G.A. Res. 2465, 23 U.N. GAOR Supp. 18, at 4, U.N. Doc. A/7218 (1968); G.A. Res. 2548, 24 U.N. GAOR Supp. 30, at 5, U.N. Doc. A/7630 (1969); G.A. Res. 2621, 25 U.N. GAOR Supp. 28, at 1, U.N. Doc. A/8028 (1970); G.A. Res. 2878 (Jan. 17, 1972).

209. Advisory opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

210. Article 55 of the U.N. Charter provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development.

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Rights and the International Covenant on Civil and Political Rights, both adopted by the General Assembly in 1966, embody the principle of self-determination in identical language: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>211</sup> The right of all peoples to self-determination was upheld by unanimous vote in 1960 in the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>212</sup> and reaffirmed in numerous subsequent resolutions of the General Assembly.<sup>213</sup>

It is no secret, of course, that the normative content of the principle of self-determination is controversial.<sup>214</sup> Without entering the lists of the controversy here, suffice it to recall that the search of Taiwanese title has revealed that Taiwan was not historically a part of China. At best, China probably exercised a type of colonial protectorate over Taiwan and its eight-year annexation was terminated by a then valid treaty in favor of another Asian state with its own historical and geopolitical claims to Taiwan. Hence, however construed, the principle of self-determination will apply to Taiwan.

c. *The Principle of Decolonization.* Decolonization is now recognized as an emergent peremptory norm, with very obvious application to the case of Taiwan.<sup>215</sup> In its landmark 1960 proclamation on decolonization, the Declaration on the Granting of Independence to

211. This is paragraph 1 of Article 1 of both the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS and the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. The other two paragraphs of the same article read as follows:

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

212. G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

213. See note 208 *supra*. Most recently, the principle of self-determination was given prominence in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 123-24, U.N. Doc. A/8028 (1970).

214. For a large number of states in the Third World, the principle of self-determination is assimilated to the emergent peremptory norm of decolonization but claimed to be inapplicable to the aspirations of newer groups in the Third World who may seek some form of group protection from international law. See Emerson, *The New Higher Law of Anti-Colonialism*, in *THE RELEVANCE OF INTERNATIONAL LAW* 153 (Deutsch & Hoffman eds. 1968) [hereinafter cited as Emerson, *Anti-Colonialism*]; but cf. Emerson, *Self-Determination*, *supra* note 137 and references therein. For further references, see note 137 *supra*.

215. For a detailed discussion of the peremptory character of this norm, see Emerson, *Anti-Colonialism*, *supra* note 214, at 153.

## Who Owns Taiwan: A Search for International Title

Colonial Countries and Peoples,<sup>216</sup> the General Assembly declared, *inter alia*, that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

The Declaration has been reaffirmed annually by the General Assembly.<sup>217</sup> Indeed, the doctrine of anti-colonialism has become such a crucial ideology in international relations as to be likened by Professor Emerson to a "higher law" in international law.<sup>218</sup>

d. *The Principle of the Rights of Non-Self-Governing Peoples.* Charter Article 73 imposes upon U.N. members who "have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" obligations, including progress toward self-determination and the assurance of respect for fundamental human rights within those territories.<sup>219</sup> Ar-

216. See note 212 *supra*.

217. See note 214 *supra*.

218. Emerson, *Anti-Colonialism*, *supra* note 214, at 153.

219. The full text of Article 73 is as follows:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:

(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and

article 73 was originally aimed at Trust Territories as well as transitional arrangements for territories which had been under Mandates of the League of Nations, but the express language of the provision seems to have been clearly designed to impose international obligations on any elite which might subsequently "assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government." This is the most reasonable construction of the provision in light of the Charter as a whole, for it is obvious that the world power process is a constantly shifting one. Even if the clear language of Article 73 had not been included in the Charter, the obligation it expresses would nonetheless have been necessarily implied in the major principles and purposes of the United Nations. A flow of resolutions by the General Assembly indicates that this has become a general expectation with regard to peoples who are *de facto* non-self-governing.<sup>220</sup>

In a factual sense, Taiwan is obviously a non-self-governing territory in that it is ruled by a political group which is distinct from the rank and file, is alien to the island-state and has done no more than assume responsibility for the administration of the island under international arrangements. In the strict legal sense, Taiwan's juridical status is analogous to Namibia's. Both are former colonial territories, severed by world authoritative decision from their metropolitans after a war, and both were subjected to forms of international supervision delegated to foreign elites. In each case, the alien elites acted unlawfully against the interest of the inhabitants and in contravention of international responsibilities. In the case of Namibia, the United Nations has already acted to terminate the unlawful occupation.<sup>221</sup> In the case of Taiwan, this has yet to be done.

their protection against abuses;

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

(c) to further international peace and security;

(d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

(e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature, relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

220. See notes 212 & 214 and pp. 656-57 *supra*.

221. G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966). For judicial confirmation of the termination, see [1971] I.C.J. 3.

e. *The Principle of Assembly Jurisdiction Over Non-Self-Governing Territories.* Non-self-governing territories remain subject to a contingent General Assembly jurisdiction, derivable from the Charter,<sup>222</sup> the general principle *ut res magis valeat quam pereat*<sup>223</sup> and the recent authoritative interpretation of the International Court of Justice in the *Namibia* case.<sup>224</sup> Hence the General Assembly retains a jurisdiction over Taiwan. The jurisdiction is supervisory, but includes in its sanction potential the competence to terminate all rights of the foreign elite to remain within the non-self-governing territory.<sup>225</sup>

f. *The Principle of the Assessment of the Intentions of the Peoples of Non-Self-Governing Territories as a Peremptory Component of Perfecting Title.* The language of the Charter as well as General Assembly practice clearly confirm that the ultimate sovereignty over territory resides with the indigenous people, and that a genuine assessment of their consent is a peremptory component of title. Thus, plebiscites, to cite one mode, have been authorized and supervised in circumstances in which they would constitute a reliable indicator of popular demands. In contrast, in circumstances in which the level of political consciousness of the local population was not deemed sufficiently refined to render the plebiscite an instrument for meaningful group choice, it has been rejected, and international supervision or even temporary dominium imposed.<sup>226</sup>

These six major normative changes in the international regime of territorial sovereignty significantly affect the question of title to Taiwan. From them, several distinct and significant conclusions emerge:

(1) Taiwan may not be disposed of bilaterally, trilaterally, or whatever. Rather, as a Non-Self-Governing Territory, any disposition of the island-state must be undertaken under the supervision of the United Nations. Furthermore, that body is obliged to act in accord with Charter and customary international legal principles which relate to territorial acquisition.

(2) Even if Taiwan were not a Non-Self-Governing Territory, and even if its status in international law were not undetermined, no decision regarding change in the status of the island and its people may

222. See U.N. CHARTER, preamble and arts. 11-14, 73.

223. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174; Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151.

224. *Namibia Case*, [1971] I.C.J. 16.

225. G.A. Res. 2145, 21 GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966).

226. See G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966); S.C. Res. 245, 246 (1968); S.C. Res. 264, 269 (1969); S.C. Res. 276, 283, 284 (1970).

be taken without full consultation of the desires of the people. The very purpose for which the peoples of the world have in recent years affirmed and reaffirmed the right of self-determination is to accord oppressed peoples the opportunity to break established political bonds. In applying the right to give peoples in Africa and Asia their freedom, it has not been suggested that prior establishment could not be abrogated in the cause of freedom. Under intertemporal principles of international law, the peremptory norm of self-determination militates against a disposition of the Taiwanese people which fails to consult their own wishes.

(3) Taiwan may not be disposed of without a meaningful consultation of the actual desires of the indigenous population. The plebiscite is only one modality for this purpose, but since Taiwan's literacy rate is one of the highest in the world and its political organization at diverse levels is quite sophisticated, it can be argued that a plebiscite there would be a particularly appropriate instrument for assessing the actual desires of the people. Given the nature of Chiang's political control, however, such a plebiscite would have to be supervised from without to insure a real opportunity for free choice.<sup>227</sup> Given its unique relevance to the Taiwanese case, let us consider briefly some of the possibilities and problems of plebiscites in international law.

## X. Plebiscites in International Law

In international law and practice, the plebiscite has come to denote a referendum of a significant number of the local population concerning proposed changes in the status of their territory.<sup>228</sup> While its basic postulate of the consent of the indigenous population as the component of sovereignty can be traced back to ancient natural law roots, plebiscites came to be increasingly favored only after the emer-

227. The absence of such a possibility in Namibia has been a major reason for rejection of the plebiscite modality there by the world community.

228. The classic and most comprehensive study on plebiscites is S. WAMBAUGH, *A MONOGRAPH ON PLEBISCITES* (1920) [hereinafter cited as WAMBAUGH, *MONOGRAPH*], which covers the period from 1789 to World War I. See S. WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR* (1933) (two vols.); S. WAMBAUGH, *THE SAAR PLEBISCITE* (1940). Though an American national, Dr. Wambaugh served in the League of Nations permanent secretariat and was appointed as one of the three experts who drew up regulations for the Saar plebiscite in 1935. See Hinton, *She Specializes in Plebiscites: Dr. Sarah Wambaugh*, *N.Y. Times*, Feb. 17, 1946, § 6 (magazine), at 24. See also H. JOHNSON, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS* (1967); J. MATTERN, *THE EMPLOYMENT OF THE PLEBISCITE IN THE DETERMINATION OF SOVEREIGNTY* (1920); THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, *THE SAAR PLEBISCITE* (1934); Note, *Causes and Consequences of the Plebiscite in the Saar*, 11 *WORLD TODAY* 530 (1955); DeAuer, *Plebiscites and the League of Nations Covenant*, 6 *TRANSACTIONS OF THE GROTIUS SOCIETY* 45 (1921); Jones, *Plebiscites*, in 13 *id.* 165 (1928).

gence of full-fledged political doctrines of popular sovereignty coupled with the renunciation of wars of conquest after the French Revolution.<sup>229</sup> The use of plebiscites has marked the curve of general demands for democracy in recent history, waxing after the French Revolution, but waning in the reaction during the era of Napoleon and the Congress of Vienna.<sup>230</sup> Plebiscites returned with the resurgence of nationalism and democracy after 1848, and "by 1866 the method of appeal to a vote of the inhabitants, either by plebiscite or by representative assemblies, especially elected, bade fair to establish itself as a custom amounting to law."<sup>231</sup>

Plebiscites before World War I manifested varying structural and procedural features. Those of the French Revolution and the Italian Unification of 1848-70 were informal and unilateral, formulated and implemented by an indigenous elite with effective control, and often involving no more than a general assessment of the popular mood. Other plebiscites were based on formal agreements to which both parties, or states representing their interests, were signatory.<sup>232</sup> With or without formal agreement, all these plebiscites were executed by only one party, which, in most instances, had established military occupation in the area.<sup>233</sup> In the informal and unilateral plebiscites, of course, the state which stood to benefit by the cession possessed the

229. Invoking the principle that no change of sovereignty should be made without the consent of the people concerned and renouncing wars of conquest, the French Constituent Assembly in 1790-91 first insisted on a plebiscite in the ninety-eight communes of the papal territory of Avignon and the Comtat-Venaissin before annexation. Subsequently plebiscites were held in the annexations of Savoy (1792) and Nice (1793), and also in the annexation of the Belgium Communes (1793) and the Rhine Valley (1793). See WAMBAUGH, MONOGRAPH, *supra* note 228, at 33-55, 173-358.

230. The plebiscite was employed by the Italian patriots to further unification; it was adopted by Prussia and the Germanic Confederation to solve the Schleswig question; and it was reaffirmed at the Conference of Paris in 1856 in regard to Moldavia and Wallachia. Later it was adopted by Great Britain in ceding the Ionian Islands to Greece and was incorporated in the Treaty of Prague of 1866 between Austria and Prussia. See WAMBAUGH, MONOGRAPH, *supra* note 228, at 58-147, 370-937; J. MATTERN, *supra* note 228, at 80-96.

231. WAMBAUGH, MONOGRAPH, *supra* note 228, at 1. The annexation by Prussia of Schleswig in 1867 in defiance of the provisions of the Treaty of Prague and of Alsace-Lorraine in 1871 dealt a severe blow to the practice of the plebiscite. The plebiscite was completely ignored by the Congress of Berlin, probably because of the general attitude of deprecation toward the political views of non-European "native populations." This nadir persisted until World War I.

232. Plebiscites in Savoy and Nice, Moldavia and Wallachia and in the Ionian Islands, St. Bartholomew, the Danish West Indies, and Norway were all based on formal agreements to which both parties, or states representing their interests, were signatory. See WAMBAUGH, MONOGRAPH, *supra* note 228, at 75-89, 101-22, 155-56, 165-69, 977-84, 1051-72.

233. The plebiscite for Moldavia and Wallachia was significant in that it was the first instance in which any degree of international supervision was exercised. Although administered by Turkish officials, the regulations governing the implementation of the plebiscite were drafted in concert with the ambassadors of Austria, France, Great Britain, Prussia, Russia and Sardinia. The consultative European Commission was also involved. See WAMBAUGH, MONOGRAPH, *supra* note 228, at 101-22, 726-837.

control. Where there was a formal agreement, the participant ceding the area controlled the plebiscite process. These plebiscites did reinforce the principle of self-determination but, unfortunately, failed to develop adequate procedures.

After World War I, important procedural developments refined the conduct and the effectiveness of plebiscites. They were, with one exception, prescribed in the Peace Treaties as integral parts of the peace settlement, for renunciations of sovereignty over territories by the defeated powers had been made contingent on the outcome of these consultations.<sup>234</sup> In significant contrast to the pre-World War I practice, the formal post-war plebiscites were all conducted under international administration and by secret ballot.<sup>235</sup>

In United Nations practice, the plebiscite has become a preferred device for determining the future status of trust territories. Article 76 (b) of the Charter states that the progressive development of the inhabitants of the trust territories shall be guided by "the freely expressed wishes of the peoples concerned." Though the provision is not specific on how these wishes are to be ascertained, the plebiscite has proved to be a particularly useful modality in the disposition of international trusteeships.<sup>236</sup>

Since almost all the original trust territories have now been transformed, the United Nations no longer distinguishes the status of trust from other colonial territories for purposes of self-determination. In consequence, the plebiscite in contemporary international law has been adapted to Non-Self-Governing Territories as one means of implementing self-determination.<sup>237</sup> The United Nations has also lent in-

234. See J. MATTERN, *supra* note 228, at 128-50; S. WAMBAUGH, PLEBISCITES, *supra* note 228.

235. Plebiscites were held in Schleswig (1920), Allenstein and Marienwerder (1920), the Klagenfurt Basin (1920), Upper Silesia (1921), Sopron (1921), the Saar (1935). See S. WAMBAUGH, PLEBISCITES, *supra* note 228, vol. 1, at 46-141, 163-297, 411-84; vol. 2, at 3-107, 124-269, 491-539.

236. Under the auspices of the United Nations, plebiscites were held in British Togoland (1956), French Togoland (1958), British Cameroons (1959 and 1961), Western Samoa (1961), and Ruanda Urundi (1961). All of these trust territory plebiscites were conducted by the administering authority, but under United Nations supervision. In the British Togoland plebiscite, a vote of 93,365 favored union with an independent Gold Coast, and 67,422 favored temporary continuation of the U.N. trusteeship pending an ultimate settlement. After the formal termination of the trusteeship agreement by the General Assembly, British Togoland was united with the Gold Coast to form the new independent state of Ghana on March 6, 1957. See YEARBOOK OF THE UNITED NATIONS, 1956, at 354-56, 368-71 (1957) [hereinafter cited as Y.B. U.N.]; *id.* at 372-76; Y.B. U.N., 1958, at 355-60 (1959); Y.B. U.N., 1959, at 361-71 (1960); Y.B. U.N., 1960, at 476-77 (1961); Y.B. U.N., 1961, at 469, 475 (1962); *id.* at 475, 495-98; *id.* at 475, 484-94; Y.B. U.N., 1960, at 455-63 (1961).

237. See UNITED NATIONS, FROM DEPENDENCE TO FREEDOM (1963); UNITED NATIONS, THE UNITED NATIONS AND DECOLONIZATION (1965); *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Docs. A/7623 and addenda (1969);

direct assistance in ascertaining popular wishes in other political situations. Elections held in South Korea were observed and reported by United Nations commissions.<sup>238</sup> The Secretary-General's representatives were able to assess the wishes of the people in Malaysia (1963)<sup>239</sup> and in Bahrain (1970)<sup>240</sup> by consulting representative leaders of the community and organized political groups. The United Nations supervised the elections held in the Cook Islands in 1965,<sup>241</sup> and, in a more restrictive way, in Equatorial Guinea in 1968.<sup>242</sup> The question of Algeria was annually brought before the United Nations, during its war for independence, and a plebiscite leading to independence was, at long last, held in Algeria in July 1962, based on the bilateral agreement between the French government and Algerian leaders.<sup>243</sup> The United Nations also conducted a plebiscite of sorts in West Irian though its unfortunate procedural pathologies were condemned in the General Assembly.<sup>244</sup>

*Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the Specialized Agencies and the International Institutions Associated with the United Nations* (Report of the Secretary-General), U.N. Doc. A/8314 (1971).

238. UNITED NATIONS, *EVERYMAN'S UNITED NATIONS* 126 (8th ed. 1968).

239. 20 U.N. GAOR, Annexes, Agenda Items Nos. 90 & 94, U.N. Doc. A/5694, at 44, ¶¶ 320-21 (1965).

240. U.N. Doc. S/9772 (30 Ap. 1970).

241. G.A. Res. 2005, 19 U.N. GAOR Supp. 15, U.N. Doc. A/5815 (1965); 20 U.N. GAOR, Annexes, Agenda Items Nos. 23 & 24, U.N. Doc. A/5962, at 2-56 (1965); G.A. Res. 2064, 20 U.N. GAOR Supp. 14, U.N. Doc. A/6014 (1965).

242. Spec. Comm. on Colonialism, Report, ch. IX: Equatorial Guinea, U.N. Doc. A/7200/Add. 4 (pt. 1), at 57 (9 Oct. 1968).

243. The question of Algeria was annually brought before the United Nations during its war for independence. In 1960, the First Committee urged the General Assembly to recommend that a plebiscite be organized and conducted by the United Nations as a means for carrying out the right of self-determination of the Algerian people. The proposal fell short of the necessary two-thirds majority vote. A plebiscite was, at long last, held in Algeria in July 1962, administered by France, based on the bilateral agreement between the French government and Algerian leaders. The result led to Algeria's independence. See generally M. ALWAN, *ALGERIA BEFORE THE UNITED NATIONS* (1959); Y.B. U.N., 1960, at 132-36 (1961); Y.B. U.N., 1961, at 97-101 (1962); E. BEIR, *THE ALGERIAN PROBLEM* (1962); J. KRAFT, *THE STRUGGLE FOR ALGERIA* (1961); G. TILLION, *ALGERIA: THE REALITIES* (1958); CENTRE D'ETUDES NORD-AFRICAINES, *ANNUAIRE DE L'AFRIQUE DU NORD*, 1962 (1963); C. FAVROD, *LE FLN ET L'ALGERIE* (1962); M. LAUNAY, *PAYSANS ALGERIENS: LA TERRE, LA VIGNE ET LES HOMMES* (1963).

244. The complex precedent of West Irian is extremely important in the plebiscite context and merits detailed treatment. The question of the future of West Irian (West New Guinea), a territory administered by the Netherlands and claimed by Indonesia, was considered by the General Assembly from 1954 to 1957, and again in 1961. The Netherlands proposed a U.N. supervised plebiscite to ascertain the wishes of the people in West Irian, but Indonesia insisted that the territory was an integral part of Indonesia. When fighting erupted between Dutch and Indonesian forces in the West Irian area, the then Acting Secretary-General of the United Nations, U Thant, urged both governments to seek a peaceful solution to the problem and offered his good offices. A preliminary accord was reached and on August 15, 1962, an agreement providing for the transfer of the administration of West Irian and for the ultimate self-determination of its people was signed by representatives of Indonesia and the Netherlands. The agreement was quickly ratified by both parties on September 20, 1962, and approved by the General Assembly the next day. According to the agreement, a United Nations Temporary Executive Authority (UNTEA) was to take over administration of the former Netherlands dependency on October 1, 1962, for an interim period ending on May 1,

International plebiscites have also been conducted without United Nations supervision. A case of particular interest in the present connection is the plebiscite held in Outer Mongolia shortly after World

1963, after which the territory would be placed under the administration of Indonesia. Meanwhile, Indonesia would make arrangements for the self-determination of the 700,000 Papuans of the territory by the end of 1969, permitting them to decide whether or not they wished to remain with Indonesia. At the invitation of Indonesia, the Secretary-General was to appoint at the proper time a representative to carry out his responsibilities to "advise, assist and participate" in arrangements for the "act of free choice." A number of United Nations experts were to be designated to remain in the territory at the time of the transfer of full administrative authority to Indonesia.

After UNTEA transferred full administrative control of the territory to Indonesia on May 1, 1963, the United Nations performed no supervisory, political or administrative function. Though the United Nations experts had been designated, President Sukarno barred their entry to West Irian. Furthermore, Indonesia withdrew from the United Nations. Thus from May 1, 1963, to August 23, 1968, no U.N. personnel were present in the territory and the implementation of the second phase of the agreement was thus frustrated.

Only on August 23, 1968, after Sukarno had been deposed, did the Secretary-General's Representative, Ambassador Fernando Ortiz-Sanz, and his mission finally arrive in West Irian. He discovered that the people there had not been given adequate information regarding the forthcoming act of free choice, and that the rights of free speech, freedom of movement and of assembly, of the inhabitants of the territory, as guaranteed by the Agreement, had been and continued to be violated. At all times the population of the territory was under the tight political control of the Indonesian Administration. Rejecting Mr. Ortiz-Sanz's proposal that the "one man, one vote" method be used in urban areas, the Indonesian government insisted on *musjawarah*.

The consultation involved eight consultative assemblies, with a total membership of 1,025. According to the practice of *musjawarah*, all the members of each of the eight assemblies were required to stand up to signify approval of the consensus reached—*i.e.*, to remain a part of Indonesia. Without individual secrecy, intimidation by surveillance could hardly fail to blunt freedom of choice. Not surprisingly, participants voted unanimously for retaining the ties with Indonesia. With some subtly phrased reservations, the Secretary-General's Representative concluded in his report that "with the limitations imposed by the geographical characteristics of the territory and the general political situation in the area, an act of free choice has taken place in West Irian in accordance with Indonesian practice, in which the representatives of the population have expressed their wish to remain with Indonesia."

When this Report came before the General Assembly in November 1969, it was bitterly challenged by many African states. In their view, the method and procedures used in the act of free choice were inadequate and the people of West Irian had not exercised their right to self-determination within the meaning of the 1962 Agreement. They rejected the argument that the people of West Irian were too primitive to have a general ballot, for the same so-called undeveloped people in Australian Papua (East New Guinea) had successfully utilized the practice of "one man, one vote." The representativeness of the consultative assemblies was open to serious doubt because they had been filled with either Indonesian government appointees or members elected, through *musjawarah*, for favoring the retention of ties with Indonesia. This gross departure from the prevailing "international standards of free elections," it was feared, could set a dangerous precedent, particularly for the regimes in Southern Africa.

The representative of Ghana formally proposed that the people of West Irian be given a further opportunity, by the end of 1975 to carry out the act of free choice as envisaged in the 1962 Agreement. Though this proposal failed passage, it did command considerable support. Even supporters of Indonesia took pains to emphasize that the method and procedure used in this instance could only be considered appropriate for the special circumstances of West Irian and could not be a precedent for the future. In general, the West Irian case seems to be viewed as an unwarranted departure from an important and intensely demanded international norm. See the Report submitted by the Representative of the Secretary-General, in Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian) (Report of the Secretary-General regarding the act of self-determination in West Irian), U.N. Doc. A/7723, Annex 1 (1969). For the Report of the Indonesian Government to the Secretary-General of the United Nations, see Annex II of the same document. See also Y.B. U.N., 1962, at 124-28 (1963); U.N. MONTHLY CHRONICLE, Dec. 1969, at 42-47.

War II. Both the Soviet Union and China were parties to this plebiscite and both acceded to the expressed wish of 100 per cent of the Mongolian population for independence from China.<sup>245</sup>

In sum, the plebiscite has been used repeatedly as a device for ascertaining the most fundamental political demands of the people of a territory. Occasional deviations or defects in plebiscite implementation are inevitable in any legal institution but do not seem to negate the usefulness of the plebiscite modality and its preeminent role in the establishment of title in contemporary international law. The essential challenge, as shown by the trend of past practice, is to refine the methods and techniques of the plebiscite in order to ensure that the

245. The Mongolian People's Republic, a landlocked area of 600,000 square miles, with a population of 1.3 million, is situated in the heart of central Asia. The Soviet Union lies to the north and the People's Republic of China to the south. The Mongolian People's Republic coincides roughly with "Outer Mongolia," as distinguished from "Inner Mongolia" as the terms were first used by the Manchus.

During the twelfth and thirteenth centuries, Genghis Khan and Kublai Khan brought parts of Russia and China under Mongol control. The Mongol Empire declined with the overthrow of their dynasty in China in 1368. Subsequently, the Manchus conquered China in 1644, and in 1691, Outer Mongolia was brought under Manchu suzerainty when the Khalkha Mongol nobles swore an oath of allegiance to the Manchu emperor. Under the regime, the Mongol rulers of Outer Mongolia enjoyed autonomy under Manchu formal sovereignty. This oath of allegiance has become the basis of all successive Chinese claims of title to Outer Mongolia, after the overthrow of the Ch'ing (Manchu) dynasty and the establishment of the Republic of China.

As Russia expanded eastward confronting Japan in the Far East, and as Manchu authority in China waned, Russia entered the picture, aiding and supporting the Mongol religious leaders and nobles. The Mongols declared their independence of Manchu rule in December 1911, shortly after a successful Chinese revolution in October had established the Republic. By the agreements signed in 1913 and 1915, the Russian government made China accept Mongolian autonomy under continued Chinese suzerainty. During the Russian Revolution, Chinese troops were dispatched to parts of Mongolia but were driven out in 1921.

On May 31, 1924, the U.S.S.R. signed an agreement with China in which Outer Mongolia was referred to as an "integral part of the Republic of China." In November 1924, the great People's Hural met and proclaimed the existence of the Mongolian People's Republic (M.P.R.), and adopted a constitution in which it called itself "independent." Shortly afterward, in March 1925, the Soviet Commissar for Foreign Affairs stated:

We recognize the M.P.R. as part of the Chinese Republic, but we recognize also its autonomy in so far-reaching a sense that we regard it as not only independent of China in its internal affairs, but also as capable of pursuing its foreign policy independently.

U.S. DEPARTMENT OF STATE FACT BOOK OF THE COUNTRIES OF THE WORLD 455 (1970).

In an exchange of notes signed on August 14, 1945 at the conclusion of the Sino-Soviet treaty of friendship and alliance, the Government of the Republic of China agreed to recognize the independence of Outer Mongolia within its "existing boundary," provided that the desire for independence often expressed by the Outer Mongolian people was confirmed by a plebiscite. When the plebiscite was held in Outer Mongolia on October 20, 1945, more than 283,000 Mongols voted 100 per cent in favor of independence from China. *Id.* Lei-fa Chang, Vice-Minister of the Interior of the Republic of China, was personally present in Ulan Bator as an observer at the plebiscite. The independence of the Mongolian People's Republic was thus recognized by the government of the Republic of China on January 5, 1946, and later by the People's Republic of China on October 6, 1949. About Mongolia, see generally C. BAWDEN, *THE MODERN HISTORY OF MONGOLIA* (1968); A. SANDERS, *THE PEOPLE'S REPUBLIC OF MONGOLIA* (1968); G. MURPHY, *SOVIET MONGOLIA* (1966); R. RUPEN, *MONGOLS OF THE TWENTIETH CENTURY* (1966); G. FRITERS, *OUTER MONGOLIA AND ITS INTERNATIONAL POSITION* (1949); O. LATTIMORE, *NATIONALISM AND REVOLUTION IN MONGOLIA* (1955).

political desires of the population concerned are freely expressed in each idiosyncratic case.

A plebiscite on Taiwan would present special problems. The Taiwanese are a politically sophisticated people who would not, as other peoples might, find the disjunctive choices dictated by the balloting process culturally alien or politically baffling. The problem of Taiwan does not involve under-politicization, but rather over-politicization.

For several decades, an authoritarian government with an advanced communications technology at its disposal, supported by the threat of terror, has monopolized the shaping of popular political perspectives. There are numerous indications that the Chiang government has not succeeded in altering Taiwanese identity or political demands and expectations, but has only stifled overt expression of these deeper feelings.<sup>246</sup>

The mere announcement that a plebiscite is to be held in the island-state, however, will not change this pattern of repression, particularly if the announcement is made by and through the government. Rather, it will be taken as only one more signal to go and dutifully vote the government line. In such circumstances, the entire purpose of the plebiscite would be frustrated. In situations where the genuine desires of the population will not be freely expressed, a plebiscite clearly ought not be conducted.

The primary administrative problem of a Taiwanese plebiscite thus does not involve the technical aspects of voting but rather the establishment and the supervision of a pre-plebiscite period during which the alternative choices may be openly discussed and explored as a means of providing information as well as dispelling conditioned political inhibitions. Government cannot be dispensed with during this interim, since the general requirements of public order, administrative services and external security will continue. On the other hand, the Nationalist government cannot be permitted to use its official power in ways which might attenuate the freedom of choice of the people of Taiwan. A balance between these requirements must be struck by means of international supervision. To this end, we suggest a set of principles regarding procedures and operational sequences which might be applicable to any internationally supervised plebiscite, but which are particularly suited to the Taiwanese case.

a. After the passage of a General Assembly resolution declaring that

246. See N.Y. Times, Mar. 12, 1972, at 3, col. 5 (city ed.).

## Who Owns Taiwan: A Search for International Title

a plebiscite will be held in Taiwan, a special Plebiscite Committee should be formed by the United Nations General Assembly, to be composed of prominent figures from other Asian and non-Asian countries, with a staff drawn from the secretariat of the Trusteeship Council and the Secretary-General's pool of fact-finding experts. The Plebiscite Committee would assume full supervision over all aspects of the plebiscite.

b. The Plebiscite Committee would formulate the options to be made available to the people of Taiwan, including resident Chinese mainlanders, with sufficient breadth so that the options themselves communicate in a secondary way that a real choice is being made available. The formulation of choices must take account not only of the aspirations of the Taiwanese, but also the political interests of outside states.<sup>247</sup> For example, by including in the options made available to the voters association with the People's Republic of China or association with Japan, as well as independence or continuation of the status quo, it would become somewhat more difficult for either of these powers to denounce the plebiscite.<sup>248</sup>

c. The Committee would establish basic guidelines for participation in and conduct of the plebiscite, including means for the dissemination of views and information. In the case of Taiwan, for example, there is a special problem regarding overseas Taiwanese. Many of them live in political exile but identify with the island-state and might wish to participate. Provision should be made for them. Furthermore, China and Japan should be given opportunities to bring their cases to the Taiwanese people.

(1) The Committee would form a Subcommittee on Public Information which would establish guidelines for campaigning and supervise their implementation on the island.<sup>249</sup>

(2) The Plebiscite Committee would also establish a Subcommittee on Governmental Supervision to oversee police, military and paramili-

247. Notable among these outside states are the People's Republic of China and Japan, and perhaps the United States and the Soviet Union.

248. See, e.g., *Hearings on United States Relations with the People's Republic of China*, *supra* note 2, at 463-65 (proposal of Frederic C. Smedley). Another proposal would place Taiwan under United Nations trusteeship, pending an ultimate settlement via a U.N. conducted plebiscite. See, e.g., *id.* at 84-87 (testimony by Representative Patsy T. Mink).

249. Equal time in the use of mass media would be afforded to all viewpoints for a fixed period before the plebiscite and a rigorously even-handed policy would be followed in allowing permits for street meetings, door-to-door campaigning and so on. The procedures would include both direct licensing from the subcommittee as well as a recourse of appeal to the subcommittee in circumstances in which a governmental licensing agency is deviating from the principle of equal time and fair representation.

tary activities which might involve harassment or intimidation of all or part of the population and thereby obstruct their freedom of choice. The Subcommittee would presumably employ observers.

d. In cases in which the Subcommittee finds that a governmental agency is acting in a way incompatible with the principles of the plebiscite, the Committee should report a censure and broadcast it fully in all the media. If the Subcommittee concludes that the government or another entity is so abusing the plebiscite procedures that a free expression of the population's will is being obstructed, it should defer the plebiscite or return the entire matter to the General Assembly for further instructions.

e. The supervised pre-plebiscite period would continue for a period of two months, subject to extension by the Committee if it should conclude that the purpose of the period—the dissemination of information relevant to the choices and the establishment of a political environment comparatively free from intimidation—has not been achieved.

f. The results of the plebiscite would be presented to the General Assembly. In the event that the Assembly concludes that no showing was strong enough for any one of the options to prevail, it could instruct the Plebiscite Committee to conduct a run-off between the top two or three options as soon as the Committee deemed it appropriate, but in no case more than two weeks after the initial vote. The outcome of the plebiscite would be confirmed as international policy by vote of the General Assembly.

This construct of a general, supervised plebiscite procedure does not take account of any of the unique political problems which might impede the operation of a fair plebiscite on Taiwan. Under contemporary political conditions, it is of course difficult to imagine a political elite permitting an internationally supervised plebiscite in its territory, particularly when one possible outcome might be the removal of that elite. Yet, modalities for the assessment of indigenous political will are necessarily implied in the human rights doctrines of contemporary international law surveyed earlier, and procedures of implementation must be devised to operate under diverse circumstances.

In the case of Taiwan, internal and external political pressures make the possibility of such a plebiscite quite feasible. Precisely because the Chiang government has been discredited abroad and has lost face at home, it may be attracted to the plebiscite as a possible

instrument of legitimization or, at worst, as a negotiable component in a peaceful transition. The critical point is not, however, whether the Chiang government is at this moment enthusiastically in favor of a plebiscite, but rather, how to conduct one in Taiwan. Thus formulated, the problem becomes conventionally political, involving the formulation of symbols and the mobilization of people and resources in order to secure a power outcome. There is no shortage of skills for this type of task.

## XI. International Implications

The institution of title in any system of law is simply a cultural and legal artifact by which a community secures the optimum use of its resources in a manner compatible with fundamental social goals and cultural postulates. If a title system works properly it accords benefits of stability and high productivity to the community in general and incentives and merit rewards to the specific titleholder. The terms and conditions of title must, of course, vary with the context, for there is no standard formula which can realize goals for all circumstances. Hence title, in its broadest sense, is a process by which the community allocates and reallocates resources among its members in order to realize all community goals.

International title, as our brief survey of post-war United Nations practice has indicated, has evolved as an institution aimed at stability of expectation, public order and optimum conditions of human dignity. Of course international title is too restricted a device to bring about a public order of human dignity. But, at certain junctures, title decisions can contribute to those goals.

The Taiwan title dispute has resulted in a rare opportunity for international law, for the lawful solution is plain and its realization is unusually feasible. At some point in the near future, Taiwan will probably seek to enter the United Nations. It is suggested that the condition for entry should be an unequivocal indication of support for the government by a majority of the people of the island. In the meanwhile, the international disposition of the Non-Self-Governing Territory of Taiwan and its people is the responsibility of the General Assembly of the United Nations. The primary and most urgent task of the world community is to guard against any unilateral or bilateral attempt to change the status of Taiwan before the wishes of the Taiwanese people have been fully and effectively expressed.

We urge the General Assembly to enact forthwith a resolution in the manner of the Praetorian edict of *uti possidetis*, enjoining any outside powers from seeking to change the status of Taiwan until such time as the Taiwanese themselves have indicated their political wishes. In addition to creating a useful precedent, such a resolution would also serve to deter alien elites within and outside the island-state who may now be conspiring to deprive the Taiwanese of the right to self-determination.

Second, we urge the members of the United Nations jointly and severally to bring pressure to bear on those with effective power in Taiwan to permit an internationally supervised plebiscite as soon as possible. This is a particularly propitious moment for such an operation, for the leaders of the present regime in Taiwan are at this time in history extremely insecure and any acts which might reinforce their status under international law will seem more attractive now than ever before.

Third, we urge the United Nations to lend its material and symbolic resources to implementing the results of a plebiscite of all inhabitants of Taiwan, by incorporating the outcome in a General Assembly Resolution and directing the appropriate organs of the United Nations to lend aid in its implementation.

At the same time, it must be recognized that the shorter range prospects for a lawful resolution to the Taiwan title question are not bright. China has burst into the world power process, insisting on acquiescence in its claim to Taiwan as a condition for intercourse with other states. The United States, erstwhile champion of an international morality of democracy and self-determination, has indicated that it will pay the price. Lesser nations, many of whom had established contacts with the People's Republic of China without betraying Formosa, are shifting to the new pattern described by President Nixon and Premier Chou En-lai.<sup>250</sup> The entire changeover is being accomplished with the neatness of a quadrille, mixing the saccharine strains of the rhetoric of self-determination with the rhythmic pomposities of the Shanghai communique.

In social affairs there are no severable, discrete cases. Every decision, every choice affects all others. The disposition of Taiwan, as indicated

250. For example, the British government, reversing its long standing position that Taiwan's international status remained undetermined, acknowledged that Taiwan was "a province" of China on March 13, 1972 in order to establish full diplomatic relations with China. N.Y. Times, Mar. 14, 1972, at 1, col. 6 (city ed.).

## Who Owns Taiwan: A Search for International Title

in the Shanghai communique, will shape the expectations of all participants in the world political process. A nation, larger than two thirds of the states of the world, is being delivered by one giant power to another because one covets it as a luscious prize and the other believes that the transaction will ease the relations between the two and facilitate trade and cultural exchanges. The expectations thereby increased will not be those of peace, but of increased instability, insecurity and violence. What cannot be hidden will be explained as a political necessity, a special case. Taiwan is, after all, only an island. . . .

But in the interdependence of world politics, there are no islands. The bell that seems to be tolling for the Taiwanese people is tolling for many others. Whether or not they now realize it, at least two thirds of the nations of the world have an important interest in the outcome of the Taiwan case. Those who decide to ignore the Taiwanese will share complicity in a gross international crime.