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The Status of Taiwan Under International Law and in a Changing World

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Golden Gate University

SCHOOL OF LAW

S.J.D. DISSERTATION

**THE STATUS OF TAIWAN UNDER INTERNATIONAL LAW
AND
IN A CHANGING WORLD**

BY

ERIC, TING-LUN HUANG *

PREFACE

The issue of Taiwan's status has long been disputed. Since 1949, more than half a century ago, a civil war divided a Chinese nation into two governments within the Chinese territories. One is the People's Republic of China on the mainland(China), the other is the Republic of China on Taiwan(Taiwan). Since then, China has long embraced the position of annexing Taiwan as its essential goal based on the political fiction of the one-China principle, assuming that "there is only one China internationally, Taiwan is a part of China, and the People's Republic of China is the sole government to represent the whole China," despite the fact that Taiwan's views of one-China concept is quite different from Mainland China's. Seemingly, however, the view that "Taiwan is a part of China" has been accepted worldwide. This situation leads the status of Taiwan to become confusing in most people's minds. If Taiwan is a part of China, who should govern Taiwan, the Republic of China or the People's Republic of China.

After enjoying years of prosperity and democracy, the people of Taiwan have gone a long way toward realizing their dream of self-governance politically and economically. Currently Taiwan is the world's 19th largest economy, the 15th largest trading country, and even one of the world's most competitive economies. Thus, the Taiwan's issue is typically one of the global problems to be considered under international law. Despite the dispute on the Taiwan sovereignty issue politically, both sides of the Taiwan Strait share common interests economically. The result of the increased economic interdependence should not come as a surprise. This evolution poses risks and, at the same time, presents opportunities to both Taiwan and China. While studying Taiwan's legal status and its related issues, the functional views of international law on political integration and economic globalization should not be put aside. Although China's threat to use force against Taiwan's separatist movement is

the source of regional instability in the Asia-Pacific area, as a matter of legal concern, it does not imply that there is no room for Taiwan to receive international respect for regaining its political status as a sovereign independent state. In other words, to internationalize the Taiwan issue is one thing, to settle the existing dispute between Taiwan and China is another. By this logic, China's views of "peaceful unification" and "one country two systems" may not be the only option to resolve the long outstanding sovereignty dispute of the Taiwan issue. The Taiwan issue itself lies not in whether Taiwan is an independent state, but rather whether or not to unite with China and that this is accepted by the people of Taiwan.

As a Taiwanese, I feel it is very meaningful to be able to focus my S.J.D. dissertation on this issue. I hope my work on this issue will create a new approach to help clarify Taiwan's ambiguous status and benefit the future of Taiwan. To complete this dissertation, I am very grateful to my S.J.D. Committee Panel, Prof. Dr. Sompong Sucharitkul, Prof. Dr. Christian N. Okeke, and Prof. Dr. Van Walt Van Praag for their thoughtful support. They made me more knowledgeable of international legal studies. I also immensely appreciate the help of Mrs. Ruth C. Traver, Ms. Penelope A. Hedges, Dr. Emeka Duruigbo, and my lovely wife, Vicky Lin, in editing the earlier draft of this dissertation. In addition, I am profoundly thankful to Prof. Chris Pagano, Prof. Warren E. Small, Prof. Michael S. Daw, Mr. Christopher Jones, Mr. Harvey Tsai, Mrs. Kuei-yin Wu, Ms. Huguette Lo, and my dear friends for their considerate encouragement. Finally, thanks to my beloved family for their constant support that allowed me to devote so much time to my studies in the USA.

Eric, Ting-lun Huang, *in San Francisco, 12/25/2002*

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THIS DISSERTATION
IS IN MEMORY OF MY DEAR MOTHER, MRS. HUANG-GONG,
LIANG(黃龔涼)(03/23/1932-06/09/2002), WHTHOUT WHOSE
LOVING ENCOURAGEMENT, NONE OF MY ADVANCED
STUDIES IN THE USA WOULD HAVE BEEN POSSIBLE.

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CHAPTER ONE

INTRODUCTION: UNDERSTANDING THE TAIWAN ISSUE

§ 1-1 Geography & People

Taiwan is an island on the Pacific Rim, sitting in the middle of a chain of islands in the Western Pacific and separated from the Chinese mainland by the Taiwan Strait.

The total area of Taiwan¹ is nearly 36,000 square miles,² that is, slightly smaller than the Netherlands. Currently, the government of Taiwan is officially known as Republic of China, or Republic of China on Taiwan. Informally, people call it Nationalist China, Formosa³, Taiwan, or simply Taipei.

There are over twenty-two million inhabitants⁴ on Taiwan making it one of the most densely populated places in the world. Taiwan is comprised of four major groups namely the Aborigines, the Fukien Taiwanese, the Hakka Taiwanese, and the Mainland Chinese(Mainlanders). The Fukien and Hakkas Taiwanese were Chinese

¹ The area including Taiwan proper, Penghu(Pescadores), Kinmen, Matsu, Orchid Island, Green Island, and the Tiaoyutai Islets, which is currently under effective control of the Republic of China. For details on Taiwan's geography and territorial composition, see THE REPUBLIC OF CHINA YEARBOOK 2001, Government Information Office of the ROC. In 1991, the ROC declared its effective control over the above mentioned areas by recognizing Beijing's legal sovereignty over the Chinese mainland. However, the ROC constitution still defines its territory to include the Chinese mainland and the Taiwan area. This issue will be further discussed in the following chapters. The names "Taiwan," "Taipei", "Republic of China," "Republic of China on Taiwan," "Government of Taiwan," and "Nationalist China" are used interchangeably in this paper in order to introduce and analyze the legislation and judicial practice of the Republic of China. All these terms refer to the ROC government that was established in 1912 by Dr. Sun Yat-sen and that has been governing effectively over Taiwan since 1949, rather than the PRC government. The names "Beijing," "People's Republic of China," "Mainland China," and "Communist China" refer to the separate geographical regions of mainland China that was established in 1949 by Mao Ze-dong. Taiwan consists of the island of Formosa, the Penghu Islands (the Pescadores), Jinmen Island, and Matsu Island.

² See THE REPUBLIC OF CHINA YEARBOOK 2001, the ROC Government Information Office(www.gio.gov.tw).

³ In 16th century, a Portuguese captain on a vessel sailing through the Taiwan Strait who was so deeply attracted to the beautiful island used the word, *Ilha Formosa*, to name the island of Taiwan. After that, Taiwan has also come to be known as *Formosa*.

⁴ According to undated statistics released by the Ministry of the Interior, ROC, the population of Taiwan was 22.44 million as of May, 2001. See information released by the ROC Government Information Office(www.gio.gov.tw).

immigrants who moved to Taiwan during the 14th and 17th centuries for the purpose of procuring a better life. The reason that Mainlanders moved to Taiwan was totally different from that of the Fukien and Hakka Taiwanese. The majority of mainlanders⁵ were either soldiers or government officials who came to Taiwan because Nationalist China was defeated by Chinese communists in 1949⁶ resulting in the birth of the People's Republic of China on the Chinese mainland and the relocation of the Republic of China to Taiwan. Since the Fukien Taiwanese and Hakka Taiwanese came to Taiwan before the Mainlanders, they also called themselves indigenous Taiwanese.⁷ Due to the economic boom as well as social and cultural changes, a very large proportion of the people of Taiwan no longer distinguish themselves from these ethnic groups strictly. Rather, they simply regard themselves as Taiwanese, or indigenous Taiwanese.

§ 1-2 Unfinished Business

The status of Taiwan has been a very sensitive and controversial issue since the founding of the People's Republic of China in Beijing by Mao Zedong and the escape of Chiang Kai-shek regime to Taiwan in 1949. The Chinese state - the Republic of

⁵ See Christopher Hughes, *TAIWAN AND CHINESE NATIONALISM*, Routledge, 2000, p. 27. (Noting that when the KMT (Chiang Kai-shek regime) retreated to Taiwan, it had brought with it some 2.5 million people, swelling the island's (Taiwan) population of just under six million to just over eight million).

⁶ Resulting from US general lack of awareness of the Chinese situation due to miscalculation that the Nationalists were not able to defeat the Communists, the Nationalists faced defeat on the Chinese mainland and fled to Taiwan in 1949. For details about the Chinese civil war, see John King Fairbank, *THE GREAT CHINESE REVOLUTION: 1800-1895*, Harper & Row, 1987, pp.240-69.

⁷ For details on Taiwan's ethnic groups, see John F. Copper, *TAIWAN: NATION-STATE OR*

China - has been divided into two parts, ruled by separate governments for more than half a century. Setting the stage for extremely confrontational relations, both sides refused to recognize the other as a legitimate government politically, but firmly asserted that there was only one China and that Taiwan was at the same time part of China. Interestingly, it was one of the few things on which the two sides could agree politically. At the same time, both sides have always differed in their definition of "one-China" and on who should govern the State. While Beijing referred to China as the People's Republic of China, Taipei referred to China as the Republic of China. Notwithstanding the division, neither government has ever ignored the common ideal of achieving reunification. The political differences and hostility between Beijing and Taipei have raised military tension in the Taiwan Strait attracting serious attention worldwide. During the Cold War, and especially before 1971, as the ROC on Taiwan was a front-line anti-communist state in the capitalist camp, the ideological rivalry with the PRC did not preclude the ROC on Taiwan from representing all the Chinese people internationally. This was the case despite Beijing's claim that Taiwan was its renegade province that must be reunified on its terms.

In the 1970s, the switch of recognition from Taipei to Beijing as the sole legitimate government of China by the majority of the members of international

community has wobbled the political status of Taiwan tremendously. As the PRC has continuously claimed its sovereignty over Taiwan and the ROC has never denied that Taiwan is part of China, the status of Taiwan has become very ambiguous and confusing for both the international community and the people of Taiwan. Chiang Kai-shek's death, in 1975, led to the realization that he and his regime would never recover the Chinese mainland, nor would his successors. Despite the political reform that led Taiwan to drop its claim to represent all of China as a sole legitimate government in 1988, the emotional and ideological dream of achieving reunification remains an ideal deeply embedded in Taiwan's official policy.⁸

Is Taiwan an independent state or something less than an independent state? Actually, the problem involves not only the legal concept of statehood but also borders on the practice of recognition of governments and the exercise of sovereign power politically. In light of the evolution of cross-strait relations and Taiwan's international relations, the issue of Taiwan's status becomes a special case in international law and it is difficult to find suitable precedents which can be applied to Taiwan. Politically, there was a settled principle to "return" Taiwan to China at the 1943 Cairo Conference and in the 1945 Potsdam Declaration.⁹ However, legally,

⁸ Taipei officially sets up its goal to reunify with Beijing by pursuing the future unification of China under democracy, freedom, and equitable prosperity. This issue will be discussed later in detail in Chapter IV.

⁹ At the *Cairo Conference* of December 1943, the United States, the United Kingdom and the Republic of China reached an agreement on the return of Taiwan and Pescadores to China from Japan after the

neither the ROC nor the PRC was authorized to control Taiwan while Japan formally gave up its authority over Taiwan in the 1952 Treaty of Peace with Japan.¹⁰ This gives rise to a controversy as to whether the status of Taiwan is still unsettled. Too many resources have been wasted by Taipei and Beijing on this issue. Without any common solution by both sides of the Taiwan Strait, opposing views of the Taiwan status have been developed lucidly, which are “Taiwan as an independent state” vs. “Taiwan as a local government of China.” In order to tackle this controversy, it is necessary to examine what is the meaningful mission of maintaining the one China policy.

The return of Hong Kong¹¹ and Macau¹² to China in 1997 and 1999, respectively, has aroused the following curiosity: “after Macau, will Taiwan be next?” Currently, no one can predict what the exact answer is, but most people have sensed that based on evolution, the Taiwan issue will not be dragged on for too long. That is

war. Two years later, this conclusion was reaffirmed in *Section 3-b(8) of Annex II of the Potsdam Declaration* of July 1945 stating that “[t]he 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.” Accordingly, Taiwan was handed to Chiang Kai-shek’s Nationalists when Japanese empire surrendered in 1945. Further discussions on this issue will be in Chapter III.

¹⁰ Neither the ROC nor the PRC were invited to join the San Francisco Peace Conference in 1951, more significantly, neither government concluded “the Treaty of Peace with Japan” which entered into force on April 8, 1952.

¹¹ On July 1, 1997, the United Kingdom returned Hong Kong to Beijing after 156 years of British colonial rule. The British had forcibly taken control of Hong Kong from the Chinese Manchu Dynasty on January 26, 1841. For details, see “A GREAT MOMENT,” *Beijing Review*, Vol.40 No.29, Beijing, July 21, 1997.

¹² In 1887, the Portuguese agreed to rule over Macao from Chinese Manchu Dynasty under *the Sino-Portuguese Treaty of Reconciliation and Trade*. In April 1987, China and Portugal signed *the Sino-Portuguese Joint Declaration* concluding that Macao is Chinese territory and the Chinese government would resume the exercise of sovereignty over it from Dec. 20, 1999. For details, see He Qing, DENG XIAOPING AND THE RETURN OF MACAO, also see Ren Min, MACAO IS HISTORICALLY CHINESE TERRITORY, *Beijing Review*, Vol.42 No.51, Beijing, Dec.20, 1999.

to say, Taiwan is likely to play with a limited time regarding its future. Taiwan's President Lee's two-states statement¹³ renewed high tensions in the Taiwan Strait militarily and was considered a dangerous move internationally.¹⁴ It has become clear that Taiwan does not have much room to deal with its own political status. Judging by the fact that the ROC was not able to assert its own stance on Taiwan in the international political arena, people in the world began to doubt whether Taiwan is an independent state. As enshrined in the doctrine of sovereignty, at the very least the government of a state is entitled to claim its external attitude, without outside intervention, in handling its own relations with other states. In this sense, since the government of Taiwan was not completely free to do so, it certainly reflects that the status of Taiwan remains uncertain. Otherwise, why was Taiwan not permitted to define its relationship with China on the basis of state-to-state? Why did the international community criticize Taiwan's two-states definition as a dangerous move affecting regional peace?

If the government of Taiwan intends to convince its people and the international

¹³ In response to a question during an interview with a German radio, Deutsche Welle radio station, on July 9 of 1999 that "the Beijing government views Taiwan as a renegade province," President Lee remarked: "the cross-strait relationship is a "special state-to-state relationship." See THE POSITION PAPER TO ELABORATE ON THE CONTROVERSIAL STATE-TO-STATE REMARKS MADE BY PRESIDENT LEE TENG-HUI TO DEFINE RELATIONS BETWEEN TAIWAN AND MAINLAND CHINA, the Mainland Affairs Council of the ROC, on Aug. 1 of 1999.

¹⁴ Regarding the new tension over the Taiwan Strait caused by Taiwan President Lee's two-states statement, ASEAN reaffirmed the "one China" policy and criticized the statement which could affect regional peace and stability and prospects for economic recovery. See Dan Sloan, ASEAN EYES TAIWAN STRAIT, TO REAFFIRM ONE CHINA, Reuters, July 23, 1999.

(<http://taiwansecurity.org/Reu/Reuters-ASEANEyesTaiwanStraitToReaffirmOneChina.htm>).

community that Taiwan is not a local government of China, the best approach would be through a close theoretical analysis of the legal basis of statehood. It is hardly useful to assess the diplomatic isolation by Beijing effectively because whatever legal arguments may be settled in favor of Taiwan to stand as a sovereign state, there remains the common objection from Beijing which realistically leads most countries in the world not to support an independent status of Taiwan. However, at least it is a step in the right direction to clarify people's increased confusion as to whether or not Taiwan is an independent state, especially those people currently living in Taiwan. In order to do that, it would be useful to take an excursion into the history of Taiwan's entrance into the world stage.

§ 1-3 Taiwan's Emergence as a Territorial Entity

Taiwan's formal appearance in world history was in the 17th century, when it was colonized by the Dutch, the first Western power to be involved on the island. Without serious interest in the value of Taiwan, the Chinese Ming Dynasty easily paved the way for the Dutch to occupy Taiwan in exchange for the control of the Pescadores in 1624. After 1661, Taiwan was taken from the Dutch by Cheng Ch'eng-kung for a brief period of time. Ch'eng was a royal general of the Chinese Ming Dynasty who was defeated by the Manchu Ching Dynasty¹⁵ in the mainland and sailed with his

¹⁵ In 1644, the Manchus destroyed the Chinese *Ming Dynasty* and established the *Manchu Ching Dynasty* in Beijing. Since then, the *Manhu Ching Dynasty* ruled China for 268 years until 1912 when

troops across the Taiwan Strait to expel the Dutch from Taiwan. After Ch'eng's retreat to Taiwan, the Cheng regime never gave up the hope to recover the mainland by overthrowing the Manchu Ching Dynasty in order to restore the Chinese Ming Dynasty. However, twenty-three years later, his regime was crushed by the Manchu Ching Dynasty in 1683. This island was then formally governed by the Manchu Ching Dynasty for about two hundred years.

Under the Shimonoseki Treaty, Taiwan was ceded to Japan by the Manchu Ching Dynasty in perpetuity following its defeat in the war with Japan in 1895. Seventeen years later, the Manchu Ching Dynasty was succeeded by the Republic of China in 1912. Before it was deprived of its sovereignty over Taiwan in 1945, Japan had colonized Taiwan for half a century. During the fifty years of separation from China as a colony of Japan, the inhabitants of Taiwan were forced to embrace Japanization, and the traffic between Taiwan and China was restricted. After its recovery by the Chiang Kai-shek regime of Nationalist China, Taiwan was swiftly annexed as one of China's provinces under the authority of Nationalist China. Under the propaganda of "happy to return to the motherland," the inhabitants of Taiwan were compelled to cut off their links to Japanese identity in order to implement China-ization. Their national identity was at first Japanese, then Chinese, while now it seems to become more

its regime was replaced by the *Republic of China*, led by Sun Yat-sen.

ambiguous between Chinese and Taiwanese.¹⁶ All of this tells us that, the indigenous population of Taiwan were not allowed to decide their own destiny by themselves and their nationality has been imposed by outside rulers.

§ 1-4 Self-Determination of the People of Taiwan

As enshrined in the Charter of the United Nations, self-determination itself is not only part of human rights, but is also deemed to be a key contribution to the prevention and resolution of internal and international conflicts.¹⁷ Despite the fact that the very concept of peoples' right was recognized by many international instruments, the issue of who is entitled to exercise self-determination remains very disputed under international law. This is because there are few well-defined principles of the people's right to self-determination in terms of the internal aspect, such as a universal standard to regulate the implementation of the right of a people to self-determination.

Going by the narrow interpretation that self-determination is an instrument of decolonization, it appears that the inhabitants of Taiwan are not very qualified to

¹⁶ For details about Taiwan's history, see John King Fairbank, CHINA: A NEW HISTORY, Harvard University Press, 1992. Also see Walter Chen, HISTORY OF TAIWAN, (<http://www.leksu.com/leksu-e.htm>).

¹⁷ The International Conference of Experts held by UNESCO in 1998 reached and adopted a conclusion to affirm the principle of self-determination by saying that "the principle and fundamental right to self-determination of all peoples is firmly established in international law, including human rights law, and must be applied equally and universally. The peaceful implementation of the right to self-determination in its broad sense is a key contribution to the prevention and solution of conflicts, especially those which involve contending interests of existing state and peoples, including indigenous peoples, and minority communities." See REPORT OF INTERNATIONAL CONFERENCE OF EXPERTS HELD IN BARCELONA FOR 21 TO 27 NOVEMBER 1998, Centre UNESCO, 1999, p.21. (Hereinafter: 1998 REPORT OF CONFERENCE IN BARCELONA)

exercise the right to self-determination on the ground that Taiwan is not currently dominated by foreign rulers. However, witnessing the increased movements in the name of self-determination outside the colonial context such as the cases of Mongolia, Palestine, East Timor, Western Sahara, Eritrea as well as observing the development of indigenous people's right¹⁸ to self-determination being recognized by the world community in the changing world,¹⁹ it is foreseeable that the right to self-determination can be implemented in its broadest sense to include the non-colonial aspect of the right to attain independent existence by pragmatically redefining the principle of disclaiming separatism and upholding the right of every people to independence as guaranteed by the UN Charter and other various international instruments.

In the modern history of Taiwan, the people of Taiwan have been seeking self-determination at least more than once. All attempts were so far unsuccessful. The first time was in 1895 when the inhabitants of Taiwan became aware of the fact that Taiwan was ceded to Japan by the Manchu Ching Dynasty, Taiwan residents fell into deep despair and indignation. The elite and some inhabitants of Taiwan led by

¹⁸ The term "indigenous people" was defined by the UN Working Group in 1983 as following: a group having a historical continuity with pre-invasion and pre-colonial societies, which consider themselves distinct from other sectors of the societies now prevailing in those territories.(See Russel Lawrence Barsh, INDIENOUS PEOPLES: AN EMERGING OBJECT OF INTERNATIONAL LAW, American Journal of International Law, US, April, 1986).

¹⁹ The international Non-Governmental Organizations Conference was held at Geneva in 1977, which set forth a draft declaration of principles to call for the recognition of indigenous peoples as subject of international law. The report of the conference was reprinted in THE ISSUE OF THE AMERICAN INDIAN JOURNAL, November 1977.

Ching-sun Tang decided to move for Taiwan's independence. They felt that Taiwan had already been abandoned by the Manchu Ching Dynasty, and therefore, the people of Taiwan had nothing to rely on in China, but to defend themselves to the last. Consequently, a Taiwan Independence Ceremony was held publicly, proclaiming the establishment of the Taiwan Democratic Republic. At the same time, Ching-sun Tang was nominated the President of the Republic. This attempt by the people of Taiwan to plan a political destiny for themselves was not only the first time that the Taiwanese would do so, but it was also the first attempt by any country in Asia to seek political independence. However, without formal recognition by foreign states, the life of the Taiwan Democratic Republic just ended like a flash. Two weeks after, it completely collapsed after the Japanese troops landed on Taiwan.

§ 1-5 The February 28 Incident

The second time that the indigenous Taiwanese intended to establish a political identity was at the time when Nationalist China sent troops to take over Taiwan after Japan's surrender in World War II.²⁰ The inhabitants of Taiwan were disappointed with the official personnel and soldiers dispatched to Taiwan by the Chiang Kai-shek

²⁰ Politically, Taiwan was to revert to China as was agreed at the Cairo Conference by few major powers - the US, the UK and the Nationalist China - in 1943. Two years later, Nationalist China occupied Taiwan on behalf of the Allied Power after Japan's surrender in 1945. However, Japan did not formally renounce its sovereignty over Taiwan until 1951 when it concluded the San Francisco Treaty with Allied Powers. It made clear at this point that before 1951 Taiwan was still an occupied territory of Japan legally and thus, its status was unsettled yet. Hence, this gave rise to the strong tendency among the people of Taiwan to struggle for their future.

regime of Nationalist China, following Japanese evacuation. Persuaded that those Mainlanders were arrogant, repressive, and corrupt, the indigenous Taiwanese felt that Nationalist China was no better than its predecessor, even worse in many ways.²¹

The Taiwanese elite began criticizing the government and demanding political reform, but none of the demands was accepted. The ill feeling gradually alienated the native Taiwanese from Mainlanders and gave rise to a distinct self-identity to set them apart from the ruling government. A widespread uprising burst out on February 28th, 1947, triggered by a conflict after a Taiwanese woman had been severely injured by Mainlanders in Taipei. Within days, angry indigenous Taiwanese took over various municipalities and clashed with Mainlanders. As a result, more troops were sent to Taiwan from the Chinese mainland cruelly to suppress the riots by systematically killing and arresting not only those directly involved in the widespread uprising, but also numerous leading figures in the society such as lawyers, doctors, professors and councilmen.²²

According to the information released officially, about 18,000 to 28,000 people lost their lives in “the 2-28 incident.” Almost a whole generation of Taiwanese intellectuals and community leaders were purged. From then on, the Taiwanese were

²¹ See J. K. Fairbank, *THE GREAT CHINESE REVOLUTION, 1800-1985*, Harper & Row Publishers, 1987, p.266.

²² As the anti-Mainlander incident was blazed since the day of February 28th, people thus call this bloody incident “the 2-28 incident”. For details about “the 2-28 incident”, see generally Allan J. Shackleton, *FORMOSA CALLING: AN EYEWITNESS ACCOUNT OF CONDITIONS IN TAIWAN*

compelled to keep silent politically under the enforcement of martial law. The Chiang Kai-shek regime of Nationalist China did not tolerate any demand for political reforms and Taiwanization by the indigenous Taiwanese, but regarded the claims as separatism against the government. There was also deep ideological repugnance against any serious study of Taiwanese history and culture in Taiwan. In subsequent years, an ethnic cleavage between the Taiwanese and the Mainlanders grew until the ruling government led by Chiang Ching-Kuo, a son of Chiang Kai-shek, decided to conduct the political reform and adopt the policy of Taiwanization in the late 1970s. In truth, to this day, this painful history of "the 2-28 incident" still haunts the sociopolitical climate of Taiwan²³ and sharpens people's minds to seek their own destiny in Taiwan.

Because of the bloody incident, a petition was submitted by Dr. Liao Bun-gei²⁴ to the United Nations in 1948, appealing that Taiwan should be placed under the trusteeship of the United Nations and that the status of Taiwan should be decided by the people of Taiwan under the principle of self-determination.²⁵ However, the following year, in 1949, the Chiang Kai-shek regime of Nationalist China lost

DURING THE FEBRUARY 28TH 1947 INCIDENT, Taiwan Publishing Co., 1998.

²³ In 1995 the very first monument was erected in Taipei in memory of the victims of the 2-28 incident, and the ROC President Lee Teng-hui publicly apologized for the cruelty by the Chiang Kai-shek regime of Nationalist China.

²⁴ Dr. Liao was one of the hundreds of Taiwanese intellectuals who fled Taiwan seeking refuge from the arrests and killings by Chiang Kai-shek regime. In 1950, he organized "Taiwan Democratic Independence Party" in Japan and became the president of the party. (See Walter Chen, HISTORY OF TAIWAN, supra Note 16, at Chapter 9)

²⁵ See id. Walter Chen, HISTORY OF TAIWAN, at Chapter 9.

Chinese mainland as a result of its defeat by Chinese communists and fled to Taiwan. Soon after, the Korean War broke out in 1950, and Nationalist China in Taiwan was put under US protection and became a part of the free world otherwise known as the Western bloc in the Cold War confrontation. Accordingly, without support from the international community, the petition for self-determination turned into a dead dream for the people of Taiwan.

Due to the continuation of Taiwanization, and the steady development of democratization since the late 1980s and 1990s, political matters are no longer controlled by the elite of the Mainlanders but more by the indigenous Taiwanese. On the other hand, the dynamic economic growth in Taiwan has led to social and political pluralism; the expansion of private wealth enables the people of Taiwan to exert greater autonomy over their own lives and feel dignified. As a result, a style of Taiwanese value is growing and a form of new Taiwanese with all people of Taiwan is emerging. The evolution of seeking the recovery of their own identity has made the people of Taiwan not to identify themselves much with China that remains a communist dictatorship. Evidently, the social, cultural and political differences resulting from half a century of separate rule explain why the people of Taiwan have strong self-identity to treat themselves as Taiwanese, not Chinese. Observing this

point, some opposition political parties²⁶ have begun to raise the issue of national identity and question the official ideal of reunification with China from time to time. They intend to redefine their own identity through challenging the assumption of Chinese nationalism imposed on them by the political elite who came from mainland China in 1940s, and they try to seek their own destiny by advocating the right of the indigenous population of Taiwan to self-determination.

§ 1-6 The "People" for Purposes of Self-Determination

On the issue of who should be eligible to determine the future of Taiwan, we must clarify the people's right in terms of self-determination, and make it more acceptable to fit the Taiwan model. Otherwise, it is inconceivable that the international community will be obliged to respect or recognize any decision made by the people of Taiwan regarding Taiwan's political status. Recently, in 2000, US President Bill Clinton²⁷ criticized a threat by China forcibly to reunify Taiwan with the Chinese mainland if there are any further delays by Taiwan on the reunification negotiations.²⁸ Mr. Clinton said that the Taiwan issue must be resolved peacefully and "with the assent of the people of Taiwan." This indicates that the right of the

²⁶ Currently, in Taiwan, there are two major political parties favoring Taiwan's independence rather than reunification with China. One is the Democratic Progressive Party(DPP), the other is the Taiwan Independence Party(TAIP).

²⁷ See CNA, Washington, Feb 25, 2000.

²⁸ On Feb 21, 2000, the PRC Taiwan Affairs Office released a white paper, entitled "THE ONE CHINA PRINCIPLE AND THE TAIWAN ISSUE," noting that further delays by Taiwan on the question of reunification could lead to war. For details of the white paper, see *The New York Times* (<http://www.nytimes.com/library/world/asia/022200china-taiwan-text.html>).

people of Taiwan to self-determination is foreseeable. In this regard, assuming that the population of Taiwan really proceeds with the exercise of self-determination and their decision is to favor permanent independence as a sovereign state by adopting the “one China, one Taiwan” or “two Chinas” policy, the consequences deserve our consideration. If China takes military action against Taiwan due to the self-determination movement, what will be the impact on regional security and what will the nature of this conflict be? Is it an international affair, or only a Chinese domestic affair? Can Taiwan file a complaint to the United Nations to seek a resolution and restoration of peace? These issues are indeed really worthy of thoughtful consideration.

§ 1-7 The Prospect of the Use of Force

In spite of the required principle that a state is deemed to have violated international law by the use of force, or the threat of force, to settle international issues including territorial disputes,²⁹ Beijing has constantly threatened to use military force against any separatist movement in Taiwan in order to fulfill its so-called “eventual reunification goal.” The threat of force by China has not only

²⁹ See DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, G. A. Res. 2625(XXV), Annex, 25 UN GAOR, Supp. (No.28), UN Doc. A/5217(1970), at 121. Further discussion will be covered later in Chapter II. (<http://www.tufts.edu/fletcher/pens/2625.htm>).

made Taiwan a major weapons buyer³⁰ internationally, but has also brought the Taiwan issue into the lime-light. It is listed with the North Korean and Kashmiri issues as the three destabilizing factors that might suddenly burst into full-fledged crises in Asia.³¹ The symbolic events of Taiwan President Lee's visit to the United States in June 1995³² and the presidential election in March 1996³³ provoked Beijing to increase military threats by conducting missile tests³⁴ around Taiwan in early 1996. The tense Missile Crisis not only was at its peak in the Taiwan Strait in the past three decades but also captured headlines with international attention focused on it. Using the Taiwan Relations Act³⁵ as the basis, the United States deployed two

³⁰ According to new statistics, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1998, released by the Bureau of Arms Control of the US State Department, the total value of Arms Transfer Deliveries of Taiwan, from 1995 to 1997, was US\$ 12,455 million, making Taiwan the second biggest recipient country in the world, just after Saudi Arabia.

³¹ For details, see Robert A, HERE COMES THE ASIAN CENTURY, China Post, Taiwan, Dec. 29, 1999. (Noting that the locus of the world's most dangerous flash points for armed conflict in Asia are the Korean Peninsula, the Taiwan Strait and the Indo-Pakistani border).

³² In response to the question, "Will China make a further reaction toward Lee Teng-hui's visit to the United States?" a spokesman of the Chinese Foreign Ministry Shen Guofang stated that "the US administration allowed Lee Tung-hui to visit the United States has seriously damaged the foundation of Sino-US relations... We have expressed strong dissatisfaction over this willful action on the part of the US government..." See NEW BRIEFINGS BY CHINESE FOREIGN MINISTRY, Beijing Review, p20, Beijing, June 26, 1995.

³³ It was the very first time, both in Chinese and Taiwanese history, that the people of Taiwan had really and directly elected their leader. For details, see Richard Hornik, TAIWAN'S SECOND MIRACLE, Times, p.45, April 1, 1996.

³⁴ For views on this missile crisis see NEW YORK TIMES (March 11, 1996), which indicated that "acknowledging that it was trying to intimidate Taiwan and affect that March 23 vote in which Lee is running for reelection, China says it has fired three M-9 ballistic missiles, carrying dummy warheads, into target zones 20 to 30 nautical miles outside of Taiwan's port of Keelung and Kaohsiung. Beijing also says it plans to begin "live ammunition" war games in a 6,000-square-mile zone whose closure will obstruct much of the shipping and air traffic in the southern portion of the Taiwan Strait." (Hereinafter *Missile Crisis*). (<http://www.nando.net/newsroom/nt/0311usescy.html>).

³⁵ In January 1979, the government of US President Carter switched its diplomatic recognition from Taipei to Beijing. Following the termination of the US-ROC defense treaty a year later, in July 1980, the congress passed the Taiwan Relations Act(TRA) to maintain the relations between Washington and Taipei and provide Taiwan a security guarantee under some circumstances. This is the very first time that the US would adopt a law to guide its relations with another state. The issues relating to TRA will be further discussed in Chapter V.

aircraft carrier battle groups to the region to cool Beijing's ardor and calm Taipei's anxiety.³⁶ Nevertheless, it appears that the military intimidation in the Taiwan Strait and the inherent rivalry would continue until Taipei accepts Beijing's offer of the reunification model, "one country, two systems," which is currently being implemented in Hong Kong as well as in Macau. Hence, the security issue of Taiwan and its neighboring states is becoming a very potential problem while tackling the issue of the Taiwan status.

§ 1-8 The United States Position

During the Missile Crisis in 1996, two carrier battle groups that the United States dispatched around the Taiwan Strait in a bid to maintain stability in the region, constituted the largest task force by the US in East Asia since the Vietnam War. The US clearly presented its policy as one of keeping a peaceful Taiwan Strait which is necessary for protecting its national interests. More significantly, it also indicated that the US probably was the only outside power that could back Taiwan with military might³⁷ against any aggression from China. In reality, the US is the most deeply involved country in the world on the Taiwan issue with the exception of China and

³⁶See Patrick Tyler, *A GREAT WALL: SIX PRESIDENTS AND CHINA*, PublicAffairs, 1999, pp. 21-46. Concerning the deployment of two aircraft carriers, the author notes that America had declared its intention to use force in the defense of Taiwan if Taiwan is threatened militarily by Beijing.

³⁷ According to a report related to the reflections on the Missile Crisis by some states, the reporter notes that "Asian countries, unwilling to risk the wrath of Beijing, aren't flocking to Taiwan's side in its standoff with powerful China. Only the United States has backed Taiwan with military might, while mighty neighbors like Japan try to stay clear of the dispute." See ASSOCIATED PRESS, March 12, 1996. (<http://www.nando.net/newsroom/nt/0312astens.html>).

Taiwan. In responding to the one-China principle, the US has adopted the strategic ambiguity tactic³⁸ to acknowledge that governments on both sides of the Taiwan Strait hold that there is only one China rather than recognize China's sovereignty over Taiwan. Moreover, in view of the fact that stability in the Taiwan Strait would directly affect peace and prosperity in the Asia-Pacific region, the US continuously reminds China of its position that the Taiwan issue should be resolved by peaceful means. As such, the Taiwan issue is indeed a very important topic in relations between the US and the PRC. Any further definition of the one-China policy in favor of Beijing by Washington would tremendously affect the future of Taiwan because of Washington's influential role in Taiwan's policymaking process. Observing this point, in an effort to achieve a tacit commitment from Washington to absorb Taiwan, Beijing has not only tried to build up a good relationship with Washington, but has also taken the Taiwan policy from the US more seriously than before.

Since China, together with Japan and Russia, are seen by Washington to be of vital interest to the political, economic, and security concerns of the US³⁹, and China is one of the major powers in Asia, it is questionable whether the two outsiders - the PRC and the US - will eventually collaborate against Taipei by settling the Taiwan

³⁸ See Dennis Van Vranken Hickey, THE US AND CORSS STRAIT RIVALRY: STRATEGIC PARTNERSHIP AND STARTEGIC AMBIGUITY, Taiwan Security Research Further discussions will be covered later in Chapter V.

(<http://taiwansecurity.org/IS/IS-Hickey-2.htm>).

³⁹ See a survey, entitled "AMERICAN LOOK AT ASIA", released by the Henry Luce Foundation, US,

issue without Taipei's participation as was the case in the 1895 Shimonoseki treaty and the 1943 Cairo Conference. The issue is always on people's minds in Taiwan. Therefore, the Taipei-Washington-Beijing triangular relationships is a vital factor in determining not only regional security but also Taiwan's future. For that reason, does it imply that the solution to the Taiwan issue lies with the United States? In fact, the issue has a complicated history behind it, which is political. In order to have a close look at it, it is essential to examine Taiwan's policies among the three governments, the Republic of China, the Peoples' Republic of China, and the United States. Without analytical frameworks to study the prospects for the triangular relations, it is difficult to establish a perspective for this kind of evolution or how the Taiwan issue would turn out.

§ 1-9 The Question of Chinese Representation in the UN

At the inception of the United Nations in San Francisco in 1945, the Republic of China was a founding member and one of the five permanent members of the UN Security Council.⁴⁰ After the Chinese civil war resulting in the emergence of two governments in the Chinese nation, the issue of who should sit in the United Nations to represent China - whether the ROC or the PRC - came up and became disputable. In January 1950, a draft resolution that would have denied the credentials of the ROC

in Oct. 1999. (<http://www.hluce.org/survey.html>).

⁴⁰ In Article 23 of the UN Charter, the Republic of China was named among the five permanent

representatives was first raised by the Soviet Union in the Security Council. Without support by the majority of members, the draft resolution was defeated. That led to the boycott of the UN Security Council by the Soviet Union for a few months in 1950 as a way of protesting the continued sitting of the ROC representatives.⁴¹ Coincidentally, the Korean armed conflict broke out at the same time, hence, without the presence of the Soviet Union, a series of UN resolutions⁴² relating to the Korean crisis (including the offer of necessary assistance to the Republic of Korea to repel the armed attack by North Korea as well as the recommendation that all Members provide military forces to a unified command under the United States to restore international peace and security in the area due to the increase of intervention by Chinese Communist military units in Korea) were adopted in the Security Council.

As a matter of fact, the question of Chinese representation was regarded as a unique case in the history of the United Nations since it involved a revolutionary change of government and the first time the two rival governments coexisted. Before 1960, for ten years, the proposal for calling the seat of representatives of the PRC in place of those from the ROC was avoided in the UN General Assembly agenda by adopting a resolution to postpone considering the matter in the UN General Assembly.

members of the UN Security Council.

⁴¹ See UN ANNUAL REPORT: 1 JULY 1949-30 JUNE 1950, 5th Sess. Supp. 1 (A/1287), pp. 31-3.

⁴² See the 1950 UN Security Council Resolution 82, 83, 84, and 85. RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL, 1946-1992, edited by Karel C. Wellens, Kluwer Academic Publisher, 1993, pp.323-27)

After 1960, due to the expansion of UN membership by the admission of newly independent states, the Western powers no longer dominated the UN as before. Thus, more and more member states began to contemplate the Chinese representation question. In 1961, for the first time, the issue was put before the UN General Assembly. In the meantime, a proposal, sponsored by the US, was adopted in the UN General Assembly to decide that any issue to change the representation of China must be considered as an important question, meaning it should be made by a two-thirds majority of the members present and voting.⁴³ From then on, any attempt to change the Chinese representation could not succeed until 1971.

Because of its commitment to the Chiang Kai-shek regime of the ROC,⁴⁴ the US for more than two decades led the fight to save the ROC by using procedural tactics. However, it could not ignore the fact that the PRC was the regime effectively in control of the Chinese mainland. In this regard, it became more difficult for the US to fight for the ROC on the issue of Chinese representation⁴⁵ on the ground that more and more member states were convinced that the PRC was the government exercising effective authority within the territory of China and thus, should represent the State in

⁴³ See Art. 18 of the UN Charter.

⁴⁴ See A. LeRoy Bennett, *INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES*, Prentice Hall, 1995, p.86.

⁴⁵ In order to hold a seat in the UN for Taiwan, the US proposed a compromise by favoring a Security Council seat for the PRC so that both Chinas can sit at the UN at the same time. But the proposal was defeated by both Chinese regimes because of the assertion of one China policy. See Frederic L. Kirgis, Jr., *INTERNATIONAL ORGANIZATION IN THEIR LEGAL SETTING*, West Publishing Co., US, 1993, p.180.(Hereinafter: Kirgis, *INTERNATIONAL ORGANIZATIONS*).

the United Nations. As a result, in 1971, the issue of Chinese representation took an about turn and was no longer characterized as an important question under Article 18 of the UN Charter by the majority of the members present and voting in the UN General Assembly. At this point, the ROC Delegation left the General Assembly Hall. Realizing the imminence of the PRC's entry to assume China's seat in the UN at the next subsequent ballot on substantive "unimportant" question, the ROC representatives announced its gracious withdrawal from the United Nations. Resolution 2758,⁴⁶ no longer requiring a two-thirds majority and without any recommendation from the Security Council, was adopted within minutes by a simple majority with the immediate effect to admit the PRC to take China's seat and "expel" the Chiang Kai-shek representatives from the United Nations.

§ 1-10 The Question of Taiwan's Status

Many arguments were raised after the adoption of UN GA Resolution 2758, because the resolution only resolved the representation issue for the people of mainland China but not for the people of Taiwan. In short, it could only affirm the right of the PRC to represent the people who were under its effective control. Admittedly, part of the rationale enabled the PRC to take over China's seat in the UN

⁴⁶ The UN General Assembly Resolution 2758 was passed in the 26th session of the UN General Assembly to admit Beijing to replace Taipei to sit in the United Nations and its Security Council. For details about the resolution, see *G.A. Res. 2758, 26 GAOR Supp. 29 (A/8429), at 2*, United Nations General Assembly, Oct. 25, 1971.

since the ROC no longer effectively controlled the Chinese mainland. Conversely, the people of Taiwan have never been under the control of the PRC for any single day but have been ruled by the ROC since 1945. A fortiorissime, the same rationale should equally apply to the case of Taiwan with a population of over twenty-two million to be represented at the United Nations.

Since 1993, Taipei has continually sought to enter the UN by arguing that “the UN needs to examine the exceptional international situation pertaining to the Republic of China on Taiwan, to ensure that the fundamental right of its twenty-three million people to participate in the work and activities of the United Nations is fully respected.”⁴⁷ However, without gaining acceptance in the UN General Assembly Steering Committee, the perennial proposal has been excluded from the UN General Assembly agenda because Beijing was able to rally its allies to voice their opposition against Taipei.

In light of Article 4 of the UN Charter, the procedure concerning the admission of new members to the United Nations includes not only that a state wishing to become a member of the UN should be a peace-loving State, accepting the obligations contained in the UN Charter and is able and willing to carry out these obligations, but also a decision of the General Assembly should be based upon “the recommendation

⁴⁷ See LETTER WRITTEN TO THE UN SECRETARY-GENERAL, released by the ROC Foreign Ministry, 1999. (<http://www.mofa.gov.tw/un/unlet99.htm>).

of the Security Council.” In short, without the recommendation from the UN Security Council, an applicant cannot qualify to become a member state in the United Nations.⁴⁸ At this point, pressure from the PRC as a permanent member of the UN Security Council with its double veto power to impede Taiwan’s entry into the UN has significantly aroused this curiosity: “how can Taiwan become a member state in the United Nations? Is it possible?” This is worthy of further discussion because it is not just a highly political issue between China and Taiwan. After all, the Taiwan issue itself with its potential for an armed conflict with China needs to be viewed as a serious threat to international peace and security. In other words, the maintenance of a peaceful Taiwan Strait should be regarded as a common desire of the international community. Hence, only when Taiwan joins the United Nations, which is recognized as a paramount organization in the world and a comprehensive forum for collective security and world dialogue, can the stable community play a key role by providing every assistance to settle the existing disputes before they degenerate into serious conflicts.

After the ROC lost its seat in the UN, it consequently failed to retain its seats in numerous other international organizations. Currently Taipei only enjoys membership in very few intergovernmental organizations (such as the Asian Development Bank,

⁴⁸ See Kirgis, INTERNATIONAL ORGANIZATIONS, p.148.

the International Cotton Advisory Committee, the Asian Productivity Organization, the Afro-Asian Rural Reconstruction Organization, and the Central American Bank for Economic Integration).⁴⁹ Significantly the US decision to switch its diplomatic relations from the Republic of China to the People's Republic of China in 1979 provided an incentive precedent for other hesitant countries to follow. This realistic trend gave rise to another round of trouble in Taipei's foreign policy. Suffering from this consequence, Taipei currently maintains official relations with only twenty-seven states.⁵⁰ Most are Latin American and Caribbean countries, and several are tiny and poor island nations located in the South Pacific and Oceania region. This reality places Taiwan in a very strange position in the world. On the one hand, the people of Taiwan have learned how to live together with one another, to respect each other, and to work with each other for the future of their community economically. On the other hand, they seem to be isolated in the global context politically. Although the economic achievement has propelled Taiwan into something akin to an "economic giant"⁵¹ internationally, the evolution still cannot change the fact that Taiwan is also acting

⁴⁹ See THE REPUBLIC OF CHINA YEARBOOK 1999, the ROC Government Information Office.

⁵⁰ See THE REPUBLIC OF CHINA YEARBOOK 2002, released by the ROC Government Information Office (Noting that Taiwan currently has diplomatic ties with 29 countries. Four countries in South Pacific and Oceania region: Palau, Solomon Island, Marshall Island, and Tuvalu; eight countries in Africa: Burkina Faso, Chad, the Gambia, Liberia, Malawi, Sao Tome and Principe, Senegal, as well as Swaziland; one West European countries: Holy See; fourteen countries in Latin America and the Caribbean area: Belize, Costa Rica, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Saint Christopher and Nevis, as well as Saint Vincent and the Grenadines).

⁵¹ See THE REPUBLIC OF CHINA YEARBOOK 1999 (Noting that, in 1998, Taiwan's Per capita GNP was the 25th highest worldwide and at the end of the same year, the accumulative sums of foreign exchange reserves was the third highest in the world. Currently, Taiwan is the world's 14th largest trade

like a “political orphan” in the world. This is regardless of the fact that there is little dispute that Taiwan meets the accepted criteria for statehood, namely, a permanent population, a defined territory, an effective government, including a capacity to enter into international relations with other states, in accordance with the Montevideo Convention on Rights and Duties of States.⁵²

Beijing has never committed itself to abandoning military action if Taiwan moves toward independence and has repeatedly warned Taiwan against using the term “state” to describe itself, regarding it as a move toward independence from China. As such, most of the people of Taiwan favor the status quo of Taiwan’s current position, that is, to remain vague in reference with a leaning toward independence and reunification. Probably, maintaining a status quo⁵³ by going beyond the independence-reunification dichotomy was a good strategy for Taiwan to avoid China absorbing Taiwan on its terms in the past. Yet, contemplating that Taiwan is gradually losing its political position in global affairs, it is doubtful at this point whether this strategy will continue to serve Taiwan in the future because currently Taiwan is already seriously overshadowed by China.

Recently, in September 1999, Taiwan experienced a terrible earthquake that

partner).

⁵² See Montevideo Convention on the Rights and Duties of States, Art.1, Dec.26 1933, 165 L.N.T.S. 25.

⁵³ From various studies and opinion polls showing the majority of people of Taiwan prefer to keep the status quo regarding relations with Beijing. The related issues will be covered in the last chapter.

killed over twenty-three hundred people and caused losses and injuries estimated at US\$3.1 billion.⁵⁴ In spite of a severe disaster, regrettably, without membership of the UN and its specialized agencies, Taiwan was not able to benefit directly from any formal financial aid provided by certain intergovernmental organizations like the World Bank and the International Monetary Fund. This is in sharp contrast to the case of Turkey. In order to express sympathy with the people of Turkey following the devastating earthquake that hit the Marmara region in August 1999, the two economic international organizations provided a series of financial emergency assistance to help Turkey recover from the effects of the earthquake.⁵⁵ The lesson therefore is that Taiwan must blend its political status into its economic position. Taiwan's economic achievement has reshaped its role on the global economic stage, but it did not help strengthening its political position in the global context. In this regard, it is clear that Taiwan's political status is left far behind its economic status. Therefore, to break out from the current international isolation and play a valuable role in the United Nations system will be highly meaningful in the enhancement of the legal status of Taiwan and the maintenance of the national security of Taiwan politically and economically.

⁵⁴ See SPECIAL REPORTS ON TAIWAN'S SEFT. 21 EARTHQUAKE, the ROC Government Information Office, 1999. (<http://publish.gio.gov.tw/iisnet/921e.htm>).

⁵⁵ See PRESS RELEASE: IMF APPROVES US\$ 501 MILLION IN EMERGENCY ASSISTANCE FOR TURKEY, News of the International Monetary Fund, 1999(Noting that, on Oct. 13, 1999, the IMF approved an emergency assistance of SDR 361.5 million(about US\$501 million) to support Turkey's recovering project),see also see WORLD BANK PROVIDES EARTHQUAKE ASSISTANCE TO TURKEY, News Release of the World Bank Group, 1999(Noting that, on November 16, 1999, two loans, one was Emergency Earthquake Recovery Loan and the other was Marmara Earthquake Emergency Reconstruction Project, totaling US\$ 757.53 million, were authorized

§ 1-11 Taiwan-China Cross-Strait Relations

Regardless of the political hostility, the increasing economic exchange⁵⁶ between both sides of the Taiwan Straits has turned Taiwan into China's second largest source of investment capital,⁵⁷ giving an added reason to the suggestion that both sides do have some common interests with each other. A quasi-official institutionalized system -- the Taipei-based Strait Exchange Foundation(SEF) and the Beijing-based Association for Relations Across the Taiwan Strait(ARATS) -- for cross-strait consultations was set up by the two sides in 1992 and 1993 respectively. However, without mutual trust and a common ground on the issue of Taiwan's sovereignty, the institutionalized communication and dialogue between the Taipei-based SEF and Beijing-based ARATS did not proceed smoothly. Due to its presumptive "one-China" principle and "one country, two systems" formulas, Beijing has refused recognition to the Republic of China, considering Taiwan as a local government. It is in this sense that an on-going economic interaction of the two sides increasingly presents a dramatic divergence between economics and politics. The complexity of developments between Taipei and Beijing signals us to the fact that

by World Bank for the purpose of assisting Turkey's recovery from the effects of the earthquake).

⁵⁶ In order to achieve its economic and political goal, China has been successful in attracting investors from Taiwan by regulating a series of policies to provide some preferential treatments. Due to the similar customs and common language as well as kinship ties, those investors found it easy to set up business there. Gradually Chinese mainland became the most favorite place of Taiwan's outbound investment. Further discussions on this will be covered in Chapter V.

⁵⁷ According to the survey released in 1998, Taiwan was China's second largest source of investment capital, after Hong Kong. China is also one of Taiwan's biggest exporting market. See John F. Copper, *TAIWAN: NATIONS-STATE OR PROVINCE*, SMC Publishing Inc., 1994, p.167.

Taiwan is playing a strategy gamble between economic interest and security interest. The evolution of the independence-reunification dichotomy would directly influence the consequence of the strategy gamble, judging from the reality that Beijing is becoming stronger and its international position is rising. Thus, Taipei is weakening its bargaining chip demanding that China should relate with Taiwan on an equal footing in negotiations over their future relations. More significantly, politically and economically, most states in the world tend to take sides on favoring Beijing's "THREE NO'S" policy⁵⁸ which successfully isolates Taiwan from global politics. Hence, to develop a pragmatic policy by meeting the balance between promoting international recognition and retaining stable cross-strait relations with Beijing would be an insuperable tactic for Taipei in handling the Taiwan issue. In short, only when there is a constructive mechanism for peaceful cross-strait relations accepted by China, can we see the status of Taiwan substantially enhanced in the world political arena.

To maintain peace in the international community is a fundamental purpose of international law. In order to retain and preserve world peace and security, the methods and procedures for the peaceful resolution of disputes and conflicts are very important in international law.⁵⁹ Although states are not obliged to proceed with the

⁵⁸ The "THREE NO'S" refers to: 1) no support for Taiwan's independence, 2) no support for "two Chinas" or "one China, one Taiwan" and 3) no support for Taiwan's membership in international organizations in which statehood is required. The related issue will be mentioned in Chapter V.

⁵⁹ See generally, Malcom N. Shaw, *INTERNATIONAL LAW*, Cambridge University Press, 1999, Chapter 18 (Hereinafter: Malcom, *INTERNATIONAL LAW*); L. Henkin, R. C. Pugh, O. Schacher & H.

prescribed methods and procedures of peaceful settlement of their disputes and conflicts, they are always available for use by the disputed states in addition to any other means of their choice. Article 2(3) of the UN Charter provides that all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered. Accordingly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States⁶⁰ further defines this principle, stating that under Article 33 of the UN Charter, states shall seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

As mentioned above, Taiwan's status is a typical issue that is both legal and political in nature. Judged by the refusal of the PRC to recognize Taiwan as an independent state and to regard the Taiwan issue as an internal affair, it seems hard to directly apply all the mechanisms adopted by the 1970 Declaration to a dispute on the Taiwan issue between Taiwan and China. Yet, part of the dispute settlement principle

Smit, *THE INTERNATIONAL LAW: CASES AND MATERIALS*, West Publishing Co., 1993, Chapter 10 (Hereinafter: Henkin, *INTERNATIONAL LAW*); United Nations, *HANDBOOK ON THE PEACEFUL SETTLEMENT OF THE DISPUTES BETWEEN STATES*, New York, 1992 (Hereinafter: UN, *HANDBOOK ON PEACEFUL SETTLEMENT*); Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, Oxford University Press Inc., 1998, Chapter 12 (Hereinafter: Brownlie, *INTERNATIONAL LAW*).

⁶⁰ See supra note 30 on Resolution 2625.

can be compared to the case of the Taiwan issue such as negotiation, good offices, and mediation. In fact, one example of the good offices was the so-called Koo-Wang meeting in 1993 in which it was arranged for the top leaders of the Taipei-based SEF and the Beijing-based ARATS to have a direct dialogue in Singapore with the good office and assistance of the government of Singapore. Hence, how to proceed with a satisfactory mechanism to reconcile divergent opinions between the two sides of the Taiwan Strait through the peaceful dispute settlement principle in international law would be an essential tactic for Taiwan to develop technically.

§ 1-12 Modern Aspect of State Sovereignty

With the collapse of the communist regimes in central and Eastern Europe, leading to the end of the Cold War, the rise of a new world order has begun. The traditional and ideological confrontation in politics has turned into the global politic as well as economic cooperation. Every country wants economic and social progress. Evidently the economic integration in the European Community renders boundaries less significant. The relationship between state sovereignty and membership of the fifteen states in the European Community illustrates a comprehensive and persuasive example that states can accept major limitations of national power politically without at the same time losing their state sovereign identity legally. Accordingly, each state

can still retain its dignity as a sovereign state in international law.⁶¹ Also this type of cooperation among nations, by working closely together in a shared enterprise, would benefit the regional security as a whole.⁶² The prospective emergence of a new regional society in European Community is likely to expose a future possibility that globalization will bring a contemporary concept in defining state sovereignty within the modern world in general. Unfortunately, it seems to remain unclear whether Taiwan can benefit from this kind of evolution particularly so long as Beijing's desire to prevent Taiwan from playing a positive role in the global politics is still visible. Yet, in any study of the future of the Taiwan issue, the functional views of globalization cannot be ignored on the ground that the Taiwan issue is typically one of the global problems under international law. Especially, the present dynamics of international relations and the socio-economic field make it clear that Taiwan has been playing an important role on the global stage. Hence, a foreseeable future for Taiwan concerns not only the people of Taiwan but also international security and prosperity.

Although, by reviewing Taiwan's factual situations in legal and political reality lucidly, many issues on the question of Taiwan's status are more deeply involved in political consideration and policy imperative than the legal aspects. This is not the

⁶¹ See Eli Lauterpacht, SOVEREIGNTY: MYTH OR REALITY, International Affairs, Vol.73 No.1, Cambridge University Press, 1997, pp.137-150.

⁶² See Douglas Hurd, DEVELOPING THE COMMON FOREIGN AND SECURITY POLICY, Vol.70 No.3, Cambridge University Press, 1994, pp.421-428 (Noting that the European Union was founded on the premise that nations cooperating so closely together in a shared enterprise would not contemplate

equivalent of conceding that the status of Taiwan is not an issue in international law, if one is mindful of the fact that law and politics represent two sides of the same coin. In truth, the two go hand in hand. Undoubtedly, international law plays an influential role in the global society which seems to suggest that international law is a product of social processes. Regardless of its lack of strong legislative, judicial and enforcement organs, international law has developed, through prevailing notions of international relations and harmony with the realities, to grapple with new issues that cannot be ignored. As Taiwan is the 19th largest economy and the 15th largest trading country worldwide, the issue of Taiwan's status is one that cannot be put aside from international law, particularly, as the people of Taiwan have gone a long way toward realizing their dream politically and economically, and keep renewing effective and strong claims to the international community as to their wants and needs. As Professor Malcolm N. Shaw suggested in his book:

“The scope of international law today is immense. From the regulation of space expeditions to the question of the division of the ocean floor, and from the protection of human rights to management of the international financial system, its involvement has spread out from

the primary concern with the preservation of peace, to embrace all the interests of contemporary international life."⁶³

In view of these developments in the international legal system, especially at the beginning of a new millennium, I feel optimistic that the time has come to create a comprehensive mechanism to resolve the Taiwan issue under the international legal system because it deeply relates to the preservation of peace as well as the international life of the twenty-three million inhabitants of Taiwan.

In an attempt to have a better understanding of the legal status of Taiwan and with a strong tendency, through the analytical framework on various fundamental issues, to present a comprehensive preview of Taiwan's prospects, I will start with the topic of self-determination and analyze whether the people of Taiwan are qualified to exercise this principle under the contemporary legal concept. After that, I will proceed with examining the current status of Taiwan based on the legal and modern aspect of sovereignty, statehood and recognition. Before the conclusion, the next stage will future a discussion on the salient issue of Taiwan's status in the UN system, and its related topics will be focused on. In order to picture the future of the Taiwan position, the issue of Taiwan question by focusing on the triangular relations between Taiwan,

⁶³ See Malcolm, INTERNATIONAL LAW, pp. 36-37.

China and the US as well as the impact of the independence-reunification dichotomy between economic interests and security interests across the Taiwan Strait will be covered in the part of the conclusion.

Accordingly, a total of five chapters are organized in this dissertation, which are: Chapter One –Introduction: Understanding the Taiwan Issue; Chapter Two - The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-determination; Chapter Three - The Modern Concept of State Sovereignty, Statehood and Recognition: A Case Study of Taiwan; Chapter Four – Taiwan’s Status in the United Nations in a Changing World: Taiwan’s Case in the Questions of Representation and Membership; and Chapter Five – Conclusion: A Vision with Hope for the Future of Taiwan.

CHAPTER TWO

The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination

I. INTRODUCTION

The Charter of the United Nations (hereinafter "UN") calls for the respect of "the principle of equal rights and self-determination of peoples."⁶⁴ In similar language, the principle of self-determination to all peoples is formally affirmed in other legal documents such as, the Universal Declaration of Human Rights (hereinafter "UDHR"),⁶⁵ the International Covenant on Civil and Political Rights (hereinafter "ICCPR"),⁶⁶ the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"),⁶⁷ various UN General Assembly resolutions, and International Court of Justice decision and advisory opinions.⁶⁸ As a crucial principle of collective human rights, the international legal instruments have elevated the

⁶⁴ See UN CHARTER, art. 1, para. 2 (stating the purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace); cf. Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 *Emory Int'l L. Rev.* 479, 501 (1994) (stating that although the Charter refers to self-determination as a right pertaining to "peoples," it contains no definition of the term); See, eg., Goler Teal Butcher, *THE IMMEDIACY OF INTERNATIONAL LAW FOR HAWARD UNIVERSITY*, 31 *How. L. J.* 435, 443 (1988) (asserting that political leaders adopted the UN CHARTER based on the principles of equal rights and self-determination in order to achieve international peace and security, as a reaction to Nazism).

⁶⁵ See Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, at 52, UN Doc. A/6316(1948) (containing core human rights principles that are widely recognized by the international community).

⁶⁶ See International Covenant on Civil and Political Rights, G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316(1966) (spelling out, in greater detail, the broad principles enunciated in the UDHR).

⁶⁷ See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, at 48, UN Doc. A/6316(1966).

⁶⁸ See Laurel Remers Pardee, *THE DILEMMA OF DOWRY DEATHS: DOMESTIC DISGRACE OR INTERNATIONAL HUMAN RIGHTS CATASTROPHE*, 13 *Ariz. J. Int'l & Comp. L.* 491, 509 (1996) (noting that the UN later codified the right of self-determination as a human right in Article one of both the ICCPR and the ICESCR); see also Bereket Habte Selassie, *SELF-DETERMINATION IN PRINCIPLE AND PRACTICE: THE ETHIOPIAN-ERITREAN EXPERIENCE*, 29 *Colum. Human Right L. Rev.* 91, 94 (1997) (stating that the link between human rights and self-determination was clearly established by the ICESCR and ICCPR); see also Prudence E. Taylor, *FROM ENVIRONMENT TO ECOLOGICAL HUMAN RIGHTS: A NEW DYNAMIC IN INTERNATIONAL LAW*, 10 *Geo. Int'l Envtl. L. Rev.* 309, 330 (1998) (noting that Part I of both the ICCPR and the ICESCR begin by declaring that "all peoples have the right of self-determination").

principle of self-determination to a norm of customary international law which has a legally binding effect on the international community.⁶⁹

§ 2-1 The Principle of Self-Determination as Customary International Law

In today's world, self-determination itself is an extremely controversial issue in relation to the qualifications of the group of persons entitled to exercise the right of self-determination.⁷⁰ No one doubts that self-determination is a fundamental principle of human rights law, but full consensus on defining the holder of the right to self-determination has not yet been reached.⁷¹

⁶⁹ See Richard N. Kiwanuka, THE MEANING OF "PEOPLE" IN THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS, 82 Am. J. Int'l L. 80, 88-9(1988)(noting that under current international law, political self-determination is generally equated with freedom from colonial-type rule); also see Eric Kolodner, THE FUTURE OF THE RIGHT TO SELF-DETERMINATION, 10 Conn. J. Int'l L. 153, 155(1994)(stating that the principles of international order became more developed after the formation of the UN as respect for self-determination became a necessary precondition for a government's international legitimacy); also see Halim Moris, SELF-DETERMINATION: AN AFFIRMATIVE RIGHT OF MERE RHETORIC?, 4 Ilsa J. Int'l & Comp. L. 201, 202-3(1997)(noting that President Woodrow Wilson was responsible for elevating the principle of self-determination to an international level when, in 1916, he included it in his fourteen points); see also Hurst Hannum, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 27 (1990)(stating that no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination).

⁷⁰ See Deborah Z. Cass, RE-THINKING SELF-DETERMINATION: A CRITICAL ANALYSIS OF CURRENT INTERNATIONAL LAW THEORIES, 18 Syracuse J. Int'l L. & Comp. 21, 21(1992)(noting the uncertainty in the application of self-determination in international law); see also Amen Tamzarian, NAGORNO-KARABAGH'S RIGHT TO POLITICAL INDEPENDENCE UNDER INTERNATIONAL LAW: AN APPLICATION OF THE PRINCIPLE OF SELF-DETERMINATION, 24 Sw. U. L. Rev. 183, 195-6(1994)(noting that, while it has been generally accepted that people under colonial domination have a right to self-determination, the application of self-determination to "peoples" within an existing state has been much more controversial). See also Gerry J. Simpson, JUDGING THE EAST TIMOR DISPUTE: SELF-DETERMINATION AT THE INTERNATIONAL COURT OF JUSTICE, 17 Hastings Int'l & Comp. L. Rev. 323, 340(1994)(noting that state practice, especially since the fall of communism in Eastern Europe and the Soviet Union, has supported the right to self-determination for non-colonial peoples).

⁷¹ See Lee C. Buchheit, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION, at 9-11, (1978)(arguing that in addition to a group's "subjective perception of distinctness," objective characteristics, such as linguistic, racial, religious, and historic differences between the group seeking self-determination and other groups must be analyzed in order to determine whether the group is an appropriate candidate for self-determination); see also Antonio Cassese, THE SELF-DETERMINATION OF PEOPLES, IN THE INTERNATIONAL BILL OF RIGHTS, at 92-4 (Louis Henkin ed., 1981)(arguing that "peoples" have a right to self-determination if they are a distinct ethnic group within a multinational state and have "a distinct legal status within the constitutional framework"); see also Dietrich Murswiek, THE ISSUE OF A RIGHT OF SECESSION

Observing the proliferation of self-determination claims after the Cold War, the concept of self-determination has been widely acknowledged yet used differently on various occasions.⁷² In general, however, it is inherent in the democratic process to allow the wishes of a people to determine their own political status and freely pursue their economic, social, and cultural development.⁷³

§ 2-2 Two Types of Self-Determination

There is no universally accepted definition of self-determination. There are, however, two types of distinctions for self-determination which are often mentioned.⁷⁴

RECONSIDERED, IN MODERN LAW OF SELF-DETERMINATION, at 21-37 (Christian Tomuschat ed., 1993)(arguing that state practice supports the rule that territorial units, rather than ethnic or religious groups, may exercise self-determination).

⁷² See Yehuda Z. Blum, HISTORIC TITLES IN INTERNATIONAL LAW, at 3 (1965)(noting that under orthodox doctrine, title turned on classic forms of acquisition, occupation, accretion, cession, conquest and prescription); see also Steven R. Ratner, DRAWING A BETTER LINE: UTI POSSIDETIS AND THE BORDERS OF NEW STATES, 90 Am. J. Int'l L. 590, 14-5(1996)(discussing that, alongside the postwar and post-Cold War era, developments regarding self-determination, there has been a change in the law governing the title of a state, or a people to a land); see also Jainming Shen, SOVEREIGNTY, STATEHOOD, SELF-DETERMINATION, AND THE ISSUE OF TAIWAN, 15 Am. U. Int'l L. Rev. 1101, 1144(2000)(discussing that in the post-Cold War era, ethnic, linguistic, religious, or cultural groups within nations reemerge demanding devolution or secession in pursuit of limited or full sovereignty).

⁷³ See Franz Xaver Perrez, THE RELATIONSHIP BETWEEN "PERMANENT SOVEREIGNTY" AND THE OBLIGATION NOT TO CAUSE TRANSBOUNDARY ENVIRONMENTAL DAMAGE, 26 Envtl. L. 1187, 1192(1996)(noting that it is generally accepted that permanent sovereignty over natural resources is a prerequisite for economic development and, therefore, is a fundamental principle of contemporary international law); see also G.A. Res. 1803, UN GAOR, 17th Sess., Supp. No. 17, at 15, UN Doc. A/5217(1962); cited in 9 United Nations Resolutions: General Assembly 107-8(Dusan J. Djonovich ed., 1974)(declaring "the right of peoples and nations to the permanent sovereignty over their natural wealth and resources" and that "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirits and principles of the UN Charter"). But see David A. Ring, SUSTAINABILITY DYNAMICS: LAND-BASED MARINE POLLUTION AND DEVELOPMENT PRIORITIES IN THE ISLAND STATES OF THE COMMONWEALTH CARIBBEAN, 22 Colum. J. Envtl. L. 65, 122(1997)(noting that a general caveat has evolved that states owe a duty to ensure that activities or pollution arising within their territories or control do not cause harm to other states and their environment).

⁷⁴ See Frederic L. Kirgis, Jr., THE DEGREE OF SELF-DETERMINATION IN THE UNITED NATIONS ERA, 88 Am. J. Int'l L. 304, 304(1994)(stating that the drafters of the UN Charter did not bother to define self-determination or to identify who the "peoples" were, but the Soviet Foreign Minister referred to the idea as "equality and the self-determination of nations"); see also Jeffrey Wutzke, DEPENDENT INDEPENDENCE: APPLICATION OF THE NUNAVUT MODEL TO NATIVE HAWAIIAN SOVEREIGNTY AND SELF-DETERMINATION CLAIMS, 22 Am. Indian L. Rev. 509, 556-7(1998)(noting that ex-colonial sovereignty was based on a notion of a universal

The first distinction between anti-colonial self-determination (meaning the right of peoples to create an independent state by liberating themselves from existing colonial or alien rule) and non-colonial self-determination (meaning the right of a people to secede or to form a new representative government or to achieve a higher degree of autonomy within an existing state).⁷⁵ The other distinction is between external self-determination (meaning the right of a people to decide their own status within the international community) and internal self-determination (meaning the right of a people freely to decide the form of government they want to pursue within an existing state).⁷⁶

doctrine of self-determination for colonial peoples, which did not presuppose underlying nationhood but only subject colonial status); see also Dean B. Suagee, HUMAN RIGHTS OF INDIGENOUS PEOPLES: WILL THE UNITED STATES RISE TO THE OCCASION?, 21 *Am. Indian L. Rev.* 365, 381(1997)(discussing Professor Anaya's distinction between the "substantive" and the "remedial" aspects of self-determination).

⁷⁵ See Edward T. Canuel, NATIONALISM, SELF-DETERMINATION, AND NATIONALIST MOVEMENTS: EXPLORING THE PALESTINIAN AND QUEBEC DRIVES FOR INDEPENDENCE, 20 *B.C. Int'l & Comp. L. Rev.* 85, 86-7(1997)(noting that while theorists and international law justify the right of former colonized peoples to seek self-determination, political expedience is a major consideration in allowing self-determination movements to secede in non-colonial states). But see Luke P. Bellocchi, SELF-DETERMINATION IN THE CASE OF CHECHNYA, 2 *Buff. J. Int'l L.* 183, 184(1995)(questioning when, where, and how, in a non-colonial context, can a people utilize their inherent and UN Chartered right to self-determination and secede into an independent nation-state); see also Gerry J. Simpson, THE DIFFUSION OF SOVEREIGNTY: SELF-DETERMINATION IN THE POST-COLONIAL AGE, 32 *Stan. J. Int'l L.* 255, 269(1996)(discussing that the question of secession and its relationship to the right to self-determination for non-colonial peoples was raised but then dismissed either as a separate problem or as a misuse of the right to self-determination).

⁷⁶ See Kiwanuka, *supra* note 69, at 93 (noting the international Covenants not only endorse the right of external self-determination, but also the right of internal self-determination: the right of a people to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution); see also Aaron P. Micheau, THE 1991 TRANSITIONAL CHARTER OF ETHIOPIA: A NEW APPLICATION OF THE SELF-DETERMINATION PRINCIPLE?, 28 *Case W. Res. J. Int'l L.* 367, 390(1996)(noting that external self-determination focuses on the independence of the state apparatus, while internal emphasizes the independence of the population and is only assured by a representative form of government); see also generally Kolodner, *supra* note 6 (arguing that the international community should attempt to resolve conflicts under principles of internal self-determination before supporting a people's right to external self-determination as it encompasses potentially disruptive consequences).

As a result of a Civil War in 1949, the Republic of China (hereinafter "ROC") was divided into two governments: the ROC in Taiwan and the Peoples' Republic of China (hereinafter "PRC") located in the Chinese mainland.⁷⁷ Since 1949, the status of Taiwan has become a central issue between the two sides of the Taiwan Strait.⁷⁸ In spite of the political confrontation between the ROC and the PRC, Taiwan has, for decades, been thought of as part of China by the two governments under the mythology of one-China principle.⁷⁹ This makes the independence of Taiwan ambiguous.⁸⁰ Does it imply that the indigenous natives of Taiwan are not eligible to

⁷⁷ See Su Wei, SOME REFLECTIONS ON THE ONE CHINA PRINCIPLE, 23 *Fordham Int'l L. J.* 1169, 1170(2000)(noting that in October 1949, the Chinese people won their New Democratic Revolution and established a new central government called the People's Republic of China); see also Tzu-wen Lee, THE INTERNATIONAL LEGAL STATUS OF TAIWAN: THE INTERNATIONAL LEGAL STATUS OF THE REPUBLIC OF CHINA ON TAIWAN, 1 *UCLA J. Int'l L. & Aff.* 351, 353(1996)(discussing that the forces of the Republic of China finally retreated to Taiwan on December 8, 1949, leaving Mao Zedong and the People's Republic in control of the mainland); see also Shen, *supra* 72, at 1117 (discussing the civil war how it caused the regime of the Republic of China to be overthrown by the People's Republic of China).

⁷⁸ See Lung-chu Chen, TAIWAN'S CURRENT INTERNATIONAL LEGAL STATUS, 32 *New Eng. L. Rev.* 675, 680(1998)(discussing the PRC's refusal to renounce threat or use of force in settling disputes with Taiwan has been a continuing source of insecurity, instability and anxiety in the Taiwan Strait area); see also Anne Hsiu-an Hsiao, IS CHINA'S POLICY TO USE FORCE AGAINST TAIWAN A VIOLATION OF THE PRINCIPLE OF NON-USE OF FORCE UNDER INTERNATIONAL LAW?, 32 *New Eng. L. Rev.* 715, 715-6(1998)(stating that the PRC has repeatedly reiterated that it reserves the right to take over Taiwan by force, and has taken action to demonstrate its determination to do so); see generally Christopher C. Joyner, THE SPRATLY ISLANDS DISPUTE: WHAT ROLE FOR NORMALIZING RELATIONS BETWEEN CHINA AND TAIWAN?, 32 *New Eng. L. Rev.* 819, 838(1998)(noting that the PRC's conduct of combat naval maneuvers and missile firings in the Taiwan Strait in 1996 seriously aggravated political relations and diminished trust between the two).

⁷⁹ See White Paper: The One China Principle and the Taiwan Issue (visited September 29, 2000)(<http://www.china-embassy.org/papers/taiwan00.htm>)(stating that "...settlement of the Taiwan issue and realization of the complete reunification of China embody the fundamental interest of the Chinese nation. The Chinese government has worked persistently toward this goal in the past 50 years."); see also Shen, *supra* note 72, at 1117 (noting the authorities in Taiwan, until necessary, also upheld the "One China" principle, although they maintained that they represented China as a whole, a claim that was false both in fact and in law).But see Lee, *supra* note 14, at 378 (discussing that the policy has apparently been implemented in order to prevent the PRC from resorting to the use of force against Taiwan and although the ROC repeatedly announces the "One China" policy, in the absence of its intention to be bound, such declarations create no international legal obligations).

⁸⁰ See Glenn R. Butterson, SIGNALS, THREATS, AND DETERRENCE: ALIVE AND WELL IN THE TAIWAN STRAIT, 47 *Cath. U.L. Rev.* 51, 66 (1997)(noting that the ambiguous of Taiwan comes from the questions of whether Taiwan is a state or a non-state); see also Jiunn-rong Yeh, INSTITUTIONAL CAPACITY-BUILDING TOWARD SUSTAINABLE DEVELOPMENT:

determine their own future?

§ 2-3 The Issue of Taiwan's Possible Entitlement to Self-Determination

Taiwan's status and the right of its people to self-determination is relevant because the size of its population of over twenty-two million is relatively large in comparison to that of other independent states in the world.⁸¹ The evolution of self-determination makes it clear that the right to collectively present the will of a people or a particular indigenous population regarding the chosen way of life should be deemed a universal value.⁸² Does the political separation between Taiwan and the Chinese mainland provide the Taiwanese people any qualification to apply the principle of self-determination as described above? This issue and related ones will be focused on and analyzed in this chapter.

TAIWAN'S ENVIRONMENTAL PROTECTION IN THE CLIMATE OF ECONOMIC DEVELOPMENT AND POLITICAL LIBERALIZATION, 6 *Duke J. Comp. & Int'l L.* 229, 257(1996)(stating that Taiwan's ambiguous diplomatic status has made participation in international environmental organizations difficult because it lacks standing as a nation); see also Joyner, *supra* note 78, at 838 (asserting that Taiwan's ambiguous international status undercuts its bargaining power because Taiwan has no legal standing in the dispute without any legal standing in international law).

⁸¹ See Alex Y. Seita, GLOBALIZATION AND THE CONVERGENCE OF VALUES, 30 *Cornell Int'l L. J.* 429, 472(1997)(noting that in 1995, Taiwan's population of 21.3 million was larger than Australia's population); see also THE WORLD ALMANAC AND BOOK OF FACTS 1996, at 822 (Robert Famighetti ed., 1995)(citing Taiwan's population statistics); see generally Jonathan I. Charney & J. R. V. Prescott, RESOLVING CROSS-STRAIT RELATIONS BETWEEN CHINA AND TAIWAN, 94 *Am. J. Int'l L.* 453, 471(2000)(arguing that Taiwan's population should be given the option of whether or not to choose some form of association with China).

⁸² See S. James Anaya, THE NATIVE HAWAIIAN PEOPLE AND INTERNATIONAL HUMAN RIGHTS LAW: TOWARD A REMEDY FOR PAST AND CONTINUING WRONGS, 28 *GA. L. Rev.* 309, 326(1994)(noting the core values of freedom and equality translate into a requirement that institutions of government be created according to the will of the people governed); see also Benedict Kingsbury, "INDIGENOUS PEOPLES" IN THE INTERNATIONAL LAW: A CONSTRUCTIVIST APPROACH TO THE ASIAN CONTROVERSY, 92 *Am. J. Int'l L.* 414, 453(1998)(asserting the international concept of indigenous people connotes emphasis on self-determination and the role of groups in decisions affecting them). But see Michael Holley, RECOGNIZING THE RIGHTS OF INDEGENOUS PEOPLE OF THEIR TRADITIONAL LANDS: A CASE STUDY OF AN INTERNALLY-DIAPLACED COMMUNITY IN GUATEMALA, 15 *Berk. J. Int'l L.* 119, 148(1997)(discussing the current international consensus on indigenous peoples' right to

This chapter is divided into eight parts. Part II deals with the traditional concept of anti-colonial self-determination during the Cold War. Part III discusses the evolution of self-determination from the non-colonial aspect in the aftermath of the Cold War. Part IV examines the evolution of self-determination in Taiwan after the Second World War, while part V focuses on the potential of an armed conflict in the self-determination movement of Taiwan. In part VI, the issue of the forcible integration and the entitlement of the people of Taiwan to external self-determination will be covered. Part VII incorporates an additional commentary and the conclusion follows in part VIII.

II. TRADITIONAL CONCEPT OF ANTI-COLONIAL SELF-DETERMINATION

DURING THE COLD WAR

§ 2-4 US President Woodrow Wilson & the 1941 Atlantic Charter

The term “self-determination” was first formally addressed by the United States President Woodrow Wilson after World War I.⁸³ Woodrow Wilson was an advocate of self-determination and promoted the concept of democracy in an attempt to establish

self-determination compromises between a strictly individualist and collectivist approach).

⁸³ See Moris, supra note 75 (noting that President Woodrow Wilson was responsible for elevating the principle of self-determination to an international level when, in 1916, he included it in his Fourteen Points); see also Jon Hinck, THE REPUBLIC OF PALAU AND THE UNITED STATES: SELF-DETERMINATION BECOMES THE PRICE OF FREE ASSOCIATION, 78 Cal. L. Rev. 915, 947(1990)(noting that Woodrow Wilson made self-determination one of his major foreign policy objectives); see also Kirgis, supra note 74 (noting the term, “self-determination” was first publicly used in 1918 by Woodrow Wilson).

self-determination as "the guiding principle for reconstructing the European society."⁸⁴ Because the principle was applied selectively to the defeated states and the authority of colonial rule was not seriously challenged, self-determination did not become a valuable principle for state creation until World War II.⁸⁵ In 1941, the principle was written into the Atlantic Charter, which later evolved into the United Nations Charter, establishing self-determination as a fundamental right of mankind.⁸⁶

It is logical to conclude that the UN members intended to establish the right of self-determination for the peoples under colonial or alien domination only.⁸⁷ The UN

⁸⁴ See Canuel, *supra* note 75, at 92 (noting Woodrow Wilson felt that the realization of such aspirations by treating such peoples as credible, rather than merely considering them "property," would be achieved through a restructuring of Europe and would create a lasting peace); see also Kirgis, *supra* note 11 (noting the idea of self-determination is closely identified with Woodrow Wilson, who first used the term publicly in 1918, but it did not emerge as a principle of positive international law until the Soviet Union insisted on using it at the 1945 San Francisco Conference on the United Nations); see also Michla Pomerance, *THE UNITED STATES AND SELF-DETERMINATION: PERSPECTIVES ON THE WILSONIAN CONCEPTION*, 70 *Am. J. L.* 1, 2(1976)(quoting Woodrow Wilson stating that "every people has a right to choose the sovereignty under which they shall live," and "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed.").

⁸⁵ See Thomas M. Franck, *LEGITIMACY IN THE INTERNATIONAL SYSTEM*, 82 *Am. J. Int'l L.* 705, 744(1988)(noting that after World War II the self-determination principle came to be applied even more generally as the UN Charter expressed a general obligation of states to help enable inhabitants of all dependent non-self-governing territories for the first time); Suagee, *supra* note 74, at 382 (discussing that in the period following World War II, the international community came to recognize that people living under the rule of colonial regimes had been deprived of the right of self-determination in both its constitutive and ongoing aspect); see also Michael C. Davis, *THE CONCEPT OF STATEHOOD AND THE STATUS OF Taiwan*, 4 *J. Chinese L.* 135, 148(1990)("[S]elf-determination" is traceable in part to Woodrow Wilson and notions of anti-colonialism.").

⁸⁶ See UN CHARTER art. 1, para. 2 (enunciating the purpose of the Charter to establish friendly relations and economic cooperation between nations based on principles of equal rights and self-determination); Catherine J. Iorns, *INDIGENOUS PEOPLES AND SELF-DETERMINATION: CHALLENGING STATE SOVEREIGNTY*, 24 *Case W. Rev. J. Int'l L.* 199, 244(1992)(discussing the Atlantic Charter, signed by both President Roosevelt and Prime Minister Churchill on August 14, 1941, which affirmed the principle of self-determination and, which was accepted in the Declaration of the United Nations in 1942); Louis B. Sohn, *THE NEW INTERNATIONAL LAW: PROTECTION OF THE RIGHTS OF INDIVIDUALS RATHER THAN STATES*, 32 *Am. U. L. Rev.* 1, 48(1982)(noting that the Atlantic Charter promised to "respect the right of all peoples to choose the form of government under which they will live," and to have "sovereign rights and self-government restored to those who have been forcibly deprived of them").

⁸⁷ See Hector Gros Espiell, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS*, at 13 (1980) (explaining the rule that excludes a right of secession for people not under colonial and alien domination); see also Taryn Ranae Tomasa,

members limited this right because secessionism was considered a tactic used to violate territorial integrity guaranteed by the UN Charter.⁸⁸ As such, the principle of self-determination in international law evolved into an enforceable right to freedom from colonial rule under Resolution 1514 entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples"(hereinafter "Resolution 1514").⁸⁹ Resolution 1514 states "[T]he continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace," ... "[A]ll 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."⁹⁰

HO'OLAHI: THE REBIRTH OF A NATION, 5 Asian L. J. 247, 262(1998)(noting that the people entitled to self-determination under the Declaration are those who at the time of the claim are under alien domination).

⁸⁸ See UN CHARTER art. 2, para. 7 (prohibiting the United Nations from intervening in the mere internal affairs of any state); see also The Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (requiring states to respect the integrity of the national territory of dependent peoples); also see Wutzke, supra note 74, at 558 (stating that the UN General Assembly embraced this categorical distinction between colonies and noncolonial groups).

⁸⁹ See The Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (prohibiting the partial or total disruption of the national unity and territorial integrity of a country); see also Franck, supra note 85, at 746 (the resolution noted "that all peoples have an inalienable right to complete freedom" and demanded immediate implementation of this right "without any conditions or reservations in accordance with their freely expressed will and desire" and regardless of "political, economic, social or educational preparedness"); see also Thomas D. Grant, BETWEEN DIVERSITY AND DISORDER: A REVIEW OF JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD, 12 Am. U. J. Int'l L. & Pol'y 629, 634(1997) (noting that the UN moderated its statement in the Declaration that subjects of self-determination included potentially any peoples under "alien subjugation, domination, or exploitation," whether or not of a colonial origin to include any peoples lacking representative government).

⁹⁰ See The Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (discussing the

§ 2-5 UN Resolution 1514: Declaration on the Granting of Independence to Colonial

Countries and Peoples

Since the passage of Resolution 1514, self-determination has greatly developed in the context of anti-colonialism. Through support of such a principle, numerous colonies in Asia, Africa and Latin America established their own sovereign states in the 1960s,⁹¹ and the universal recognition of the right to anti-colonial self-determination has led to its acceptance as a norm of customary international law.⁹² Peoples subjected to colonial oppression were entitled to seek and receive

right to self-determination and how colonialism impedes the rights of people and the goal of peace); see also Laurence S. Hanauer, *THE IRRELEVANCE OF SELF-DETERMINATION LAW TO ETHNO-NATIONAL CONFLICT: A NEW LOOK AT THE WESTERN SAHARA CASE*, 9 *Emory Int'l L. Rev.* 133, 146(1995) (noting that by placing the right to self-determination firmly in the context of colonialism, the resolution defines self-determination as a right to decolonization, therefore linking the law of self-determination to the process of decolonization); also see Caroline S. Palmer, *WAITING FOR DEMOCRACY: CONGRESS, CONTROL BOARDS AND PURSUIT OF SELF-DETERMINATION IN THE DISTRICT OF COLUMBIA*, 19 *Hamline J. Pub. L. & Pol'y* 339, 379(1997) (noting that the covenant protects the right of all citizens to take part in formulating policy on all levels of government, either directly or through their elected representatives).

⁹¹ See Moris, *supra* note 69, at 206 (stating that while the external right to self-determination was extremely popular during the 1960s and 1970s in Asia, Africa, and Latin America, claims of a right to external self-determination in the colonial context are virtually nonexistent today); also see Simpson, *supra* note 75, at 257 (claiming that the post-independence nation-building in parts of Africa and Asia has been achieved at the cost of abandoning democracy and suppressing postcolonial claims to national or cultural self-determination). But see *id.*, Hanauer, at 176 (noting that the law of self-determination inadequately addresses the ethnic and national crises that erupted in Yugoslavia, Central Asia, India, Sri Lanka, Afghanistan, and many other non-colonial and self-governing territories).

⁹² See *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, UN GAOR, 25th Sess., Supp. 28, at 121, UN Doc. A/8028 (1970) (explicitly expanding the right of self-determination beyond its anti-colonial implications); see also Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 515 (4th ed. 1990) (discussing the principle of anti-colonial self-determination customary law that cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of like character and contrary effect); see also Jacques deLisle, *THE ROLE OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: DISQUIET ON THE EASTERN FRONT: LIBERAL AGENDAS, DOMESTIC LEGAL ORDERS, AND THE ROLE OF INTERNATIONAL LAW AFTER THE COLD WAR AND AMID RESURGENT CULTURAL IDENTITIES*, 18 *Fordham Int'l L. J.* 1725, 1729(1995) (noting anti-colonial and separatist assaults on existing arrangements typically invoked the norms of the existing system, seeking recognition of a new sovereign state within colonial boundaries or coincident with areas inhabited by a particular people).

support in their struggle.⁹³ In this sense, any failure by a responsible state to meet its obligation to support self-determination of this kind would give rise to responsibility at the international level.⁹⁴

The preference for territorial integrity over social classification in political sovereignty was premised on the fear of the dangers of separatism.⁹⁵ Moreover, in an effort to minimize any potential hostility between the capitalist and the communist blocs during the Cold War era, the world community resisted any non-colonial self-determination by viewing it as a secessionist movement threatening the territorial

⁹³ See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2160, UN GAOR, 21st Sess., Supp. No. 16, at 4, UN Doc. A/6316 (1966) (stating that any forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination, freedom, independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations); see also Kolodner, *supra* note 69, at 157-58 (noting that while the era of decolonization might have formally ended, many peoples still suffer under neo-colonial oppression and only if the international community supports movements for self-determination can it guarantee the protection of the rights of peoples throughout the world). See generally Charney & Prescott, *supra* note 81, at 475 (noting that simplistic conceptions of the international legal system of the past regarding territory which was either under the complete sovereignty of a state or was not, are not valid today).

⁹⁴ See Suagee, *supra* note 74, at 368 (noting that Convention No. 169 is criticized for leaving in too much residual state authority and for its failure to recognize the right of indigenous "peoples" to self-determination); see also Sohn, *supra* note 86, at 50 (noting that every state has an obligation to respect every other state's right of self-determination and to refrain from interference in the internal affairs of a state). But see H. Kelsen, *THE LAW OF THE UNITED NATIONS*, at 29 (1951) (commenting that the language of the UN Charter does not adequately describe any human rights or desire to make the obligations binding on states).

⁹⁵ See Ravi Mahalingam, *THE COMPATIBILITY OF THE PRINCIPLE OF NONINTERVENTION WITH THE RIGHT OF HUMANITARIAN INTERVENTION*, 1 *UCLA J. Int'l L. & Foreign Aff.* 221, 234 (1996) (noting that nonintervention is an important principle because it preserves the sanctity of a State's rights of political sovereignty and territorial integrity and is further necessary for the principle of self-determination to take root without the corrupting interference of foreign powers); see also Guyora Binder, *THE KAPLAN LECTURE ON HUMAN RIGHTS: THE CASE FOR SELF-DETERMINATION*, 29 *Stan. J. Int'l L.* 223, 225 (1993) (stating that group separatism must be immoral, except as a remedy of last resort against discrimination, and irrational because it is premised on the mistaken belief that group identity is natural or immutable); see also Leslie E. Schafer, *IMMIGRATION PROJECT: LEARNING FROM RWANDA: ADDRESSING THE GLOBAL INSTITUTIONAL STALEMATE IN REFUGEE CRISES*, 6 *Ind. J. Global Legal Stud.* 315, 337 (1998) (noting that although the United Nations has supported the use of force to overcome colonial control, many member States do not encourage separatism).

integrity of the existing state.⁹⁶ In this respect, Resolution 1514 laid out its support for the preservation of territorial integrity by indicating that “*any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.*”⁹⁷

§ 2-6 Secessionist Movements in the Congo & Nigeria

In order to avoid setting a precedent of encouraging secessionist movements, the UN Security Council adopted Resolution 169 in 1961 to maintain the territorial integrity which supported the existing political status of the Republic of the Congo.⁹⁸

⁹⁶ See generally Trent N. Tappe, CHECHENYA AND THE STATE OF SELF-DETERMINATION IN A BREAKAWAY REGION OF THE FORMER SOVIET UNION: EVALUATING THE LEGITIMACY OF SECESSIONIST CLAIMS, 34 Colum. J. Transnat'l L. 255, 261(1995) (noting that any right which is to be of any practical use in evaluating secessionist claims must include limitations that will address the concerns preventing states from recognizing other secessionist movements in the past). But see Thomas M. Franck, THE EMERGING RIGHT TO DEMOCRATIC GOVERNANCE, 86 Am. J. Int'l L. 46, 55(1992) (presenting the idea that self-determination has evolved into a more general notion of internationally validated political consultation beginning to be applied even to independent states without implying the community's right to validate secessionist movements within sovereign states); see also Canuel, *supra* note 12, at 95 (noting that while none of the signatories of the Helsinki Accord are current colonial states, the acceptance of non-colonial self-determination movements as legally recognizable secessionist movements has thus gained momentum).

⁹⁷ See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (discussing the United Nations ideal of universal peace); see also Shen, *supra* note 9, at 1154 (noting that both the Decolonization and 1970 Declarations establish self-determination explicitly with the caveat that its exercise should not disrupt territorial integrity); see also Wutzke, *supra* note 11, at 558 (noting that academics, politicians and the UN General Assembly embrace the categorical distinction between colonies and noncolonial groups).

⁹⁸ See S.C. Res. 169, UN SCOR, 16th Sess., 982nd mtg., UN Doc S/5002 (1961); See also Lawrence S. Eastwood, Jr., SECESSION: STATE PRACTICE AND INTERNATIONAL LAW AFTER THE DISSOLUTION OF SOVIET UNION AND YUGOSLAVIA, 3 Duke J. Comp. & Int'l L. 299, 305-6(1993) (stating that on November 24, 1961, the Security Council adopted a resolution which stated that one purpose of the involvement of the United Nations was to maintain the territorial integrity and political independence of the Republic of the Congo); see also Kenneth D. Heath, COULD WE HAVE ARMED THE KOSOVO LIBERATION ARMY? THE NEW NORMS GOVERNING INTERVENTION IN CIVIL WAR, 4 UCLA J. Int'l L. & Foreign Aff. 251, 297 (1999) (noting the obligation of all States to respect the territorial integrity, political independence and national sovereignty of the Democratic Republic of the Congo in accordance with the Charter of the United Nations); see, e.g., S.C. Res. 199, UN SCOR, 19th Sess., 1189th mtg. at 328-29, UN Doc. S/6129

Resolution 169 provided that “[d]eploring all armed action in opposition to the authority of the Government of the Republic of the Congo, specially secessionist activities and armed action now being carried on by the provincial administration of Katanga with the aid of external resources and foreign mercenaries, and completely rejecting the claim that Katanga is a sovereign independent nation.”⁹⁹ The council thus rejected Katanga’s Declaration of Independence from the Congo.¹⁰⁰

In a similar move, the UN supported the position of the Nigerian federal government against the Ibos who wanted to opt out of Nigeria in 1967.¹⁰¹ The UN refused to recognize the resolve of the Ibos to create an independent Republic of Biafra within the territory of Nigeria despite the fact that the African states of Gabon,

(1964) (reaffirming the sovereignty and territorial integrity of the Democratic Republic of the Congo and requesting "all states to refrain or desist from intervening in the domestic affairs of the Congo.").

⁹⁹ See S.C. Res. 169, UN SCOR, 16th Sess., 982nd mtg., UN Doc. S/5002, at 3 (1961) (following the attempted secession of the province of Katanga from the newly independent Republic of the Congo in 1960, the Security Council of the United Nations stated the policies and purposes of the United Nations with respect to the Congo); see also Louis Henkin Et Al., INTERNATIONAL LAW, at 779-80 (2d ed. 1987) (noting that the Security Council passed a resolution authorizing the Secretary General "to provide the Government of the Republic of the Congo with such military assistance as may be necessary to fully meet their task); see also Thomas D. Grant, EAST TIMOR, THE UN SYSTEM, AND ENFORCING NON-RECOGNITION IN INTERNATIONAL LAW, 33 Vand. J. Transnat'l L. 273, 282(2000) (stating that the affirmation of the territorial integrity of the Congo was contained in Security Council and General Assembly resolutions).

¹⁰⁰ See S.C. Res. 169, UN SCOR, 16th Sess., 982nd mtg., UN Doc. S/5002 (1961) (stating that the United Nations completely rejected the claim that Katanga was a sovereign independent nation); see also Eastwood, supra note 98 (stating that although Katanga declared its independence from the Congo and a constitution had been approved by the Katanga Assembly establishing Katanga as an independent sovereign state, Katanga was never formally recognized by any country); see also Grant, supra note 99 (noting that the rejection of the claim by Katanga to constitute an independent state was contained in Security Council and General Assembly resolutions).

¹⁰¹ See Dr. Bryan Schwartz & Susan Waywood, A MODEL DECLARATION ON THE RIGHT OF SECESSION, 11 N.Y. Int'l L. Rev. 1, 23(1998) (providing that the UN was slow to intervene during the massacre of 10,000 to 30,000 Ibos and when it did, the UN supported the Nigerian government); see also Thomas D. Grant, CURRENT DEVELOPMENT: AFGHANISTAN RECOGNIZE CHECHNYA, 15 Am. U. Int'l L. Rev. 869, 887(2000) (stating that the friction between the Ibos and the federal government of Nigeria became great which resulted in secession by the Ibos); see also Joel E. Starr, "WHAT DO YOU HAVE FOR ME TODAY?": OBSERVING THE 1999 NIGERIAN ELECTIONS, 35 Stan. J. Int'l L. 389, 391(1999) (stating that the Ibos tried to secede from Nigeria to

the Ivory Coast, Tanzania, and Zambia had already done so.¹⁰²

The provision in the relevant international legal instruments holding that the right to self-determination belongs to peoples under colonial rule has been narrowly applied to colonial conditions by international law.¹⁰³ In 1970, the UN Secretary General U Thant affirmed this point when stating:

"[A]s far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State."¹⁰⁴

This view reiterates the idea that the world community was greatly skeptical about self-determination claims.¹⁰⁵ As a result, any secessionist movement from an

form the Republic of Biafra).

¹⁰² See M. H. Halperin, D. J. Scheffer, & P. L. Small, SELF- DETERMINATION IN THE NEW WORLD ORDER, at 14 (1992); see also Franck, supra note 85, at 759 n.175 (stating that only five nations recognized Biafra's claim to independence while the UN never even considered recognizing it); also see id., Grant (declaring that no state recognized Biafra).

¹⁰³ See Jerome Wilson, ETHNIC GROUPS AND THE RIGHT TO SELF-DETERMINATION, 11 Conn. J. Int'l L. 433, 482(1996) ("The statist bias of the current understanding of self-determination is not inherent in the doctrine, but rather the result of a successful attempt on the part of states to restrict in practice the recognition of sub-state peoples to the colonial context."); see also Dr. Sam Blay, SELF-DETERMINATION: A REASSESSMENT IN THE POST COMMUNIST ERA, 22 Denv. J. Int'l L. & Pol'y 275, 275(1994) (stating that although self-determination is an accepted legal norm, it is usually narrowly confined in cases of people under colonial rule); Kolodner, supra note 6, at 157 (providing that the international community has not agreed as to whether self-determination applies outside the colonial context).

¹⁰⁴ UN MONTHLY CHRON., Feb. 1970, at 36. See Haile, supra note 1, at 502 (stating that the United Nations will never accept the principle of secession); UN Secretary-General U. Thant, Remarks at a Press Conference in Dakar, Senegal (Jan. 4, 1970), UN MONTHLY CHRON., Feb. 1970, at 34, 36.

¹⁰⁵ See Anaya, supra note 82, at 329-30 (asserting that self- determination has been approached with

existing state found it difficult in gaining international recognition unless the relevant parties consented to change the territorial boundaries (as was the case in Singapore's separation from Malaysia).¹⁰⁶ For example, it is a clear fact that the world community did not recognize any secessionist claim during the Cold War period (the only exception was East Pakistan's secession from Pakistan).¹⁰⁷

§ 2-7 UN's Granting of Bangladesh Membership

The UN Security Council adopted Resolution 352 recommending that the People's Republic of Bangladesh be admitted to membership in the UN in 1947.¹⁰⁸ Indeed, the inhabitants of East Pakistan were ethnically and culturally distinct from West Pakistan,¹⁰⁹ however, the United Nations' ultimate recognition of East Pakistan

skepticism with the exception of control exercised by the colonial power); see also Angela M. Lloyd, NOTE THE SOUTHERN SUDAN: A COMPELLING CASE FOR SECESSION, 32 Colum. J. Transnat'l L. 419, 424-5(1994) ("Implicit in international accession to the right in documents like the UN CHARTER was the understanding that secessionist self-determination was not to be a general legal norm available to any group or territory that claimed it."). See generally Edward A. Laing, THE NORM OF SELF-DETERMINATION: 1941-1991, 22 Cal. W. Int'l L. J. 209, 250(1992) (discussing that the General Assembly accepted self-determination in terms of colonial ruling situations).

¹⁰⁶ See Lawrence M. Frankel, INTERNATIONAL LAW OF SECESSION: NEW RULES FOR A NEW REA, 14 Hous. J. Int'l L. 521, 534(1992) (discussing the theory of premature recognition which demonstrates the balance between recognizing a secessionist movement and questioning whether it controls its territory); see also Douglas L. Tookey, SINGAPORE'S ENVIRONMENTAL MANAGEMENT SYSTEM: STRENGTHS AND WEAKNESSES AND RECOMMENDATIONS FOR YEAR AHEAD, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 169, 170(1998) (stating that Singapore separated from Malaysia in 1965). See generally Gregory H. Fox, SELF-DETERMINATION IN THE POST-COLD WAR ERA: A NEW INTERNAL FOCUS, 16 Mich. J. Int'l L. 733, 736-7(1995) (providing that decolonization does not present the clash between self-determination and territorial integrity that secessionist claims present).

¹⁰⁷ See *id.*, at 562 (stating that since the end of the Cold War, the United States and the former Soviet Union are more likely to recognize secessionist claims); see also Tappe, *supra* note 96, at 295 (stating that secessionist efforts were met with disapproval by the international community during the Cold War). But see Kate Greene, INTERNATIONAL RESPONSES TO SECESSIONIST CONFLICTS, 90 Am. Soc'y Int'l L. Proc. 296, 297(1996) (stating that secessionist claims are not related to the end of the Cold War and are not a phenomenon of the last ten years).

¹⁰⁸ See Yehuda Z. Blum, MEMBERSHIP OF THE NEW YUGOSLAVIA: CONTINUITY OR BREAK?, 86 Am. J. Int'l L. 830, 832(1992) ("Bangladesh applied for membership as a new state and was admitted in 1974.").

¹⁰⁹ See Brian K. McCalmon, STATES, REFUGEES, AND SELF-DEFENSE, 10 Geo. Immigr. L. J.

(Bangladesh) did not imply a general acceptance of the right of secession in the name of self-determination.¹¹⁰ The UN's decision was rather influenced by the fact that India sided with East Pakistan by recognizing East Pakistan's right to self-determination.¹¹¹ This led to a full-scale war between India and Pakistan, constituting an immediate threat to international peace and security.¹¹² At the same time, Pakistan had strong support from Communist China.¹¹³ The UN inevitably recognized East Pakistan (Bangladesh) as an independent state for fear of causing a

215, 223(1996) (stating that there were cultural, linguistic and political differences between East Pakistan and West Pakistan); see also Barry M. Benjamin, UNILATERAL HUMANITARIAN INTERVENTION:LEGALIZING THE USE OF FORCE TO PREVENT HUMAN RIGHTS ATROCITIES, 16 Fordham Int'l L. J. 120, 131(1992) (stating that Pakistan was separated not only by hundreds of miles, but by cultural and linguistic differences). See generally Kenneth L. Rosenbaum, RULE OF THE LAND, 59 Or. St. B. Bull. 9, 10(1999) (stating that there were different languages spoken in East Pakistan and West Pakistan).

¹¹⁰ See Eastwood, supra note 98, at 310 (discussing whether the recognition of East Pakistan implied acceptance of secession); M. Rafiqul Islam, SECESSION CRISIS IN PAPUA NEW GUINEA: THE PROCLAIMED REPUBLIC OF BOUGAINVILLE IN INTERNATIONAL LAW, 13 U. Haw. L. Rev. 453, 458(1991) ("Secession is a form of self-determination."). See generally Tappe, supra note 96 (stating that prior to 1970, there were no UN documents suggesting a recognized right to secession because of self-determination).

¹¹¹ See Eastwood, supra note 98, at 312-13 ("It appears that the distinguishing feature explaining the success of the Bangladesh secession was Indian intervention."); see also C. Lloyd Brown-John, SELF-DETERMINATION, AUTONOMY AND STATE SECESSION IN FEDERAL CONSTITUTIONAL AND INTERNATIONAL LAW, 40 S. Tex. L. Rev. 567, 589(1999) (asserting that the Indian Army's support of the Bangladesh secession caused the success of its secession). See generally Tauhidul Anwar Khan, MANAGEMENT AND SHARING OF THE GANGES, 36 Nat. Resources J. 455, 462(1996) (providing that in 1972, India and Bangladesh worked together to set up a joint rivers commission).

¹¹² See Michael L. Feeley, APOCALYPSE NOW? RESOLVING INDIA'S AND PAKISTAN'S TESTING CRISIS, 23 Suffolk Transnat'l L. REV. 777, 780 (2000) (stating that Pakistan and India fought over the Kashmir region between 1947 & 1948); see also Richard W. Aldrich & Deborah Charron Pollard, PAKISTAN'S NUCLEAR WEAPONS PROGRAM: LEGAL AND POLICY IMPLICATIONS OF THE PRESSLER AMENDMENT, 5 U.S.A.F. Acad. J. Legal Stud. 103, 103 (1994) (discussing the ongoing rivalry between Pakistan and India which resulted in war and division of the two); see also Adam Packer, NOTE NUCLEAR PROLIFERATION IN SOUTH ASIA, 38 Colum. J. Transnat'l L. 631, 634-5(2000) ("The polarization of Indo-Pakistani relations resulting from the politics of partition led to three wars, in 1947- 48, 1965 and 1971.").

¹¹³ See Mitchell A. Silk & Lester Ross, TRANSNATIONAL DEPOSITS, GOVERNMENT SUCCESSION, FROZEN ASSETS AND THE TAIWAN RELATIONS ACT: NATIONAL BANK OF PAKISTAN V. THE INTERNATIONAL COMMERCIAL BANK OF CHINA, 8 Int'l Tax & Bus. L. 1, 30 n.69(1990) ("Nevertheless, China did have an interest in maintaining friendly ties with Pakistan."); see, e.g., Packer, supra note 49 (noting China's sharing of nuclear technology with Pakistan). See generally Kathleen M. Caruso, WE NEED TO KEEP A CLOSE EYE ON BEIJING, MILWAUKEE J. SENTINEL, July 16, 2000, at 5J (noting China's sale of weapons to Pakistan).

widespread armed conflict in the area.¹¹⁴

This non-colonial form of self-determination was likely to be defined only as a democratic concept due to its lack of formal recognition under international law.¹¹⁵

In this sense, a population group within an independent state intends to achieve a truly representative government by democratic means such as the freedom of expression, assembly, and association.¹¹⁶ In view of the deference that states give to the principle of sovereignty, this kind of claim for self-determination was considered a domestic affair, a matter within the jurisdiction of a state.¹¹⁷ Thus, other members of the

¹¹⁴ See Grant, *supra* note 101, at 889 (providing that the recognition of East Pakistan did not arise from humanitarian concerns); see also Anthony Wanis St. John, *THE MEDIATING ROLE IN THE KASHMIR DISPUTE BETWEEN INDIA AND PAKISTAN*, 21 *Fletcher Foreign World Aff.* 173, 186 (1997) (stating that the UN engaged in many peacemaking efforts to prevent any additional conflict between India and Pakistan). See generally Gregory L. Naarden, *UN INTERVENTION AFTER THE COLD WAR: POLITICAL WARS AND THE UNITED STATES*, 29 *Tex. Int'l L. J.* 231, 233(1994) (discussing how an observation team was established in order to discourage possible hostilities resulting from the India/Pakistan conflict).

¹¹⁵ See Iorns, *supra* note 86, at 304 ("[T]he view was expressed that self-determination is a corollary of the democratic principle of consent of the governed."); see also Dr. Yussuf N. Kly, *Discussion Paper, AFRICAN-AMERICANS AND THE RIGHT TO SELF-DETERMINATION*, 17 *Hamline L. Rev.* 1, 42-3(1993) ("A democratic right to self-determination is now seeing the light of day and tends to confirm the universality of the right of non-colonial peoples to self-determination."). But see J. Oloka-Onyango, *HERETICAL REFLECTIONS ON THE RIGHT TO SELF-DETERMINATION: PROSPECTS AND PROBLEMS FOR A DEMOCRATIC GLOBAL FUTURE IN THE NEW MILLENNIUM*, 15 *Am. U. Int'l L. Rev.* 151, 208(1999) (noting that no right of self-determination exists within the context of a "democratic" state and representative government).

¹¹⁶ See Haile, *supra* note 64, at 479 ("The spread of democratic ideology and the demise of the Cold War have enabled some minority groups in independent states to express their discontent openly and with varying degrees of impunity."). But see Anatoly Konstantinovich Kotov, *APPROACHING THE MILLENNIUM: ARE PENNSYLVANIA'S ADMINISTRATIVE PROCEEDURE STATUTES STILL DOING THE JOB?: THE PARLIMENTARY PROCESS IN THE REPUBLIC OF KAZAHKISTAN*, 8 *Widener J. Pub. L.* 457, 466, n.50(1994) (stating that representative governments as a collective are not necessarily all democratic). See generally Moris, *supra* note 6, at 210 (discussing the possibility of having a representative government by democratic means).

¹¹⁷ See Haile, *supra* note 64, at 486 (noting that Eritrea will maintain some control over its government in all matters not left to the federal government); see also Eric Kolodner, *NOTE POPULATION TRANSFER: THE EFFECTS OF SETTLE INFUSION POLICIES ON A HOST POPULATION'S RIGHT TO SELF-DETERMINATION*, 27 *N.Y.U. J. Int'l L. & Pol'y* 159, 192 (noting the unwillingness of the international community to infringe on state sovereignty). See generally Claude-Armand Sheppard, *THE CREE INTERVENTION IN THE CANADIAN SUPREME COURT REFERENCE ON QUEBEC SECESSION: A SUBJECTIVE ASSESSMENT*, 23 *Vt. L. Rev.* 845, 858(1999) (noting that the right to self-determination is vested in the people and not outsiders).

international community were hesitant to involve themselves with an issue, considered internal to another state.¹¹⁸

§ 2-8 Non-Colonial Form of Self-Determination

The adoption of the ICESCR and ICCPR in 1966¹¹⁹ however, gave rise to the discussion that international law would provide support beyond the form of anti-colonial self-determination.¹²⁰ Article I of both the ICESCR and the ICCPR stresses that "*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.*"¹²¹

¹¹⁸ See, e.g., Peter Daniel DiPaola, A NOBLE SACRIFICE? Jus Ad BELLUM AND THE INTERNATIONAL COMMUNITY'S GAMBLE IN CHECHENYA, 4 Ind. J. Global Legal Stud. 435, 467(1997) (stating that the international community might be hesitant to get involved in areas which resemble the Balkans). See generally Kolodner, supra note 54 ("[T]he international community, historically hesitant to infringe on state sovereignty."); also see Sheppard, supra note 54 (discussing that people have the right to self-determination as opposed to outsiders).

¹¹⁹ See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16, at 48, UN Doc. A/6316 (1966) (noting that the equal and inalienable rights of all members of the human family" are derived from "the inherent dignity of the human person"); see also International Covenant on Civil and Political Rights, G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16, at 59, UN Doc. A/6316 (1966), 999 U.N.T.S. 302. (stating "[T]he equal and inalienable rights of all members of the human family" are derived from "the inherent dignity of the human person."); see also Kitty Arambulo, DRAFTING AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CAN AN IDEAL BECOME REALITY?, 2 U.C. Davis J. Int'l L. & Pol'y 111, 111(1996) (calling the International Covenant on Economic, Social and Cultural Rights the "main international treaty setting forth economic, social, and cultural rights").

¹²⁰ See Kirgis, supra note 74, at 305 (stating that the UN expanded the ideas of self-determination past anti-colonialism); see also Oloka-Onyango, supra note 115, at 164 (ascertaining acceptance of self-determination by degree with "the recognition that the right had arguably expanded to be assertable against a government that is unrepresentative of people who are defined by characteristics not limited to race, creed or color."); see also Johan D. van der Vyver, SOVEREIGNTY AND HUMAN RIGHTS IN CONSTITUTIONAL AND INTERNATIONAL LAW, 5 Emory Int'l L. Rev. 321, 402(1991) (providing that self-determination was expanded past anti-colonialism to people subject to racist regimes).

¹²¹ International Covenant on Civil and Political Rights, G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, at 368, UN Doc. A/6316 (1966); see also Malvina Halberstam, Remark, NATIONALISM AND THE RIGHT TO SELF-DETERMINATION: THE ARAB-ISRAELI CONFLICT, 26 N.Y.U. J. Int'l L. & Pol'y 573, 573(1994) (stating that many General Assembly resolutions affirm the right to self-determination and often supersedes the provisions of the UN Charter); Richard Wilner,

Moreover, the 1948 UDHR states that "the will of the people shall be the basis of the authority of government," implying that the right of anti-colonial self-determination was broadened to include a political right of non-colonial self-determination.¹²² This prompted argument that the non-colonial aspect of self-determination should be honored in the same way as its external counterpart because a claim for self-determination within an existing state always arose while a central government engaged in internal colonization.¹²³ Unlike the right to anti-colonial self-determination, which in the external sense has been firmly established under international law, claims based on other forms of self-determination were not able to gather much international support as expected.¹²⁴ This is because the international community still believed that such claims might encompass the

NATIONALIST MOVEMENTS AND THE MIDDLE EAST PEACE PROCESS: EXERCISES IN SELF-DETERMINATION, 1 U.C. Davis J. Int'l L. & Pol'y 297, 306(1995) (providing that the principle of self-determination was turned into a necessary condition for individual human rights).

¹²² See Universal Declaration on Human Rights, UN GAOR, 3rd Sess., Supp. No. 16, UN Doc. A/6316 (1948); see also James A.R. Nafziger, SELF-DETERMINATION & HUMANITARIAN INTERVENTION IN A COMMUNITY OF POWER, 20 Denv. J. Int'l L. & Pol'y 9, 12(1991) (discussing Article 21(3) of the Universal Declaration of Human Rights); see also Oloka-Onyango, supra note 115, at 170 ("Although absent from the Universal Declaration, several statements in the preamble can be taken to constitute a reference to an underlying belief in the exercise of the right of self-determination.").

¹²³ See Lung-Chu Chen, SELF-DETERMINATION AND WORLD PUBLIC ORDER, 66 Notre Dame L. Rev. 1287, 1294(1991) ("[T]he basis for either granting or rejecting the demands of a group should not be whether a given situation is colonial or non-colonial, but whether the decision would move the situation closer to goal values of human dignity."); see also Laing, supra note 42, at 248 (discussing two writers who agree that self-determination should be accepted without limitations as to colonial or non-colonial status). See generally Simpson, supra note 12, at 271-75 (discussing various methods of non-colonial self-determination including: national self-determination, democratic self-determination, devolutionary self-determination, and secession).

¹²⁴ See Moris, supra note 69, at 204-05 (stating that some nation states believe only in a right to colonial self-determination and do not recognize other forms); see also David R. Penna, ARE INTERNATIONAL INSTITUTIONS DOING THEIR JOB? CULTURAL DOMINANCE, 90 Am. Soc'y Int'l L. Proc. 193, 221(1996) (noting the lack of recognition given by international law to a right to secession outside the decolonization context). But see Lloyd, supra note 105, at 420 (providing that the recent rise of Eastern Europe and the former Soviet Union indicate that some form of

conflict of secession and threaten the territorial integrity of an existing state.¹²⁵

§ 2-9 UN Resolution 2625: Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN

When the UN General Assembly passed Resolution 2625, known as the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations" (hereinafter "Resolution 2625"),¹²⁶ there was no doubt that self-determination might extend beyond the traditional notion of decolonization.¹²⁷ Resolution 2625 expanded the previous definition of self-determination with a strong intent to authorize a collective right to cover the concept of non-colonial self-determination by specifying

self-determination outside of the colonial sense has been accepted).

¹²⁵ See Tappe, *supra* note 96, at 295 n.39 ("Secession has typically been disfavored in the past by the international community because articulation of a secession right would threaten the territorial integrity of the states which themselves make international law."); see also Schwartz & Waywood, *supra* note 101, at 14 (stating that the territorial integrity of states in existence would be threatened by successful claims). See generally Holly A. Osterland, Note, NATIONAL SELF-DETERMINATION AND SECESSION: THE SLOVAK MODEL, 25 Case W. Rev. J. Int'l L. 655, 669(1993) ("Perhaps the most important legal limitation on international recognition of a right to secede is the principle of territorial integrity.").

¹²⁶ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN GAOR, 6th Comm., 25th Sess., Supp. No.28, UN Doc A/8082 (1970) (supporting the rights of all people to determine their political status). See generally Canuel, *supra* note 75, at 93-94 (discussing Resolution 2625).

¹²⁷ See Paul H. Brietzke, SELF-DETERMINATION OR JURISPRUDENTIAL CONFUSION: EXACERBATING POLITICAL CONFLICT, 14 Wis. Int'l L. J. 69, 102(1995) (stating that it is agreed that self-determination could extend beyond established beliefs about decolonization); see also Thomas D. Grant, EXTENDING DECOLONIZATION: HOW THE UNITED STATES MIGHT HAVE ADDRESSED KOSOVO, 28 Ga. J. Int'l & Comp. L. 9, 37(1999) ("In at least one General Assembly Third Committee session, a state representative suggested that the ambit of self-determination might be extended beyond those situations dealt with so far by decolonization."); Kirgis, *supra* note 74 (stating that self determination extends past anticolonialism). But see Thomas D. Grant, PANEL OF EXPERTS FOR CHECHENYA: PURPOSES AND PROSPECTS IN LIGHT OF INTERNATIONAL LAW, 40 Va. J. Int'l L. 115, 179(1999) (stating that although the principle of self-determination has extended in breadth,

that a state should have a government representing all belonging to the territory without distinction as to race, creed, or color.¹²⁸ There is no consensus as to whether Resolution 2625 has legalized other forms of self-determination beyond the colonial context, in an attempt to resolve any apparent conflict between the right to self-determination and the right of nations to their territorial integrity.¹²⁹ Resolution 2625, however, has clearly legalized the effect of people's domestic political collective rights.¹³⁰ The Resolution states that the right of self-determination is a right to which a "people" is entitled to determine its "political status," that may include establishing "a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status

the applications are still narrow).

¹²⁸ See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at para. E(4), UN Doc. A/8028 (1970); see also Christine Bell & Kathleen Cavanaugh, CPNSTRUCTIVE AMBIGUITY OR INTERNAL SELF-DETERMINATION? SELF-DETERMINATION, GROUP ACCOMODATION, AND THE BELFAST AGREEMENT, 22Fordham Int'l L. J. 1345, 1347(1999) (stating that the word "peoples" as used in Resolution 2625 is not defined and as such can be extended to include ethno-nationalist groups in their claim to self-determination); see also Visuvanathan Rudrakumaran, THE REQUIREMENT OF PLEBISCITE IN TERRITORIAL RAPPROCHEMENT, 12 Hous. J. Int'l L. 23, 40(1989) (stating that Resolution 2625 does not distinguish between race, color or creed).

¹²⁹ See Bell & Cavanaugh, supra note 128, at 1349 (stating Resolution 2625 established self-determination while providing that it should not upset the principles of territorial integrity); see also Julie M. Sforza, NOTE THE TIMOR GAP DISPUTE: THE VALIDITY OF THE TIMOR GAP TREATY, SELF-DETERINATION, AND DECOLONIZATION, 22 Suffolk Transnat'l L. Rev. 481, 494 (1999) ("The UN cautiously warns, however, that the concepts enshrined in Resolution 2625 shall in no way encroach upon the territorial sovereignty of a State."). See generally Peter Ruffatto, COMMENT, US ACTION IN MICRONESIA AS A NORM OF CUSTOMARY INTERNATIONAL LAW: THE EFFECTION OF THE RIGHT TO SELF-DETERMINATION FOR GUAM AND OTHER NON-SELF-GOVERNING TERRITORIES, 2 Pac. Rim L. & Pol'y J. 377, 383 (1993) (stating that Resolution 2625 enlarges the right of self-determination to include all peoples).

¹³⁰ See Shen, supra note 72, at 1149 (stating that the people still retain a domestic right to decide their political status); see also Rudolph C. Ryser, BETWEEN INDIGENOUS NATIONS AND STATES: SELF-DETERMINATION IN THE BALANCE, 7 Tulsa J. Comp. & Int'l L. 129, 156(1999) ("[N]on-self-governing peoples obtain an internal political status of their own choosing."); REFERENCE RE SECESSION OF QUEBEC, 23 Vt. L. Rev. 721, 760(1999) (noting that people's domestic political rights are unquestionably legal).

freely determined."¹³¹

With the end of the colonialization era and further claims for freedom from colonial or foreign domination, the external aspect of anti-colonial self-determination has ceased to be functional in the international legal context.¹³² Yet, as typical collective human rights, self-determination needed to retain a valuable function under international law. Especially as this post-Cold War era has been witnessing increasing claims to self-determination by peoples who are seeking a greater recognition of their cultural and political identity within their existing states.¹³³ Indeed, there was a comprehensive imperative that international law should play a formative role in the legalization and development of non-colonial self-determination.¹³⁴ In this respect,

¹³¹ See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 124, UN Doc. A/8028 (1970) (noting that Resolution 2625 does not define the word "peoples"); see also Shen, *supra* note 9, at 1147 ("The Covenant similarly contains no definition of peoples."); see also Suzan Dionne Balz, *COUNTRY WITHIN A COUNTRY: REDRAWING BORDERS ON THE POST-COLONIAL SOVEREIGN STATE*, 2 Mich. J. Race & L. 537, 563(1997) (stating that Resolution 2625 does not give a definition for peoples).

¹³² See Oloka-Onyango, *supra* note 115, at 151 (discussing perceptions and presumptions about self-determination as it relates to international law); see also Osterland, *supra* note 125, at 655 (stating national self-determination enjoyed a brief period of acceptance in international law after World War I and remains a powerful emotional and political principle despite the refusal of the international community to recognize its validity). But see Ruth Gordon, *SAVING FAILED STATES: SOMETIMES A NEOCOLONIALIST NATION*, 12 Am. U. J. Int'l L. & Pol'y 903, 955(1997) (stating that since self-determination has emerged in the UN era, it has forced international law to address these issues in order to remain relevant).

¹³³ See Ved P. Nanda, *REVISITING SELF-DETERMINATION AS AN INTERNATIONAL LAW CONCEPT: A MAJOR CHALLENGE IN THE POST-COLD WAR ERA*, 3 *Ilsa. J. Int'l & Comp. L.* 443, 444(1997) ("Now, in the post-Cold War era, we are witnessing the unfolding of the explosive quality of self-determination to which he referred, as the international community confronts the challenge of ever-increasing ethnic-national self-determination claims."); see also Mahalingam, *supra* note 95, at 252 ("[T]he post-Cold war era has witnessed tremendous turmoil internal to States caused by movements for ethnic self-determination that have resulted in tragic humanitarian consequences."). See generally Kolodner, *supra* note 69, at 154 (stating that the concept of self-determination must be reevaluated following the Cold War).

¹³⁴ See Tamzarian, *supra* note 70, at 198 (stating that while the principles of self-determination arising in non-colonial group situations have not yet been resolved by international law, there have been many proposals to do so). See generally Canuel, *supra* note 75, at 91 (stating that legal scholars have tried to

the world community began to consider ways of managing other forms of self-determination in spite of the traditional rejection of such claims by international law.¹³⁵

In recent times, the international recognition of the non-colonial component of self-determination can be traced to the collapse of the former Socialist Federal Republic of Yugoslavia (hereinafter "former Yugoslavia") and the former Soviet Union.¹³⁶ These two events pushed the world community to re-examine the traditional principle of self-determination by extending it past the traditional anti-colonial concept.¹³⁷ Any claim for non-colonial self-determination could not be

create a set of criteria to determine self-determinist movements under international law); see also Gregory J. Ewald, *THE KURD'S RIGHT TO SECEDE UNDER INTERNATIONAL LAW: SELF-DETERMINATION PREVAILS OVER POLITICAL MANIPULATION*, 22 *Denv. J. Int'l L. & Pol'y* 375, 376(1994) (discussing the need to continue formulating international law in the area of non-colonial self-determination).

¹³⁵ See Hanauer, *supra* note 90, at 134 ("Despite the political nature of the conflict, the severe limitations on the S.A.D.R.'s political viability, and the extremely brief history of Sahrawi national consciousness, the international community has recognized the Western Sahara's legal right to decolonization and to determine its status freely."); see also John W. Head, *SELLING HONG KONG TO CHINA: WHAT HAPPENED TO THE RIGHT OF SELF-DETERMINATION?*, 46 *Kan. L. Rev.* 283, 287 (1998) ("[T]he UN CHARTER placed obligations on the remaining colonial powers to develop self-government within their colonial territories."). But see Simpson, *supra* note 75, at 255 (discussing the failure of the UN to address secession properly).

¹³⁶ See Thomas M. Franck, *FRIENDMANN AWARD ADDRESS*, 38 *Colum. J. Transnat'l L.* 1, 6(1999) (discussing the UN's willingness to admit seceding states such as Bangladesh and three Baltic Republics); see also Diba B. Majzub, *DOES SECESSION MEAN SUCCESSION? THE INTERNATIONAL LAW OF TREATY SUCCESSION AND AN INDEPENDENT QUEBEC*, 24 *Queen's L. J.* 411, 420(1999) (discussing the fragmentation of the Soviet Union and the Socialist Federal Republic of Yugoslavia); see also Canuel, *supra* note 75, at 95 ("[W]hile none of the signatories of the Helsinki Accord are current colonial states, the broadening to accept non-colonial self-determination movements as legally recognizable secessionist movements has thus gained momentum since 1975.").

¹³⁷ See Ved P. Nanda, *THE NEW DYNAMICS OF SELF-DETERMINATION: REVISITING SELF-DETERMINATION AS AN INTERNATIONAL LAW CONCEPT: A MAJOR CHALLENGE IN THE POST COLD WOR ERA*, 3 *Ilsa. J. Int'l & Comp. L.* 443, 451(1997)("[T]he General Assembly in 1970 unanimously adopted the Declaration on Principles of International Law Concerning Friendly Relations under which all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter."); see also Moris, *supra* note 69, at 210 (providing examples of places where the viability of an internal right to

admitted because it would damage the territorial integrity of the state due to the modern non-colonial aspect of self-determination.¹³⁸ This new approach presents a strong proof that the right to non-colonial self-determination cannot be ignored in today's world.¹³⁹ It is my opinion that the above cases were not about de-colonization, but deeply related to the protection of humanitarian imperatives and the maintenance of international peace and security.¹⁴⁰ There are numerous territories in the world where there are disputes and demands for non-colonial self-determination.¹⁴¹ Therefore, it is inevitable for the international community to manage these various

self-determination has clearly been enhanced); see also generally Cass, *supra* note 70, at 31 (stating that the right of self-determination extends beyond the colonial context).

¹³⁸ See Bell & Cavanaugh, *supra* note 128, at 1349 (arguing that self-determination should not disrupt territorial integrity); see also Amy E. Eckert, *FREE DETERMINATION OR THE DETERMINATION TO BE FREE? SELF-DETERMINATION AND THE DEMOCRATIC ENTITLEMENT*, 4 *UCLA J. Int'l L. & Foreign Aff.* 55, 78 (1999) ("Ironically, an assertive pro-democratic position, which seeks to promote the protection of human rights, may undermine one of the most cherished rights, the right of a people to determine their political future through self-determination."); see also Roya M. Hanna, *RIGHT TO SELF-DETERMINATION IN RE SECESSION OF QUEBEC*, 23 *Md. J. Int'l L. & Trade* 213, 216(1999) (discussing the Canadian Court's determination that Quebec does not have the right to unilaterally secede).

¹³⁹ See Richard Falk, *PROBLEMS AND PROSPECTS FOR THE KURDISH STRUGGLE FOR SELF-DETERMINATION AFTER THE END OF THE GULF AND COLD WARS*, 15 *Mich. J. Int'l L.* 591, 598(1994) ("[A]s expressed in the famous Declaration on the Granting of Independence to Colonial Countries and Peoples, the scope of the right of self-determination is broader than the explicit circumstances of colonial subjugation."); see also Simpson, *supra* note 75, at 257 (asserting that the concept of secession was consistently ignored at the official level until it caused the break-up of Yugoslavia and the Soviet Union); see also Oloka-Onyango, *supra* note 115, at 151 (noting how self-determination gained the most acceptance under the framework of the UN in the aftermath of the Second World War).

¹⁴⁰ See Jost Delbruck, *A FRESH LOOK AT HUMANITARIAN INTERVENTION UNDER THE AUTHORITY OF THE UNITED NATIONS*, 67 *Ind. L. J.* 887, 887(1992) (discussing the UN's intervention in the attack of Kuwait by Iraq in order to protect human rights); see also Hanauer, *supra* note 90, at 138, ([S]elf-determination was not, however, originally conceived as a method through which the colonies of Germany and the Sublime Porte would gain independence, but rather as a means of attaining peace and security by preventing a recurrence of the nationalistic outbursts that precipitated World War I.) See also Ratner, *supra* note 72, at 591 ("[R]eliance on *uti possidetis* during the post-Cold War breakups reduces the prospects of armed conflict by providing the only clear outcome in such situations. Absent such a policy, all borders would be open to dispute, and new states would fall prey to irredentist neighbors or internal secessionist claimants.").

¹⁴¹ See Grant, *supra* note 127, at 28 (mentioning the struggle in Kosovo); Tamzarian, *supra* note 70, at 196 (discussing the right of Karabagh to self-determination versus the right of Azerbaijan to maintain its territorial integrity); see also Majzub, *supra* note 136, at 413 (discussing the requirements Quebec needs to fulfill in order to become independent).

forms of self-determination in this changing political world.¹⁴²

§ 2-10 The 1993 UN Vienna Declaration and Programme of Action

A strong march toward a broad view of self-determination has developed since the collapse of the former Yugoslavia and the former Soviet Union.¹⁴³ A new acceptable type of self-determination (not based on colonialism) has become the modern approach used by the world community and has challenged the traditional concept of defined boundaries.¹⁴⁴ The United Nations World Conference on Human Rights, drawing participation from all members of the UN, reaffirmed the right to self-determination of all peoples in 1993.¹⁴⁵ Although these participants unanimously

¹⁴² See Will Kymlicka, *THEORIZING INDIGENOUS RIGHTS*, 49 U. Toronto L. J. 281, 286(1999) (claiming that, although the UN Draft extends self-determination to include indigenous people, it focuses on internal autonomy rather than independent statehood); see also Leslie E. Schafer, *LEARNING FROM REWANDA: ADDRESSING THE GLOVAL INSTITUTIONAL STALEMATE IN REFUGEE CRISES*, 6 Ind. J. Global Legal Stud. 315, 338(1998) ("[D]ue to this failure of the institution of the State in developing countries, perhaps some form of self-determination should be supported to remedy ethnic conflicts and their attendant refugee problems. One approach will involve promoting "ethnic self-determination" and/or "regional integration" to seek better ethnic relations."); see also Kolodner, *supra* note 69, at 157 (discussing the need for the international community to continue to support self-determination in order to protect human rights and to prevent internal conflict).

¹⁴³ See Eastwood, *supra* note 98, at 299 ("[T]he international community's broad support for the secessions of the Baltic states from the Soviet Union and the speedy recognition of several seceding former Yugoslav republics may mark the beginning of a pattern of state practice that could, in time, reveal a right of secession under international law."); see also Igor Grazin, *THE INTERNATIONAL RECOGNITION OF NATIONAL RIGHTS: THE BALTIC STATES' CASE*, 66 Notre Dame L. Rev. 1385, 1410(1991) (discussing the Baltic States' struggle for independence). But see Hurst Hannum, *RETHINKING SELF-DETERMINATION*, 34 Va. J. Int'l L. 1, 38(1993) (discussing how most governments have refused to recognize demands for self-determination by ethnic groups and nations within the new states of the former Soviet Union).

¹⁴⁴ See Cass, *supra* note 70, at 33 ("[C]ertain minorities have either achieved self-determination, or are in the process of seeking it, often with international sanction and recognition, in spite of the conventional view."); Simpson, *supra* note 75, at 271 (suggesting that use of the word "peoples" in the UN CHARTER was intended to mean "communities that live under (but not share in) alien sovereignty"); see also Oloka-Onyango, *supra* note 115, at 204 (arguing for the need for a different form of self-determination other than in the colonial context).

¹⁴⁵ See Janet E. Lord, *THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS: CHALLENGES AND OPPORTUNITIES*, 17 Loy. L.A. Int'l & Comp. L. J. 329, 329(1995) ("[T]he United Nations General Assembly adopted Resolution 48/141 to create the post of High Commissioner for the Promotion and Protection of All Human Rights."); see also Elsa Stamatopoulou, *THE DEVELOPMENT OF UNIFIED NATIONS MECHANISMS FOR THE PROTECTION AND*

adopted "*the Vienna Declaration and Programme of Action*,"¹⁴⁶ choosing a similar language as was used in Resolution 1514, it undoubtedly shows that the world community is moving toward legalizing the right to non-colonial self-determination.¹⁴⁷ In the cases of the former Yugoslavia and the Soviet Union for example, the secession in the name of self-determination may not have granted a clearly enforceable right under international law, but among the various possible forms of self-determination movements, the international community began to broaden its understanding of self-determination and its relations to sovereignty and territorial integrity.¹⁴⁸ That is, the concept of self-determination on non-colonial

PROMOTION OF HUMAN RIGHTS, 55 Wash. & Lee L. Rev. 687, 692(1998) (presenting the main points of consensus at the World Conference that promoted human rights); see also Christina M. Cerna, A SMALL STEP FORWARD FOR HUMAN RIGHTS: THE CREATION OF THE POST OF UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 10 Am. U. J. Int'l L. & Pol'y 1265, 1267(1995) ("[A]ll human rights are universal, indivisible and interdependent and interrelated.").

¹⁴⁶ See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights in 1993, UN Department of Public Information, US, 1995, para. 2 (discussing the right of people within the minority to enjoy their own culture and to practice their own religion); see also id., Cerna, at 1266 (discussing the fact that the Vienna Conference led to the creation of the High Commissioner position); see also id., Lord ("[S]uch breadth suggests that the High Commissioner will have the necessary latitude to decide the focus of his or her office without the constraints of hierarchical prescriptions as to the importance of one human right over another.").

¹⁴⁷ See Andrew M. Beato, NEWLY INDEPENDENT AND SEPARATING STATES' SUCCESSION TO TREATIES: CONSIDERATIONS ON THE HYBRID DEPENDENCY OF REPUBLICS OF THE FORMER SOVIET UNION, 9 Am. U. J. Int'l L. & Pol'y 525, 541(1994) (discussing the notion that a state should not be held answerable to treaties that it neither helped create nor ratified is inherent in the principle of self-determination); see also Tamzarian, supra note 70, at 198 ("[T]he principle of territorial integrity is recognized by the UN CHARTER and is considered by most scholars and jurists as a well-established norm of international law, vital to the stability and peace of the world community."); see also Franck, supra note 136 ("Contemporary practice recognizes that groups do succeed in seceding, for example by the UN General Assembly's willingness to admit to the UN such seceding entities as Bangladesh, the three Baltic Republics, the successor states of the former Soviet Union and of the former Yugoslavia.").

¹⁴⁸ See David M. Kresock, "ETHNIC CLEANING" IN THE BALKANS: THE LEGAL FOUNDATIONS OF FOREIGN INTERVENTION, 27 Cornell Int'l L. J. 203, 239(1994) (noting how international law can protect this valid interest by permitting humanitarian intervention only when necessary to protect human rights as the desire for self-determination spreads across the globe); see also Haile, supra note 64, at 479 (using France and the United States as examples of countries with democratic ideologies whose revolutions gave rise to self-determination, but who do not recognize a right of secession). But see Elliot Stanton Berke, RECENT DEVELOPMENT: THE CHECHNYA

aspect is not only relating to international law, but might also be operative within domestic law.¹⁴⁹

III. EVOLUTION OF SELF-DETERMINATION ON NON-COLONIAL ASPECT IN THE AFTERMATH OF THE COLD WAR

§ 2-11 Dissolution of Soviet Union and Yugoslavia

The collapse of the communist regime in central and Eastern Europe both led to the end of the Cold War yet also gave rise to numerous claims by people seeking self-determination.¹⁵⁰ These claims were, in the non-colonial context and almost all were denied by the responsible state due to the protection of sovereignty and territorial integrity under international law.¹⁵¹ As a matter of fact, the denial of

INQUIRY: CONSTITUTIONAL COMMITMENT OR ABANDONMENT?, 10 Emory Int'l L. Rev. 879, 905(1996) (stating that Russia will refuse to recognize self-determination if it potentially will deprive Russia of natural or industrial resources, and justifies its behavior under its right to territorial integrity).

¹⁴⁹ See U.S.S.R. Const., Art. 72 (endorsing the inherent right of secession for member states of the Soviet Union). (visited October 25, 2000). (http://www.uni-wuerzburg.de/law/r100000_.html); see also Jon M. Van Dyke, Carmen Di Amore-Siah, Gerald W. Berkley-Coats, SELF-DETERMINATION FOR NONSELF-GOVERNING PEOPLES AND FOR INDIGENOUS PEOPLES: THE CASES OF GUAM AND HAWAII, 18 Haw. L. Rev. 623, 623 (1996) (discussing the rights of self-determination and self-governance given to indigenous people under international (and domestic) law that are different from those given to colonized people); see also Hanna, supra note 138, at 222 ("[T]he Court determined that since Quebec's secession would be contrary to the constitution and laws of Canada, the international law is likely to accept the Court's conclusion unless it is contrary to the right of self-determination.").

¹⁵⁰ See Osterland, supra note 125, at 657 ("[T]he most recent evidence of the continuing political force of national self-determination has occurred since the last months of 1989, when Communist regimes across Eastern and Central Europe crumbled."); see also Tappe, supra note 96, at 255 (discussing secession movements during the cold war). But see Ethan A. Klingsberg, INTERNATIONAL HUMAN RIGHTS INTERVENTION ON BEHALF OF MINORITIES IN POST-WORLD WAR I EASTERN EUROPE AND TODAY: PLACEBO, POISON, OR PANACEA?, 1993 U. Chi. L. Sch. Roundtable 1, 11(1993) ("[T]he physical features of the post-communist region dictate against the validation of an ethnic group's right to national self-determination.").

¹⁵¹ See Osterland, supra note 125, at 668 ("[A]s a matter of international law, recognition of a claim to secede, prior to the separatist's group achieving de facto status as an independent state, would

self-determination and its implementation were always sources of conflict.¹⁵² After the Cold War, the Western liberal bloc led by the United States played an influential role in managing such non-colonial claims to self-determination.¹⁵³ The international community, including the UN, various UN bodies and regional organizations began to limit the central government of the responsible state through the use of "inhuman repression" to block a claim for self-determination within its territory.¹⁵⁴ This kind of repression, however, was deemed to be a "breach of peace."¹⁵⁵

§ 2-12 Commitment to Humanitarian Imperatives & Maintenance of International

improperly interfere with essential domestic matters of states in violation of the United Nations Charter."); see also Hercules Booyen, SOUTH AFRICA: IN NEED OF A FEDERAL CONSTITUTION FOR ITS MINORITY PEOPLES, 19 Loy. L.A. Int'l & Comp. L. J. 789, 799(1997) (questioning the significance of Principle XXXIV and suggesting that Parliament may amend the Constitution to include "territorial self-determination for any cultural community"). But see Tappe, supra note 96, at 255 (discussing the recognition by the Soviet Union of self-determination for Chechnya).

¹⁵² See Osterland, supra note 125, at 668 ("[A]s a matter of international law, recognition of a claim to secede, prior to the separatist's group achieving de facto status as an independent state, would improperly interfere with essential domestic matters of states in violation of the United Nations Charter."). But see Tappe, supra note 96 (discussing Russia's recognition of self-determination for Chechnya).

¹⁵³ See Tamzarian, supra note 70, at 211 ("[T]he Restatement (Third) of the Foreign Relations Law of the United States that the declaratory approach to recognition (i.e., recognition is unnecessary if an entity meets the traditional criteria for statehood) is the better rule."); see also Canuel, supra note 75, at 85 (stating that international law protects the sovereign rights of the legitimate government of the occupied territory and protects the inhabitants from being exploited."); Hannum, supra note 143, at 51 (discussing the supportive position of the United States and European Community for Yugoslav unity, before and after declarations of independence by Slovenia and Croatia).

¹⁵⁴ See Booyen, supra note 151 (discussing the uncertainty of significance for Principle XXXIV and the reasoning behind it); see also Wilson, supra note 103, at 433 ("[I]n short, the well-being of states required not only that they be protected from external interference, but also, paradoxically, that some internal populations be granted rights as against them."); see also Hannum, supra note 143, at 1 (1993) (discussing the range of recognized remedies available within the realm of international law as put forth though notion of "remedial secession").

¹⁵⁵ See UN CHARTER art. 1, para. 1 (concluding that the main reasons for the UN is to maintain international peace and security); see also Ruth Gordon, UNITED NATIONS INTERVENTION IN INTERNAL CONFLICTS: IRAQ, SOMALIA, AND BEYOND, 15 Mich. J. Int'l L. 519, 519(1994) ("[T]hreat to the peace is a flexible concept that may cover anything from intra-State situations to inter-State confrontation; it was originally viewed as a precursor to a finding of a "breach" of the peace."); see also Julie Mertus, HUMANITARIAN INTERVENTION AND KOSOVO, 41 Wm. & Mary L. Rev. 1743, 1770(2000) ("[I]ndeed, international peace and security must mean more than the absence of an internationally recognized war; human rights violations short of all-out war also constitute major breaches of peace and security.").

Peace and Security

Internal military conflicts, caused by the quest for self-determination, have led to massive loss of lives, grave deprivation of human rights, mass migrations, and even cross-border combat (which also threatened international peace and security at the same time).¹⁵⁶ Therefore, the growing global commitment to the humanitarian imperatives and the maintenance of international peace and security is the major consideration as to whether the international community should lend its full support.¹⁵⁷ Accordingly, the international communities provided numerous forums through diplomatic intervention, in an effort to reach peaceful settlement of such conflicts so that disputes between the responsible state and the self-determination party could be addressed through negotiation, mediation or conciliation.¹⁵⁸ The

¹⁵⁶ See Heath, *supra* note 98, at 276 (stating that the UN Charter "[A]rticle 2(4) does not speak directly to intervention, either in times of peace or civil war, nor does it speak to the use of force in internal conflicts."); see also Kresock, *supra* note 148, at 203 (discussing the internal strife in Bosnia); see also Satvinder S. Juss, Book Note, 6 *Ind. J. Global Legal Stud.* 371(1998) (reviewing David Wippman, *INTERNATIONAL LAW & ETHNIC CONFLICT*) ("The twentieth century is littered with examples of this, with grave threats to peace arising from partitions of previously peaceful societies along ethnic or religious distinctions.").

¹⁵⁷ See UN CHARTER, arts. 39-51 (Chapter VII) (noting the Security Council possesses the authority to find that an internal conflict, as in Rwanda, rises to a level threatening international peace and security and to take measures accordingly); see also Reginald Ezetah, *THE RIGHT TO DEMOCRACY: A QUALITATIVE INQUIRY*, 22 *Brook. J. Int'l L.* 495, 531(1997) ("[A]ll States have the right and the duty to take collective measures to protect the democratic character of any State, provided such action is taken under the aegis of the United Nations and in accordance with its Charter.").

¹⁵⁸ See C. M. Chinkin, *THIRD PARTY INTERVENTION BEFORE THE INTERNATIONAL COURT OF JUSTICE*, 80 *Am. J. Int'l L.* 495, 501(1986) (recognizing the international judicial arena as a fundamental norm in the settlement of disputes); Richard E. Rupp, *COOPERATION, INTERNATIONAL ORGANIZATIONS, AND MULTILATERAL INTERVENTION IN THE POST-COLD WAR ERA: LESSONS LEARNED FROM THE BALKANS, SOMALIA, AND CAMBODIA*, 3 *UCLA J. Int'l L. & Foreign Aff.* 183, 191 (1998) ("[A]n effectively functioning international organization or regime can promote cooperation and peaceful relations by serving as a forum where member states exchange information."). But see Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *TRAGEDIES IN SOMALIA, YUGOSLAVIA, HAITI, RWANDA AND LIBERIA-REVISITING THE VALIDITY OF HUMANITARIAN INTERVENTION UNDER INTERNATIONAL LAW-PART II*, 26 *Denv. J. Int'l L. & Pol'y* 827, 854(1998) (discussing the failed

international community has even proceeded with other suitable mechanisms, such as economic sanctions and military intervention to compel the government to engage in a reasonable dialogue with a self-determination party.¹⁵⁹

Many conflicts that took place within states were attributable to the great aspiration of a people seeking recognition of their cultural, religious, linguistic, ethnic and political identity.¹⁶⁰ What is so clear in this connection is that the non-colonial claim for self-determination itself is not limited to secessionist movements.¹⁶¹ The non-colonial aspect of self-determination has actually been interpreted broadly to include the incorporation into a state, or some measure of autonomy within a state, a

attempts to resolve the conflict in West Africa).

¹⁵⁹ See Lt. Col. Susan S. Gibson, INTERNATIONAL ECONOMIC SANCTIONS: THE IMPORTANCE OF GOVERNMENT STRUCTURES, 13 *Emory Int'l L. Rev.* 161, 161(1999) ("[T]he great advantage of economic sanctions is that on the one hand they can be very potent, while on the other hand they do not involve that resort to force which is repugnant to our objective of peace."); see also Patricia Stirling, THE USE OF TRADE SANCTIONS AS AN ENFORCEMENT MECHANISAM FOR BASIC HUMAN RIGHTS: A PROPOSAL FOR ADDITION TO THE WORLD TRADE ORGANIZATION, 11 *Am. U. J. Int'l L. & Pol'y* 1, 25(1996) (discussing the preference of the U.S. for economic sanctions); see also David Wippman, INTERNATIONAL LAW IN THE AMERICAS: RETHINKING NATIONAL SOVEREIGNTY IN AN AGE OF REGIONAL INTEGRATION ARTICLE & ESSAYS: DEFENDING DEMOCRACY THROUGH FOREIGN INTERVENTION, 19 *Hous. J. Int'l L.* 659, 659(1997) (giving examples of recent authorizations, by the Security Council, of military intervention).

¹⁶⁰ See Elizabeth F. Defeis, MINORITY PROTECTIONS AND BILATERAL AGREEMENTS: AN EFFECTIVE MECHANISM, 22 *Hamline J. Pub. L. & Pol'y* 291, 291 (1999) (discussing the ethnic violence in the former Soviet Union and Yugoslavia); see also Hurst Hannum, CONTEMPORARY DEVELOPMENTS IN THE INTERNATIONAL PROTECTION OF THE RIGHTS OF MINORITIES, 66 *Notre Dame L. Rev.* 1431, 1431(1991) (discussing how the proposed European Convention for the Protection of Minorities draft concerns only ethnic, religious and linguistic minorities); see also Jani Purnawanty, RECENT DEVELOPMENT IN EAST TIMOR: VARIOUS PERSPECTIVES IN UNDERSTANDING THE EAST TIMOR CRISIS, 14 *Temp. Int'l & Comp. L. J.* 61, 66-73(2000) (discussing the recent crisis in East Timor).

¹⁶¹ See Canuel, *supra* note 75, at 95 ("[I]nternational law regarding occupied territories allows the occupant, or occupying state, to wield certain powers while limiting other powers, in order to ensure that the occupied peoples are treated with humanity throughout the occupation."); see also Simpson, *supra* note 75, at 263 (stating that the international community does not support secession as a form of self-determination); also see Tappe, *supra* note 96, at 267 (asserting that the international community's reaction to the Katangan and Biafran movements was grounded in the belief that recognition of a secession right threatens territorial integrity of states).

larger degree of freedom in a federation, or even complete independence.¹⁶² The failure to set up a universal standard of managing these kinds of conflicts caused by non-colonial self-determination movements, pre-supposes that the world community can only consider each condition on a case-by-case basis to determine if a conflict is serious enough to warrant international involvement.¹⁶³

§ 2-13 Self-Determination Movements in Western Sahara & East Timor

As a result, some peoples have been fortunate to receive international support in settling their problems, such as is the case in Western Sahara and East Timor.¹⁶⁴ On the other hand, some other peoples have not been so fortunate to gain full international support.¹⁶⁵ A striking example is the case of Chechnya, which is still facing horrific violence, and even large-scale warfare in Russia.¹⁶⁶ It is therefore

¹⁶² See Canuel, *supra* note 75, at 95; see also Moris, *supra* note 69, at 201 (discussing the recognition of a secessionist movement in Yugoslavia); Tamzarian, *supra* note 7 (discussing the struggle for freedom of Artsakh).

¹⁶³ See Tamzarian, *supra* note 70 ("[T]he debate over the right of Karabagh to self-determination versus the right of Azerbaijan to maintain its territorial integrity must be analyzed in view of the de facto independence Karabagh has attained."); Tappe, *supra* note 96 (discussing the legitimacy of the Chechen claim to secession). But see Johan D. Van der Vyver, UNIVERSALITY AND RELATIVITY OF HUMAN RIGHTS: AMERICAN RELATIVISM, 4 *Buff. Hum. Rgh. L. Rev.* 43, 54 (1998) (discussing two standards of when secession can take place).

¹⁶⁴ See UN Security Council Res. 384, Dec. 22, 1975 & Res. 389, April 22, 1976 (visited October 25, 2000) <<http://www.etan.org/etun/genasRes.htm>> (discussing the extent of UN involvement and proposals regarding the conflicts in Western Sahara and East Timor); see also Yahia H. Zoubir, THE WESTERN SAHARA CONFLICT: A CASE STUDY IN FAILURE OF PRENEGOTIATION AND PROLONGATION OF CONFLICT, 26 *Cal. W. Int'l L. J.* 173, 175 (1996) (analyzing the Western Sahara dispute); see also Purnawanty, *supra* note 160, at 62-65 (discussing the history of East Timor).

¹⁶⁵ See Eastwood, *supra* note 98, at 304 ("[D]uring the attempted secession of Katanga from the newly independent Congo in the early 1960s, the response of the international community to the dispute evolved from initial efforts to maintain neutrality into outright opposition to secession."); see also Kevin MacMillan, SECESSION PERSPECTIVES AND THE INDEPENDENCE OF QUEBEC, 7 *Tul. J. Int'l & Comp. L.* 333, 335 (1999) (discussing how many nations do not take the independence movements in Lithuania and Chechnya seriously); see also Tappe, *supra* note 96, at 255 (discussing the rationale behind the international reaction to this invasion).

¹⁶⁶ See Tappe, *supra* note 96, at 255 (discussing Russia's invasion of Chechnya because it will not allow Chechnya to remain independent); Wendy Turnoff Atrokhov, THE KHASAVYURT ACCORDS:

quite important to clarify what "people" are qualified or entitled to the right of self-determination.¹⁶⁷ For the purposes of self-determination, a final report by the United Nations Educational, Scientific and Cultural Organization (hereinafter "UNESCO"),¹⁶⁸ defined "peoplehood" as:

"[A] group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life." The group as a whole must have the will to be identified as a people or the consciousness of being a people. The UNESCO experts further emphasized that the group should have a certain size and must be more than a mere association of individuals within a state. It also considered the existence of representative institutions as a possible additional criterion for the exercise of self-determination.¹⁶⁹

MAINTAINING THE RULE OF LAW AND LEGITIMACY OF DEMOCRACY IN THE RUSSIAN FEDERATION AMIDST THE CHECHEN CRISIS, 32 *Cornell Int'l L. J.* 367, 372(1999) (discussing the post-Soviet Chechnya struggle for independence); see also Hanna, *supra* note 138 (discussing the Canadian Court's determination that Quebec does not have the right to unilaterally secede).

¹⁶⁷ See Booyesen, *supra* note 151, at 804 (suggesting that minority groups should be "concentrated in a well demarcated territory, in which its members constitute the majority."); Grant, *supra* note 64, at 32 (discussing the requirements a territory must take in seeking its independence); see also Wilner, *supra* note 121, at 303 (discussing the four principles of self-determination).

¹⁶⁸ See Olivia Q. Goldman, THE NEED FOR AN INDEPENDENT INTERNATIONAL MECHANISM TO PROTECT GROUP RIGHTS: A CASE STUDY OF THE KURDS, 2 *Tulsa J. Comp. & Int'l L.* 45, 48(1994) (discussing the shared characteristics of groups); El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua, HUMAN RIGHTS IN AFRICA-A NEW PERSPECTIVE ON LINKING THE PAST TO THE PRESENT, 41 *Mcgill L. J.* 819, 840(1994) (providing examples of what some of the shared characteristics are within a group); see also Grant, *supra* note 127, at 22 (noting the confusion over which groups of people actually have a self-determination claim).

¹⁶⁹ See Bell & Cavanaugh, *supra* note 128, at 1351 (asserting that nationalists believe that Catholics have been discriminated against); Hannum, *supra* note 160, at 1145 (discussing the importance of language for minorities); see also *id.*, El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua(1994)

§ 2-14 Definition of Peoplehood

There is no difficulty to identify a distinct "people" in most cases, but the issue arises over whether a particular group also constitutes a minority.¹⁷⁰ If it is held that only the term "peoples" are qualified to self-determination, it becomes important to distinguish the term "peoples" from "minority population."¹⁷¹ However, as Professor Dr. Michael C. van Walt van Praag has indicated:

"[T]he existence of cases where the identification of distinct peoples by means of objectively identifiable criteria gives rise to problems, should not be caused by an ideological refusal to implement the right to self-determination based on an alleged inability to adequately define the term people."¹⁷²

Indeed, the issue of defining a particular group in terms of "whether it satisfies

(noting the size requirement for a group).

¹⁷⁰ See Brietzke, *supra* note 127, at 82-83 (noting that there is a large number of minorities claiming rights against entities which have just claimed self-determination); see also Cass, *supra* note 70, at 39 (recognizing particular groups which have made certain claims against groups that have successfully claimed self-determination); see, e.g., Walter Laqueur, INDEPENDENCE MAY ENSLAVE MILLIONS: THE RUSH TOWARD NATIONAL SEPARATISM IS AN INVITATION TO ECONOMIC RUIN AND TO UNDEMOCRATIC RULERS, L.A. TIMES, September 8, 1991, at M5 (citing examples of groups that have made claims against others who have claimed self-determination).

¹⁷¹ See Y. Frank Chiang, STATE, SOVEREIGNTY AND TAIWAN, 23 Fordham Int'l L. J. 959, 1002-3(2000) (questioning whether or not minority groups are entitled to self-determination); see also Omar M. Dajani, STALLED BETWEEN SEASONS: THE INTERNATIONAL LEGAL STATUS OF PALESTINE DURING THE INTERIM PERIOD, 26 Denv. J. Int'l L. & Pol'y 27, 32-3(1997) (noting that self-determination is only a right to be exercised by groups who have been recognized as a people). See generally Jill Allison Weiner, ISRAEL, PALESTINE AND THE OSLA ACCORDS, 23 Fordham Int'l L. J. 230, 261-2(1999) (noting that self determination can only be invoked by those recognized as a "people").

¹⁷² See Michael V. Van Walt Van Praag, SELF-DETERMINATION IN A WORLD OF CONFLICT: A SOURCE OF INSTABILITY OR INSTRUMENT OF PEACE IN THE REPORT OF THE UNESCO INTERNATIONAL CONFERENCE OF EXPERTS, HELD IN BARCELONA FROM NOV. 21-27, 1998 63 (van Walt van Praag, ed., 1999).

the criteria of a people" is politically subjective.¹⁷³ Not only is the effort to distinguish between a people and a minority population questionable, these categories are simply too broad to have much meaning.¹⁷⁴ In today's world, the legal basis for authorizing a particular group to possess the right of self-determination considers the protection of humanitarian imperatives and the maintenance of international peace and security.¹⁷⁵ The wish for self-determination in the context of de-colonization is not only affected by the definition of legal scholars or the UN, but also by the political will of states.¹⁷⁶ Once the political principle is "ripe" enough to allow the international community to render its assistance to the distress, the international community will recognize a particular group as a "people" and their right to self-determination even though the group might only be a minority.¹⁷⁷

¹⁷³ See Brietzke, *supra* note 127, at 83 (1995) (stating that the "lives of people must surely transcend the integrity of the territories"); see also Cass, *supra* note 70, at 23-24 (1992) (noting that there are problems that exist because of a reliance by indigenous people and minorities on the concept of self-determination). See generally John A. Collins, *SELF-DETERMINATION IN INTERNATIONAL LAW: THE PALESTINIANS*, 12 *Case W. Res. J. Int'l L.* 137, 153 (1980) (arguing that the principle of self-determination should not be considered solely as a territorial right).

¹⁷⁴ See Dajani, *supra* note 171, at 30 (noting that the word "peoples" can be defined broadly); see also Bell & Cavanaugh, *supra* note 128 (discussing the definition of "peoples"). See generally Cass, *supra* note 70, at 29 (noting that there is a "critical uncertainty" as to whom the right attaches).

¹⁷⁵ See Bell & Cavanaugh, *supra* note 128, at 1347-48 (discussing the distinction between self-determination as a right of "peoples" versus that of minorities); Christopher Wall, *HUMAN RIGHTS AND ECONOMIC SANCTIONS*, 22 *Fordham Int'l L. J.* 577, 604(1998) (noting that self-determination should only be allowed when human rights are ensured); see also Michla Pomerance, *SELF DETERMINATION IN LAW & PRACTICE*, at 41(1982) ("[S]elf determination is the imperative basis for all human rights.").

¹⁷⁶ See UN CHARTER, Art. 73 (defining which territories are entitled to self-determination); see also Antony Anghie, *FINDING THE PERIPHERIES: SOVEREIGNTY AND COLONIALISM IN NINETEENTH-CENTURY INTERNATIONAL LAW*, 40 *Harv. Int'l L. J.* 74, 74-5(1999) (noting that the process of decolonization is formulating doctrines of self-determination as opposed to annexation); see also Dajani, *supra* note 171, at 32 (noting the United Nation's definition of which territories qualify as entitled to self-determination).

¹⁷⁷ See Bell & Cavanaugh, *supra* note 128, at 1347-48 (noting the blurred distinction between "people" and "minorities"); see, e.g., Stephen Kinzer, *EUROPE, BAKING GERMANS, ACCEPTS YUGOSLAV BREAKUP*, *N.Y. TIMES*, Jan. 16, 1992, at A10 (discussing the recognition by the

For example, the people of East Timor successfully exercised their right to self-determination of their own future under international process regardless of being the same ethnic group as the people of West Timor,¹⁷⁸ while the people of Tibet are distinct from other ethnic groups of China and have not benefited from the principle of self-determination.¹⁷⁹ This is true notwithstanding the fact that the size of the Tibetan population is quite large in comparison to that of East Timor.¹⁸⁰ Moreover, the right of the Tibetan people to preserve their cultural and religious life was affirmed by the UN under the principle of human rights and fundamental freedom in 1959, 1961 and 1965.¹⁸¹ Based on the foregoing, it appears that it is unnecessary to make a distinction between "peoples" and "minority population" in terms of

European Union of the independence of Yugoslavia). See generally Cass, *supra* note 70, at 31 (noting that there are certain circumstances where minorities should be allowed to exercise the right of self-determination and cites examples of when this "controversial" approach has been allowed).

¹⁷⁸ See Chiang, *supra* note 171, at 973 (mentioning that East Timor held a referendum in 1999 in order to express the common will of the people); see also Indonesian Institute of Science, *EMBARGO AND LESSONS FROM HISTORY*, THE JAKARTA POST, Sept. 30, 2000 (discussing the successful referendum in East Timor in August 1999). See generally Andrea Hopkins, *Australia Allowed Invasion Of East Timor: Records Show Canberra Had 3 Days' Warning But Did Nothing*, THE GUARDIAN (LONDON), Sept. 13, 2000, at 16 (noting East Timor's successful referendum).

¹⁷⁹ See John Billington, *LETTER, PLEA FOR TIBET*, THE INDEPENDENT (LONDON), Oct. 7, 2000, at 2 (noting that nothing has happened by way of establishing a right of self-determination for the Tibetans); see also Lobsang Sangay, *UN'S SHODDY TREATMENT OF TIBET*, THE BOSTON GLOBE, July 2, 2000, at F7 (discussing the need for public support of the establishment of self-determination in Tibet). See generally Terence Tan, *WHY CHINA'S LEADERS FEAR FULL DEMOCRACY*, THE STRAITS TIMES (SINGAPORE), Sept. 17, 2000, at 23 (discussing China's fear of a democracy and the fact that it could cause them to lose control over Tibet).

¹⁸⁰ See Frederick J. Petersen, *THE FAÇADE OF HUMANITARIAN INTERVENTION FOR HUMAN RIGHTS IN A COMMUNITY OF SOVEREIGN NATIONS*, 15 *Ariz. J. Int'l & Comp. L.* 871, 898-900 (1998) (estimating that the population of East Timor is six hundred thousand, while the Tibetan population is comprised of nearly eight million Chinese and six million native Tibetans).

¹⁸¹ See *Question of Tibet*, G.A. Res. 1353, UN GAOR, 14th Sess., Supp. No. 16, UN Doc. A/L.264 (1959) (condemning Chinese invasion of Tibet and human rights abuses that took place); G.A. Res. 1723, UN GAOR, 16th Sess., Supp. No. 17, vol. 1, UN Doc. A/5100 (1961) (affirming Tibetans right to self-determination); G.A. Res. 2079, UN GAOR, 20th Sess., Supp. No. 14, UN Doc. A/L. 473 (1965) (discussing that the basic human rights of fundamental freedom are not only encouraged, but will be enforced by the UN by whatever means necessary). See generally *id.*, Petersen, at 900 (noting the Tibetan population is at 6 million).

entitlement to the right of self-determination.¹⁸² This is perhaps the reason why there is hardly any indication that many states are prepared to adopt the generally applicable criteria.

Another notable case is the self-determination movement in Palestine, which presents a typical claim for self-determination within an existing state.¹⁸³ In this case, the UN has repeatedly affirmed that the Palestinians have the inalienable right to self-determination.¹⁸⁴ The UN has established a special committee, in spite of US opposition and hostile threats from Israel, to help the Palestinians in proceeding to build their own state.¹⁸⁵

¹⁸² See Cass, *supra* note 70, at 31 (discussing the fact that there has been a change in the international community's perception of when self-determination can arise); see also Kiwanuka, *supra* note 69, at 90 (concluding that the right of people to assert the right of self-determination extends to all people "within the boundaries of a country or a geographical entity"); Sohn, *supra* note 86, at 50 (discussing the distinction between allowing minorities the right of self-determination and allowing it only within the colonial borders). See generally Kinzer, *supra* note 177 (showing a shift in the international attitude toward recognizing the rights of minorities).

¹⁸³ See Justus R. Weiner, THE PALESTINIAN REFUGEES' "RIGHT TO RETURN" AND THE PEACE PROCESS, 20 B.C. Int'l & Comp. L. Rev. 1, 1(1997) (noting that if Israel accepts Palestine's national identity, then the concept of self-determination should be guaranteed); see also Canuel, *supra* note 75, at 100 (discussing the movement towards self-determination and the resistance of Israeli occupation of Palestine); see also Shlomo Alvineri, A PALESTINIAN TRAGEDY, THE JERUSALEM POST, July 28, 2000, at 8A (discussing the situation in Palestine and their claim for self-determination and poor leadership).

¹⁸⁴ See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 29, at 123, UN Doc. A/8028 (1970) (supporting the rights of all people to determine their political status); see also Resolutions and Decisions of the UN General Assembly and the UN Security Council Relating to the Question of Palestine, G.A. Doc. A/AC.183/L.2 (1947-1975), G.A. Coc. A/AC.83/L.2/Add.1 (1976-1979) (noting the importance of the right to freely determine one's own political future). See generally Canuel, *supra* note 75, at 93-94 (1997) (noting that the United Nations has repeatedly recognized the rights of all people to "freely determine their political status").

¹⁸⁵ See Allegra Pacheco, A FORM OF APARTHEID BEING FORCED ON PALESTINIANS, THE HOUS. CHRON., Oct. 6, 2000, at A45 (noting that President Clinton was a proponent of the Middle East Peace Agreement, but failed to let the Palestinians know that the agreement did not include a guarantee of self-determination); see also Dajani, *supra* note 171, at 41-42 (arguing that United States and Israel still refrain from acknowledging Palestinians' claimed right to self-determination); see also Weiner, *supra* note 171, at 241-42 (noting United States' refusal to recognize the Palestinians as a self-determined people).

§ 2-15 Guidelines on Recognition of New States in Eastern Europe and the Soviet

Union

There are also some other persuasive precedents visible in Europe. Concerned with increased claims for non-colonial self-determination in Eastern Europe and in the Soviet Union in the early 1990s,¹⁸⁶ the Member states of the European Community adopted the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (hereinafter "Guidelines").¹⁸⁷ The Guidelines constitute a general criteria on the process of recognizing such new states based specifically on the principle of non-colonial self-determination.¹⁸⁸ As a result, numerous new states emerging from the former Yugoslavia and the former Soviet Union have gained recognition from the European Community and other states.¹⁸⁹

¹⁸⁶ See Svetozar Stojanovic, THE DESTRUCTION OF YUGOSLAVIA, 19 Fordham Int'l L. J. 337, 358(1995) (discussing that the secessions from Yugoslavia was viewed as self determination movements); see also Gideon A. Moor, Note, THE REPUBLIC OF BOSNIA-HERZEGOVINA AND ARTICLE 51: INHERENT RIGHTS AND UNEMT RESPONSIBILITIES, 18 Fordham Int'l L. J. 870, 873-4(1995) (discussing the fall of communism in 1989, the changing face of Eastern Europe in the early 1990s and the nationalist self-determination movement). See generally John Tagliabue, CONFLICT IN YUGOSLAVIA, N.Y. TIMES, July 3, 1991, at A6 (describing political successors in Yugoslavia as former communists who evoke old national aspirations as a way of casting off that which originally gave rise to communism).

¹⁸⁷ See Guideline on the Recognition of New States in Eastern Europe and in the Soviet Union, E.C. BULLETIN 12-1991, at 119 (laying the foundation for self-determination with respect to former Communist Bloc countries who sought independence); see also Ruth Wedgwood, NATO'S KOSOVO INTERVENTION: NATO'S CAMPAIGN IN YUGOSLAVIA, 93 Am. J. Int'l L. 828, 833 (1999) (discussing how the "Guidelines" make clear that political membership in the European- Atlantic community requires minimum guarantees for the rights of minority populations); see, e.g., Political Cooperation: EEC Moves to Recognize Georgia, EUROPEAN REPORT, March 25, 1992, at 13 (stating that Georgia has met the stated requirements in the Guideline on Recognition of New States in Eastern Europe and the Soviet Union and proceeded with recognition).

¹⁸⁸ See Chiang, supra note 171, at 1003 (discussing the fact that many new states were created out of former Soviet Union and United States' colonies in the "name of self-determination"); see also Sohn, supra note 86, at 50 (discussing that Estonia, Latvia, and Lithuania, have been deprived of their right to independence). See generally Kinzer, supra note 177 (showing a shift in the international attitude toward recognizing the rights of minorities based on self-determination).

¹⁸⁹ See Patrick R. Hugg, THE REPUBLIC OF TURKEY IN EUROPE: RECONSIDERING THE

Another prominent progress relating to non-colonial self-determination has been the development of indigenous people's right to self-determination over the past two decades.¹⁹⁰ For instance, the UN Working Group on Indigenous Populations (hereinafter "Working Group") was established in 1982 to deal with the issue of indigenous populations.¹⁹¹ The Working Group adopted the Draft Declaration of Rights of Indigenous Peoples at its 11th session which was also later adopted by UNESCO in 1993 (hereinafter "1993 Declaration").¹⁹² Article 31 of the 1993 Declaration provides that "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters

LUXEMBOURG EXCLUSION, 23 *Fordham Int'l L. J.* 606, 611-2(2000) (discussing the changing map of Europe, the newly emerging states from the old Soviet powers and the European Union's offer of membership to some emerging democracies); see also Kinzer, *supra* note 177 (discussing the recognition of the independence of Yugoslavia); see e.g., Political Cooperation: EEC Moves to Recognize Georgia, *supra* note 184 (stating that Georgia has met the stated requirements in the Guideline on Recognition of New States in Eastern Europe and the Soviet Union and proceeded with recognition).

¹⁹⁰ See Cass, *supra* note 70, at 23-24 (noting problems that exist because of a reliance by indigenous persons and minorities on the concept of self-determination); see also Patrick Macklem, ABORIGINAL RIGHTS AND STATE OBLIGATIONS, 35 *Alta. L. Rev.* 97, 113 (1997) ("Indigenous peoples have the right to self-determination in accordance with international law"); Chair- Rapporteur of the Working Group on Indigenous Populations, Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/26 (released 8 June 1993) (addressing fact that indigenous peoples have the right to self-determination).

¹⁹¹ See Rick Sarre, SEEKING JUSTICE: CRITICAL PERSPECTIVES OF NATIVE PEOPLE: THE IMPRISONMENT OF INDIGENOUS AUSTRALIANS: DILEMMAS AND CHALLENGES FOR POLICYMAKERS, 4 *Geo. Pub. Pol'y Rev.* 165, 167 n. 5(1999) (discussing the United Nation's creation of the Working Group on Indigenous Populations); see also Penelope Andrews, CONCEPTUALIZING VIOLENCE: PRESENT AND FUTURE DEVELOPMENTS IN INTERNATIONAL LAW: PANEL III: SEX AND SEXUALITY: VIOLENCE AND CULTURE IN THE NEW INTERNATIONAL ORDER: VIOLENCE AGAINST ABORIGINAL WOMEN IN AUSTRALIA: POSSIBILITIES FOR REDRESS WITHIN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK, 60 *Alb. L. Rev.* 917, 932(1997) (analyzing the Working Group on Indigenous Populations impact on international relations); Suagee, *supra* note 74, at 369-70 (noting the duties of the Working Group on Indigenous Populations).

¹⁹² See Draft Declaration of Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1993/29; see also Macklem, *supra* note 190 ("Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations."); see also *id.*, Sarre(discussing the Draft Declaration which provides in part that indigenous peoples have the right to have their specific characteristics respected).

relating to their internal and local affairs.”¹⁹³

§ 2-16 Indigenous People’s Right to Self-Determination

As noted above, it may be hard to see the right of non-colonial self-determination being interpreted in its broadest sense in the near future. However, giving “indigenous peoples” a high degree of control over their own destiny and settling self-determination claims by guaranteeing democratic entitlement to these claimants under international processes have become more acceptable at the international level.¹⁹⁴ After the Cold War, the growing worldwide pressure for democracy promoted a progressive development toward self-determination by encouraging respect for human rights as a universal value (which is protected under international law).¹⁹⁵ Watching the development of the right to self-determination from an anti-colonial concept to a non-colonial concept, observers are likely to be convinced

¹⁹³ See Alexandra Kersey, THE NUNAVUT AGREEMENT: A MODEL FOR PRESERVING INDIGENOUS RIGHTS, 11 *Ariz. J. Int’l & Comp. L.* 429, 453 n.210(1994) (“Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs”); see also Angela R. Hoefft, COMING FULL CIRCLE: AMERICAN INDIAN TREATY LITIGATION FROM AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE, 14 *L. & Ineq. J.* 203, 227 (commenting on Article 31 of the Draft Declaration of Rights of Indigenous Peoples); Wilson, *supra* note 103, at 470 (discussing Article 31 of the Draft Declaration of Rights of Indigenous People).

¹⁹⁴ See Bell & Cavanaugh, *supra* note 128, at 1347-48 (discussing how indigent peoples have blurred the distinction between peoples and minorities, thus expanding the right of self-determination); see also Stojanovic, *supra* note 186(asserting that the secessions from Yugoslavia were viewed as self-determination movements); Kinzer, *supra* note 179(stating that the European Union recognized the independence of Yugoslavia).

¹⁹⁵ See Stephen R. Ratner, DOES INTERNATIONAL LAW MATTER IN PREVENTING ETHNIC CONFLICT?, 32 *N.Y.U. J. Int’l L. & Pol’y* 591, 592-93 (2000) (noting that there has been “modest progress” made toward a more worldly recognition of human rights since the end of the Cold War). See generally Chiang, *supra* note 171, at 1003 (stating that many new states were created out of the the former Soviet Union and United States’ colonies in the “name of self-determination”); see also Suagee, *supra* note 74, at 389-90 (explaining the United States will have to take the moral high ground in order to insure that self-determination for indigenous peoples continues to become a reality).

that, regardless of the form of self-determination contemplated, the issue of choice is an underlying factor.¹⁹⁶ In essence, people have the right to choose who governs them and what kind of government they should practice.¹⁹⁷

With regard to the political choices, the UN adopted Resolution 2625¹⁹⁸ on the principle of democratic entitlement. Relations 2625 states that "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people."¹⁹⁹ Yet, as a matter of international law, there exist relatively few procedures to implement the right of self-determination.²⁰⁰

¹⁹⁶ See Kingsbury, *supra* note 82, at 440 (recognizing existing doctrine of choice in some international institutions regarding self-determination); see also Tomasa, *supra* note 87, at 248-49 (listing countries that have colonized in the past define self-determination as a choice of right to freely choose a status). See generally Marc Weller, THE INTERNATIONAL RESPONSE TO THE DISSOLUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA, 86 Am. J. Int'l L. 569, 592(1992) (discussing the 1966 Human Rights Covenants and their allowance for individuals to make a choice regarding ethnicity, religion and language).

¹⁹⁷ See Suagee, *supra* note 74, at 380 (stating that "under international law indigenous peoples have been treated as not having one particular right that other peoples have--the right to choose to become a nation-state").

¹⁹⁸ See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN GAOR, 9th Sess., Supp. No. 28, at 121, UN Doc. 8/8028 (1970) (Resolution 2625); see also Hurst Hannum, 1999 SELF-DETERMINATION AND NATIONAL MINORITIES, 93 Am. J. Int'l L. 274, 275(1999) (discussing Resolution 2625); see also Claus Arndt, LEGAL PROBLEMS OF THE GERMAN EASTERN TREATIES, 74 Am. J. Int'l L. 122, 130 (1980) (explaining specific sections of Resolution 2625).

¹⁹⁹ See Major James Francis Gravelle, CONTEMPORARY INTERNATIONAL LEGAL ISSUES-THE FALKLAND(MALVINAS) ISLANDS: AN INTERNATIONAL LAW ANALYSIS OF THE DISPUTE BETWEEN ARGENTINA AND GREAT BRITAIN, 107 Mil. L. Rve. 5, 40(1985) (discussing Resolution 2625); see also Tamzarian, *supra* note 70, at 192 (explaining the substantive legal issues pertaining to the Karabagh conflict); see also Brian D. Vaughan, Note & Comment, WILL GOD SAVE THE QUEEN? SHARE AUTHORITY AND SOVEREIGNTY IN NORTHERN IRELAND AND THE CASE FOR CROSS-BORDER BODIES, 18 Wis. Int'l L. J. 511, 524(2000) (regarding the forms that self-determination may take).

²⁰⁰ See Wall, *supra* note 175, at 603-04 (asserting there is no international procedure to insure the implementation of self-determination); see also cf. Selassie, *supra* note 68, at 98 (stating the UN

§ 2-17 Procedures to Implement the Right of Self-Determination

To commence a direct, secret and universal ballot is a comprehensive way to assess the will of the people.²⁰¹ In order to prevent electoral fraud or any other violation of the electoral process, the international community often conducts international election observer missions to ensure that the following issues are in place: 1) whether those people entitled to vote are properly registered and that the electoral rolls are not tampered with; 2) whether all those registered people are able to vote freely and that their ballots are properly and fairly counted; and 3) whether, during the electoral campaign and the election itself, information flowed freely to and from the people so as to ensure that they are able to vote under the best possible conditions.²⁰² Thus, democratic entitlement itself can serve as an imperative to conflict resolution because it helps to present a real outcome of the will of the people.²⁰³ Through this democratic procedure, however, the responsible state can

CHARTER provides for procedures which give the concept of self-determination concrete form).

²⁰¹ See Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, reprinted in 29 I.L.M. 1305, 1308 (1990) (discussing the "inalienable rights of all human beings" inherent in having an election by secret ballot to ensure that free opinion of the electors is expressed); see also Franck, supra note 96, at 66 (noting that elections by secret ballot are important in protecting the rights of those voting); see also Joy Gordon, THE CONCEPT OF HUMAN RIGHTS: THE HISTORY AND MEANING OF ITS POLITICIZATION, 23 Brook. J. Int'l. L. 689, 759(1998) (noting that the election of a particular individual is the "will of the people").

²⁰² See Yves Beigbeder, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS 37-38 (1994) (discussing what is done in order to ensure that electoral issues are in place). See generally Tan Lian Choo, GOOD, CAPABLE OFFICERS PICKED TO ACT AS REPUBLIC'S ENVOYS, THE STRAITS TIMES (Singapore), October 24, 1994, at 4 (stating that "election monitors" were sent to observe the first non-racial elections in South Africa).

²⁰³ See Brietzke, supra note 127, at 130 (noting that it is important for the international community to define self-determination in democratic terms in order to ensure that the people get what they want); see also Hannum, supra note 143, at 66 (viewing self-determination as a means to a democratic end lends validity to the proposition because it serves to protect the interests of the people). See generally

satisfy the burden of proof to eliminate any legal justification for intervention by another state or international community and thus, the conflicts arising from the self-determination movement can be resolved smoothly by the possibility of certain degrees of preference.²⁰⁴

The case of Eritrea, which broke away from Ethiopia, serves as a remarkable model for such a point.²⁰⁵ The Eritrean's launched a long-term armed struggle against the Ethiopian regime despite the fact that the UN paved the way for the Ethiopian Empire to absorb Eritrea as an integral part of Ethiopian territory without respecting the right of the Eritrean people to self-determination.²⁰⁶ The conflict remained

Adeno Addis, *INDIVIDUALISM, COMMUNITARIANISM, AND THE RIGHTS OF ETHNIC MINORITIES*, 67 *Notre Dame L. Rev.* 615, 616(1992) (noting that a right of self-determination is generally taken to mean a declaration of independence of a territorial unit).

²⁰⁴ See Brietzke, *supra* note 127, at 0118-19 (discussing how the democratization of the burdens of proof would eliminate any legal justification for intervention by another state or international community). See generally Thomas Carothers, *DEMOCRACY AND HUMAN RIGHTS: POLICY ALLIES OR RIVALS?*, *Wash. Q.*, Summer 1994, at 106 ("In their view, U.S. government pressure on a foreign government to improve its human rights behavior is a form of entirely legitimate intervention in the internal affairs of that country because human rights norms are binding under international law on all states.").

²⁰⁵ See *The Nations Speak*; UN General Assembly General Debate, September 27 to October 13, 1993, *UN CHRON.*, March 1994, at 8 ("Eritrea has not only secured peace and stability; it has made the rare achievement of establishing warm relations of cooperations with its former enemy, Ethiopia."). See generally Africa Policy Information Center, *United States and Africa*; *Africa Policy: Report from the American Assembly*, *AFRICA NEWS*, May 6, 1997 (providing examples of many countries that have made significant progress toward democracies).

²⁰⁶ See Chris Landsberg, *AFRICA'S RENAISSANCE IS BEING HELD HOSTAGE BY ETHIOPIA-ERITREA CONFLICT: OPTIMISM IS DELAYED*, *NEWS & RECORD* (North Carolina), July 15, 1998, at A11 (concluding that surprise victory over the Ethiopian Army initiated the UN sanctioned referendum on Eritrean self-determination, where 98% of Eritreans voted for independence). See generally Henry J. Richardson, *RECENT STRUGGLE FOR DEMOCRACY UNDER PROTOCOLS I AND II TO THE GENVA CONVENTIONS*, 6 *Temp. Int'l & Comp. L. Rev.* 13, 16 (1992) (recognizing combat that arises out of popular uprisings, within state boundaries, during the pursuit of self-determination); see also Michael A. Hiltzik, *ARMY COLLAPSE REPORTEDLY CRIPPLES ETHIOPIAN REGIME*, *L.A. TIMES*, Oct. 13, 1989, at A1, col. 5 (noting that Eritrean People's Liberation Front was the dominant guerilla warfare organization); see also *War Brings Ethiopia to Verge of Fall: Rebellion: In an Impassioned Speech, President Mengistu Says the Mother Land Is in Collapse*, *L.A. TIMES*, June 23, 1990, at A11 (stating that the president of Ethiopia accused the Eritrean People's Liberation Front of being involved in a conspiracy to divide the country).

uncontrollable for thirty years until the Eritrean People were permitted to hold a democratic referendum under international monitoring for determining the status of Eritrea in 1993.²⁰⁷

§ 2-18 Democratic Referendum in Eritrea

In reviewing the process that the Eritrean people took in their struggle for self-determination, it is clear that self-determination itself is a right to choose one's destiny by full democratic participation.²⁰⁸ It also appears that oppressed people do not compromise on their right of self-determination.²⁰⁹ After the Cold War, a democratic vitality has been growing around the world.²¹⁰ More significantly,

²⁰⁷ See Tom Killion, BOTH SIDES IN AFRICA'S LONGEST WAR LOOK FOR PEACEFUL SOLUTION IN ATLANTA, L.A. TIMES, Sep. 3, 1989, at page 2 (noting that the Eritrean People's Liberation Front worked for several years to obtain an internationally supervised referendum on Eritrea's political future); see also Robert E. Lutz, II, PERSPECTIVES ON THE WORLD COURT, THE UNITED STATES, AND INTERNATIONAL DISPUTE RESOLUTION IN A CHANGING WORLD, 25 Int'l L. 675 (1991) (speculating that international peace talks were held in Atlanta, Georgia with the hope of settling the civil war between the Ethiopian Government and Eritrean rebels); see also PEACE TALKS IN ATLANTA, L.A. TIMES, Aug. 17, 1989, at A1 (noting that President Carter would oversee international peace talks between the government of Ethiopia and the Eritrean People's Liberation Front). See generally Halperin, Scheffeer & Small, supra note 102, at 125-26 (discussing the UN's General Assembly adoption of Resolution 390(V) that proposed Eritrea be federated within the Ethiopian Empire).

²⁰⁸ See Kolodner, supra note 69, at 158 (noting that the exercise of self-determination is a prerequisite to the exercise of human rights and freedoms). See generally Henry J. Richardson, A CRITICAL THOUGHT ON SELF-DETERMINATION FOR EAST TIMOR AND KOSOVO, 14 Temp. Int'l & Comp. L. J. 101, 101(2000) (stating that international community has a duty to uphold self-determination as a fundamental right); see also Henry J. Richard III & Goler T. Butcher, RIGHTS OF SELF-DETERMINATION OF PEOPLES IN ESTABLISHED STATES: SOUTHERN AFRICA AND THE MIDDLE EAST, 85 Am. Soc'y Int'l L. Proc. 541, 546(1991) (noting that in established states, this right is defined as each person's power to participate in decisions which affect the political future of the state).

²⁰⁹ See generally Brown-John, supra note 111, at 573 (noting that the self-determination and independence movement can be linked in situations where peoples have been oppressed); see also Mitchell A. Hill, WHAT THE PRINCIPLE OF SELF-DETERMINATION MEANS TODAY, 1 Ilsa. Int'l & Comp. L. 119, 131(1995) (under the 1970 Declaration of the United Nations, when a government is not representative of its people, oppressed groups within the state may be afforded the right to self-determination). But see Hanauer, supra note 90, at 133 (stating that the right of every oppressed ethnic or religious group to claim independence and freedom from domination is a very idealistic political and moral view).

²¹⁰ See Richardson, supra note 208, at 102 (noting that in the post- Cold War Era, the right to

democratic values have become acceptable in many regions of the world.²¹¹ Hence, a responsible state is guaranteed its status quo "territorial integrity and political unity" against the right of self-determination only when its government has satisfied the obligation to the people to engage in "good governance."²¹² Using this approach, democracy will become a universal value irrespective of differing racial, religious and cultural characteristics.²¹³ By acting together through the democratic frameworks,²¹⁴ both the state and its people can effectuate mutual trust and minimize the conflicts

self-determination has been "intensely claimed and invoked"); see also Clarence Davis, PROCEEDINGS OF THE CONFERENCE ON AFRICAN-AMERICANS AND THE RIGHT TO SELF-DETERMINATION, 17 Hamline L. Rev. 1, 6(1993) ("With the ending of the Cold War, there has been an international expansion in the desire for democracy."); see also Kolodner, *supra* note 69, at 153 (asserting that self-determination has gained growing acceptance in the international community in the post-Cold War era); see also Nafziger, *supra* note 122, at 28 (noting that in the post-Cold War Era, the United Nations has been able to facilitate self-determination more readily).

²¹¹ See Kolodner, *supra* note 69, at 153 (stating that democratic freedoms have become more widely accepted and promulgated since the Cold War). See generally Muna Ndulo, THE DEMOCRATIC STATE IN AFRICA: THE CHALLENGES FOR INSTITUTION BUILDING, 16 Nat'l Black L. J. 70, 84(1998) (noting that in many regions of the world, providing political power to local communities has become one of the corner stones of democracy); see also Karen Ann Widess, IMPLEMENTING DEMOCRATIZATION: WHAT ROLE FOR INTERNATIONAL ORGANIZATIONS?, 91 Am. Soc'y Int'l L. Proc. 356, 357(1997) (discussing the fact that there has been increased support support for democratic transitions within international organizations in the post-Cold War Era).

²¹² See Henry J. Richardson, "FAILED STATES," SELF-DETERMINATION AND PREVENTIVE DIPLOMACY: COLONIALIST NOSTALGIA AND DEMOCRATIC EXPECTATIONS, 10 Temp. Int'l & Comp. L. J. 1, 21(1996) (placing burden on every political state to protect the human rights of all its citizens); see also Hanna, *supra* note 138, at 224 (discussing protection of people within specific territories under international law of its territorial integrity). See generally Canuel, *supra* note 75, at 91 (stating that the international standard for determining whether self-determination is legitimate depends upon, in part, the degree of deprivation of basic human rights within the state).

²¹³ See United Nations And Businesses Find Common Ground; UN Chief Says Agency Creates The Conditions Necessary For Business Success, STAR TRIB. (Minneapolis), July 20, 1998, at 3D ("Freedom and the peaceful resolution of disputes; social progress and better standards of living, equality, tolerance and dignity; these are the universal values"); see also Panafrican News Agency, Africa-at-Large; Conference on Globalisation Ends in Maputo, AFRICA NEWS July 5, 1998 (emphasizing the need for universal values based on Democracy but it cannot be forced). See generally Daniel J. Vargas, PRIEST'S CRY FOR INDEPENDENCE REMEMBERED, SAN ANTONIO EXPRESS-NEWS, September 15, 1998, at E1 ("[A]utonomy, self-determination, fairness, justice and democracy--universal values").

²¹⁴ See International Covenant on Civil and Political Rights, G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, art. 25, UN Doc. A/6316 (1966). Article 25 provides: every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2, and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be by secret ballot, guaranteeing the free expression of the will of the

that may arise between them.²¹⁵ In other words, democracy is deeply linked to peace and security because it can effectively resolve conflicts caused by self-determination movements.²¹⁶

As mentioned above, what the international community can do to contribute is to promote the creation of democratic institutions (which constitute an essential and indispensable stage in the economic and social development of nations).²¹⁷ In his "An Agenda for Peace," UN Secretary-General B. Boutros-Ghali stated:

There is a new requirement for technical assistance, which the United Nations has an obligation to develop and provide when requested: support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions. The authority of the United Nations system to act in this field would rest on the consensus that social peace is as

electors; c) To have access, on general terms of equality, to public service in his country.

²¹⁵ See generally Patti Waldmeir, THE SYSTEM TAKES THE BLAME, NOT THE WHITES, FINANCIAL TIMES (London), April 23, 1994, at 10 (emphasizing the need to minimize conflict and misunderstanding in an effort to create a government with national unity)

²¹⁶ See Rudrakumaran, supra note 128, at 35 (noting that democratic principles may be useful in conflicts involving self-determination because democracy promotes deliberations, mediations, and compromises). Compare Nafziger, supra note 122, at 20 (discussing the fact that self-determination has done little to promote democracy). See generally Brown-John, supra note 111, at 595 (stating that democracy is part of the "natural order of human political evolution").

²¹⁷ See Dianne Otto, CHALLENGING THE "NEW WORLD ORDER": INTERNATIONAL LAW, GLOBAL DEMOCRACY AND THE POSSIBILITIES FOR WOMEN, 3 Transnat'l L. & Contemp. Prob. 371, 374(1993) (noting that in the international community, there are movements "seeking decolonization and self-determination, the liberation of women, freedom from racial discrimination, indigenous peoples' rights, environmental democracy, and emancipation from economic domination and political repression); see also William P. Alford, EXPORTING "THE PURSUIT OF HAPPINESS," 113 Harv. L. Rev. 1677, 1680(2000) (discussing the fact that the Carnegie Endowment for International Peace promotes the furtherance of democratic systems abroad).

*important as strategic or political peace. There is an obvious connection between democratic practices such as the rule of law and transparency in decision-making and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities.*²¹⁸

§ 2-19 Another Mission of the UN Trusteeship System

There is a need for the United Nations to set up a permanent body to engineer the creation of these democratic institutions and handle the issue of self-determination.²¹⁹

It is known that the UN trusteeship system was created to succeed the Mandate system of the League of Nations for the purpose of ensuring "well-being and development" of the non-self-governing peoples and their eventual self-government or independence under the UN Charter.²²⁰ After the last trust territory in the island of

²¹⁸ See General Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping--Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on January 31, 1992*, UN Doc. A/47/277-S/24111, (1992) (for a report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on January 31, 1992); 31 ILM 956, 960-3(1992). See also Sharon K. Hom & Eric K. Yamamoto, *COLLECTIVE MEMORY, HISTORY, AND SOCIAL JUSTICE*, 47 UCLA L. Rev. 1747, 1787(2000) (noting the United Nations' potential role as protector of human rights on an international level).

²¹⁹ See Kolodner, *supra* note 69, at 158 ("Only if the international community supports movements for self-determination can it guarantee the protection of the rights of peoples throughout the world."); Robert B. Porter, *PROPOSAL TO THE HANODAGANYAS TO DECOLONIZE FEDERAL INDIAN CONTROL LAW*, 31 U. Mich. J. L. Rev. 899, 946(1998) (recognizing the UN's considerable progress in securing protection of basic human rights under international law).

²²⁰ See Michael Mandelbaum, *THE RELUCTANCE TO INTERVENE; IN FOREIGN COUNTRY PROBLEMS, INFORMATION ACCESS COMPANY*, June 22, 1994 at 3 ("After the two world wars, efforts were made to use the state-building skills of the major powers under the auspices of an international organization, first with the League of Nations mandate system, then as UN trusteeships."); see also William Pfaff, *WWI-ERA MANDATE SYSTEM MIGHT SAVE PLACES LIKE SOMOLIA*,

Palau achieved its independence from the United States in 1999, the UN trusteeship system has successfully fulfilled its traditional function.²²¹ In fact, all functions of the UN trusteeship system relating to political, economic, social, and educational matters in trust territories were based on the well-being and development of the inhabitants of such territories. In order to approach their maximum well-being and development, the inhabitants of such trust territories were entitled to exercise their right to self-determination in approving their respective new status by democratic means (which were observed by visiting missions of the Trusteeship Council).²²²

Likewise, the recognition of the principle of non-colonial self-determination by the international community is also due to a similar general purpose under the UN trusteeship system to promote "well-being and development" of such peoples.²²³ As

CHI. TRIB., November 29, 1992 at 3C (noting the institution of mandated territories after World War I). See generally Walter de Gruyter, *THE LEAGUE OF NATIONS IN RETROSPECT: PROCEEDINGS OF THE SYMPOSIUM*, 80 *Am. J. Int'l L.* 200, 200-5(1986) (discussing historical information on the League of Nations).

²²¹ See Richard D. Lyons, *WORK ENDED, TRUSTEESHIP COUNCIL RESISTS UN AX FOR NOW*, *THE NEW YORK TIMES*, November 6, 1994 at 11 ("[T]he United States, which had administered the Palau island chain since 1947 at the behest of the United Nations, formally notified the Trusteeship Council that Palau's 16,000 people had officially voted to become a sovereign nation."). See generally Hinck, *supra* note 73, at 916 (noting the interest in the UN CHARTER has in protecting the rights of people in non-self-governing territories and promoting their well-being).

²²² See Franck, *supra* note 86, at 58-59 ("The Covenant clearly intends to make the right of self-determination applicable to the citizens of all nations, entitling them to determine their collective political status through democratic means."); see, e.g., Marian Nash (Leich), *U.S. Practice: CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW*, 89 *A.J.I.L.* 96, 97(1995) (noting that the people of Palau had freely exercised their right to self-determination). See generally Hurst Hannum & Richard B. Lillich, *THE CONCEPT OF AUTONOMY IN INTERNATIONAL LAW*, 74 *A.J.I.L.* 858, 885- 86 (1980) (concluding that the key to achieving self-determination is the "freely and democratically expressed wishes" of those individuals concerned).

²²³ See Hinck, *supra* note 73, at 916 (noting the UN CHARTER'S interest in protection the rights of those people in non-self-governing systems); see also Kolodner, *supra* note 54 ("[T]he international community, historically hesitant to infringe on state sovereignty."). See generally Kolodner, *supra* note 69, at 158 (stating the rights of peoples throughout the world will be protected only if the international community recognizes a right to self-determination).

of 2000, all of the trust territories had achieved independence or "self-government" within another state.²²⁴ It is the right time for the UN to modernize the function of the trusteeship system, specifically in order to manage other forms of non-colonial self-determination movements.²²⁵ By so doing, the UN cannot only avoid humanitarian crises from horrific armed conflicts in particular, but also ensure international peace and security in general.²²⁶

IV. THE EVOLUTION OF SELF-DETERMINATION IN TAIWAN AFTER THE

SECOND WORLD WAR: FROM EXTERNAL SELF-DETERMINATION TO

INTERNAL SELF-DETERMINATION

§ 2-20 Japanese Colonialism on Taiwan

²²⁴ See Manuel Rodriguez-Orellana, PROPTER HONORIS RESPECTRUM: HUMAN RIGHTS TALK AND SELF-DETERMINATION TOO!, 117 Notre Dame L. Rev. 1391, 1411(1998) (stating that all trust territories have allegedly achieved independence or self-government within another state); see also Fox, supra note 106, at 736 (discussing the non-self-governing and trust territories that achieved independence in the post-war era retained their colonial-era boundaries). See generally Robert N. Wells, UNITED NATIONS IS IN NEED OF REFORMS AND RESTRUCTURING, NEW STRAITS TIMES (MALAYSIA), November 15, 1995, at 13 (stating that all the UN trust territories have achieved independence).

²²⁵ See Lyons, supra note 211 (stating that Palau is the last of the 11 territories in the United Nations trusteeship system to gain self-determination); see also William Pfaff, A NEW COLONIALISM? EUROPE MUST GO BACK INTO AFRICA, Foreign Affairs, January, 1995 / February, 1995 at 2 (stating that leaders want the old League of Nations trusteeship system reestablished, with African and Asian nations among those appointed by the United Nations to govern certain countries). See generally World Politics and Current Affairs, THE ECONOMIST, November 22, 1997, at 49 (discussing the new trusteeship system under which the UN would put collapsed countries together again).

²²⁶ See UN CHARTER art. 2, para. 6 (providing that the UN shall ensure the compliance of non-member states for the maintenance of international peace and security); see also Evan T. Bloom, PROTECTING PEACEKEEPERS, THE CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL, 89 Am. J. Int'l L. 621, 621(1995) (noting member states' realization that there was an urgent need for an international agreement that would deter and ensure punishment of such armed conflicts). But see Ernst-Ulrich Petersmann, HOW TO REFORM THE UNITED NATIONS: LESSONS FROM THE INTERNATIONAL ECONOMIC LAW REVOLUTION, 2 UCLA J. Int'l L. & Foreign Aff. 185, 188 (1998) (questioning whether the UN Charter can ensure the rule of international law or achieve the goal of peaceful settlement disputes without compulsory

During the period of Japanese colonialism from 1895 to 1945, Japan proceeded with exclusionist and racially discriminatory policies against the inhabitants of Taiwan.²²⁷ The inhabitants of Taiwan did not enjoy equal rights with Japanese citizens.²²⁸ The unequal status between the Taiwanese and the Japanese gave rise to anti-Japanese resistance from the inhabitants of Taiwan in the hope of building an independent state rather than reverting to Chinese rule.²²⁹ In an effort to approach this ideal, some anti-Japanese organizations started operating in China.²³⁰ There is no

international adjudication).

²²⁷ See Yu-Ming Shaw, MODERN HISTORY OF TAIWAN: AN INTERPRETATIVE ACCOUNT, IN CHINA AND THE TAIWAN ISSUE 21-24 (Hungdah Chiu ed., 1979) (criticizing Japan's use of economic growth as an excuse to impose harsh exploitive rule over Taiwan); see also Tay-Sheng Wang, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945): THE RECEPTION OF WESTERN LAW 26-83 (1992) (discussing how the legal system in Taiwan has been influenced by Japanese civil law traditions); see also Shen, *supra* note 72, at 1108 (explaining how the Treaty of Shimonoseki in 1895 began a history of fifty years of Japanese colonial reign of Taiwan against the will of the Chinese people).

²²⁸ See Edgar Snow, RED STAR OVER CHINA, N.Y. TIMES, February 9, 1968, at 106-113. (discussing how Taiwanese people had to conform to Japanese ways); see e.g., Parris Chana and Koh-Uibim, THE INTERNATIONAL LEGAL STATUS OF TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP, 1 UCLA J. Int'l L. & Foreign Aff. 393, 467 (1997) (noting that the Japanese made Taiwanese people use the Japanese language exclusively and duplicate its educational and legal system). See generally Angeline G. Chen, TAIWAN'S INTERNATIONAL PERSONALITY: CROSS THE RIVER BY FEELING THE STONES, 20 Loy. L. A. Int'l & Comp. L. J. 223, 230(1998) (stating that Taiwan changed hands without being consulted, after Japan defeated China in the Sino-Japanese War).

²²⁹ See Christopher J. Carolan, THE REPUBLIC OF TAIWAN: A LEGAL HISTORICAL JUSTIFICATION FOR A TAIWANESE DECLARATION OF INDEPENDENCE, 75 N.Y.U. L. Rev. 429, 433-4(2000) ("the Cairo Declaration of 1943 that challenged Japanese possession of Taiwan resulted in Taiwan becoming China's colony"); see also Charney & Prescott, *supra* note 81, at 464-65 (discussing how Taiwan satisfies the criteria for statehood because it is a territory under its control, it has the capacity to enter into international relations independently of any other government, and it has a strong economy). But see Nii Lante Wallace, TAIWAN AND SOMALIA: INTERNATIONAL LEGAL CURIOSITIES, 22 Queens L. J. 453, 461-2(1997) (discussing the ongoing struggle for Taiwan's independence).

²³⁰ See *id.*, Carolan, at 448 (noting that Taiwan's resistance to Japanese control did not mean that Taiwan wanted to be a part of China, rather it fostered the goal of establishing an independent Taiwanese government); see also Yeh, *supra* note 80, at 237-38 (stating that, directly after decolonialization, Taiwanese nationalists failed to establish significant institutions for Taiwanese independence). See generally Colin P.A. Jones, UNTIED STATES ARMS EXPORTS TO TAIWAN UNDER THE TAIWAN RELATIONS ACT: THE FAILED ROLE OF LAW IN UNITED STATES FOREIGN RELATIONS, 9 Conn. J. Int'l L. 51, 52, n. 5(1993) (discussing the conflict between Taiwanese and Chinese Nationalists after Taiwan was returned to China after Japanese rule, and the possible initiation of a trusteeship over Taiwan by the United States).

evidence, however, that China argued for its nationalist credentials over Taiwan during that period.²³¹ In an interview by an American Journalist in 1936 regarding the question: “Is it the immediate task of the Chinese people to regain all the territories lost to Japanese imperialism, or only to drive Japan from North China, and all Chinese territories beyond the Great Wall?” the top leader of Chinese Communist Party(hereinafter “CCP”), Mao Zedong, indicated:

It is the immediate task of China to regain all our lost territories, not merely to defend our sovereignty south of 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 in their struggle for independence. The same thing applies for Taiwan[Formosa]. As for Inner Mongolia, which is populated by both Chinese and Mongolians, we will struggle to drive Japan from

²³¹ See Carolan, *supra* note 229, at 433 (noting that prior to World War II, China did not challenge Japan's possession of Taiwan); see also Parris Chang & Kok-Ui Lim, TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP, 1 UCLA J. Int'l L. & Foreign Aff. 393, 407-08 (1997) (questioning whether the signing of the 1943 Cairo Declaration and the Potsdam Declaration, which established the Allied Powers' intent to return Taiwan to China, served as conclusive evidence that China asserted control over Taiwan during that period). Compare Shen, *supra* note 72, at 1108 (noting that during the period of Japanese colonization of Taiwan, the Chinese never ceased in their efforts to return Taiwan to China).

*there and help Inner Mongolia to establish an autonomous state.*²³²

Since Taiwan was ceded to Japan by the Manchu Ching Dynasty in the 19th century, there was no strong sense of Chinese identity to consider Taiwan a part of China.²³³ On the contrary, because of Taiwan's cession from China in perpetuity under the Shimonoseki Treaty, there was no further cultural and historical linkage between Taiwan and China.²³⁴ Although the 1943 Cairo Conference concluded that Taiwan should return to China, this outcome was more a result of political compromise than an expression of an emotional belonging that the people of Taiwan were Chinese culturally and historically.²³⁵

§ 2-21 The 1943 Cairo Conference & the 1945 Potsdam Declaration

²³² See Christopher K. Costa, Comment, ONE COUNTRY-TWO FOREIGN POLICIES: UNITED STATES RELATIONS WITH HONG KONG AFTER JULY 1, 1997, 38 Vill. L. Rev. 825, 834(1993) (discussing China's eighty year quest to regain all of its lost territories). See generally James L. Wescoat, Jr., MAIN CURRENTS IN EARLY MULTILATERAL WATER TREATIES: A HISTORICAL GEOGRAPHIC PERSPECTIVE, 1648- 1948, 7 Colo. J. Int'l Env'tl. L. & Pol'y 39, 68 (1996) (stating Japan conquered Manchuria from China in 1931).

²³³ See Charney & Prescott, supra note 81, at 456 (stating that Taiwan ceded to Japan in 1895); see also Chang & Lim, supra note 181, at 429 (asserting that while there may be civility between the two, there is no strong pull to consider Taiwan as a part of China). See generally Piero Tozzi, NOTE, CONSTITUTIONAL REFORM ON TAIWAN: FULFILLING A CHINESE NOTION OF DEMOCRATIC SOVEREIGNTY?, 64 Fordham L. Rev. 1193, 1251 n.245(1995) (discussing the difficulty of forming strong identity in the middle of their "hodgepodge" history).

²³⁴ See Kwan Weng Kin, DESERTED ISLES AROUSED INTEREST ONLY AFTER REPORT OF OIL RESERVES, THE STRAITS TIMES, September 21, 1996, at 36 ("Taiwan [was] ceded to Japan as spoils of war through the Treaty of Shimonoseki after China's defeat in the 1894-95 Sino-Japanese War."); see also Yoshio Nakagawa & Yomiuri Shimbun, TAIWAN'S COLONIAL LEGACY REVISITED, The Daily Yomiuri, May 7, 1995, at 5 (stating that, with the signing of the treaty, Japan acquired Taiwan from China with the signing at the end of the Sino-Japanese War); Xiao-huang Yin and Tsung Chi, IS US PLAYING THE TAIWAN CARD BY GRANTING ITS PRESIDENT A VISA?, Los Angeles TIMES, June 4, 1995, at M2 (stating that since the signing of the Shimonoseki Treaty, Taiwan has been "lost" from China).

²³⁵ See A Brief Retrospect, The British Broadcasting Corporation, July 14, 1982 (stating that Taiwan was returned to China as a result of the Cairo Declaration and the Potsdam Proclamation); see also TAIWAN IS INALIENABLE PART OF CHINA, Says White Paper, The Xinhua General Overseas News Service, AUGUST 31, 1993 (noting that Taiwan and the Penghu archipelago had been incorporated into the territory of China and that the people of those territories were subject to the sovereignty of China).

The 1943 Cairo Conference and the 1945 Potsdam Declaration served as a basis for Nationalist China to take over Taiwan after Japan's surrender in World War II.²³⁶ In fact, the occupation of Taiwan by China was only on behalf of the Allied Powers because Japan had not formally and legally renounced its authority over Taiwan until 1951.²³⁷ From 1945 to 1951, the Chiang Kai-shek regime of Nationalist China was only an Occupying Power in Taiwan, forced to abide by "The 1907 Hague Regulations on Land Warfare" (hereinafter "Hague Regulations") and "The 1949 Geneva Conventions on Protection of Civilians" (hereinafter "Geneva Conventions") to maintain public order and safety of Taiwan without any change in the status of the territory.²³⁸ Taiwan was typically qualified as a non self-governance territory at that time and the inhabitants of Taiwan were qualified as a non self-governing people,

²³⁶ See Paik Choong-hyun, JAPAN RENEWS SPURIOUS CLAIM TO TOKTO ISLETS, Feb. 16, 1996;(visited Oct. 21, 2000) (<http://korea.emb.washington.dc.us/Kois/News/Backgrounder/bg140.html#Concern>) (pointing to 1943 Cairo Declaration with pledge that Japan would forfeit all islands it seized, occupied, or took by force); see also Benjamin K. Sibbett, TOKDO OR TAKESHIMA? THE TERRITORIAL DISPUTE BETWEEN JAPAN AND THE REPUBLIC OF KOREA, 21Fordham Int'l L. J. 1606, 1637-8(1998) (stating that Japan returned Liancourt and ended Japanese rule over Korea, as a result of the 1943 Cairo Declaration and 1945 Potsdam Proclamation).

²³⁷ See Charney & Prescott, *supra* note 81, at 457 (quoting Treaty of Peace, signed at Taipei on April 28, 1952, providing: "It is recognized that under Article 2 of the multilateral Peace Treaty of 1951, Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands."); see also Shen, *supra* note 72, at 1114 (arguing that the 1951 Peace Treaty superseded the Cairo and Potsdam declarations and problematically did not identify to whom Taiwan should be returned).

²³⁸ See William A. Schabas, CONCEPTUALIZING VIOLENCE: PRESENT AND FUTURE DEVELOPMENTS IN INTERNATIONAL LAW: PANEL II: ADJUDICATING VIOLENCE: PROBLEMS CONFRONTING INTERNATIONAL LAW AND POLICY ON WAR CRIMES AND CRIMES AGAINST HUMANITY AND THE DEATH PENALTY, 60 Alb. L. Rev. 733, 764(1997) ("In the United Kingdom, under the 1969 Genocide Act, genocide is punishable in the same manner as 'grave breaches' of the '1949 Geneva Conventions.'"). See generally Theodor Meron, THE HAGUE PEACE CONFERENCES: THE MARTENS CLAUSE, PRINCIPLES OF HUMANITY, AND DICTATES OF PUBLIC CONSCIENCE, 94 A. J. I. L. 78, 82(2000) (discussing the bases of the 1949 Geneva Conventions and the ways it could be breached).

meaning that they were entitled to the opportunity of enjoying the advantage of promoting their progressive development toward self-government or independence.²³⁹

Although Nationalist China had a strong tendency to annex Taiwan as part of China, it did not take necessary steps to give effect to the Hague Regulations or the Geneva Conventions in such an occupied territory, but rather exercised its sovereign power.²⁴⁰ Soon after Nationalist China occupied Taiwan, the indigenous population of Taiwan were forced to switch their national identity from Japanese to Chinese, which led to ethnic friction in the Taiwanese society.²⁴¹ In other words, there began to arise an identity crisis concerning the relationship between being Chinese and being Taiwanese.²⁴² As a result, the growing ethnic differences between Taiwan and China caused a widespread uprising known as "the 2-28 Incident."²⁴³ The 2-28 Incident

²³⁹ See Keith Highet, George Kahale, and Antony Anghie, *INTERNATIONAL DECISIONS*, 87 *A.J.I.L.* 282, 283(1993) (discussing the promotion of the political, economic, social, and educational advancement of the inhabitants of Nauru towards self-government or independence).

²⁴⁰ See Joakim E. Parker, *CULTURAL AUTONOMY: A PRIME DIRECTIVE FOR THE BLUE HELMETS*, 55 *U. Pitt. L. Rev.* 207, 213-4(1993) (stating that "the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 are accepted as authoritative statements of customary international law, and as such have no exceptions to their applicability.").

²⁴¹ See Sean Cooney, *WHY TAIWAN IS NOT HONG KONG: A REVIEW OF THE PRC'S "ONE COUNTRY, TWO SYSTEMS" MODEL FOR REUNIFICATION WITH TAIWAN*, 6 *Pac. Rim L. & Pol'y* 497, 498 (1997) (stating Beijing's remaining obstacle to national reunification as the "Taiwan question"); see also Chang & Lim, *supra* note 231, at 415 (accussing certain policies of intending to suppress sentiment for independence and eradicate any sense of Taiwan identity). See generally Charney & Prescott, *supra* note 81, at 472 (stating that Taiwan, and the ethnic and cultural identities of their populations, substantially differs from those of the metropolitan state).

²⁴² See C. HUGHES, *TAIWAN AND CHINESE NATIONALISM*, at 12 (Routledge 2000); see also Margaret Chon, *CHON ON CHEN ON CHANG*, 81 *Iowa L. Rev.* 1535, 1551(1996) (describing self-identification as a representation of a complicated type of national identification with four different views of interpretation); see also Tozzi, *supra* note 233. The author articulated the "Five Threats" as the following: (i) the Democratic Progressive Party's advocacy of Taiwanese independence; (ii) the disappearance of the "one China" policy; (iii) conflict between native Taiwanese and those of mainland extraction; (iv) lack of devotion to the Three Principles of the People; and (v) abandonment of the five branch division of governmental power in favor of a presidential autocracy.

²⁴³ See John F. Copper, *TAIWAN: NATION-STATE OR PROVINCE?*, at 35 (1996) (discussing the culmination of the "2-28 Incident" through the developing feelings of rebellion and resistance to KMT

cost about 18,000 to 28,000 lives due to inhuman repression by Nationalist China including almost the whole generation of Taiwanese intellectuals and society leaders.²⁴⁴ After the 2-28 Incident, a strong sense of self-identity began to grow among the people of Taiwan to seek their own destiny.²⁴⁵

The lack of an international awareness and condemnation of such an inhuman repression by Chinese troops prevented the population of Taiwan from seizing the opportunity to successfully express their wish to secede from Japan or China and achieve their own political destiny through the exercise of external self-determination (as was the case in Western Sahara).²⁴⁶ In response to the request for an Advisory Opinion on Western Sahara from the UN General Assembly as to the following questions: "Was Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If not, what were the legal ties between this

rule); see also Chen, *supra* note 228, at 233 (describing the "2-28 Incident").

²⁴⁴ See COPPER, *supra* note 233, at 35 (stating that the "2-28 Incident" was ingored for 48 years until President Lee Teng-hui (himself Taiwanese) issued a formal apology on behalf of the government); see also Chen, *supra* note 228, at 233 (noting the atrocities that took place as a result of 5,000 armed troops coming in from the mainland to "quell the disturbance.")

²⁴⁵ See Chen, *supra* note 78, at 679-80 (discussing how the common efforts of Taiwanese people have helped to develop a distinctive economic, social and cultural system of their own); see also Charney & Prescott, *supra* note 81, at 473 (considering Taiwanese as a separate "people" having the right of self-determination); see also Mark S. Zaid, TAIWAN: IT LOOKS LIKE IT, IT ACTS LIKE IT, BUT IS IT A STATE?, 32 New Eng. L. Rev. 805, 808-10(1998) (scrutinizing Taiwan's moves and suggesting the entitlement of Taiwan to its own statehood and sovereignty strengthen its claim to self-determination as an independent entity despite the assertions of China).

²⁴⁶ See Chen, *supra* note 228, at 240-243 (stating that, in 1947, Japan had not yet given up its sovereignty over Taiwan, showing that Taiwan was still an occupied territory of Japan legally, despite the fact that at the same time China had already annexed Taiwan as its own political territory); see also Franck, *supra* note 96, at 54 (explaining that the concept of self-determination has its inception in a moral mandate directed at decolonizing European and Japanese colonies during the period following World War II); see, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res 1514, UN GAOR, 15th Sess., Supp. No. 16, at 138-39, UN Doc. A/4684 (1960) (pointing to "self-determination" as the one of the purposes behind the United Nations and as one of the general objectives within the areas of social and economic development and human rights).

territory and the Kingdom of Morocco and the Mauritanian entity?" The International Court of Justice (hereinafter "ICJ") laid down the need to pay regard to the freely expressed will of peoples by suggesting that:

Whenever there are territories inhabited by indigenous populations that are collectively organized (although not in such a manner as to constitute a state proper) and the state wielding sovereign authority over such territories decides to withdraw, it does not follow that the territories automatically become terra nullius, and hence open to appropriation by any state. Even if the indigenous populations may not come to be regarded as organized in the form of a state, they must be enabled freely to express their wish to associate or integrate into an existing sovereign state, or acquire some sort of international status gradually leading to independent statehood. ²⁴⁷

In this regard, it is obvious that the indigenous population of Taiwan were deprived of the opportunity to join the great wave of global anti-colonial self-determination following World War II.²⁴⁸

²⁴⁷ Western Sahara, 1975 I.C.J. 4, 66-68.

²⁴⁸ See Charney & Prescott, *supra* note 81, at 460 (examining post-World War II peace treaties determinative of the disposition of Taiwan); see also Jianming Shen, INTERNATIONAL LAW RULES AND HISTORICAL EVIDENCES SUPPORTING CHINA'S TITLE TO THE SOUTH CHINA SEA ISLANDS, 21 *Hastings Int'l & Comp. L. Rev.* 1, 50(1997) (discussing the effects of the absence of Chinese participation in 1951 multilateral peace conference); Shen, *supra* note 72, at 1158-59 (questioning the possibility for Taiwan to attain independence through self-determination or unilateral secession).

§ 2-22 Two Rival Governments Across the Taiwan Strait

In 1949, Nationalist China lost control of the Chinese mainland to Communist China and the government retreated to Taiwan.²⁴⁹ A situation was created whereby there existed two rival governments: the PRC and the ROC, in Beijing and Taipei respectively.²⁵⁰ Taiwan has since then become the only effective territory of Nationalist China.²⁵¹ Hence, any growing nationalism to be distinct from Chinese would be a direct challenge to the existence of the Nationalist China.²⁵² The ruling government therefore would not tolerate any movement toward Taiwanization.²⁵³ On

²⁴⁹ See Cheri Attix, BETWEEN THE DEVIL AND THE DEEP BLUE SEA: ARE TAIWAN'S TRADING PARTNERS IMPLYING RECOGNITION OF TAIWANESE STATEHOOD?, 25 Cal. W. Int'l L. J. 357, 361(1995) (stating that, following defeat by the Communists in 1949, President Chiang Kai-shek and the KMT government fled to Taiwan and established the "temporary" capital of China in Taipei); see also Lee, supra note 77 (noting that the forces of the ROC retreated to Taiwan on December 8, 1949, leaving Mao Tse Tung and the People's Republic in control on the mainland); see also Scott A. McKenzie, GLOBAL PROTECTION OF TRADEMARK INTELLECTUAL PROPERTY RIGHTS: A COMPARISON OF INFRINGEMENT AND REMEDIES AVAILABLE IN CHINA VERSUS THE EUROPEAN UNION, 34 Gonz. L. Rev. 529, 549(1999) (noting that many Western nations, including the United States, refused to recognize the People's Republic as the government of mainland China).

²⁵⁰ See Chen, supra note 228, at 224 (noting that, until 1991, the government of the Republic of China on Taiwan insisted that it was the sole representative government of Taiwan and China); see also Joyner, supra note 78, at 823 (comparing the differing views between the ROC and PRC with respect to which legal authority should govern both Beijing and Taipei). Compare, Chiang, supra note 171, at 981 (stating that, by 1996, Taiwan was part of the China state, as well as represented by the PRC government there and subjected to exercises of China's sovereign power).

²⁵¹ See Lee, supra note 77, at 352 (noting that the names the "Republic of China," the "Republic of China on Taiwan," "Taiwan," "ROC" and "Nationalist China" are used interchangeably, depending upon the context referring to the territory under the effective control of the ROC government, rather than the Chinese mainland); see also McKenzie, supra note 249 (quoting E.D. Hirsch, Jr. et al., DICTIONARY OF CULTURAL LITERACY 299-300 (1988)) (concluding that the government of Nationalist China was forced to exile on Taiwan because People's Republic of China ruled the mainland).

²⁵² See Lee, supra note 77, at 390 (1997) (describing how in the PRC terminology, the creation of "Two Chinas" or "One China, One Taiwan" is a violation of "the basic justice or righteousness of Chinese nationalism"); see also Chen, supra note 78, at 697 (arguing that the new course of action, led by Lee Tenghui since the early 1990s, has diminished Beijing's hope that a peaceful reunification could be achieved by relying on traditional Chinese nationalism); see also James W. Soong, PERSPECTIVE: TAIWAN AND MAINLAND CHINA: UNFINISHED BUSINESS, 1 U. C. Davis J. Int'l L. & Pol'y 361, 365(1995) (noting that Taiwan independence is dependent upon mainland China and Chinese nationalism acquiescence).

²⁵³ See Hung-Mao Tien, TAIWAN'S EVOLUTION TOWARD DEMOCRACY: A HISTORICAL PERSPECTIVE, IN TAIWAN: BEYOND THE ECONOMIC MIRACLE, at 3, 9 (Denis F. Simon &

the other hand, the population of Taiwan learned that there was no room for them to develop their own nationalism under such a sociopolitical climate through the bitter memory of the 2-28 incident.²⁵⁴ Accordingly, the desire for external self-determination to seek a self-destiny became a "dead dream" in the Taiwanese people's minds.²⁵⁵ Instead, the population of Taiwan could only hope that the regime of Nationalist China would grow into a more representative government.²⁵⁶

Prior to the 1970s and during the regime of Chiang Kai-shek, the whole society of Taiwan was dominated by the Chinese mainlanders, who embodied the myth of recovering the Chinese mainland but did not interact with Taiwan's society smoothly.²⁵⁷ It was assumed that Taiwan should be an anti-communism base for

Michael Y. M. Kau ed., 1992); see also Chen, *supra* note 78, at 675-76 (stating that the demise of the Chiangs' reign of "white terror" in 1988 introduced a decade of profound transformation toward democratization and "Taiwanization"); see also TOZZI, *supra* note 233, at 1239 (1995) (describing Chiang Ching-kuo's anti-Communist "Taiwanization" efforts in the 1970s).

²⁵⁴ See Attix, *supra* note 249 (discussing the institution of martial law throughout China after the local population rebelled against the imposition of Chinese rule); see also Lee, *supra* note 77, at 391 (describing the political ramifications of the military actions taken to stop rebellion after the "2-28 Incident" and the growing hatred of mainland Chinese people); see also Nicholas D. Kristof, THE HORROR OF 2-28: TAIWAN RIPS OPEN THE PAST, N.Y. TIMES, Apr. 3, 1993, at A4 (detailing human rights violations of the subsequent years).

²⁵⁵ See Attix, *supra* note 249 (stating that martial law, under the KMT, continued on Taiwan for the next forty years and support for Taiwanese independence was criminalized); see also Charney & Prescott, *supra* note 81, at 460 (asserting that the peace treaties that placed the island's population under Beijing's control would violate the doctrine of self-determination, at it later came to be understood); Shen, *supra* note 72, at 1160 (claiming that there is neither a legal basis, nor practical possibility for Taiwan to attain independence through self-determination).

²⁵⁶ See SUN YAT-SEN, SAN MIN CHU I: THE THREE PRINCIPLES OF THE PEOPLE 111 (Frank W. Price trans., China Publ'g 1927) (1925) (stressing the importance of China having a representative government, but criticizing China's failure to learn from Western democratic systems); see also Lee, *supra* note 77, at 379 (1997) (asserting that the only way for the people of Taiwan to have their voices heard is at the local level, instead of attempting to overthrow the central government); see also David M. Morris, FROM WAR TO PEACE: A STUDY OF CEASE FIRE AGREEMENTS AND THE EVOLVING ROLE OF THE INTED NATIONS, 36 Va. J. Int'l L. 801, 876(1996) (noting that the UN Security Council has refused to give Nationalist China her permanent-member seat to the People's Republic of China, thereby acknowledging it as not being the legitimate representative of the Chinese people).

²⁵⁷ See Omar Saleem, THE SPRATLY ISLANDS DISPUTE: CHINA DEFINES THE NEW

recovering the Chinese mainland so the people of Taiwan were impelled to "China-ization," with a greater emphasis on the cultural homogeneity, linguistic unity, common historical tradition, and ethnic identity.²⁵⁸ This held true despite the fact that the Chinese government had lost its effective control over the Chinese mainland, showing that there was no territorial connection or common economic life between Taiwan and China.²⁵⁹ The implementation of "China-ization" by the government of Nationalist China compelled the people of Taiwan to therefore accept Chinese nationalism.²⁶⁰

§ 2-23 Taiwan's China-ization & Dictatorship Regime

MILLENNIUM, 15 Am. U. Int'l L. Rev. 527, 535(2000) (recognizing the tension between Taipei and Beijing after the 1949 civil war when Chiang Kai-Shek fled the mainland to Taiwan); Shen, supra note 72, at 1118 (noting the change in government, name, form and system of the state when the PRC Government replaced the ROC Government in 1949).

²⁵⁸ See Thomas B. Gold, TAIWAN'S QUEST FOR IDENTITY IN THE SHADOW OF CHINA, IN THE SHADOW OF CHINA: POLITICAL DEVELOPMENTS IN TAIWAN SINCE 1949, at 169 (Steve Tsang ed., 1993) (discussing Taiwan's efforts to create a common identity with China); see also Yeh, supra note 80, at 238 (explaining why, despite their shared ethnic identity, the Taiwanese received the new "external" regime with a level of caution and distrust); see, e.g., Duan Aline DeVore, LEGAL ASPECTS OF CONDUCTING BUSINESS IN ASIA: INTRODUCTION: THROUGH THE LOOKING GLASS-CULTURAL FACTORS AFFECTING THE PERCEPTION OF THE EAST ASIAN BUSINESS PARTNER, 8 Transnat'l L. 55, 55(1995) (discussing how the cultural mores, collective orientation and homogeneity of the region render its outlook particularly predominant in the thinking and views of its inhabitants).

²⁵⁹ See Chen, supra note 78, at 676 (describing the different political, economic, social and cultural systems found in Taiwan and China); see also Zhengyuan Fu, THE INTERNATIONAL LEGAL STATUS OF TAIWAN: CHINA'S PERCEPTION OF THE TAIWAN ISSUE, 1 UCLA J. Int'l L. & Foreign Aff. 321, 327 (1997) (describing China's policy towards Taiwan as the idea of "one country, two systems," whereby CCP leaders have expressed their willingness to tolerate Taiwan's maintenance of independent political and economic systems); Chairman Ye Jianying's Elaborations on Policy Concerning Return of Taiwan to Motherland and Peaceful Unification, BEIJING REV., Oct. 5, 1981, at 10 (proposing a way for a peaceful resolution).

²⁶⁰ See Chiang, supra note 171, at 1002 (describing the doctrine of self-determination has as an important issue, after World War II, in the context of Taiwanese nationalism); Jacques DeLisle, POLITICAL ALCHEMY, THE LONG TRANSITION, AND LAW'S PROMISED EMPIRE: HOW JULY 1, 1997 MATTERS-AND DOESN'T MATTER-IN HONG KONG'S RETURN TO CHINA, 18 U. Pa. J. Int'l Econ. L. 69, 131(1997) (noting China is resorting to a more aggressive nationalism); Lee, supra note 77, at 390 (explaining how Chinese nationalism shifted from being used as a defense against foreign aggression to a defense against mainland Chinese nationalism).

After the central government of Nationalist China moved to Taiwan in 1949, the Chiang Kai-shek regime of Nationalist China represented all of China by retaining the ROC Constitution.²⁶¹ As a result of applying the ROC Constitution, Taiwan became a tiny part of the territories of the Republic of China.²⁶² The government re-established the full array of central political bodies which had existed on the mainland in order to retain the credibility of ROC's claim as the sole legitimate government of China, rather than simply the government of Taiwan.²⁶³

The failure to exercise effective control over the Chinese mainland made it impossible for the government of the ROC on Taiwan to abide by the ROC Constitution in holding regular elections to re-elect parliamentarians in the two parliamentary institutions, called the National Assembly and the Legislative Yuan.²⁶⁴

²⁶¹ See Cooney, *supra* note 241, at 513-19 (discussing the intricacies of the ROC Constitution during the martial law period); see also Yeh, *supra* note 80, at 250 (discussing how the nationalist authorities used Taiwan as their base for the mission to recover the mainland, centering policy around power consolidation for the ruling political party, national security and social stability); see, e.g., Congressman Donald M. Fraser, POLITICAL REPRESSION IN "FREE CHINA," 116 Cong. Rec. E7953-56 (1970) (describing political dictatorship in Taiwan before 1971).

²⁶² See THE REPUBLIC OF CHINA INFORMATION OFFICE, THE REPUBLIC OF CHINA YEARBOOK 43 (2000) (noting that under the definition of the ROC Constitution, a total territorial area of the ROC is about 11.4 million sq. km (including Mongolia), while the total area of Taiwan is only near 36,000 sq. km.); see also Hans Kelsen & Robert Tucker, PRINCIPLES OF INTERNATIONAL LAW 328-33 (2d ed. 1966) (stating that, although the PRC claimed sovereignty over Taiwan and Taiwan claimed sovereignty over the ROC, this dispute does not disqualify Taiwan from sovereign status); Lee, *supra* note 77, at 387 (noting that Taiwan's population of 21.3 million, most of whom are of Chinese ethnicity, speak the same official language or dialects as are spoken on the Chinese mainland, and share the same cultural heritage as most residents of the PRC).

²⁶³ See Charney & Prescott, *supra* note 81, at 461 (noting the disagreement among the Allied Powers with respect to whether the PRC or ROC represented the legitimate government of China); see also McKenzie, *supra* note 249 (stating that United States did not recognize the People's Republic as the representative government of China); Shen, *supra* note 248 (discussing the bi-lateral peace treaty between Japan and either the ROC or PRC).

²⁶⁴ See Sean Cooney, THE NEW TAIWAN AND ITS OLD LABOUR LAW: AUTHORITARIAN LEGISLATION IN A DEMOCRATIZED SOCIETY, 18 Comp. Lab. L. 1, 4(1996) (listing additional powers of Legislative Yuan beyond original legislative functions); see also Lawrence Shao-liang Liu, JUDICIAL REVIEW AND EMERGING CONSTITUTIONALISM: THE UNEASY CASE FOR THE

The National Assembly and the Legislative Yuan were elected to represent Mainland areas.²⁶⁵ In order to show its legitimacy by retaining these seats for representing constituencies of the Chinese mainland, the ROC Constitution was amended by the "Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion"(hereinafter "Temporary Provisions").²⁶⁶ Consequently, these parliamentarians who followed the Chiang Kai-shek regime and fled to Taiwan after 1949 were permitted to hold their seats without periodic re-elections until such time as the unification between Taiwan and mainland China could occur.²⁶⁷ Without a right to fully and directly re-elect these parliamentarians,

REPUBLIC OF CHINA ON TAIWAN, 39 Am. J. Comp. L. 509, 523-34 (1991) (noting that the judicial body charged with interpreting the ROC Constitution rarely acted to protect constitutional freedoms); see also Yeh, *supra* note 80, at 240 (concluding that constitutional interpretations by the Council of Grand Justices (the constitutional court in Taiwan), congressional seats were given to, and continuously occupied by, the same group of representatives).

²⁶⁵ See Cooney, *supra* note 241, at 515 (listing some main functions of the Legislative Yuan, in addition to legislative power); see also Dennis Te-Chung Tang, NEW DEVELOPMENTS IN ENVIRONMENTAL LAW AND POLICY IN TAIWAN, 6 Pac. Rim. L. & Pol'y 245, 252 (1997) (describing that main functions of the National Assembly were to elect the president and vice president, amend the ROC Constitution and approve appointments made by the President); see also Tozzi, *supra* note 233, at 1233 (describing the branches of government created by the ROC Constitution and their functions in 1946).

²⁶⁶ See Cooney, *supra* note 241, at 519-20 (noting that in April 1991, the National Assembly abolished the Temporary Provisions, restoring normal constitutional order and amended the ROC Constitution so that its operation was for electoral purposes confined to the Taiwan area); see also Yeh, *supra* note 80, at 240 (noting that the temporary Provisions were promulgated in May 1948 to give the Executive branch more power than was granted under the ROC Constitution and was enacted in light of Article 174(1) of the ROC Constitution and remained effective until 1991 when President Lee Ten-huei terminated them); see, e.g., ROC Const. art. 47 (Republic of China) (noting that Article 47 of the Constitution specifies a two term limit for presidency, but Provision 3 of the "Temporary Provisions in the Period of Mobilization against Communist Rebellion" froze the constitutional mandate in order to allow Chiang Kai-shek to remain in power longer).

²⁶⁷ See Tak-wing Ngo, CIVIL SOCIETY AND POLITICAL LIBERATION IN TAIWAN, 25 Bull. Concerned Scholars, 5 (1993) (noting that by repressing political identities, and by denying freedom of speech, association, and other civil and political rights, the ruling party tried to destroy self-organized and autonomously defined political spaces, substituting for them a state-controlled public arena); see also Yeh, *supra* note 80, at 240 (explaining why same group of representatives were insulated from re-election); see, e.g., Chang & Lim, *supra* note 231, at 416-21 (discussing China's territorial claim to Taiwan, its legal title, domestic jurisdiction, and de facto independence).

the indigenous population of Taiwan was indeed not self-governing.²⁶⁸ In the meantime, the government of Nationalist China promulgated a martial law in 1949, limiting the people's rights to freedom of speech, belief, publication, assembly and association.²⁶⁹ The authorities in Taiwan always justified the need for martial law on national security considerations, regardless of whether these reasons were well-grounded or not.²⁷⁰ Consequently, peaceful opposition efforts toward democratic reform were blocked by the martial law, even bringing tragedy upon innocent individuals who had no desire to engage in politics.²⁷¹ This made the

²⁶⁸ See Chang & Lim, *supra* note 231, at 411 (noting that the Nationalist government's treatment of the Taiwanese people and its institution of a one-party dictatorship was witnessed by American officials, some of whom lost confidence in the KMT, whereby all government positions were the exclusive domain of ethnic Chinese mainlanders); Walter J. Kendall, III, A PEACE PERSECTIVE ON THE TAIWAN UNTIED NATIONS MEMBERSHIP QUESTION, 28 *J Marshall L. Rev.* 259, 260(1994) (questioning whether the indigenous people, who represent a large majority or the current government of Taiwan should make decisions regarding Taiwan's future); see also Wallace-Bruce, *supra* note 229, at 459 (describing the growth in population when President Chiang Kai-Shek and his followers arrived in Taiwan in 1949, who became known as wai sheng jen (meaning outside province people)).

²⁶⁹ See Charney & Prescott, *supra* note 81, at 462 (arguing that human rights violations can be made against the ROC, as a result of the question period of martial law between 1949 and 1987). Compare Winston Hsiao, THE DEVELOPMENT OF HUMAN RIGHTS IN THE REPPUBLIC OF CHINA ON TAIWAN, 5 *Pac. Rim. L. & Pol'y* 161, 178, 180-3(1995) (reporting limited progress by the PRC in that area); Sean D. Murphy, CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW, 93 *Am. J. Int'l. L.* 879, 895 (1999) (comparing the martial law system to the present system in Taiwan, which allows for a vibrant democracy characterized by free elections, a free press, and dynamic political campaigns).

²⁷⁰ See Attix, *supra* note 249 (claiming that KMT declared martial law throughout China in 1948 in response to the growing success of CCP forces on the mainland); see also Cooney, *supra* note 264 (discussing how substantial amendment of the "frozen" laws ideologically was unacceptable as it would have compromised the KMT's claim that it was the legitimate government of China); Yeh, *supra* note 80, at 234 (characterizing the present government in Taiwan as a political regime in which presidential and congressional national elections are routinely held, partisan politics is thriving, and restrictions on constitutional rights are substantially removed).

²⁷¹ See Chang & Lim, *supra* note 231, at 412-13 (providing examples of numerous human rights violations that took place as a result of instituting martial law); see also Chen, *supra* note 228, at 232 (stating that during the first fifteen months of the KMT's rule, Taiwan's intellectual elite were targeted, arrested, and often beaten, along with anyone suspected of conspiring or befriending the Japanese); see also Clement Cheng, A COMPARATIVE APPROACH TO REGULATING MONEY POLITICS IN TAIWAN: LEARNING FROM THE MISTAKES OF OTHERS, 20 *Loy. L.A. Int'l & Comp. L. J.* 535, 540(1998) (noting that the KMT maintained control through martial law and through selling favors to local factions in exchange for political support).

Chiang Kai-shek regime of Nationalist China in Taiwan a typical dictatorship.²⁷²

When the Chiang Kai-shek regime was succeeded by his son Chiang Ching-kuo in the middle 1970s, when there was an increasing political consciousness of self-governance, the indigenous population of Taiwan became concerned with democracy and open debate on the issue of constitutional reforms so that the ideal of self-governance could be substantially carried out in Taiwan.²⁷³ Numerous campaigns were commenced by political opposition groups calling for an end to the martial law and the emergence of political pluralism.²⁷⁴ In the meantime, the Foreign Relations Committee of the US Senate and the Committee on Foreign Affairs (hereinafter "Committee") of the US House of Representatives introduced various resolutions expressing their concerns about Taiwan's political human rights condition.²⁷⁵ The Committee urged the Chiang Ching-Kuo regime to commence

²⁷² See Chen, *supra* note 78, at 675-76 (noting that Taiwan was subject to military occupation by Chinese authorities, known as "white terror"); see also Soong, *supra* note 252, at 363 (referring to an antagonistic gesture toward the KMT after the period of martial law ended whereby the new mayor ordered municipal government offices to remove all pictures of Taiwan's former KMT dictator and President Chiang Kai-shek and his son Chiang Ching-kuo); Tozzi, *supra* note 233, at 1230 (stating that the Communist theory of a single class dictatorship and Chiang Kai-shek's de facto personal dictatorship is the most ruinous element of today's political systems).

²⁷³ See Yeh, *supra* note 80, at 244 (describing the "Ten Major Constructions" as the transition period after Chiang Ching-kuo succeeded his father as national leader); see also Cooney, *supra* note 241, at 519 (discussing the reforms which resulted in civilians being no longer subject to military trials, and eased restrictions on assembly, association, publication and speech); Tozzi, *supra* note 233, at 1239 (describing Chiang Ching-kuo as a "true reformer").

²⁷⁴ See John Fei, *The Taiwan Economy in the Seventies*, in *CHIANG CHING-KUO'S LEADERSHIP IN THE DEVELOPMENT OF THE REPUBLIC OF CHINA ON TAIWAN*, at 63 (Shao Chuan Leng ed., 1993) (assessing the role of Chiang Ching-kuo in Taiwan's economic development); see also Cooney, *supra* note 241, at 519 (discussing the political liberalization which resulted in new political parties being formed legally and the commencement of a process of Constitutional reform); Yeh, *supra* note 80, at 245-48 (noting that farmers, veterans, students, indigent people, workers, and environmentalists took their cases to the streets, demanding regulatory reforms in their respective areas).

²⁷⁵ See *CHINA-TAIWAN: UNITED STATES POLICY: HEARING BEFORE THE COMMITTEE*

democratic reforms.²⁷⁶ Because of the growing domestic and international pressure for the Chiang Ching-Kuo regime to commit to democratization, the regime adopted the Taiwanization policy and began to implement political reforms by the middle 1980s.²⁷⁷ As a result, martial law was abolished in 1987 and the people of Taiwan were able to regain their rights guaranteed by the ROC Constitution, including the right of assembly and association.²⁷⁸

§ 2-24 Taiwanization & Democratization

Since the founding of the Democratic Progressive Party (hereinafter "DPP") in 1986, the DPP has presented a strong desire to push the government toward

ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, 96TH CONG., 2D SESS. 34-37 (1982) (providing letters from President Ronald Reagan to China); see also W. Gary Vause, CHINESE HUMAN RIGHTS AND UNITED STATES FOREIGN POLICY, 42 Vand. L. Rev. 1575, 1591-2(1989) (discussing the unanimous condemnation of China by the Senate, led by a coalition of Democrats promoting human rights); see also Pamela Constable, U.S. SENATE MULLS STIFF TRADE TERMS FOR CHINA, Boston Globe, July 23, 1991, at 3 (discussing condemnation of China for human rights abuses).

²⁷⁶ See Frank Gibney, THE PACIFIC CENTURY: AMERICA AND ASIA IN A CHANGING WORLD 358 (1992) (noting that political and legal reform was aided by former President Chiang Ching-Kuo's decision to end thirty-five years of martial law); see also Cooney, supra note 241, at 519 (recognizing the role of political liberalization in the the lifting of martial law by Chiang Ching- Kuo); see also Andrew Nathan & Helen Ho, CHIANG CHING-KUO'S DECISION FOR POLITICAL REFORM, in CHIANG CHING-KUO'S LEADERSHIP IN THE DEVELOPMENT OF THE REPUBLIC OF CHINA ON TAIWAN, at 31 (Shao Chuan Leng ed., 1993) (noting that by the end of Chiang Ching-Kuo's presidency, political reform was in action).

²⁷⁷ See Andrew B. Brick, FOR AMERICA, TAIPEI OFFERS AN EXAMPLE OF CHINESE DEMOCRACY, The Heritage Foundation, April 12, 1990, at 1 (discussing political domination of mainland Chinese that had retreated to Taiwan); see also Maria Shao & Bill Javetski, WHY TAIPEI PLANS TO LET A HUMDRED FLOWERS BLOOM, Business Week, November 17, 1986, at 85 ("Pressure on the KMT to liberalize increased in September, when opponents set up the new Democratic Progress Party (DDP) in defiance of martial law."); Sofia Wu, DPP CHAIRMAN ON CHIANG'S ROLE IN TAIWAN'S DEMOCRATIZATION, Central News Agency, January 12, 1998 (recognizing President Chiang Ching-kuo's greatest contribution to Taiwan's democratization as his nomination of Lee Teng-hui, a native Taiwanese, as vice president under his presidency).

²⁷⁸ See id., Brick(discussing the first time Taiwanese people were allowed to cast ballots for an organized political opposition, the Democratic Party (DPP)); see also Ross A. Snel & Pierro Tozzi, TAIWAN GOES TO THE POLLS: NURTURING DEMOCRACY, The New Leader, October 10, 1994 at 9 ("On July 15, 1987, Chiang Ching-kuo lifted the martial law imposed by his father. Among other far-reaching consequences, the move effectively ended the ban on the formation of opposition parties").

Taiwanization in a democratic manner.²⁷⁹ In order to fulfill its political ideal of self-governance, the DPP proposed that all members of the parliamentary institutions and the ROC President should be elected directly by the indigenous population of Taiwan.²⁸⁰ This move gathered wide support from Taiwan's society and has resulted in electoral support for the DPP.²⁸¹ Significantly, in 1995, the DPP gathered thirty-six percent of the popular vote, making it the biggest opposition party with powerful influence in Taiwan's sociopolitics.²⁸²

Based on the increased trend towards Taiwanization since the late 1980s, the

²⁷⁹ See Betsy Henderson, TAIWAN ELECTION SCARE CHINA, *The Dayton Daily News*, March 18, 1996, at 5A (stating that evidence of "Taiwanization" was found in the election of Kuomintang, the first native born Taiwanese person to take office following the death of Chiang Ching-kuo); see also Confab On Taipei's International Role Opens In Washington, CENTRAL NEWS AGENCY, February 27, 1993 ("In the opinion of Auw, the increasing trend toward "Taiwanization" within the Taipei government and the KMT will also reinforce the argument for "one China, one Taiwan" advocated by the DPP and some factions within the KMT, thus creating new tensions in domestic politics."). see also C.f. Keith B. Richburg, Taiwan Candidates Muffle Freedom Call to Calm Voters Fearful of China Backlash, *THE WASHINGTON POST*, NOVEMBER 07, 1995, at A19 (criticizing the DPP's emphasis on "Taiwanization" in the election).

²⁸⁰ See Former Taiwan Opposition Head Chooses To Serve Jail Term, *AGENCE FRANCE PRESSE*, April 01, 1997 (discussing the protest march taken as a call for direct elections for president, in 1991 by Shih and DPP supporters); see also Ian Johnson, Taiwan Votes In China's Shadow; Beijing Missile Rattling Fails To Scare Voters; 70% Turnout Expected, *THE BALTIMORE SUN*, March 23, 1996, at 1A ("Under Taiwan's new democratic system, the president is elected directly by the people. He in turn appoints a prime minister with the consent of a parliament. Taiwan has already held direct elections for Parliament and local leaders."); see also Janet Matthews, Information Services, Taiwan, *ASIA & PACIFIC REVIEW WORLD OF INFORMATION*, January 1996 at 1 (discussing approval of constitutional reforms which allow for various elections).

²⁸¹ See Grassroots Races Confirm Democracy Vibrant In Taiwan, *FREE CHINA JOURNAL* February 6, 1998 (giving examples of elections where the DPP saw its numbers rise); see also Taiwan Tightens Security In Election Run-Up, *ASIAN POLITICAL NEWS*, December 5, 1994 (discussing the incentives used by the the Democratic People's Party in an effort to gather support for declaring their independence from China). But see Grassroots Races Vital For Democratic Process, *FREE CHINA JOURNAL* January 23, 1998 (speculating that the KMT's poor showing in the elections was more a result of internal conflict, rather than the uprising of support for the DPP's party).

²⁸² See Annie Thomas, Taiwan, *AGENCE FRANCE PRESSE*, December 2, 1995 ("Taiwan's ruling Kuomintang maintained its majority in parliament following elections. The DPP took 33 percent of the popular vote."); see also Lawrence Chung, Taiwan's Ruling Kuomintang Wins Frail Majority In Parliament, *AGENCE FRANCE PRESSE*, December 02, 1995 (providing specific election results); Zaid, *supra* note 245, at 810 (discussing that Taiwan's recent local elections at the end of 1997 as demonstrating the DPP's growing presence when it emerged with the greatest number of votes).

legislative Yuan passed "the Law on Voluntary Retirement of Senior Parliamentarians" to persuade older members of the two parliamentary bodies to step down in 1989.²⁸³ The following year, the Council of Grand Justices reached a constitutional decision to limit the term of those senior parliamentarians to 1991.²⁸⁴ As a result of the abolition of the Temporary Provisions and the amending of the ROC Constitution (to end the representation of Chinese mainland in the two parliamentary institutions in 1991), all the members of the two parliamentary bodies became subject to democratic elections.²⁸⁵ This has regularly been done by the people of Taiwan in the following years. Significantly, in 1994, the National Assembly passed an amendment to the Constitution to implement direct election of the president and vice president every four years since 1996.²⁸⁶

²⁸³ See Ann Scott Tyson, *THE CHRISTIAN SCIENCE MONITOR*, December 23, 1987, at 7 (discussing the establishment of a voluntary retirement plan for members of aging parliamentarians); see also Taiwan's 1989 Election Milestone Of Roc's Democratization, Cnaa Says, *PR NEWSWIRE*, November 29, 1989 ("[A] law was passed by the Legislative Yuan on January 26 of this year, establishing the procedure for voluntary retirement for aging parliamentarians."). See generally ROC To Join Mainland People In Toppling Communist Tyranny: Lee, *CENTRAL NEWS AGENCY*, August 10, 1989 (suggesting two ways to rejuvenate the parliament).

²⁸⁴ See S. Dept. of State Dispatch, February 1, 1991, 1990 Human Rights Report (discussing the mandated retirement plan for all senior parliamentarians and resistance voiced from some of the elders who rejected the ruling as unconstitutional); see also TIEN, *supra* note 192 (noting that in early 1990, 632 of the 2961 members of the National Assembly and 144 of 760 Legislators originally elected were still alive and attending to their political duties); see also Tozzi, *supra* note 233, at 1241 (discussing the Council of Grand Justices order that the gerontocrats retire by the end of the year to solve the problem of aging parliamentarians who had not faced a competitive election since the late 1940s).

²⁸⁵ See Hung-mao Tien & Yun-han Chu, *BUILDING DEMOCRACY IN TAIWAN*, 148 *China Q.* 1141, 1163-64 (1996) (noting that in the March 1996 elections for the first time the parliament was entirely elected by the people which resulted in the former one-party authoritarian regime yielding to coalition politics); see also Goh Sui Noi, *Father Of Taiwan Or History's Sinner?* *THE STRAITS TIMES* (SINGAPORE), May 29, 2000, at 48 (stating that the parliament and National Assembly opened up to full democratic election); see also Chen, *supra* note 78, at 679 (noting that with the democratic elections of all members of the National Assembly in 1991 and in 1996 and of all members of the Legislative Yuan in 1992 and in 1995, Taiwan finally has had an equivalent of a parliament that represents the present population and reflects the political realities of Taiwan).

²⁸⁶ See Lee Teng-Hui's "Democracy" Ploy Further Refuted, *THE XINHUA NEWS AGENCY*, March

Thanks to the efforts of impelling political reforms, the people of Taiwan have achieved profound self-governance through the processes of democratization and Taiwanization.²⁸⁷ This continuing process of Taiwanization and democratization created a new milestone in 1996 when the people of Taiwan directly elected their President for the first time in their history.²⁸⁸ In March 2000, an opposition politician from DPP, Mr. Chen Shui-bian, was elected as president and ended more than half a century of rule by the Nationalist Party.²⁸⁹ This singular act has propelled Taiwan's democracy into a new era. Since a people's domestic right to self-governance is regarded as an universal principle in the context of internal self-determination, the fact that Taiwan has evolved into full-fledged democratic governance by

13, 1996 ("[I]n 1994 the third "amendment to the constitution" was passed in Taipei, which made clear a system of "direct election for president."); see also Taiwan: Review 1997, ASIA & PACIFIC REVIEW WORLD OF INFORMATION, May 1997, at 232 (discussing approval of constitutional reforms to include provisions for the direct election of the president and vice-president). See generally Successes And Sorrow, NEW STRAITS TIMES (MALAYSIA), December 31, 1996, at 12 (stating that the election of Lee Teng Hui was Taiwan's first direct presidential elections and the first ever direct election of a leader in the 5,000-year history of Chinese civilization).

²⁸⁷ See ROC Seen To Earn A Place In World Community As A Democracy, CENTRAL NEWS AGENCY, APRIL 30, 1991 (stating that ROC may earn a place in the world community as a democracy, as a result of its ongoing reform). See generally Brick, *supra* note 274 (recognizing continued political reform on Taiwan).

²⁸⁸ See Huang Kwang-chun, Democracy Is Taiwan's Guarantee For Survive, CENTRAL NEWS AGENCY, September 22, 1998 ("Taipei has spared no effort to promote democratic reform and multi-party politics, which culminated in the first direct election of the president on March 23, 1996, setting a milestone in Taiwan's democratization."). See generally Chen, *supra* note 78, at 676 (noting that in March 1996 while Taiwan was peacefully holding its first ever direct election of its President, China responded by taking provocative and blatant acts of military threat and aggression against Taiwan); see also Moving Toward Sovereignty, ASIA WEEK September 29, 2000, at 56 (noting the close margin in favor of Chen Shui-bian that decided the election).

²⁸⁹ See Henry Chu, Taiwan President Appoints New Premier, The Second Since May, LOS ANGELES TIMES October 4, 2000, Wednesday at 4 (stating that Chen was the first president in Taiwan's history that was not a Nationalist Party member); see also Susanne Ganz, Taiwan Appoints New Premier, Cabinet To Be Reshuffled, JAPAN ECONOMIC NEWswire, October 4, 2000 ("[W]hen President Chen Shui-bian's DPP-led administration took power in May. The DPP ousted the KMT, which ruled Taiwan for more than half a century."); see also Taiwan: Country Profile, ASIA & PACIFIC REVIEW WORLD OF INFORMATION, September 6, 2000, at 1 ("Chen Shui-bian of the opposition DPP won the second direct presidential election on 18 March with 39 per cent of the vote.").

Taiwanization and Democratization,²⁹⁰ therefore makes it clear that the people of Taiwan have successfully exercised their right of internal self-determination and transformed Taiwan from a dictatorial regime to a representative government of internal and indeed external sovereignty.²⁹¹

V. THE POTENTIAL OF AN ARMED CONFLICT IN THE
SELF-DETERMINATION MOVEMENT OF TAIWAN

§ 2-25 China's Threat of Use of Force

Taiwan fulfils the traditional requirements of a legal state, as its government has substantial relation with numerous countries and regions and controls a defined

²⁹⁰ See Ambassador Harvey Feldman, The Master Stroke Of Taiwan's New President, HERITAGE FOUNDATION REPORTS, June 22, 2000 ("It is still the early days of the Chen administration, but the new administration has had an excellent beginning. The United States should celebrate not only the growth of a young democracy, but also the fortuitous ascension of someone whose master strokes may lead a region defined by misunderstanding into a new era of cooperation and peace."); see also Perspectives of Mainichi Shimbun reporters, MAINICHI DAILY NEWS, June 28, 2000, at 2 (discussing the symbolism behind President Chen bowing in front of the statue of Chiang Kai-shek, a man who had repressed the growth of democracy, as signifying the arrival of a new era); see also Asian Editorial Excerpts: Is China Equal To New Challenge?, ASIAN POLITICAL NEWS, May 29, 2000 ("The inauguration on Saturday of the latest Taiwanese government, led by Chen Shui-bian and his deputy Annette Lu, marks the beginning of a new era for the island.").

²⁹¹ See Alan M. Wachman, TAIWAN: NATIONAL IDENTITY AND DEMOCRATIZATION, at 78-9(M. E. SHARP, 1994) (noting that "[F]rom the perspective of Taiwanese nationalism, the continued dominance of Taiwan politics by Mainlanders has become unacceptable. Taiwanese have a sufficiently intense view of themselves as a distinct national group-- regardless of how valid their claims for distinction may be--that they can no longer abide by a government that is dominated by a group they perceive to be different. This is not a matter of policy preference; it is not a matter of demanding autonomy from a power on which the island is currently dependent. It is simply a matter of a community demanding the right of self-determination so that it may govern itself"). See also Stephen J. Yates, Promoting Freedom And Security In U.S.-Taiwan Policy, HERITAGE FOUNDATION REPORTS, October 13, 1998, at 1 (discussing the Taiwan debate about whether to allow its people to exercise their right to self-determination); see also Ryser, supra note 130, at 129 ("[T]he principle of self-determination asserts that it is the right of all peoples to freely choose their social, economic, political and cultural future without external interference.").

territory.²⁹² However, the PRC has repeatedly asserted that Taiwan is a political subdivision of China, and not an independent state.²⁹³ The PRC even threatens to use force against any separatist movement in the name of self-determination in Taiwan.²⁹⁴ The government of Taiwan is currently an independent regime with effective self-governance in accordance of the will of its people.²⁹⁵

Since Taiwan was controlled by the Chiang Kai-shek regime of Nationalist China after Japan's surrender in 1945, Communist China has never exercised its sovereignty over Taiwan.²⁹⁶ Taiwan has created an exclusive community with its own values and

²⁹² See Convention on the Rights and Duties of States, art. 1, 49 Stat. 3097, 165 L. N. T. S. 25. Under the 1933 Montevideo Convention, the traditional four criteria for statehood are: (1) a defined territory; (2) a permanent population; (3) an effective government; and (4) the capacity to enter into relations with other states. See also Alexander K. Young, End The 'One China' Fiction, THE JAPAN TIMES, August 15, 1999 ("Taiwan has satisfied the conditions for recognition as an independent country (a territory larger than 40 percent of the countries of the world; 22 million residents; a government that exercises control; the ability to forge treaties and fulfill all international obligations."). But see Jorge Castaneda, valeur juridique des resolutions des nations unies, in RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 206, 316 (1970) ("[N]on conventional norms do not have any exterior formal sign which indicates in an indubitable manner at which moment, in which conditions and to what extent one leaps from a pre-legal state to a legal one.") (author's translation).

²⁹³ See China Warns Taiwan Of Independence "Disaster," BBC WORLDWIDE MONITORING, February 21, 2000 ("From 1979, the Chinese government has striven for the peaceful reunification of China in the form of "one country, two systems" with the greatest sincerity and the utmost effort."); see also Excerpts of White Paper on Taiwan Issue, XINHUA GENERAL NEWS SERVICE, February 21, 2000 (reiterating China's insistence that there is only one China in the world and one legal, representative government); see also Taiwan President Lee Teng-Hui Urges China To Open Dialogue, DEUTSCHE PRESSE-AGENTUR, December 31, 1999 (noting that China recognizes Taiwan only as its province and bars foreign nations from recognizing it otherwise).

²⁹⁴ See James R. Lilley, Face-off over Taiwan; Uncle Sam is the Middle as the Two Chinas Escalate Their War of Words and Threats, THE SAN DIEGO UNION- TRIBUNE, March 19, 2000, at G1 (comparing the ways that American and Chinese leadership view democracy, self-determination and sovereignty); see also id., China Warns Taiwan Of Independence "Disaster," ("China would "do its best to achieve peaceful reunification" but would not rule out the use of force."); see also Yates, supra note 291 (noting China's method of imposing its will through force or intimidation).

²⁹⁵ See China Warns Taiwan Of Independence "Disaster," supra note 293 ("[S]ince the early 1990s, Lee Teng-hui has gradually deviated from the one- China principle, trumpeting "two governments", "two reciprocal political entities," [and] "Taiwan is already a state with independent sovereignty."); see also Noi, supra note 285 (crediting the President with turning Taiwan from an authoritarian state into a functioning democracy); see also Moving Toward Sovereignty, supra note 288 ("After elections for the national legislature a year hence, it is likely that the DPP will take the majority and Chen will be poised to move forward in asserting Taiwan's sovereignty, backed by solid public support.").

²⁹⁶ See Maubo Chang, VP Lu: Taiwan Belongs To Its People, Not To ROC Or PRC, CENTRAL NEWS AGENCY May 28, 2000 ("Beijing's claims over the island--which it has never ruled before--are

there is no doubt that the PRC is considered an outside power to the people of Taiwan.²⁹⁷ The people of Taiwan have the profound desire to live in enduring peace and security and in freedom from fear and want.²⁹⁸ At this point, it is clear that any outside political power(including the PRC), which engages in incitement to conflicts or acts of aggression tending to isolate the people of Taiwan from the outside World, would be condemned by the international community.²⁹⁹

§ 2-26 The Principle of Non-Threat or Non-Use of Force

The principle of non-threat or non-use of force affirmed by Article 2(4) of the UN Charter is deemed to be a part of customary international law and obliges the international community to respect it as a norm.³⁰⁰ Some scholars even consider the

totally baseless under international law, and fail to account for the Taiwan people's sovereignty over their island."); see also China Warns Taiwan Of Independence "Disaster," supra note 293 (claiming that, since neither territories on either side of the straits recognized the jurisdiction of the other, the government of the PRC has never ruled Taiwan); see also Young, supra note 289 ("Taiwan has had a separate existence from China for the past several hundred years, especially the last 100 years (50 years under Japanese rule, 50 years under the Kuomintang government--the PRC has never ruled Taiwan)").

²⁹⁷ See id., Chang, ("Lee and the overwhelming majority of the people he represents want "a separate existence" from China. They resent China's continuing hostile policy of isolating and containing Taiwan internationally and bullying it militarily."); see also China 'Must Learn From [My] Election', BUSINESS WEEK, August 14, 2000, at 26 ("[The President] spoke boldly of Taiwan as 'a sovereign and independent country' and said China does not understand the island's democracy or its people--or him.").

²⁹⁸ See id., China 'Must Learn From [My] Election,' ("We must promote peace and stability in the Taiwan Strait."). But see Chinese Defense Minister Warns Taiwan On PLA Anniversary, AGENCE FRANCE PRESSE, August 1, 2000 (asserting that "hegemonism" and "power politics" continue to exist and even develop and threaten global peace and security).

²⁹⁹ See Chang, supra note 296 ("Lee's statement has caused a big headache for the United States, because the Taiwan Relations Act requires the president and the Congress to take "appropriate action" when Taiwan is threatened-- an action that could lead to a deadly war with China."). But see Romana Sadurska, THREATS OF FORCE, 82 A.J.I.L. 239, 249(1988) ("[I]t seems unnecessary for all practical purposes and theoretically dubious to characterize the prohibition of the threat of force as a rule of customary international law."). See generally Kirsty Scott, The Two Faces of China's Rage, THE HERALD (GLASGOW), May 20, 1999, at 10 (stating that the West has an existing alliance system in East Asia, strong support for the sovereignty of Taiwan, and continuing condemnation of alleged human-rights abuses in China).

³⁰⁰ See Danna Harman, Clinton to Decide on Summit Today, Barak Leads to London, Paris, THE JERUSALEM POST, July 5, 2000, at 1 (stating that Article 2(4) of the United Nations Charter

prohibition of the use of force with the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy as the least controversial examples of *jus cogens* (meaning that it is a rule of customary law which cannot be set aside by treaty or mutual acquiescence).³⁰¹ Moreover, the UN ensures that the principle of non-threat or non-use of force is also applied to non member states of the UN in the necessary maintenance of international peace and security.³⁰² That is, all states of the world are obliged to abide by this principle. Significantly, regarding the self-determination movement, the principle of Article 2(4) of the UN Charter was reaffirmed by Resolution 2625 which emphasizes that states must not use force to deprive a people of their right to self-determination and independence.³⁰³

Accordingly, the "Geneva Diplomatic Conference on the Reaffirmation and

prohibits the use of armed force not only against the territorial integrity of a state, but also in any other manner inconsistent with the purposes of the United Nations). See generally John A. Perkins, THE CHANGING FOUNDATIONS OF INTERNATIONAL LAW: FROM STATE CONSENT TO STATE RESPONSIBILITY, 15 B.U. Int'l L. J. 433, 465(1997) (stating UN CHARTER Article 2 §§ 4 and 51, were also binding customary international law).

³⁰¹ See Hsiao, supra note 78, at 719 (discussing the established non- use of force principle, its role in international law and the consequences of any violation). See also Cf. LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS, at ch. 8, 323- 56 (1988).

³⁰² See Hsiao, supra note 78, at 719 (discussing the provision); see also Sadurska, supra note 299 (Article 2(6) of the Charter provides that "[t]he Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."). But see China's UN Envoy Reiterates One-China Principle, supra note 296 (stating that Taiwan cannot participate in the work or activities of the UN and its specialized agencies).

³⁰³ See Nigel D. White & Robert Cryer, UNILATERAL ENFORCEMENT OF RESOLUTION 687: A THREAT TOO FAR?, 29 Cal. W. Int'l L. J. 243, 244(1999) (discussing provisions of Article 2(4)); see also id., at 247 ("Resolution 2625 includes the passage "such a threat or use of force constitutes a violation of international law and the Charter of the United Nations, and shall never be employed as a means of settling international issues.").

Development of International Humanitarian Law Applicable in Armed Conflicts” adopted two Protocols in 1977.³⁰⁴ These Protocols defined armed conflicts caused by self-determination movements (in which people are fighting against colonial domination or alien occupation), as international armed conflicts and therefore subject to the international law of armed conflict.³⁰⁵ As discussed above, not only should the PRC be refrained from using any form of forcible action to unify Taiwan, but Taiwan has the right to exercise the related rights provided by the UN Charter as well as other international legal instruments so long as it is attacked by alien powers(including the PRC).³⁰⁶

§ 2-27 Individual Self-Defense & Collective Self-Defense

According to this approach, if China uses force to suppress the claim of the people of Taiwan to self-determination, it would be regarded as an aggressive act according to a consensus definition of aggression in Resolution 3314 of the UN General Assembly.³⁰⁷ Based on the condition of necessity and proportionality,

³⁰⁴ See Janet E. Lord, LEGAL RESTRAINTS IN THE USE OF LANDMINES: HUMANITARIAN AND ENVIRONMENTAL CRISIS, 25 Cal. W. Int'l L. J. 311, 330(1995) (“[T]he Geneva Diplomatic Conference on Humanitarian Law which met from 1974 to 1977 and produced two Additional Protocols to the 1949 Geneva Conventions.”); see also Michael J. Matheson, CURRENT DEVELOPMENT: THE REVISION OF THE MINES PROTOCOL, 91 A.J.I.L. 158, 160, n.13(1997) (discussing paragraph 4 of Protocol I). See generally George H. Aldrich, PROSPECTS FOR UNITED STATES RATIFICATION OF ADDITIONAL PROTOCOL I TO THE 1949 GENEVA CONVENTIONS, 85 A.J.I.L. 1, 1(1991) (describing Protocol I as an important treaty codifying and developing international humanitarian law).

³⁰⁵ See *id.*, Aldrich(covering armed conflicts in which people are “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”).

³⁰⁶ See Hsiao, *supra* note 78, at 721 (“It leaves only a few exceptions where the use of armed force by states is permissible. These are: individual or collective self-defense (Article 51).”).

³⁰⁷ See Stephen C. McCaffrey, CURRENT DEVELOPMENT: THE FORTIETH SESSION OF THE INTERNATIONAL LAW COMMISSION, 83 Am. J. Int'l L. 153, 159-60(1989) (discussing how the adoption of the definition of aggression through Resolution 3314 (XXIX) cleared the way for further work on the Draft Code of Crimes against the Peace and Security of Mankind); see also Rosemary Rayfuse, THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF

aggression by China would constitute a basis for Security Council jurisdiction under Article 39 of the UN Charter.³⁰⁸ Taiwan is also entitled to exercise the right of individual self-defense or proceed with collective self-defense with its neighboring states in coping with any aggression by China under the principle guaranteed by Article 51 of the UN Charter.³⁰⁹ An aggression against a self-determination movement is regarded as a most serious and dangerous form of illegal measures in managing claims for self-determination.³¹⁰ Therefore, the right to seek protection

MANKIND: EATING DISORDERS AT THE INTERANTIONAL LAW COMMISSION, 8 *Crim. L. F.* 43, 58-62(1997) (defining "aggression" in Resolution 3314 (XXIX) within the framework of problems regarding the linkage of the individual crime with aggression committed by a state). Compare Louis Rene Beres, *AFTER THE "PEACE PROCESS:" ISRAEL, PLESTINE, AND REGIONAL NUCLEAR WAR*, 15 *Dick. J. Int'l L.* 301, 328 n.82(1997) ("Resolution 3314: Article 1 enjoins members to refrain from "the threat or use of force against the territorial integrity or political independence of any state.").

³⁰⁸ See Helmut Freudenshubeta, *ARTICLE 39 OF THE UN CHARTER REVISITED: THREATS TO THE PEACE AND THE RECENT PRACTICE OF THE UN SECURITY COUNCIL*, 46 *Aus. J. Pub. Int'l L.* 1, 36 (1993) (discussing the impact of Article 39 in international disputes and the role of the security council in this context); see also Hanna, *supra* note 138, at 244 ("Article 39 of the UN CHARTER states that the "Security Council shall determine the existence of any threat to peace ... and make recommendations, or decide what measures shall be taken."); see also Christopher K. Penny, "NO JUSTICE, NO PEACE?:" A POLITICAL AND LEGAL ANALYSIS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 30 *Ottawa. L. Rev.* 259, 287 (1999) ("Article 39 stipulates, the determination that a threat exists to international peace and security is within the discretion of the UNSC,"); see, e.g., William D. Rogers, James A. Beat & Christopher Wolf, *CURRENT DEVELOPMENT: APPLICATION OF EL SALVADOR TO INTERVENE IN THE JURISDICTION AND ADMISSABILITY PHASE OF NICARAGUA V. UNITED STATES*, 78 *A.J.I.L.* 929, 931(1984) (discussing El Salvador's argument, which stated that the International Court of Justice did not have proper jurisdiction over the matter between Nicaragua and the United States under Article 39 of the UN CHARTER).

³⁰⁹ Article 51 of the UN Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measure necessary to maintain international peace and security. Measure taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." See also Charney & Prescott, *supra* note 81, at 477 (analyzing Taiwan's right of individual self-defense and right to seek outside support through collective self-defense in the case of an attack by China, pursuant to Article 51 of the UN Charter); Hsiao, *supra* note 78, at 721 ("It leaves only a few exceptions where the use of armed force by states is permissible. These are: individual or collective self-defense (Article 51)."); see also Nicholas Rostow, *TAIWAN: PLAYING FOR TIME*, 32 *New Eng. L. Rev.* 707, 709-10(1998) (applying Article 51 and Article 2(4) to Taiwan, while analyzing the question of whether or not Taiwan is widely recognized as an independent state); see also James P. Rowles, *NICARAGUA VERSU THE UNITED STATES: ISSUES OF LAW AND POLICY*, 20 *Int'l L.* 1245, 1245, n.155 (1986); see also Maria Stavropoulou, *THE RIGHT NOT TO BE DISPLACED*, 9 *Am. U. J. Int'l L. & Pol'y* 689, 744(1994) ("[A] person's rights legitimize their individual or collective efforts to seek protections from threatening acts and redress adequately enough to restore a harmed interest.").

³¹⁰ See Charney & Prescott, *supra* note 81, at 460 (questioning whether the Post-World War II peace treaties between China and Taiwan constituted violations of Taiwan's self-determination movement). See generally George E. Edwards, *APPLICABILITY OF THE "ONE COUNTRY, TWO SYSTEMS"*

under armed attacks caused by self-determination has been deemed as a universal principle in customary international law.³¹¹ Taiwan, in spite of lack of membership in the UN, is absolutely qualified to exercise the right of self-defense enshrined in Article 51 of the UN Charter.³¹² There is a growing realization that any aggressive action by China to attack Taiwan should be placed on the level of "international affairs" rather than Chinese domestic issues, especially if the armed conflict is caused by a typical self-determination movement.³¹³

§ 2-28 The Principle of Preventive Deployment

It appears that where there are armed conflicts caused by a self-determination movement, an intervention by military force in a peacekeeping operation will follow

HONG KONG MODEL TO TAIWAN: WILL HONG KONG'S POST-REVERSION AUTONOMY, ACCOUNTABILITY, AND HUMAN RIGHTS RECORD DISCOURAGE TAIWAN'S REUNIFICATION WITH THE PEOPLE'S REPUBLIC OF CHINA?, 32 *New. Eng. L. Rev.* 751, 757-8(1998) (analyzing the differences between Taiwan's self-determination movement and Hong Kong's acquiescence to Chinese rule); see e.g., Kolodner, *supra* note 69, at 163-64 (discussing the aggressions of China and Israel against internal and external self-determination movements of Tibet and Palestine, respectively).

³¹¹ See Hsiao, *supra* note 78, at 721 (providing exceptions, found in Article 51, for when states can use armed force, such as individual or collective self-defense); see also Lieutenant Commander Catherine S. Knowles, LIFE AND HUMAN DIGNITY, THE BIRTHRIGHT OF ALL HUMAN BEINGS: AN ANALYSIS OF THE IRAQI GENOCIDE OF THE KURDS AND EFFECTIVE ENFORCEMENT OF HUMAN RIGHTS, 45 *Naval. L. Rev.* 152, 172-4(1998) (discussing the International Covenant on Civil and Political Rights as a binding treaty defining various human rights described in the Universal Declaration, giving rise to customary international law); Kolodner, *supra* note 69, at 166 ("Promoted within a myriad of international instruments, principles of self-determination have become embedded within international law."); Stavropoulou, *supra* note 309 ("[A] person's rights legitimize their individual or collective efforts to seek protections from threatening acts and redress adequately enough to restore a harmed interest.").

³¹² See Charney & Prescott, *supra* note 81, at 477 (arguing that since Taiwan is not legally under Beijing's rule, the use of force by China to try and extend PRC governance over Taiwan would be a violation of the right of self-defense under Article 51); see also Hsiao, *supra* note 78, at 721 (emphasizing that there must be an "armed attack" before a state can claim self-defense). See generally Malvina Halberstam, THE RIGHT TO SELF-DEFENSE ONCE THE SECURITY COUNCIL TAKES ACTION, 17 *Mich. J. Int'l L.* 229, 248(1996) (arguing that the most plausible interpretation of Article 51 is that a state retains the right of self-defense until the Security Council has taken measures that have succeeded in restoring international peace and security).

³¹³ See Kolodner, *supra* note 69, at 167 (arguing that the international community must foster human rights, support democracy, and maintain world peace and stability by limiting movements for external self-determination and recognizing legitimate movements for internal self-determination); see also Chen, *supra* note 123, at 1291 (noting the vital roles of the United Nations and the world community in seeking out solutions to international problems of self-determination). See generally Charney & Prescott, *supra* note 81, at 465-66 (discussing the decline of the traditional state-centered framework

to deliver humanitarian assistance and to prevent a deterioration of the situation.³¹⁴ In other words, the principle of self-determination has become the very purpose for the UN to maintain international peace and security.³¹⁵ The world community has begun to move toward that direction by following the principle of "preventive deployment" in order to avoid the unilateral intervention to support a self-determination movement.³¹⁶ This would cause an infringement of a State's sovereignty guaranteed by Article 2(7) of the UN Charter.³¹⁷ This principle of "preventive deployment" means to deploy the UN-authorized military, police or civilian personnel in conditions

due to the self-determination doctrine in the international arena).

³¹⁴ See Halperin, Scheffer, & Small, *supra* note 102, at 105-111 (discussing the legitimacy of claims by sub-state groups by posing alternatives to the "internal" and "external" self-determination categories); see also Stephan A. Wangsgard, SECESSION, HUMANITARIAN INTERVENTION, AND CLEAR OBJECTIVES: WHEN TO COMMIT UNITED STATES MILITARY FORCES, 3 *Tulsa J. Comp. & Int'l L.* 313, 315-23(1996) (analyzing the doctrine of self-determination within the context of human assistance and intervention). See generally Yogesh K. Tyagi, THE CONCEPT OF HUMANITARIAN INTERVENTION REVISITED, 16 *Mich. J. Int'l L.* 883, 891-4(1995) (highlighting the differences between humanitarian intervention and humanitarian assistance, specifically stating that pursuant to Article 2(5), it is a duty of all member states to extend every assistance to the United Nations to promote fundamental freedoms).

³¹⁵ See Eckert, *supra* note 138, at 70-78 (discussing the interpretation of self-determination by the International Court of Justice, within context of the UN's Charter to maintain international peace and democratic entitlement); see also Bartram S. Brown, THE PROTECTION OF HUMAN RIGHT IN DISINTEGRATING STATES: A NEW CHALLENGE, 68 *Chi.-Knet. L. Rev.* 203, 217-218 (1992) (noting that the maintenance of international peace and security were at the forefront of the agenda for the first summit, in 1991, of the United Nations Security Council); Head, *supra* note 135, at 285 (stating the purpose of the UN CHARTER is 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.").

³¹⁶ See Stephen T. Ostrowski, PREVENTIVE DEPLOYMENT OF TROOPS AS PREVENTIVE MEASURES: MACEDONIA AND BEYOND, 30 *N.Y.U. J. Int'l L. & Pol'y* 793, 801(1998) ("Preventive diplomacy requires the constructive engagement of the international community"); see also Lilly R. Sucharipa-Behrmann and Thomas M. Franck, PREVENTIVE MEASURES, 30 *N.Y.U. J. Int'l L. Pol'y* 485, 485(1998) (discussing how United Nations measures have shifted their focus on preventive plannings in the post-Cold War era); see also Shashi Tharoor, THE CHANGING FACE OF PEACE-KEEPING AND PEACE-ENFORCEMENT, 19 *Fordham Int'l L. J.* 408, 422(1995) (noting the various positive effects of preventive deployment, including the cheaper costs in lives and resources).

³¹⁷ See W. Michael Reisman, NATO'S KOSOVO INTERVENTION: KOSOVO'S ANTINOMIES, 93 *A.J.I.L.* 860, 860 (1999) (discussing how Article 2(4) was changed by the contraction of Article 2(7), eliminating serious human rights violations). But cf. Antonio F. Perez, 89 *A.J.I. L.* 658, 659(1995) (reviewing LOUIS B. SOHN, RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA (1995)); Wedgwood, *supra* note 189 (stating that Article 2(7) forbids intervention within the

of crisis within an area where military conflict has occurred with the expectation of alleviating suffering and to limit or control violence.³¹⁸ In inter-State disputes, such deployment could take place when a country feels threatened and requests an appropriate United Nations presence.³¹⁹ In a national crisis, such deployment could be employed at the request of the Government or all parties concerned with their consent.³²⁰

The Serbian Republic of Bosnia Herzegovina was proclaimed in 1992 which led to the aggression against independence and territorial integrity by the Yugoslavia national Army (Serbian troops).³²¹ The deteriorating situation cost thousands of lives

domestic jurisdiction of a member state except by Council decision under Chapter VII).

³¹⁸ See Ostrowski, *supra* note 313, at 798-800 (describing preventive deployment as a "dispute resolution ladder," whereby low-cost procedures are utilized early and more costly and intrusive measures are only employed if those fail); see also Thomas G. Weiss, *THE UN'S PREVENTION PIPE-DREAM*, 14 *Berk. J. Int'l L.* 423, 424-25 (1996) (stating that the most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict); see, e.g., Diego Garcia-Sayan, *HUMAN RIGHTS AND PEACE-KEEPING OPERATIONS*, 29 *U. Rich. L. Rev.* 41, 44(1994) (explaining that the only "preventive deployment" operation undertaken by the UN has been a mainly military one in the observing the boundary with Serbia since June 1993).

³¹⁹ See Brown, *supra* note 315, at 219 (arguing that the UN presence in Yugoslavia provided an example of the new broader role for UN peacekeeping, especially as it applies to the significant problems resulting from changes to state structures); see also Mary Ellen O'Connell, *CONTINUING LIMITS ON UN INTERVENTION IN CIVIL WAR*, 67 *Ind. L. J.* 903, 912(1992) (discussing U.S. presence in Yugoslavia, constituting the largest amount of deployed troops since the U.S. intervention in Congo). See generally Soong, *supra* note 252, at 364 (discussing how Taiwan's imminent admission to the GATT may provide the island with an indirect route to some form of UN presence).

³²⁰ See Ostrowski, *supra* note 313, at 796 (arguing that preventive deployment should be undertaken only with the consent of all parties to the conflict and when if it is closely linked to achievable political or humanitarian goals.); see also Christine Gray, *THE UNITED NATIONS, REGIONAL ORGANIZATIONS, AND MILITARY OPERATIONS: HOST-STATE CONSENT AND UNITED NATIONS PEACEKEEPING IN YUGOSLAVIA*, 7 *Duke J. Comp. & Int'l L.* 241, 243-9(1996) (discussing issue of whether consent of all parties is needed or consent of only the host government is needed for deployment of UN troops).

³²¹ See Nanda, et al., *supra* note 158, at 837-40 (discussing Yugoslavia's historical struggle in failing to succeed as a political community and always being forced to compete with its subsidiary national communities); see also James C. O'Brien, *THE INTERNATIONAL TRIBUNAL FOR VIOLATIONS OF INTERNATIONAL LAW IN THE FORMER YUGOSLAVIA*, 87 *A.J.I. L.* 639, 640(1993) (explaining the role of the Security Council in response to the ethnic cleansing and other violations of human rights); see also Weller, *supra* note 196, at 579 (explaining the historical setting of the dispute in Yugoslavia and how it represents a direct threat to international peace and security).

and hundreds of thousands became homeless.³²² In response to the request for deployment of UN peace-keeping forces from the new *de facto* Bosnia-Herzegovina government, the UN established the United Nations Protection Force (hereinafter "UNPROFOR") in order to operate "preventive deployment" within the territory of Bosnia-Herzegovina.³²³ The UN collective military presence in Bosnia to deter the Serbian aggression proves that the consent could be obtained from the *de facto* government on whose territory the "preventive deployment" is to take place.³²⁴

As a matter of fact, the "preventive deployment" for the resolution of conflicts arising from self-determination movements has been applied not only to the external situation, but also to the internal condition.³²⁵ For example, the Kurds in Northern

³²² See Nanda, et al., *supra* note 158, at 837 (discussing the dispute in former Yugoslavia and how it had a huge toll in human life and property damage captured the attention of the world); see also O'Brien, *supra* note 321, at 639 (discussing the atrocities undertaken during the fighting in the former Yugoslavia, including the abuse of women, inhumane detention facilities, indiscriminate targeting of defenseless civilians, forced expulsions and deportations, and the obstruction of relief convoys); see also A. Mark Weisburd, THE EMPTINESS OF THE CONCEPT OF JUS COGENS, AS ILLUSTRATED BY THE WAR IN BOSNIA-HERZEGOVINA, 17 Mich. J. Int'l L. 1, 6-7(1995) (suggesting that the death tolls for all the contending parties in Bosnia were likely in the 25,000-60,000 range, representing 0.5%-1.5% of the population of Bosnia-Herzegovina).

³²³ See Yasushi Akashi, THE USE OF FORCE IN A UNITED NATIONS PEACE-MAKING OPERATION: LESSONS LEARNT FROM THE SAFE AREAS MANDATE, 19 Fordham Int'l L. J. 312, 312(1995) (stating that at the height of its deployment, UNPROFOR was the largest, most complex, and most expensive peace-keeping operation in the United Nations' history, with personnel numbered some 45,000 and an annual budget close to US\$ 2 billion); see also Weller, *supra* note 198, at 585 (1992) (discussing the composition and history of the creation of the United Nations Protection Force (UNPROFOR)).

³²⁴ See Gray, *supra* note 320, at 249-50 (stating that in the United Nations Peacekeeping Operation in Yugoslavia, consent for deployment of troops was supposed to be attained by the contributing states on the recommendation of the Secretary-General after consultation with the Yugoslav parties, but mostly took place in private). See generally Akashi, *supra* note 323, at 313 ("For peace-keeping operations to be successful, they must be based on the consent and cooperation of the parties in conflict."); see also Ostrowski, *supra* note 313, at 796 (discussing the idea of preventive deployment within the framework of political consent).

³²⁵ See Kolodner, *supra* note 69, at 163-64 (analyzing the distinctions between internal and external self-determination movements of various nations); Charney & Prescott, *supra* note 81, at 460 (questioning whether the Post World War II peace treaties between China and Taiwan constituted violations of Taiwan's self-determination movement). See generally Kolodner, *supra* note 69, at 166

Iraq sought political autonomy following the Gulf war in March 1991.³²⁶ As a result of inhuman repression by the Iraqi army, there was a massive flow of refugees toward and across international frontiers, which threatened international peace and security in the region.³²⁷ In consideration of requests from Turkey and France, as well as the report on the human rights situation in Iraq by the Special Rapporteur of the Commission on Human Rights, the UN Security Council conducted a collective military intervention in Northern Iraq under the unified command of the United States to deter the repression by the Iraqi army and to deliver humanitarian assistance.³²⁸

§ 2-29 China's Complaint to the UN Security Council

It is apparent that if the need and feasibility of protecting humanitarian

("Promoted within a myriad of international instruments, principles of self-determination have become embedded within international law.").

³²⁶ See Leslie A. Benton & Glenn T. Ware, HAITI: A CASE STUDY OF THE INTERNATIONAL RESPONSE AND THE EFFICACY OF NON-GOVERNMENTAL ORGANIZATIONS IN THE CRISIS, 12 Emory Int'l L. Rev. 851, 917-8(1998) (discussing how the Kurdish rebellion against Saddam Hussein was quashed by the more powerful Hussein); see also Mary Ellen O'Connell, REGULATING THE USE OF FORCE IN THE 21st CENTURY: THE CONTINUING IMPORTANCE OF STATE AUTONOMY, 36 Colum. J. Transnat'l L. 473, 484-6(1997) ("At the end of February 1991, as the fighting to liberate Kuwait was ending, the Kurds of northern Iraq began a rebellion against the Iraqi government, apparently either to secede from Iraq or at least to establish an autonomous Kurdish region."). See generally O'Connell, supra note 319, at 903 (noting the Kurd rebellion against the Iraqi government caught the UN off guard).

³²⁷ See Benton & Ware, supra note 326, at 917-18 (discussing the resettlement of the Kurdish refugees who had fled into southern Turkey); see also Jon E. Fink, FROM PEACEKEEPING TO PEACE ENFORCEMENT: THE BLURRING OF THE MANDATE FOR THE USE OF FORCE IN MAINTAINING INTERNATIONAL PEACE AND SECURITY, 19 Md. J. Int'l L. & Trade 1, 1(1995) (discussing how the passing of Resolution 688 pointed to the threat to international peace and security which emanated from the transboundary impact of a mass exodus of refugees into other states); see also O'Connell, supra note 319, at 907 (stating that the United States sent its troops to place camps for the refugees inside Iraq and tried to defend the refugees from Iraqi attack).

³²⁸ See S.C. Res. 688, UN SCOR, 46th Sess., 2982d mtg., UN Doc. S/Res/688 (1991); see also Benton & Ware, supra note 326, at 917-18 (stating that the main primary focus of UN launched Operation Provide Comfort was humanitarian, not military). See generally O'Connell, supra note 319, at 906 (noting the UN decided not to interfere with Iraq's political internal affairs by helping the Kurds secede or re-arrange Iraq, but rather only interfered by providing humanitarian assistance, such as food, water, and shelter).

imperatives and maintaining international peace and security can be proved, a proportional military intervention by the world community in response to an armed conflict caused by a non-colonial self-determination movement will be considered as a necessary measure.³²⁹ This is especially relevant to the fact that the PRC, without membership in the UN, complained to the President of the UN Security Council that the US Seventh Fleet Battle Groups' movement towards the Taiwan Strait and contingents of the US Air Force in Taiwan were a direct aggressive action, and that the Security Council should take the immediate measures to ensure complete withdrawal of US forces.³³⁰

Accordingly, the Security Council adopted a resolution to accept this complaint from the PRC and invite a representative of the PRC Government to attend the meeting of the Council held during the discussion of the issue of an armed invasion of

³²⁹ See Fink, *supra* note 327 (discussing how the humanitarian aspects of the UN assistance present the UN with new challenges to its foundational principles of sovereignty and non-intervention); see also Gavin A. Symes, *FORCE WITHOUT LAW: SEEKING A LEGAL JUSTIFICATION FOR THE SEPTEMBER 1996 U.S. MILITARY INTERVENTION IN IRAQ*, 19 *Mich. J. Int'l L.* 581, 581(1998) (describing the justifications of the State Department supporting military intervention in Iraq in order to protect U.S. national security, to contain an Iraqi threat to neighboring countries, to enforce general norms of international law, and to protect Kurdish human rights). See generally Mahalingam, *supra* note 95, at 224 (recognizing historical ambivalence and tension with respect to the legitimacy of unilateral intervention, but general support for collective intervention).

³³⁰ See Joyner, *supra* note 78, at 822 (explaining how diplomatic situation became extremely tense when the United States sent a fleet of sixteen warships to the Taiwan Strait in response to PRC's firing live missiles offshore Taiwan in retaliation for US-Taiwan talks in mid-1995); see also Warren I. Cohen, *One China Plus One Taiwan Equals Trouble*, *CHRISTIAN SCI. MONITOR*, June 15, 1995, at 19 (stating that the PRC has found its relationship with the US too valuable to jeopardize over the Taiwan issue); see also James Lilley, *THE UNITED STATES, CHINA, AND TAIWAN: A FUTURE WITH HOPE*, 32 *New. Eng. L. Rev.* 743, 743(1998) (discussing how U.S. assurances concerning Taiwan's security after the Mutual Defense Treaty had been terminated were "given teeth" when the U.S. sent two carrier battle groups off the east coast of Taiwan in response to Chinese missile shots).

Taiwan declared by the PRC.³³¹ The Council held that this action was based on its duty to investigate any situation likely to lead to international friction or endanger international peace and security.³³² Thus, the PRC was recognized as having the entitlement to request the UN Security Council to take measures necessary for the restoration of international peace and security.³³³

The presence of the UN preventive deployment in the cases of northern Iraq and Bosnia and the complaint by the PRC to the UN Security Council concerning the armed invasion of Taiwan by the US have created salient and persuasive precedents for Taiwan to apply for preventative deployment if it is ever under an armed attack by China.³³⁴ Based on the foregoing, it is definite that a request by Taiwan for a

³³¹ See Fu, *supra* note 259, at 329 (presenting different reasons as to why PRC would launch a military attack against Taiwan); see, e.g., Chris Ajemian, THE 1997 U.S.-JAPAN DEFENSE GUIDELINES UNDER THE JAPANESE CONSTITUTION AND THEIR IMPLICATIONS FOR U.S. FOREIGN POLICY, 7 Pac. Rim L. & Pol'y 323, 344 (1998) (discussing the March 1996 incident, when China staged military exercises in the Taiwan Straits in a dramatic show of force, as a response to Taiwan's presidential message that reunification with China was uncertain). See generally Joyner, *supra* note 78, at 832 (discussing both China and Taiwan's geo-strategic interests in the framework of each nation's military strengths and weaknesses).

³³² See, e.g., Jonathan Broder, Israel, Jordan Come Step Nearer To Peace Talks, CHI. TRIB., May 2, 1987, at 4 (discussing the participation of the five United Nations Security Council members in the process of international peace and security); see also Thomas L. Friedman, U.S. May Back International Talks if Israel Stymies Vote Plan, N.Y. TIMES, July 9, 1989, at 1-16 (explaining the UN's plan for calling an international peace conference due to frictions between rival states). See generally O'Connell, *supra* note 319, at 904 ("The Security Council may take action only to maintain international peace and security.").

³³³ See Bruce Fein, Rethinking Veto Power at the UN, WASH. TIMES, December 12, 1990, at G3 ("The PRC, not the Soviet Union, is thus the likely bete noire of the Security Council in the future"). See generally John Metzler, Give Taiwan a Voice at the UN, WASH. TIMES, October 28, 1996, at A17 (discussing China's strong influence in the UN by being a part of the Security Council since 1945); see also John J. Metzler, The Year of the Rat, WASH. TIMES, March 11, 1996, at A-19 (discussing the PRC's mission of trying to work through the Association of Southeast Asian Nations to solve the Taiwanese crisis in an attempt to keep the issue away from the UN Security Council).

³³⁴ See Coffey, KEYNOTE ADDRESS: RULE OF LAW AND REGIONAL CONFLICT, 19 Whittier L. Rev. 257, 260(1997) (discussing the importance of preventive diplomacy being institutionalized on the multilateral level.); see, e.g., Scott Keefer, INTERNATIONAL CONTROL OF BIOLOGICAL WEAPONS, 6 Ilsa J. Int'l & Comp. L. 107, 108(1999) (discussing the production of preventive measures against biological warfare, including biological disaster training for first response medical

preventive deployment in order to deter a deteriorating situation should be justified by the international community if China attacks Taiwan to oppose the self-determination movement.³³⁵

VI. THE FORCIBLE INTEGRATION AND THE ENTITLEMENT OF THE PEOPLE OF TAIWAN TO EXTERNAL SELF-DETERMINATION

As mentioned earlier, the successful political reforms in the 80s and 90s that resulted in full self-governance by the people of Taiwan led to a trend toward Taiwanization at the same time.³³⁶ Consequently, the inhabitants of Taiwan began to question the fundamental assumption of Chinese nationalism that the Chinese elite has held for decades.³³⁷ Since the political division of the Chinese state in 1949, there

personnel and stockpiling of antibiotics). See generally Sucharipa- Behrmann & Franck, *supra* note 313, at 485-86 (explaining how preventive diplomacy has become emphasized in the UN and in the international arena in the Post-Cold War Era).

³³⁵ See Ostrowski, *supra* note 313, at 794-95 (emphasizing the new international propensity towards taking preventive deployment measures); see, e.g., Lilley, *supra* note 330, at 749 ("The U.S., on the Korean Peninsula and elsewhere in East Asia, must steadfastly stand behind only peaceful means to resolve disputes."); see also Carolan, *supra* note 229, at 467 (discussing the vital role of international law in acting as a resource in not only conflict resolution but conflict prevention).

³³⁶ See John Marks, *Taiwanization of SDI Allows the Dialogue to Continue*, L.A. TIMES, December 20, 1987, at 5 (providing an alternative definition to the concept of "Taiwanization"); see also Lena H. Sun, *Taiwan Election May Reflect Emerging Pride of a People: Opposition Turning Today's Vote into 'Taiwanization' Referendum*, WASH. POST, December 21, 1991, at A16 (explaining that the movement for "Taiwanization" began a decade ago and is indicative in Taiwan's electoral process). See generally *Voting in Taiwan is a Sign of Gains*, N.Y. TIMES, December 5, 1983, at 7 (explaining "Taiwanization" as bringing more native Taiwanese, who comprise 85 percent of the island's 18.5 million people, into positions of responsibility in the government and the ruling party).

³³⁷ See Sunny Goh, *Why China is So Testy with the West*, STRAITS TIMES (SINGAPORE), April 4, 1999, at 31 (stating that a storm of protests broke out not only in the mainland, but also among Chinese in Hong Kong and Taiwan as well); see also Teresa Poole, *Humiliating History Feeds an Obsession with Race--Hong Kong Handover*, INDEPENDENT (LONDON), Jan. 3, 1997, at 10 (discussing how Chinese nationalism is still a powerful mobilizing force). See generally Che-Fu Lee, *CHINA'S PERCEPTION OF THE TAIWAN ISSUE*, 32 New Eng. L. Rev. 695, 697(1998) (questioning whether a peaceful reunification could be achieved by merely relying on age-old Chinese nationalism).

has been no linkage between Taiwan and China and the population of Taiwan has developed a strong sense of self-identity belonging to its own society.³³⁸ Although having been educated in Chinese politics through the political ideology that Taiwan should be part of China, the people of Taiwan generally do not identify themselves with China on an emotional level.³³⁹ Meanwhile, the steady economic growth in the past two decades (due to free market principles and the increase in foreign trade) have given rise to the explicit desire for asserting Taiwanese interests economically.³⁴⁰ In fact, the vast majority of the population of Taiwan has already identified itself as Taiwanese rather than Chinese in arguing that:

³³⁸ See Carolan, *supra* note 229, at 431 (discussing the history of Taiwan as showing that, while ethnically and culturally Taiwan may be said to be Chinese, the force of events has set the island and the mainland on different paths, providing a rationale for their current, continued separation); see also Daniel C.K. Chow, *RECOGNIZING THE ENVIRONMENTAL COSTS OF THE RECOGNITION PROBLEM: THE ADVANTAGES OF TAIWAN'S DIRECT PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL LAW TREATIES*, 14 *Stan. Envtl. L.J.* 256, 283 (1995) (stating that Taiwan adamantly refuses to submit to China's governmental authority); see also Zaid, *supra* note 235, at 808 (stating that recently, Taiwan has sought to stake out a position separate and distinct from that of China).

³³⁹ See Chung Huang, *One China Based on Fiction*, *ATL. J. CONST.*, March 14, 2000, at 16A (recognizing that today Taiwan is a nation of 22 million free people who identify themselves as Taiwanese, not Chinese); see also Indira A.R. Lakshmanan, *Chinese, Taiwanese See a Reunion Through Diverging Lenses*, *BOST. GLOBE*, May 20, 2000, at A2 (citing the statement of a Taiwanese graduate student who regards Chinese not as brothers, but as enemies); Frank Langfitt, *Ocean of Difference Lie Across Taiwan Strait--Island Splits Over Chinese Heritage*, *BALT. SUN*, August 25, 1999, at 1A (recognizing that although the terms are not mutually exclusive, more and more identify themselves as "Taiwanese" rather than "Chinese" in public polls).

³⁴⁰ See Michael S. Bennett, *UNLEASHING A TIGER: FINANCIAL DEREGULATION IN TAIWAN*, 11 *UCLA Pac. Basin. L. J.* 1, 5(1992) (discussing the small manufacturing companies that fuel Taiwan's export-driven economy that comprise eighty-five percent of the island's industrial sector); see also Lawrence L.C. Lee, *INTEGRATION OF INTERNATIONAL FINANCIAL REGULATORY STANDARDS FOR THE CHINESE ECONOMIC AREA: THE CHALLENGE FOR CHINA, HONG KONG, AND TAIWAN*, 20 *Nw. J. Int'l L. & Bus.* 1, 17(1999) (stating that the growth of Taiwan's financial market has evolved from Taiwan's stable economic environment during the past decades and how Taiwan's impressive economic performance stimulated the development of its financial sectors); see also Shin-Yi Peng, *ECONOMIC RELATIONS BETWEEN TAIWAN AND SOUTHEAST ASIA: A REVIEW OF TAIWAN'S "GO SOUTH" POLICY*, 16 *Wis. Int'l L. J.* 639, 647(1998) (noting Taiwan's commitment to strengthen its economic ties with the other countries of this region and how, over the past 30 years, it has achieved the status of a dynamic region for economic growth).

“Chinese is a cultural or ethnic category, not a political category; the Taiwanese nation is not the same as the Chinese nation; Taiwanese are not Chinese, just as Americans are not British.”³⁴¹

§ 2-30 Taiwanese Self-Identification

Resulting from decades of China-ization policy from the 1940s to the 1970s, it cannot be ignored that there are some forms of shared identities between Taiwan and China in terms of ethnic identity, cultural homogeneity and linguistic unity.³⁴² However, the indigenous population of Taiwan does not desire to be identified as Chinese people and lacks the consciousness of being a Chinese people.³⁴³ On the contrary, they would like to enhance their own political destiny and develop a distinctive economic, social, and cultural system of their own.³⁴⁴ In essence, the

³⁴¹ See Keith B. Richburg, *Modern Taiwan Looks Inward for New National Identity*, WASH. POST, June 11, 1995, at A26 (recognizing the significance of deciding on a national identity); see also *Two Views of Monetary Park's Bilingual Dispute*, L.A. TIMES, Aug. 15, 1991 at 3 (stating that a substantial number (at least 50%) of "Chinese-Americans" prefer to be designated as "Taiwanese-Americans" instead and went to considerable pains to ensure that this classification won official recognition in the 1990 Census); see, e.g., *Letters to the Editor*, SAN. FRAN. CHRON., April 7, 1996 at 6 (stating the vast majority of those calling themselves "Taiwanese" are direct descendants of ethnic Chinese who moved to the island starting in the seventh century and the only true Taiwanese are the aborigines whose culture and civilization have existed on Taiwan since prehistory).

³⁴² See *id.*, *Two Views of Monetary Park's Bilingual Dispute* (stating that a substantial number (at least 50%) of "Chinese-Americans" prefer to be designated as "Taiwanese-Americans" instead and went to considerable pains to ensure that this classification won official recognition in the 1990 Census).

³⁴³ See *Reunification*, DET. NEWS, August 29, 1999 at A18 (citing Chen, who with every threat China makes against Taiwan, states "I am Taiwanese, not Chinese."); see also Julie Schmit, *Despite Unification Dreams, Taiwan, China Worlds Apart Rich, Busy Island Forges Own Identity*, USA TODAY, August 26, 1999, at 10A (stating that 46% of Taiwan residents identified themselves as strictly Taiwanese). See generally *Survey Says Taiwanese Identity on the Increase*, CHINA NEWS, May 20, 1998 (finding that the number of those who still consider themselves "Chinese" has dropped to a record low, while the number identifying themselves as "Taiwanese" has surged compared to previous polls).

³⁴⁴ See Charney & Prescott, *supra* note 81, at 473 (discussing Taiwan's right of self-determination and the substantial ways in which their socioeconomic system and culture differ substantially from that of the mainland); see also *Bulldozers Demolish 44 South Military Village*, CHINA NEWS, May 5, 1999 (stating the Taipei City Government decided to restore part of Taiwan's first military village and turn it into a Military Cultural Village); *Poll- Economic Outlook Grim*, CHINA NEWS, February 22, 1999

overwhelming majority of the Taiwanese people do not desire to be a part of China and prefer to be characterized as a people existing on their own identity – Taiwanese.³⁴⁵

These factors mentioned above are relevant to the reason why, regardless of the constant threats of force which they face from China, most Taiwanese still favor the status quo of continued autonomy rather than immediate reunification with China that remains under a dictatorship.³⁴⁶ Indeed, the achievement of democracy and prosperity in Taiwan has dramatically evolved into a new Taiwan value that could in turn have an influence on Chinese nationalism.³⁴⁷ This evolution suggests that the growing identification with Taiwanese nationalism by the indigenous population of

(placing blame on barriers to developing their own systems on international economic factors and unsound systems).

³⁴⁵ See Valerie Epps, SELF-DETERMINATION IN THE TAIWAN/CHINA CONTEX, 32 New Eng. L. Rev. 685, 692(1998) (citing a recent poll in Taiwan, which said that if given the choice of gaining independence, maintaining the status quo or achieving unification, the majority opted for status quo); see also Fu, supra note 259, at 348 (stating that Taiwanese independence would operate against the wishes of the majority of Taiwanese resident who wish to maintain their de facto independence from China).

³⁴⁶ See id., Epps(stating that Taiwanese independence would operate against the wishes of the majority of Taiwanese resident who wish to maintain their de facto independence from China); see also James Harding, Taiwanese Rulers Boosted in Elections, FIN. TIMES (LONDON), Dec. 7, 1998, at A3 (asserting that the gap between the DPP and the KMT over the relationship with China has narrowed in recent years around a consensus in favor of the status quo--Taiwan's de facto independence); see also Wire Reports, Taiwan Taking 'Dangerous Steps,' China Warns--President Lee Accused of Seeking Independence, BALT. SUN, July 14, 1999, at 16A (stating that most Taiwanese favor the status quo of de facto independence from China).

³⁴⁷ See Robert Dole, The Challenges To Peace And Prosperity in Asia, TRADEWINDS, Sep. 8, 1997, at Business (recognizing that Taiwan's growing prosperity gives "unassailable testimony to the power of free markets to free any people from the circumstances of their birth"); see also Graham Hutchings, Wind of Change Sends Shudders Through the Corridors of Power in Beijing Defiance of China by the Voters of Taiwan Has Opened a New Political Era, DAILY TELEGRAPH (LONDON), Mar. 20, 2000, at 9 (stating democracy in Taiwan has involved an affirmation of "Taiwaneseness" and greater separation from the mainland in everything but trade and investment); also see Terence Tan, Why China's Leaders Fear Full Democracy, THE STRAITS TIMES (SINGAPORE), Sep. 17, 2000, at 23 (stating that Beijing thinks democracy will lead to the break-up of the country and threaten eventual reunification with Taiwan, says a Chinese scholar).

Taiwan would unambiguously create a new nationhood transcending the Chinese nationalism.³⁴⁸

Nationalism is not synonymous with shared cultural, ethnic, linguistic identities, but with the sentiments of self-identity to be a group.³⁴⁹ As Prof. Dr. P'eng Ming-min suggested:

“[T]he most fundamental basis of the modern state is not ethnic, religious, or linguistic heritage but a sense of commonality – having the same destiny regardless of the ethnic identity. This is the most fundamental aspect of modern nationality, not one’s ethnic group, but a common destiny. Even if different ethnic groups are together, people can be of the same nation because they share a common destiny. But without it, even if the people are of the same ethnic

³⁴⁸ See Maurice Meisner, *China: The Volatile Ties With Taiwan--The Historical Basis For A Free Taiwan*, L.A. TIMES, Mar. 26, 2000, at 1 (discussing the future of Taiwan and how Chinese nationalism, at a minimum, demands "one China," including Taiwan.); see also *Taiwan Should Finance China Movement*, CHINA NEWS, Dec. 29, 1998, at News (recognizing that because of the lack of freedom and democracy in China, Taiwan must be more cautious in its dealings and endorsed Taiwan's so-called "Go Slow, Be Patient" policy while recognizing the island's political and economic development during the past 50 years); see also *Lee Issues National Day Address*, CHINA NEWS, Oct. 10, 1998, at News (citing President Lee Teng-hui issued a congratulatory message saying that Taiwan has completed its "quiet revolution" and has won worldwide acclaim because of its active promotion of constitutional reform, democracy and rule of law).

³⁴⁹ See generally Sarah Clift, *How Canada's Identity Is Tied to Kosovo's War*, TORONTO STAR, May 10, 1999, at News (stating there are no general values to which the nationalist subscribes--all cultural, linguistic, or historical values are, for him, dictated by that which they are not); Pankaj Mishra, *India Needs More Than Muscle to Attain Greatness*, HOUSTON CHRONICLE, Sept. 20, 2000 at 37 (discussing how the Hindu nationalists remain attached to a stern 19th-century idea of nationalism, which dilutes traditional social and cultural diversity and replaces it with one people, one culture and one language). See *id.*, The author discusses how Hindu nationalists remain attached to a stern 19th-century idea of nationalism, which dilutes traditional social and cultural diversity and replaces it with one people, one culture and one language.

group, they cannot have that commonality.”³⁵⁰

§ 2-31 Taiwan's qualification as a People for Purpose of Self-Determination

Concerning the definition of the term “people” for the right to self-determination, territorial connection and common economic life would indeed be critical criteria for identifying a people for purposes of self-determination.³⁵¹ Accordingly, this contemplates the facts that: 1) the vast majority of the inhabitants of Taiwan prefer to be characterized as a people with the term “Taiwanese” rather than “Chinese”; 2) the vast majority of the inhabitants of Taiwan have the consciousness of being a people with the term “Taiwanese”; 3) the inhabitants of Taiwan have their own common economic life differing from that of the people of mainland China; 4) the inhabitants of Taiwan are indigenous to a territory under the control of the government by their free choice not by China's authority; 5) The population of Taiwan is a large and complete society with a population of over twenty-two million. There is no doubt that

³⁵⁰ See generally Kevin Baxter, *Around the Dial; Radio; New Frontiers; After Helping Foster Spanish-Language Market, Liberman Adds Chinese, Vietnamese Programs*, L.A. TIMES, Sept. 11, 1997, at 22 (discussing commonalities, including culture and the commonality of religion); *Times Poll On American Jews*, L. A. TIMES, Apr. 24, 1988, at 4 (discussing commonalities, including culture and the commonality of religion); see also Wilson, *supra* note 93, at 438 (recognizing that certain groups of people languages, religions, cultures and other characteristics -- gender, occupation, political ideology, sporting activity, and so on and that ethnic group identity becomes intensely important and exclusive).

³⁵¹ See Iorns, *supra* note 86, at 288 (noting that, in the context of self-determination, the ordinary meaning of “people” relates to “a specific type of human community sharing a common desire to establish an entity in order to ensure a common future.”); see also Lloyd, *supra* note 95, at 434 (discussing how the problem of identifying or designating the “peoples” to whom the right to self-determination has accrued still remains). See generally Jill C. Watson, *SELF-DETERMINATION OF PEOPLES AND POLITIES*, 86 Am. Soc’y Int’l L. Proc. 369, 393(1992) (stating that self-determination is not simply dependent on the choice of the indigenous people but also on more precise criteria tied to the underlying purposes served by the right).

the inhabitants of Taiwan are a distinct people from the Chinese people.³⁵²

VII. COMMENTARY

In the discussion above, it has been shown that the concept "all peoples have the right to self-determination" in international law refers to the colonial context. The internal aspect of self-determination has not been recognized as an accepted universal right, but as a principle that the world community is not necessarily obliged to provide its responsibility or recognition in response.³⁵³ Whether or not a particular group is entitled to self-determination, it should be judged by an international process on a case-by-case basis. However, at least, it is clear that any aggression against self-determination movement is regarded as a most serious and dangerous form of illegal measure.

³⁵² See Chang & Lim, *supra* note 231, at 428 (concluding that the international community is largely uninformed about Taiwan's democratic changes and the UN membership aspirations of its 21 million people); see also Shen, *supra* note 69, at 1127 (stating that there are about 21 million permanent residents in the province of Taiwan). See generally Daniel C.K. Chow, *RECOGNIZING THE ENVIRONMENTAL COSTS OF THE RECOGNITION PROBLEM: THE ADVANTAGES OF TAIWAN'S DIRECT PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL LAW TREATIES*, 14 *Stan. Env'tl. L. J.* 256, 264 (stating that Taiwan illustrates the costs of the Asian economic "miracle" and now among the wealthiest nations in the world, Taiwan has achieved its success, today with twenty-one million people crowding the small island).

³⁵³ See Kathleen Cavanaugh, *CONSTRUCTIVE AMBIGUITY OR INTERNAL SELF-DETERMINATION? SELF-DETERMINATION, GROUP ACCOMODATION, AND THE BELFAST AGREEMENT*, 22 *Fordham Int'l L. J.* 1345, 1347 (1999) (stating that "[s]elf-determination is essentially a right of peoples It is peoples as such which are entitled to the right to self-determination"); see also Hill, *supra* note 209, at 126 (noting that the 1970 Declaration extends the right of self-determination beyond the realm of traditional colonial domination and recognizes that in some situations groups suffering oppression within an independent state may have the right to seek self-determination). See generally James A.R. Nafziger, *THE USE OF FORCE IN THE POST-COLD WAR ERA: SELF-DETERMINATION AND HUMANITARIAN INTERVENTION IN A COMMUNITY OF POWER*, 20 *Denv. J. Int'l L. & Pol'y* 9, 167 (1991) (stating that by the international community supporting movements for internal self-determination, it can potentially avoid the disruption that often accompanies movements for external self-determination).

§ 2-32 The Problem of Maintaining the One-China Principle

In essence, the principle of self-determination itself does not provide a right which automatically attaches to whoever claims it.³⁵⁴ As mentioned above, it is always judged by the international community on a case-by-case basis. In that regard, if Taipei is less ambiguous on its alleged "one-China" policy so that the international community is convinced that, without territorial connection and common economic life, both Taiwan and China do not share a common destiny, it is thus not necessary for Taiwan to become a part of China. Otherwise, it would be harder for Taipei to gain significant recognition for its self-determination movement.³⁵⁵ This is because the one-China principle has created international confusion, giving a misleading impression that there is no need for the people of Taiwan to implement the external self-determination on the unwarranted assumption that Taiwan is part of China and that this is acceptable to the people of Taiwan.³⁵⁶

³⁵⁴ See Ryser, *supra* note 130, at 154 (recognizing the principle of self-determination as unique in that it is a recognized collective right within the realm of international law); see also Simpson, *supra* note 75, at 285 (stating that the reserve domain of sovereign states no longer automatically includes an exclusive right to deal with the internal claims of its peoples to self-determination). See generally Iorns, *supra* note 86, at 345 (discussing the characteristics associated with the term self-determination).

³⁵⁵ See Clinton China Trip Fuels The Fears: Foreign Relations By Laura Tyson: There Are Concerns That The U.S. Is Carrying Out a Secret Dialogue With the Mainland, *FINANCIAL TIMES* (London), Oct. 12, 1999, at 2 (citing Mr. Yang who stated "Taiwan can only take the moral approach that we are a democracy now, and as such we should be entitled to self-determination"); see also Joseph S. Nye Jr., A Taiwan Deal, *WASHINGTON POST*, Mar. 8, 1998, at C07 (discussing a three-part package could preserve these freedoms in Taiwan while reducing the significant risks in the present circumstances). See generally Edward A. Gargan, Taiwan Pushes to Rebuild Its Position in Global Community, *N.Y. TIMES*, June 26, 1994, at 8 (stating that in promoting its claims for renewed international recognition, Taiwan has trumpeted its democratic politics, its free markets and its growing economic influence, fueled by Taiwan's substantial investments in the region).

³⁵⁶ See Chen, *supra* note 228, at 227 (stating that the world community must recognize its responsibility to uphold basic tenets of international law and both challenge and resist China's coercive tactics aimed at denying Taiwan recognition as a sovereign nation-state); see also Shen, *supra* note 72,

Even though the indigenous population of Taiwan is qualified as a people in the self-determination context, considering China's possible aggression against the Taiwan's separatist movement that would absolutely affect the regional peace and security, politically, it is foreseeable that the world community will not readily respect the exercise of self-determination by the people of Taiwan as regards the external aspect.³⁵⁷ In this regard, the implication is that any move by the Taiwanese people toward external self-determination would be subject to political negotiation between Taipei and Beijing.³⁵⁸ Thus, the key to mobilizing the right of the Taiwanese people to external self-determination is to find an effective procedure under the agreement between the two sides of the Taiwan Strait.³⁵⁹ Moreover, as Taiwan is already a

at 1139 (discussing that the international community recognizes the persistent Chinese position that, throughout history, Taiwan has been an inalienable part of China); Cabinet Holds Mainland Meeting, CHINA NEWS, Nov. 3, 1998, at News (stating that both sides of the strait are equally deserving of respect without one excluding the other).

³⁵⁷ See Chen, *supra* note 228, at 227 (stating that the world community must recognize its responsibility to uphold basic tenets of international law and both challenge and resist China's coercive tactics aimed at denying Taiwan recognition as a sovereign nation-state); see also Shen, *supra* note 72, at 1139 (discussing reasons why the international community sees Taiwan as a part of Taiwan).

³⁵⁸ See Ching Cheong, *Is China and Taiwan Headed For War? Look Up This Checklist*, STRAITS TIMES (SINGAPORE), Aug. 21, 2000, at 45 (stating that the Centre for Nonproliferation Studies (CNS) of the Monterey Institute of International Studies that runs this project hopes to identify both trends and incidents that could bring Beijing, Taipei and Washington into a war situation and find ways to avoid such a crisis); see also Tozzi, *supra* note 233, at 1243 (discussing the detailed 1994 White Paper revisions made to the Republic of China's traditional "One China" policy); see also Linda Jakobson, *The Taiwan That Beijing Doesn't Want To See*, WASHINGTON POST, Mar. 12, 2000, at B01 (stating that the question of Taiwanese national identity evokes excruciating anxiety in the People's Republic of China, spelled out in a white paper issued by the Communist government last month discussing Beijing's and Taipei).

³⁵⁹ See Chen, *supra* note 78, at 676 (stating that in reality, Taiwan has existed as a sovereign, independent country for more than forty years and that the question today is whether to recognize Taiwan as an independent state in name, as well as in fact); see also Michael J. Kelly, *POLITICAL DOWNSIZING: THE RE-EMERGENCE OF SELF-DETERMINATION, AND THE MOVEMENT TOWARD SMALLER, ETHNICALLY HOMOGENOUS STATES*, 47 Drake L. Rev. 209, 226(1999) (discussing external self-determination and how most countries recognize the People's Republic of China over Taiwan). See generally BOOK NOTES: *The New GATT: Implications For The United States*, Edited By Susan M. Collins And Barry P. Bosworth. Washington, D.C., 28 Gw. J. Int'l L. & Econ. 753, 753 (1995) (discussing Taiwan's economic growth and the difference between external and

popular and independent regime separated from Communist China totally, there is no need for the Taiwanese people to rush to exercise the external self-determination regarding Taiwan's political status.

§ 2-33 The Ripe Time to Exercise the Right to External Self-Determination

However, if Beijing carries out a forcible integration of Taiwan by claiming the area to be an integral part of its territory (as was the case in the Moroccan occupation of Western Sahara as well as the Indonesian occupation of East Timor), there is no doubt that the implication of the right to external self-determination of the Taiwanese people subjected to China's military occupation will become "ripe" to gather an international momentum.³⁶⁰ Any hostile military action by China would be identified as an act of aggression against the will of the Taiwanese people and armed conflict would affect the maintenance of international peace and security.³⁶¹ Under this situation, it is quite predictable that to affirm the right of the Taiwanese people to

internal self-determination).

³⁶⁰ See Charney & Prescott, *supra* note 81, at 495 (discussing the 1940s and 50s relationship between Beijing and Taiwan saying that the peace treaties that placed the island's population under Beijing's control would violate the doctrine of self-determination, at least as it later came to be understood); see also Lee, *supra* note 265, at 695 (discussing Beijing's use of military threat against Taiwan). See generally Chang & Lim, *supra* note 251, at 424 (stating that it was the pro-independence DPP that first argued for Taiwan's pursuit of *de jure* independence, if not an end to the KMT's own "One China" policy, to counter Beijing's alarming diplomatic isolation tactics against the island).

³⁶¹ See Kiyotaka Shibasaki, *G-8 Calls For Global Partnership Digital Divide, GMO Threat, Armed Conflicts Highlighted*, THE DAILY YOMIURI (TOKYO), July 24, 2000, at 1 (emphasizing the need to nurture a "culture of prevention" to prevent armed conflicts from breaking out around the world relating it to Taiwan and China as well as other areas); see also Felix Soh, *Bad News: Tension In N.E. Asia, Good News: Dialogues Going On* THE STRAITS TIMES (SINGAPORE), June 14, 1996, at 4 (stating that the greatest threats to the security of Asia are the cross-strait tension between China and Taiwan). Compare War Games, THE TIMES-PICAYUNE, Mar. 13, 1996, at B6 (stating that no one seriously expects China to attack Taiwan, but Taiwan's delicate position in international relations allows room for alarms and excursions at China's will).

external self-determination under international process will serve as a satisfactory resolution of international conflict between Taiwan and China. The recent case of Kosovo has especially set the precedent that even a domestic ethnic conflict cannot be resolved by forcible means because it would engage international responsibility.³⁶²

VIII. CONCLUSION

With impressive political transformation and economic growth, the people of Taiwan deserve the right to form their own political entity even though they live beside China which is undoubtedly a more powerful nation that considers the issue differently.³⁶³ Now, it is conceivable that the principle of non-colonial self-determination could be more generally accepted by the international community (as in the case of former Yugoslavia or the former Soviet Union). The people of

³⁶² See Mertus, *supra* note 155, at 1743 (discussing how international policymakers were overwhelmingly aware that the pressure in Kosovo was mounting and that an even greater human rights disaster loomed near). See generally Walter Gary Sharp, Sr., OPERATION ALLIED FORCE: REVIEWING THE LAWFULNESS OF NATO'S USE OF MILITARY FORCE TO DEFEND KOSOVO, 23 Maryland. J. Int'l L. & Trade 295 (1999) (discussing NATO's role in the Kosovo crisis and the support of the international community); see also William Drozdiak, Nato Will Send 20,000 More Troops To Balkans--Leaders Won't Rule Out Kosovo Invasion If Mediation Fails, THE PLAIN DEALER, May 26, 1999, at 1A (stating that NATO allies approved plans to send more than 20,000 additional troops to Macedonia and Albania as part of a peacekeeping force that will await orders to move into Kosovo and help ethnic Albanian refugees return to their homeland).

³⁶³ See Eva Chen, DGBAS Will Not Revise Upward Taiwan's Annual Economic Growth: Official, CENTRAL NEWS AGENCY (Taiwan), Apr. 26, 2000, at News (stating that economic growth in Taiwan will be supported by robust foreign trade, rosy domestic consumption and increasing private investment, according to officials of the Taiwan Institute of Economic Research). See generally Herman Pan and Angel Liu, IMF Says Taiwan's Economic Growth Will Reach 4.9% In 1998, CENTRAL NEWS AGENCY (Taiwan), Dec. 22, 1998, at News (stating that Taiwan's economic growth will likely reach 4.9 percent in 1998, the third highest of 28 developed countries); Taiwan Economic Growth Was Fifth-Highest In World In Past 11 Years, DEUTSCHE PRESSE-AGENTUR, Mar. 16, 1997, at Financial Pages (noting Taiwan's rate of economic growth as the world's fifth-highest in the past 11 years but has begun to slow down).

Taiwan should deserve an equal chance for determining their own future. Therefore, the international community should pave a way for the Taiwanese people, so that the Taiwanese people could achieve what they desire rather than what the authorities of Beijing plan for them.

§ 2-34 Not an Outcome of Independence

As noted above, self-determination is not an outcome of independence but it is a process to present the legitimate will and aspirations of the people. Regarding the specific situation of Taiwan, the world community need not withhold its affirmative response to Taiwan's self-determination movement until an armed conflict occurs. On the contrary, the world community needs to explicitly declare the necessity of an international process to prevent the potential conflict of Taiwan's self-determination movement and recognize the right of the Taiwanese people to self-determination. To cooperate with this external aspect of self-determination in Taiwan would be more likely to contribute to a satisfactory solution. A commitment would also reconcile the divergent opinions on Taiwan's status between the two sides of the Taiwan Strait if there existed a well-defined procedure for exercising a choice that can be adopted through negotiation, commitment, or agreement by both sides of the Taiwan Strait. Since self-determination itself is not an answer but an ongoing process, the feasibility of a potential outcome cannot be confined to the level of the

“independence-reunification” dichotomy.³⁶⁴ If the way of implementing self-determination is based on the will of the Taiwanese people, the free choice of the people of Taiwan should be respected and recognized internationally whether or not it is for an independent state.

³⁶⁴ See Cavanaugh, *supra* note 353 (“[s]elf-determination is essentially a right of peoples It is peoples as such which are entitled to the right to self-determination”); see also Hill, *supra* note 209, at 126 (stating that the 1970 Declaration extends the right of self-determination beyond the realm of traditional colonial domination and recognizes that in some groups suffering oppression within an independent state may have the right to seek self-determination). See generally Nafziger, *supra* note 353 (stating that by the international community supporting movements for internal self-determination, it can potentially avoid the disruption that often accompanies movements for external self-determination).

CHAPTER THREE

THE MODERN CONCEPT OF STATE

SOVEREIGNTY, STATEHOOD AND RECOGNITION: A CASE

STUDY OF TAIWAN

I. INTRODUCTION

Since the 17th century, first in Europe and then elsewhere, the concept of state sovereignty has led to the emergence of the territorial state. Despite the persistence of ethnic and religious identities, the notion of the territorial state emerged as the basic unit of social organization that presumably was responsible at least for order, justice and prosperity within a state's boundary. As the term "territorial state" refers to a governing system for a specific territory with a stable population and a functional government, the emergence of the territorial state was accompanied by the notion that a state was sovereign.³⁶⁵

§ 3-1 Territorial State & State Sovereignty

Accordingly, the sovereignty of all social groupings within a state's boundaries was legally subordinated to the sovereignty of the state. This was the position at the earliest stages of development of the concept of state sovereignty. Since then, state sovereignty has become an idea that has come to be widely accepted as the ultimate authority to make policy within a state's borders. Sovereignty is therefore deemed to enhance the power of those persons making up the government that represents the state. Some pertinent questions arise: What is the legal foundation of sovereignty? Does it reside in a state or a nation? If the territorial state was

³⁶⁵ See Thomas G. Weiss, David P. Forsythe & Roger A. Coate, *THE UNITED NATIONS AND CHANGING WORLD POLITICS*, Westview Press, 1997, pp.4-9.

sovereign within its boundaries, is there no outside power over the state?

The concept of state sovereignty is a topical issue. Decolonization in the 1950s and the dissolution of the former Soviet Union³⁶⁶ and the former Yugoslavia³⁶⁷ in the 1990s resulted in the birth of numerous states in the world. Apart from the issue of state sovereignty, the confusing notion of the multinational state is another salient question that is being raised around the world today. Especially, in the aftermath of World War II, divided states such as former West and East Germany, South and North Korea, and the case of China (the Republic of China and the People's Republic of China) have made it complicated to define the notion of the multinational state. This is because some of them possibly may make claims to being independent states.

³⁶⁶ The definitive stages of the break-up of the former Soviet Union began with the failed coup by hard-line Communists in August 1991 that sparked declarations of independence from all of the republics of the former Soviet Union except Russia and Kazakhstan. In the midst of these declarations of independence, the Soviet Government formally recognized the independence of the Baltic States of Estonia, Latvia, and Lithuania on September 6, 1991.

but attempted to keep the other twelve republics together in a Union of Sovereign States with both the Union and the individual republics maintaining international personalities. As a result of a referendum, affirmed by 90% of the vote that doomed the Union Treaty at the outset, the Republics of Ukraine, Belarus, and Russia formally declared that the Soviet Union had disintegrated and announced the formation of the Commonwealth of Independent States. By December of 1991, all of the republics except Georgia had agreed to membership in the Commonwealth. See generally Urs W. Saxer, *THE TRANSFORMATION OF THE SOVIET UNION: FROM A SOCIALIST FEDERATION TO A COMMONWEALTH OF INDEPENDENT STATES*, 14 *Loy. L.A. Int'l & Comp. L.J.* 581, 670 (1992); see also Paul R. Williams, *THE TREATY OBLIGATIONS OF THE SUCCESSOR STATES OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA: DO THEY CONTINUE IN FORCE?*, 23 *Denv. J. Int'l L. & Pol'y* 1, 3(1994).

³⁶⁷ See *id.*, Paul R. Williams, *THE TREATY OBLIGATIONS OF THE SUCCESSOR STATES OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA: DO THEY CONTINUE IN FORCE?*, at 4-6. See also Svetozar Stojanovic, *THE DESTRUCTION OF YUGOSLAVIA*, 19 *Fordham Int'l L. J.* 337, 358(1995) (discussing that the secessions from Yugoslavia was viewed as self determination movements); see also Gideon A. Moor, Note, *THE REPUBLIC OF BOSNIA-HERZEGOVINA AND ARTICLE 51: INHERENT RIGHTS AND UNEMT RESPONSIBILITIES*, 18 *Fordham Int'l L. J.* 870, 873-4(1995) (discussing the fall of communism in 1989, the changing face of Eastern Europe in the early 1990s and the nationalist self-determination movement). See generally John Tagliabue, *CONFLICT IN YUGOSLAVIA*, *N.Y. TIMES*, July 3, 1991, at A6 (describing political successors in Yugoslavia as former communists who evoke old national aspirations as a way of casting off that which originally gave rise to communism).

Taiwan is a typical example of that.

The situation in Taiwan presents a very different international law problem at the outset because two governments on each side of the Taiwan Strait are involved, one in Beijing and the other in Taipei, both of which are simultaneously claiming sovereignty over Taiwan. While there is a strong argument that Taiwan should be regarded as a sovereign state in international law, most countries still do not feel comfortable to regard Taiwan as a state.

In view of this environment that reflects the issue that if Taiwan is a state, it has to be a sovereign equal with other states (including China) regardless of its actual power. Does state sovereignty become an idea that guarantees Taiwan's status internationally? International law must deal with the issue of coming into being of a state. As is the case with Taiwan, this further leads to another important issue: the need for international law to make the contemporary connection between the concept of "state sovereignty" and the concept of "statehood." In this respect, what basis would there be for regarding Taiwan as a sovereign state under international law? Considering that the word "sovereignty" is used in a variety of shapes and sizes, should we draw a further distinction between a legal sovereign and a political sovereign? As a practical matter, particularly in the European Community/Union,³⁶⁸

³⁶⁸ The European Union (hereinafter "EU") was set up after the 2nd World War. The process of European integration was launched in 1950 when France officially proposed to create the first concrete

we can assess, with regard to the concept "state sovereignty," whether the reciprocal benefit that is derived from the correlative restriction upon the power of another state makes the loss of one's power acceptable.

§ 3-2 Territorial Dispute Settlement

Since the Middle East Peace treaty of 1979³⁶⁹ and the Panama Canal Treaty of 1977,³⁷⁰ there has been no negotiated settlement of a major territorial dispute involving sovereignty issues other than the 1997 Hong Kong model.³⁷¹ Under that

foundation of a European federation. Six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) joined from the very beginning. Today, after four waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden) the EU has 15 Member States and is preparing for the accession of 13 eastern and southern European countries. For detail, see the EU website (www.europa.eu.int/abc-en.htm).

³⁶⁹ See generally Jill Allison Weiner, ISRAEL, PALESTINE, AND THE OSLO ACCORDS, 23 *Fordham Int'l L.J.* 230(1999); see also David R. Karasik, SECURING THE PEACE DIVIDEND IN THE MIDDLE EAST: AMENDING GATT ARTICLE XXIV TO ALLOW SECTORAL PREFERENCES IN FREE TRADE AREAS, 18 *Mich. J. Int'l L.* 527, 564 n.2(1997) (As of January 1, 1997, several significant peace agreements have been signed between Israel and the Arabs. See Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, 18 *I.L.M.* 362; Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, 34 *I.L.M.* 43; Israel-Palestine Liberation Organization: Declaration of Principles On Interim Self-Government Arrangements, Sept. 13, 1993, 32 *I.L.M.* 1525).

³⁷⁰ See Panama Canal Treaty, United States-Panama, 193 Stat. 4521, 33 *U.S.T.* 39, *T.I.A.S.* No. 10030 (signed Sept. 7, 1977; entered into force Oct. 1, 1979); see also Ruth Wedgwood, THE USE OF ARMED FORCE IN INTERNATIONAL AFFAIRS: SELF-DEFENSE AND THE PANAMA INVASION, 29 *Colum. J. Transnat'l L.* 609, 627, n.2(1991) (The Panama Canal Treaty recognizes Panamanian sovereignty over the former Canal Zone, but allows the Panama Canal Commission, a U.S. government corporation, to continue operating the Canal itself until the year 2000, subject to requirements of paying at least \$10 million annually to Panama in toll revenues, increasing Panamanian employment in operating the Canal, and having a Panamanian Administrator for the Canal Commission as of January 1, 1990. In the year 2000 and after, the new legal regime of a Permanent Neutrality Treaty will govern the Canal. The Canal is to be a neutral international waterway operated by Panama, and as of that date only Panama may "maintain military forces, defense sites and military installations within its national territory." The United States retains the right to "defend the Canal against any aggression or threat against the peaceful transit of vessels through the Canal.").

³⁷¹ In 19th century, Great Britain acquired Hong Kong from China pursuant to three treaties, which are (1) the 1842 Treaty of Nanking, which ceded Hong Kong Island and some adjacent territory in perpetuity to Great Britain; (2) the 1860 Convention of Beijing, which ceded Stone-Cutters Island and a portion of Kowloon Peninsula in perpetuity to Great Britain; (3) the 1898 Convention of Beijing, which leased the rest of Kowloon and the New Territories to Great Britain for 99 years. The two treaties of the 1842 Treaty of Nanking as well as the 1869 Convention of Beijing account for the cession of an area of about 8 percent of the total area of what is now Hong Kong, and the 1898 Convention of Beijing accounts an area of about 92 percent of the total area of what is now Hong Kong. In 1984, the United Kingdom concluded a joint declaration with the People's Republic of China to relinquish its claim of enforceable legal right to Hong Kong and Kowloon (Hereinafter: "Hong Kong"),

model, the governments of the United Kingdom (hereinafter "UK") and the People's Republic of China (hereinafter "PRC") signed a joint declaration in 1984, which was ratified in 1985, to decide the future status of Hong Kong beyond 1997. That arrangement holds immense value as a peaceful solution to a major territorial dispute.³⁷² Indeed, the 1997 Hong Kong handover was the focus of international attention because the idea of "one country two systems"³⁷³ that it promoted was bold and unprecedented. In considering the Hong Kong model that provides one option for dealing with the problem of disputed territories under international law, extensive debates have taken place regarding the issue of whether that model is a workable model for settlement of other territorial disputes. There are also debates on the feasibility of applying the Hong Kong model to Taiwan. Would the status of Taiwan also be that of a special administrative region under which Taiwan could be reunified with mainland China?

Regardless of whether Taiwan can be regarded as a sovereign state, the change or resolution of the status of Taiwan could occur in a number of ways. For example, it

and transfer its full authority over Hong Kong to PRC after 1997. The issue of the "Hong Kong model" will be discussed later in part V of this chapter.

³⁷² See Kevin M. Harris, *THE HONG KONG ACCORD AS A MODEL FOR DEALING WITH OTHER DISPUTED TERRITORIES*, 80 *Am. Soc'y Int'l L. Proc.* 348, 352(1986).

³⁷³ On China's resumption of sovereignty in 1997, Hong Kong becomes a special administrative region, that should be directly under the authority of the Central Government of China. Yet, Hong Kong can enjoy a high degree of autonomy except in foreign affairs and defense matters, which are the responsibility of the central government. That is, Hong Kong can retain the status of a free port, a separate customs territory, and an international financial center. The status of Hong Kong, a quasi-autonomous entity of a semi-Capitalist nature within the framework of a Socialist polity, is what has been called "one country two systems." Issues related to the "one country two systems" concept will be discussed later in part V of this chapter.

could take the form of a forcible re-integration of Taiwan into Beijing's political system through the military prowess of Beijing authority. It could also result from the ability of Taipei authority to continue to expand its international influence and eventually request support for independence from other states. Yet another option may be to pursue Taiwan's reunification with China on a similar "one country two systems" basis as Hong Kong.

§ 3-3 Statehood Doctrine & Recognition Practice

The international community has accorded official recognition to the PRC as the sole legitimate government for representing the whole of China. At the same time, and in spite of that, most countries maintain unofficial trade, political and cultural relations with Taiwan as though Taiwan were a sovereign state.³⁷⁴ While the recognition of Taiwan as the Republic of China (a divided state of China) continues to draw tremendous attention on the grounds that international practices of according recognition are the main determinants of whether the effect of recognition on statehood is turned by recognizing states. In this respect, how we should deal with the extent of implied recognition to a satisfactory resolution of the relationship so that it can benefit and improve Taiwan's legal status would be a critical point to the future of Taiwan. Maybe it is difficult to evaluate this charge absolutely. But, at least, before

³⁷⁴ See Tzu-Wen Lee, INTERNATIONAL LEGAL STATUS OF THE REPUBLIC OF CHINA ON TAIWAN, 1 U.C.L.A. J. Int'l L. & Foreign Aff. 351, 351(1996).

answering questions related to the Taiwan's entitlement of a sovereign state as separated from Communist China, before doubts of the Taiwan's status can be entertained due to the lacks of recognition as a state by the majority of international community, it is essential to generate a legal analysis in a rather advanced way to systematize the effect of recognition on statehood. Only by going there, will we be able to have a better look at Taiwan's legal status through examining Taiwan's factual background. After all, there might have been some guidelines that indicate how the international community might react if Taiwan were to assert its independence either upon its own volition, or subsequent to a military incursion by Communist China. This is because, in the past and even today, there has been an attempt to reassure under international law that a state's sovereignty will continue to be guaranteed.

As noted earlier, many doubts have been raised as to whether Taiwan already satisfies the criteria for statehood and therefore independence as a sovereign state, or something less than an independent state but an entity entitling it to a certain degree of international recognition. This issue involves not only the state sovereignty and statehood of Taiwan, but also borders on the issue of recognition.

Primarily, the object of this chapter is to analyze the legal issues surrounding any attempt by Taiwan to move from its current status at the periphery and into the realm of independence, or in the alternative, an attempt by China to coerce Taiwan

into one China with the "one country two systems" policy. However, in doing so, the significant and practical issue of evolution of the concepts of "state sovereignty" regarding the "sovereign's sovereignty" and the "people's sovereignty" cannot be ignored here.

This chapter starts with the issue of state sovereignty, which is covered in part II. The point here is to focus on the level of international law and explain the development of the concepts of state sovereignty and statehood. Thereafter, Part III discusses aspects related to recognition of a state and recognition of a government. This issue is discussed not only from a legal perspective, but also in terms of policy considerations and pragmatic imperative. The point is that the issue may turn more on states' practices than on legal considerations. Part IV of the chapter focuses on the current position of Taiwan and discusses the significant differences that exist between the authority in Beijing and the authority in Taipei regarding the view of Taiwan's status. After that, Part V will discuss issues relating to the "Hong Kong" or the "one country two systems" model, which is used by the PRC as a basis for the prospective reunification of Taiwan and mainland China, and then argue why this model remains inappropriate for Taiwan. This is because the positions of the governments on both sides of the Taiwan Straits with respect to the status of Taiwan are quite different from each other and it is really problematic whether a Socialist government like PRC can

govern such non-Socialist enclaves as Taiwan within its borders in the near future. Applying this analysis to the Taiwan context, Part VI turns to demonstrate some precedents of divided statehood such as Germany, Yemen and Korea so as to define the current position of Taiwan and its relation with China. By this logic, any decision regarding recognition of Taiwan vis-a-vis the Peoples' Republic of China, where the will of the people in Taiwan is involved, is a matter that should not be ignored. That is, any attempt at linking the international status of Taiwan without, at the same time, considering the will of the people of Taiwan would amount to an abuse of the principle of international law.

II. THE MORDERN CONCEPTS OF STATE SOVEREIGNTY AND STATEHOOD

§ 3-4 Definition of State Sovereignty

The term "sovereignty" has had a long and varied history during which it has been defined in a variety of ways depending on the context and the objectives of those using the word. In the most significant doctrine of international law, state sovereignty itself means not simply the power of an independent state, but the ultimate authority of the state, which is absolute within its territory and equal in its relations with other sovereigns. Accordingly, sovereignty in this sense is important in that it is a relevant concept for describing the right of a state to freely exercise its

power within its territory, and the right of a state to exclude from its territory the exercise of power by any other state without any permission to do so. As such, the sovereign's will was the only one that was legally relevant. The power of sovereigns and their political authority must be respected, meaning that no outside rules and organizations are held to be superior to the state. The word "state" is closely linked to the word "nation." Since the notion of "nation" refers to any grouping of people as well as to the totality of persons governed by a state, nations and states are not the same. A nation is a people linked to a state. By definition, where there is a state there is a nation, but there may be several people within (or under) a state.³⁷⁵

§ 3-5 The 1933 Montevideo Convention

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States³⁷⁶ provides four requirements for de facto status as a State. These four requirements are: (1) the existence of a stable population; (2) a defined territory; (3) a functioning, governing government; and (4) the capacity to engage in foreign relations. From the view of international practice, it is understood that a political entity without statehood has no sovereignty and cannot enter into relations with other states. Moreover, the equal status with other states in the concept of state sovereignty is

³⁷⁵ For example, in Switzerland, by definition there is the Swiss nation, but in reality there are four peoples linked to that state: the Swiss-German, the Swiss-French, the Swiss-Italians, and the Swiss-Romanisch.

³⁷⁶ See CONVENTION ON THE RIGHTS AND DUTIES OF STATES, art. 1, 49 Stat. 3097, 3100, T.S. No. 881 (1933).

meaningful when the state deals with other states.

In light of Dr. James Crawford's observation that legal title, or legitimacy, refers to a government's exclusive sovereignty and the legal right to govern a territory under international law,³⁷⁷ sovereignty is an indispensable requirement for statehood. Notably, the power of a state is closely linked to its territory. It is possible that this territory came into acquisition by way of occupation, prescription, succession or secession by the former sovereign of the territory.³⁷⁸ Judging the actual exercise of authority, the concept of territorial sovereignty limits the power of a state to exercise its authority within its borders. At this point, territory is the space within which the state can exercise absolute power and that separates one sovereign state from another. Governments act in the name of states to determine how to manage certain transnational issues. It is obvious that, by defining the use of territory, a sovereign state registers an absolute and exclusive jurisdiction whose boundaries were territorial under international law.³⁷⁹ In this respect, one sovereign state cannot bind another to its law. Absent consent, a sovereign was immune from the jurisdiction of another. As Dr. Robert Lansing has noted:³⁸⁰

³⁷⁷ See James Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW*, (5th ed., 1998), at 77.

³⁷⁸ See *id.*, see also Jianming Shen, *SOVEREIGNTY, STATEHOOD, SELF-DETERMINATION, AND THE ISSUE OF TAIWAN*, 15 *Am. U. Int'l L. Rev.* 1101, 1132(2000).

³⁷⁹ See David Kennedy, *INTERNATIONAL LAW AND THE NINETEENTH CENTURY: HISTORY OF AN ILLUSION*, *L. Rev. Ass. Quinnipiac C. L.* (1997).

³⁸⁰ See Robert Lansing, *NOTE ON SOVEREIGNTY IN A STATE*, 1 *Am. J. Int'l L.* 105, 124 (1907).

“It is an accepted principle of the law of nations that every state, whatever may be its population, power and resources, is the political equal of every other state, and that its sovereign is independent and supreme within the state. There is no such thing as degrees of sovereignty among states.”

As the exercise of sovereign jurisdiction within its territory should be rooted in the effect of the sovereign state concerned, the consolidation of an absolute sovereignty would create a need for doctrines regarding the binding effects of treaties and custom. Accordingly, states have used their freedom to make policies to reduce their freedom. That is to say, international law is created by consensus of the states to restrain or limit their own power.³⁸¹

§ 3-6 Non-Territorial Consideration of State Sovereignty

As a result of improvement in communications and the development of the range and scale of international trade, states have become more interdependent, meaning that it is impossible to see how any state can live in a separate compartment without relations with one another. Hence, initial sovereignty, linked to territory, has

³⁸¹ There are three principal sources of international law, namely, international convention; international custom; and the general principles of law recognized by nations (See Statute of the Int'l Court of Justice, art. 38, 59 Stat. 1055, T.S. No. 993). These sources are all based on the self-limitation and self-regulation of states and the basis of international law is consent. Treaties or international conventions are most explicit on the consensus because they are signed by the contracting states. See Arthur M. Weisburd, THE EXECUTIVE BRANCH AND INTERNATIONAL LAW, 41 Vand. L. Rev. 1205(1998); see also Y. Frank Chiang, STATE, SOVEREIGNTY, AND TAIWAN, 23 Fordham Int'l L. J. 959(2000).

been used to restrict that sovereignty by means of international managements acting primarily on the basis of non-territorial consideration. In this sense, international law must evolve a new pattern field of state sovereignty and in some instances because several states also highly value state sovereignty. For example, the United States has neither ratified the Inter-American Convention on Human Rights nor accepted the Jurisdiction and authority of the Inter-American Court of Human Rights. China, too, argues that only the state, not outside parties, can determine what is best for the Chinese people whether in the realm of security, human rights, or sustainable human development.³⁸²

As the peoples and states of the world become more interconnected today, there are demands for international treaties for effective international management, particularly those treaties that establish international organizations to promote and coordinate state endeavor in diverse fields, i.e., peace and security; economic development and international finance. Hence, in the eyes of this progression, a system of institutions must be linked to a consciousness of the methodology under international law and therefore, international law can become substantive, and deal directly with war and peace to avoid conflicts arising out of sovereign states.

If there remained differences in the rules applicable in different parts of the

³⁸² See Thomas G. Weiss, David P. Forsythe & Roger A. Coate, *THE UNITED NATIONS AND CHANGING WORLD POLITICS*, Westview Press, 1997, p.7.

world, it would be common in international legal literature to suggest that international law might be different in the various regions of the world and thus, there could be African, Asian, European or American international law. But, of course, there is but one international law, wherever two sovereigns are gathered in its name, and there can be only one government in a State, which represents the State and exercises its sole sovereign power. As a result, all sovereign states, in relations with one another, would be subject to the same international law. The very concept of international law requires that one State be separate from any other State, and by doing so, international law can enforce the boundaries between sovereign states and explains the expectations of one sovereign's absolute right for the behavior of another.

§ 3-7 Declaration for the Purpose of Establishing a State

In this respect, state sovereignty on this basis becomes not only a description of ultimate political discretion, but also a legal idea of independence. Indeed, it is law that provides a language to explain, ratify, and protect sovereignty which is so essential for statehood.³⁸³ As noted above, to qualify as a sovereign state, a political entity that acquires the criteria for statehood does not become a state unless it declares that it is an independent sovereign state. This is derived from international custom that

³⁸³ See "COMPULSORY PILOTAGE, PUBLIC POLICY, AND THE EARLY PRIVATE INTERNATIONAL LAW OF TORTS" by Daniel Bederman, 64 Tul. L. Rev. 1033 (1990) or "COMITY IN INTERNATIONAL LAW" by Joel R. Paul, , 32 Harv. Int'l L. J. 1 (1991).

a declaration of the establishment of a state is necessary to create a new state.³⁸⁴ The process often used is a declaration of independence, such as the United States from England in 1776 and Belgium from the Netherlands in 1831. While discussing the historical evolution of the concept of “state sovereignty,” both the American Revolution³⁸⁵ and the French Revolution³⁸⁶ are prominent examples of progression to the modern concept of state sovereignty that should be noted. Since then, to commence a subsequent democratic-government has turned to be a comprehensive way to confirm the modern concept of state sovereignty. That is to say, political legitimacy derives from popular support and governmental authority is based on the consent of the people in the territory. As Dr. Thomas G. Weiss, Dr. David P. Forsythe and Dr. Roger A. Coate noted: “Governments are governed by states, states have governments, sovereignty is an attribute of states, but it is exercised by governments. What is frequently called national sovereignty is actually state sovereignty. Whether the persons of a nation are sovereign referred to whether the state derived its

³⁸⁴ See generally Y. Frank Chiang, STATE, SOVEREIGNTY, AND TAIWAN, 23 *Fordham Int'l L. J.* 959, 972-4(2000) (noting that “there are two characteristics of a declaration of the establishment of a state. First, it is a claim of statehood. Second, it is an announcement to the international community that the entity is a state from the time of the declaration); see also, Kathryn M. McKinney, THE LEGAL EFFECTS OF THE ISRAELI-PLO DECLARATION OF PRINCIPLES: STEPS TOWARD STATEHOOD FOR PALESTINE, 18 *Seattle U. L. Rev.* 93,124(1994) (noting that achieving the objective requirements of statehood will be closer to being met after the interim period if everything contemplated in the Declaration of Principles is actually accomplished).

³⁸⁵ See generally Carlton F.W. Larson, THE DECLARATION OF INDEPENDENCE: A 225TH ANNIVERSARY REINTERPRETATION, 76 *Wash. L. Rev.* 701(2001).

³⁸⁶ See generally Hurst Hannum, THE STATUS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW, 25 *Ga. J. Int'l & Comp. L.* 287(1995).

legitimacy from popular will.”³⁸⁷

During a century beset by imperialism, colonialism and fascism, by the end of the Second World War, popular sovereignty was firmly rooted as one of the fundamental postulates of political legitimacy. With regard to this evolution, the United Nations Charter (hereinafter “UN Charter”) has deemed it as one of the purposes of the United Nations to develop friendly relations between states, not on any terms, but based on respect for the principle of equal rights and self-determination of peoples.³⁸⁸ The significant statement in the UN Charter is of such universal value that it is expressed in a fundamental international constitutive legal document.

§ 3-8 Popular Sovereignty

In an effort to affirm the concept of popular sovereignty, the UN, the international lawmaking system, proceeded to prescribe criteria for appraising the conformity of internal governance with international standards of democracy.³⁸⁹ At present, international and regional organizational monitors use the international standard of democracy in observing critical national elections so as to ensure that they

³⁸⁷ See Thomas G. Weiss, David P. Forsythe & Roger A. Coate, *THE UNITED NATIONS AND CHANGING WORLD POLITICS*, Westview Press, 1997, p.6

³⁸⁸ See UN Charter, art. 1. (June 26, 1945) U.S.T.S. 993, 59 Stat. 1031.

³⁸⁹ Evidently, the UN has adopted numerous resolutions to confirm the concept of popular sovereignty. For example, see *DECLARATION OF BASIC PRINCIPLE OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER*, U.N. G.A. Res. 40/34 (1985); *CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*, U.N. G.A. Res. 39/46 (1984); *DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF*, U.N. G.A. Res. 36/55 (1981); *CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*, U.N. G.A. Res. 34/180 (1979); *INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID*, U.N. G.A. Res. 3068

are free and fair. For instance, a UN observation mission for the verification of elections in Nicaragua (ONUNEN) was set up there in December of 1989 to observe and monitor the 1990 elections.³⁹⁰ As a matter of fact, it was during this period that the common will of the people served as evidence of popular sovereignty and became the basis for international endorsement of the elected government. A similar case is the UN observation mission in East Timor of 1999. Obviously, this effort, in functional terms, would lay the ground work for the international community to develop a type of inclusive international collective-recognition,³⁹¹ harmonizing reciprocal differences among states.

§ 3-9 People's Sovereignty vs. Sovereign's Sovereignty

As mentioned above, in spite of the fact that sovereignty itself continues to be used differently due to the national legal culture and political influence, there is no doubt that the international law of value still protects state sovereignty as a "people's sovereignty" rather than a "sovereign's sovereignty."³⁹² As sovereignty comes to be

(1973).

³⁹⁰ This international legal supervision of elections was designed to include an adequate period for candidacies to be developed and to allow campaigning, so that voters could make the informed choice that was at the center of free and fair elections.

³⁹¹ See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, at 96-8 (4th ed., 1990); see also P.K. Menon, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW*, at 51-4 (Edwin Mellen Press, 1994). The issue of collective recognition will be touched in the latter part of this paper.

³⁹² See W. Michael Reisman, *SOVEREIGNTY AND HUMAN RIGHTS IN CONTEMPORARY INTERNATIONAL LAW*, 84 *AMJIL* 886, 869 (1990) (noting that "[W]hat happens to sovereignty, in its modern sense, when it is not an outsider but some home-grown specialist in violence who seizes and purports to wield the authority of the government against the wishes of the people, by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 percent of the electorate purportedly votes for the incumbent's list (often the only choice)? Such a seizer of power is not entitled to invoke the international legal term "national sovereignty" to establish or reinforce his own position in international politics.").

conceptualized more sharply, we find the theoretical disputes concerning the distinctions between "people's sovereignty" and "sovereign's sovereignty." This evolution in content of the term "state sovereignty" has also raised a new concern as to who can violate that sovereignty. The reality of the situation is that those who possess legal sovereignty may not always be able effectively to exercise their legal sovereignty. Rather, the effectiveness of legal sovereignty is dependent on the will of the people. That is, international law is concerned with the protection of state sovereignty. In the contemporary sense, the objective of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population to freely express and effect choice about the identities and policies of its governors. It is also clear that popular sovereignty is violated when an outside force invades and imposes its will on the people. Such it was the case of the Soviet invasion of Afghanistan in 1979³⁹³ or Iraq's invasion of Kuwait in 1990,³⁹⁴ for example.

Going by the understanding of the economic integration in the European Community, the underlying concern in relations between state sovereignty and

³⁹³ Since Soviet invasion of Afghanistan in 1979, the United Nations had repeatedly criticized the Soviet presence and called for withdrawal by affirming the principle that "the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside interference. i.e., UN Doc. S/13729(1980); GA Res. ES-6/2(Jan. 14, 1980).

³⁹⁴ In response to Iraq's aggression against Kuwait of 1990, the United Nations, for the second time in its history (the first time was in response to the Communist invasion of South Korea in 1950), authorized the deployment of armed forces to stop an aggressor nation. By adopting numerous resolutions (i.e., the UN Security Council resolution 660, 661, 662, 663, 664, & 678), the UN condemned Iraq's invasion of Kuwait and declared its annexation "illegal," as well as took all

membership of the fifteen states, to be sure, presents a matter that international law will develop by solidifying its cooperative machinery. Evidently, in the European Community, the comprehensive and persuasive example that states can accept major limitations of national power politically without at the same time losing their sovereign identity in a system of absolute territorial sovereignty is a good point that the consequence of a number of significant conceptual developments relating to the concepts of "state sovereignty" and "statehood" is clearly beneficial to the new value of the international legal system. In this case, the prospective emergence of a new regional society in the European Community is to expose a future possibility that, at least, state sovereignty which people appear to have in mind is no longer what it once was thought to be. What does matter is that states may, in consequence, have fewer powers and freedoms; in exchange, they may receive certain benefits at the same time.

§ 3-10 Conceptual Development of State Sovereignty in the European Community

Regardless of the fact that the right to use of force in support of the national interest other than by way of self-defense is deemed an important element in state sovereignty, the state has compromised its sovereignty resulting in an enhancement of security by the acceptance of a limitation on the right to resort to force when the state

necessary steps to demand Iraq's immediate and unconditional withdrawal.

has accepted the duty to refrain from the use of force.³⁹⁵ Much the same can be said, for example, for the variations according to the extent to which states are parties to human rights conventions, the members of a free trade area, a common market or otherwise find themselves in a situation, where by reason of some international obligation, their national freedom of action is severely curtailed. Again, regarding regional security and prosperity as a whole, to develop a modern state sovereignty of value in the functional views of globalization is just a matter of time. As Professor David Kennedy suggested, “[I]nternational law has taken us from coexistence to cooperation, and from autonomy to community.”³⁹⁶ With regard to the evolution of the concepts of “state sovereignty” and “statehood,” these must be seen largely as foreseeable—the state remains a sovereign state under international law and continues to be able to guide its future destiny within the limits that it has itself accepted.

III. RECOGNITION OF A STATE AND RECOGNITION OF A GOVERNMENT:

LEGAL DOCTRINE AND STATE PRACTICE

When the emergence of a new state or the rise to power of a new government

³⁹⁵ For instance, Iraq was subject to extensive measures of international investigation and supervision following its aggression against Kuwait and consequent UN action. Even the fact that Iraq continues to exist as a state with sovereignty, it had to agree that it would destroy all chemical and biological weapons and ballistic missiles with a range of more than 150 kilometers, as well as nuclear weapons. The fulfillment of these obligations was supervised by a special international commission which can be regarded as a compromise of sovereignty.

³⁹⁶ See supra note 379, David Kennedy, INTERNATIONAL LAW AND THE NINETEENTH CENTURY: HISTORY OF AN ILLUSION, L. Rev. Ass. Quinnipiac C. L.(1997) at 4.

within an existing state occurs, recognition may be accorded to the new state or the government. As recognition denotes the expression of the recognizer's willingness to accept both the fact of change and the legal consequences by recognizing the new state or government, it is certain that a political entity in question can improve its legal status and effectuate its relations with the recognizing world through recognition. In general, the issue of recognition is more of a political matter than a legal issue. Practically, recognition is an optional and political act, the recognizer may withdraw or repudiate its recognition based on its own national interest.³⁹⁷ Hence, the law of recognition is a highly politicized part of public international law. That is why the issue of recognition has not been resolved smoothly either in theory or in practice.³⁹⁸

§ 3-11 Distinction between Recognition of a State and Recognition of a Government

The term "recognition" imports two different components in legal doctrine and state practice. One aspect of it involves the "recognition of a state" and the other

³⁹⁷ See supra note 381, Y. Frank Chiang, *STATE, SOVEREIGNTY, AND TAIWAN*, at 968-9. The author has different views regarding the issue of withdrawing or repudiating recognition (noting that "State recognition is different from recognizing a government. State recognition is recognition of another political entity as equal with the recognizing state, and signifies that the recognizing state is willing to enter into relations with the recognized state on equal footing. State recognition is permanent and cannot be withdrawn unless the recognized state becomes extinct. Government recognition is recognition by the recognizing state of a certain government as the legitimate representative of another state. This type of recognition may be withdrawn or repudiated. When a new state is just established, state recognition and government recognition occur simultaneously, and government recognition also implies state recognition.").

³⁹⁸ See Hungdah Chiu, *THE INTERNATIONAL LAW OF RECOGNITION AND THE STATUS OF THE REPUBLIC OF CHINA*, 3 *J. Chinese L.* 193, 195(1989) (noting that "[L]ike the question of identifying an entity as a state, the determination that a government can represent a particular state is left to the decision of the individual states of the international community through the system of recognition. Again, state practice indicates that such decisions are based primarily on policy considerations rather than legal principles."); see also Hersh Lauterpacht, *RECOGNITION IN INTERNATIONAL LAW* 1 (1947) (noting that "[A]ccording to what is probably still the predominant view in the literature of international law, recognition of States is not a matter governed by law but a

aspect relates to the "recognition of a government." There is a fundamental difference between them. It is important to distinguish the two aspects of recognition. Recognition of a state is a statement that an entity in question will be treated by the recognizer as a state with legal rights and duties prescribed by international law. Accordingly, the recognized state and the recognizing state should be regarded as an equal with each other. The issue of whether there is a duty of state recognition has been argued and no consensus has been reached yet. Regarding this debatable issue, in a deeper sense, the views expressed by Professors Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit are instructive. According to the learned writers, "[t]here is no legal duty in this regard. However, if an entity bears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations."³⁹⁹ The present thesis subscribes to the above view.

Theoretically, the decision of whether to recognize an entity as a state may take into consideration, such factors as whether entity being recognized has effective control over a defined territory and stable population, an organized governmental administration, and the capacity to act effectively to maintain its international relations and to fulfill international obligations prescribed by the UN Charter.⁴⁰⁰ In

question of policy.").

³⁹⁹ See Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, INTERNATIONAL LAW, 3rd ed., (1993), at p. 255.

⁴⁰⁰ See David O. Lloyd, Note SUCCESSION, SECESSION, AND STATE MEMBERSHIP IN THE UNITED NATIONS, 26 N.Y.U. J. Int'l L. & Pol. 761, 792(1994) (The recent practice of the United

essence, if an entity has met the criteria as mentioned above, it is in the interest of international relations for the international community to accommodate the entity and accord it recognition.⁴⁰¹ However, from a practical standpoint, the decision to recognize a state often depends on political policy rather than on the ability to meet the objective test as set under international law.

The concept of recognition of a government is employed to indicate the position of the recognizer in its relations with a government in question and treat the government as a legal entity for the state it represents. Generally, a decision as to whether to recognize an entity as a government may be based on such considerations as the consideration with the question of whether the entity is in fact in control of the government. From a legal perspective, the recognized entity, on obtaining its recognition, becomes an international person who can directly implicate international law on behalf of the State it represents. By this logic, when changes in governments occur, the new government succeeds in acting as the sole legal entity responsible for conducting the affairs of the state it represents in the international community.

Recognition of a state is not the same as recognition of its government.

Nations has been to recognize secessionist entities when they have fulfilled two criteria: they must be "states" and they must be willing to abide by the U.N. Charter).

⁴⁰¹ See Johan D. Van Der Vyver, SELF-DETERMINATION OF THE PEOPLES OF QUEBEC UNDER INTERNATIONAL LAW, 10 J. Transnat'l L. & Pol'y 1, 30(2000) (To recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition); see also Alfred P. Rubin, RECOGNITION VS. REALITY IN INTERNATIONAL LAW AND POLICY, 32 New Eng. L. Rev. 669 (1998).

Recognizing a new state does not necessarily include recognition of its government, but normally it does. That is to say, "recognition of a state" and "recognition of its government" may occur at the same time when a new state is just established by a declared legitimate government. Such was the case of Israel, for example. In 1948, Israel was recognized as a new state by other states after it established statehood by Declaration of the Establishment of the State of Israel.⁴⁰² Another notable example of this is the recent case of East Timor.

§ 3-12 Recognition of an Insurgency or a *de facto* Government

In most cases, there is only one government existing within a state. However, when a state is facing a rival change of government, quite possibly, there may be more than one contesting authority and each claims in turn to be the only effective government throughout the territory of the existing state it represents. Such was the case of the two governments of China.

In such instances, considering the necessity of having relations with the rebels, recognition of an insurgency or a *de facto* government would possibly be given to the rebels by a third-party State if the rebellion grew in size and persisted. This type of recognition is only in relation to the status of an independent administering authority (called an insurgency or a *de facto* government), but not a legitimate government. It is

⁴⁰² See Declaration of the Establishment of the State of Israel, 1948, 1 I.L.S.I. 3(1948).

understood that such an authority cannot be a subject of international law unless it represents the state "in the process of formation."⁴⁰³ Actually, the recognition decision here is based more on political preferences, rather than on legal criteria. Under this circumstance, the legitimate government would then be recognized as the *de jure* government of the state it represents, but the *de jure* government would be considered responsible only for acts performed in that part of the territory under its *de facto* control.⁴⁰⁴

§ 3-13 Effective Control and Recognition of a Government

By going with the assumption of the fact that there are two rival governments co-existing within a state, how a government comes to be competent to represent its state in international society becomes a critical issue when considering the state's right to participate in international affairs.⁴⁰⁵ Regarding the principle of the according of recognition on this issue, a notable example that can be cited here is that of the two governments of China (Nationalist China and Communist China).

⁴⁰³ See Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, INTERNATIONAL LAW, 3rd ed., (1993), at p. 271.

⁴⁰⁴ Generally and simply speaking, a *de jure* government is one which should hold power but doesn't, a *de facto* government is one which does hold power but shouldn't. Prof. Dr. Maryan Green suggested that there would appear to be no difference between recognition *de facto* and *de jure* in international law so far as the legal consequences are concerned. See Maryan Green, INTERNATIONAL LAW, at 38-9, (3rd ed., 1987).

⁴⁰⁵ Since recognition becomes an issue only when regimes come to power in ways contrary to the constitution, laws, or customs of the country in effect, this is a powerful argument against it. Though a legal succession can be interpreted to mean that the recognition granted to one government was handed to its successor along with the rest of its legitimate claim to power, the idea that origins should be treated as the fact that the unrecognized regime is in clear control of its state, given full legal effect if it regulates the activities of persons on its own territory. Regarding this point, see generally M.J. Peterson, "RECOGNITION OF GOVERNMENTS SHOULD NOT BE ABOLISHED", 77 Am. J. Int'l L. 31 (1983).

Before the 60s, despite the fact that Communist China had met the requirements of statehood, it was clear that the majority of the international community refused to recognize Communist China as the legitimate government for China internationally. Rather, Nationalist China was recognized as the legitimate government for China. This was regardless of the fact that Communist China had effective control over the Chinese territory of the mainland area and thus, this situation prompted a long debate at the UN as to which government (Nationalist China or Communist China) was entitled to represent China at the United Nations. Indeed, the question of China's seat at the United Nations was an issue of the representation matter and also a factual test of the criteria of "recognition of a government," which was to see what principle should be followed in choosing between the two rivals (Communist China and Nationalist China).

Communist China's success, in 1971, in maintaining such a majority against seating delegates of Nationalist China in the UN General Assembly not just evidenced that a state may have only one legitimate government, but also implied that the withdrawal of recognition of Nationalist China as the legitimate government of China was because the ROC did not effectively control the mainland Chinese territory and therefore, Nationalist China was not entitled to represent the Chinese territory of the

mainland area.⁴⁰⁶

As a matter of recognition in state practice, this has created a notable principle to us. That is, if recognition of a government is to perform the proper function of the State it represents, the recognition decision must be based on “whether the regime exercises effective control within the territory of the State it represents” and “whether the regime came to power by means of violating international law.” If the regime came to power as a result of foreign imposition or a violation of international law, it is the duty of the international community to refuse to accord its recognition, as in the cases of Manchukuo’s secession from China,⁴⁰⁷ and the Iraq’s annexation claims to Kuwait. Similarly, the same rationale should equally apply to the case of Taiwan, if China forcibly annexes Taiwan. Also by this logic of the effective control theory, it is unacceptable for Communist China to seek recognition as a government representing Taiwan internationally, because Taiwan is not under Communist China’s effective control at all.

§ 3-14 Effect of Recognition on Statehood

⁴⁰⁶For the resolution on presentation of China, see United Nations General Assembly, Oct. 25, 1971. G.A.Res. 2758, 26 GAOR Supp. 29 (a/8429), at 2.

⁴⁰⁷In 1931, the League of Nations rejected Manchuria’s declaration of independence from China due to Japan’s involvement in Manchuria’s secession. The author believes that recognition should be denied to regimes that are imposed by foreign intervention, base themselves on policies of racial discrimination, represent counterrevolutionary movements, or commit massive violations of human rights in the course of consolidating power. See M. Kelly Malone, *THE RIGHTS OF NEWLY EMERGING DEMOCRATIC STATES PRIOR TO INTERNATIONAL RECOGNITION AND THE SERBO-CROATION CONFLICT*, 6 Temp. Int’l & Comp. L.J. 81,85(1992) (members of the League of Nations refused to endorse Manchuria’s claim to independence in 1931 because of Japan’s involvement and continued presence in its liberation movement).

There are two dominant views on the effect of recognition.⁴⁰⁸ One school is the “constitutive theory” which regards recognition as indispensable to establishing the international legal personality of the state and competence of a government,⁴⁰⁹ the other school, the “declarative theory,” rejects this the “constitutive theory”⁴¹⁰ instead taking the point that a new state exists prior to and independent of recognition. Under this declaratory view, a state may exist without being recognized. If it does exist in fact, whether or not it has been formally recognized by other states, it has a right to be treated as a state.⁴¹¹ The main function of recognition here is “to acknowledge the fact of the state’s political existence and to declare the recognizing state’s willingness

⁴⁰⁸ See generally H. Lauterpacht, *RECOGNITION IN INTERNATIONAL LAW*, (AMS Press 1978) at 66-73; see also Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, (4th ed., 1990) at 87-106; see also Malcolm N. Shaw, *INTERNATIONAL LAW*, at 255-75 (3rd ed. 1991); see also N. A. Maryan Green, *INTERNATIONAL LAW*, at 33-40 (3rd ed., 1987); see also E. D. Brown, *A MANUAL OF INTERNATIONAL LAW*, at 55-62 (6th ed., 1976).

⁴⁰⁹ See L. Oppenheim, *INTERNATIONAL LAW*, Vol. II, (9th ed., 1992) at 109-13; see also id., Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, at 88-91.

⁴¹⁰ Dr. James Crawford criticized the constitutive theory arguing that “it does not indicate the number of states required to recognize a new political entity before the latter become a state, it does not explain the character of the agreements signed by the new political entity with other states before it becomes a state neither.” Cited in Y. Frank Chiang, *STATE, SOVEREIGNTY, AND TAIWAN*, 23 *Fordham Int’l L. J.* 959, 1005 n.53(2000); see also, Thomas D. Grant, *Review BETWEEN DIVERSITY AND DISORDER: A REVIEW OF JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF- DETERMINATION AND STATEHOOD*, 12 *Am. U. J. Int’l L. & Pol’y* 629, 685 n.94(1997) (noting that one of the criticisms commonly leveled against constitutivism is that it posits entities outside the protection of international law. If rights of statehood depend on recognition, the unrecognized entity lies open to abuse. The declaratory view seems more consistent with the contemporary emphasis on individual rights. The declaratory view reasons that even absent recognition, an entity--or at least the people inhabiting it--still enjoys the protections of international law).

⁴¹¹ It is a widespread view taken by many scholars; See Louis Henkin, Richard C. Rough, Oscar Schachter, & Hans Smit, *INTERNATIONAL LAW*, (3rd ed. 1993) at 244; Malcolm N. Shaw, *INTERNATIONAL LAW*, at 243-7 (3rd ed. 1991); James Brierly, *THE LAW OF NATIONS*, (6TH 1963), at 138-9; see also generally M. J. Peterson, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE (1815-1995)*, (New York: St. Martin’s Press, 1997); see also Thomas D. Grant, *Comment TERRITORIAL STATUS, RECOGNITION, AND STATEHOOD: SOME ASPECTS OF THE GENOCIDE CASE (BOSNIA AND HERZEGOVINA v. YUGOSLAVIA)*, 33 *Stan. J. Int’l L.* 305, 326(1997) (The dominant view is that recognition does not create the state and is thus declaratory rather than constitutive).

to treat the entity as an international person with the rights and obligations of a State.”

The different viewpoints on recognition have given rise to the discussion of whether an entity that fulfills the criteria for statehood is disqualified as a State merely because of the lack of recognition and whether the international community should recognize an entity that fulfills the criteria for statehood as a state.⁴¹² Although the declarative theory enjoys majority support, and both the Montevideo Convention on Rights and Duties of States⁴¹³ and the Restatement of the Foreign Relations Law of the United States⁴¹⁴ adopt this theory, the practice of some states does not absolutely

⁴¹² See Jianming Shen, SOVEREIGNTY, STATEHOOD, SELF-DETERMINATION, AND THE ISSUE OF TAIWAN 15 *Am. U. Int'l L. Rev.* 1101, 1124-5(2000) (Generally, a situation denied recognition, and the consequences directly flowing from it, will be treated by non-recognizing states as without international legal effect. Thus a non-recognized state will not be treated as a state, nor its government as a government of the state); see also David O. Lloyd, Note SUCCESSION, SECESSION, AND STATE MEMBERSHIP IN THE UNITED NATIONS, 26 *N.Y.U. J. Int'l L. & Pol.* 761,764(1994) (The relationship between statehood and recognition is complex, and scholars have long debated on the declarative theory of statehood and the constitutive theory of statehood); See also Thomas D. Grant, BETWEEN DIVERSITY AND DISORDER: A REVIEW OF JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD, 12 *Am. U. J. Int'l L. & Pol'y* 629, 678(1997) (The terms of the old debate--constitutive and declaratory--have been retained, though scholars are now less interested in the nature of recognition as a concept); see also Yasmin Abdullah, Note THE HOLY SEE AT UNITED NATIONS CONFERENCES: STATE OR CHURCH?, 96 *Colum. L. Rev.* 1835, 195891996) (noting that [t]he debate between proponents of the constitutive and declaratory theories of state recognition ... question is whether a previously unrecognized entity becomes a state because it is recognized by other states as such, or whether it becomes a state because it has attained the factual indicia of statehood).

⁴¹³ See Matthew N. Bathon, THE ATYPICAL INTERNATIONAL STATUS OF THE HOLY SEE, 134 *Vand. J. Transnat'l L.* 597, 620(2001) (The four-part test set out in the Montevideo Convention, establishing objective criteria only, thus reflects the declarative theory of statehood). Moreover, the Montevideo Convention itself is generally accepted as reflecting the requirements of statehood at customary international law. See D.J. Harris, *CASES AND MATERIALS ON INTERNATIONAL LAW*, (5th ed., 1998), at 102.

⁴¹⁴ See Restatement of the Foreign Relations Law of the United States, §202, Cmt. a (3rd ed. 1987). (Noting that “definition of state in Restatement is nearly identical to that in Article 1 of the Montevideo Convention.”). See also United States Department of State Press Relations Office Notice, Nov. 1, 1976, cited in Thomas D. Grant, DEFINING STATEHOOD: THE MONTEVIDEO CONVENTION AND ITS DISCONTENTS 37 *Colum. J. Transnat'l L.* 403, 415(1999) (The United States Department of State, for example, wrote in 1976: In [judging whether to recognize an entity as a state], the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill international obligations).

support the view that they have legal existence before recognition.⁴¹⁵ The doctrine of non-recognition⁴¹⁶ in the late 1970s may certainly be in fact an acceptance of the constitutive theory. Actually, non-recognition of a particular regime is not necessarily a determination that the state represented by that regime does not qualify for statehood, rather, it is always a part of a general policy of boycott and disapproval.⁴¹⁷

Although a state is not obligated to accord recognition to any other entity in question, the view that "a state may exist without being recognized and recognition is not a requirement for statehood" has been well supported by legal doctrine and state practice. As the Charter of Organization of American States provides:⁴¹⁸ *"The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise*

⁴¹⁵ See Omar M. Dajani, STALLED BETWEEN SEASONS: THE INTERNATIONAL LEGAL STATUS OF PALESTINE DURING THE INTERIM PERIOD 26 Denv. J. Int'l L. & Pol'y 27, 81(1997) (noting that Lauterpacht attempts to reconcile the declaratory and constitutive approaches by suggesting that whilerecognition is "declaratory of facts," it is "constitutive of rights." He reasons, "[a] State may exist as a physical fact. But it is a physical fact which is of no relevance for the commencement of particular international rights and duties until accompanied by recognition).

⁴¹⁶ Regarding the legal consequences of non-recognition, Dr. Oppenheim pointed out that "generally a situation denied recognition, and the consequences directly flowing from it, will be treated by non-recognizing states as without international legal effect. Thus a non-recognized state will not be treated as a state, nor its government as a government of the state; and since the community or authority in question will thus not be treated as having the status or capacities of a state or government in international law." See supra note 405, L. Oppenheim, INTERNATIONAL LAW at 199.

⁴¹⁷ See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 4TH ed., 1990. pp. 87-93.

⁴¹⁸ See THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES at art. 12, 119 U.N.T.S. 3 (1951).

of these rights is limited only by the exercise of the rights of other States in accordance with international law."

As mentioned above, since recognition is not a requirement for statehood under international law, the legal effects of recognition must be minimal in the international legal order. In this sense, recognition is only a declaratory act. Hence, by minimizing the effect of recognition, this work strongly believes that it would always be supported by legal doctrine and state practice that "a state may exist without being recognized."

§ 3-15 Implied Recognition

In recent decades, multilateral conferences and intergovernmental organizations provided channels through such fields as commercial, economic, humanitarian, technical, and various ad hoc contacts that have multiplied far beyond their numbers of a hundred years ago. Soon, technological matters, trade, the environment, and all manner of regulatory fields meant governments had to stay in more constant and more varied contact with one another.

In most multilateral undertakings, considering matters regarding financial benefit or other humanitarian issues with another entity that it does not recognize, the international community might take it as a connection to pursue a wider variety of negotiations and have wider eligibility to conclude agreements. The fact is that a need

to maintain relations with other states has sometimes been interpreted as the unofficial term which is separated from the according of official recognition but close to the official recognition. However, the conclusion of a bilateral treaty regulating relations between the state and the unrecognized entity should be highly considered as the requisite intent for expressing or implying the state's formal recognition of the unrecognized entity for the territories of the State it represented. This is because to conclude a bilateral treaty would serve as a basis of a *de facto* state for purposes of enforcing the unrecognized entity's rights and duties under international law in the state's relations with the unrecognized entity.⁴¹⁹

In fact, the growth of unofficial contacts among states for economic, technical, cultural, humanitarian, and other purposes has broadened the effect of the informal recognition. Although a state is not required to accord formal recognition to any other states, this kind of implied recognition has provided the unrecognized regime a good position to maintain its international functions. A notable example of this is Taiwan's informal relations with the international community, especially Taiwan's relations with the US.⁴²⁰ This visible tendency shows us that in the practice of recognition, the

⁴¹⁹ See Cheri L. Attix, BETWEEN THE DEVIL AND THE DEEP BLUE SEA: ARE TAIWAN'S TRADING PARTNERS IMPLYING RECOGNITION OF TAIWANESE STATEHOOD?, 25 Cal. W. Int'l L.J. 357, 380(1994) (stating that due to the nature of the international legal system, in which sovereign states enjoy a high degree of freedom from imposed obligations, recognition is rarely implied. The exception to this general rule is the conclusion of a bilateral treaty regulating relations between the state and the new entity and/or the exchange of official representatives)

⁴²⁰ Following its switch of official recognition from Taiwan to China, the US still maintains semi-official relations with Taiwan. The related issue will be discuss later in this chapter.

according of formal recognition seems less important than before.⁴²¹

§ 3-16 Collective Recognition & Recognition on Humanitarian Concern

Membership in international organizations is not necessary for determining whether an entity has acquired the status of statehood, but it is an effective way of improving the international status of the unrecognized entity. This is because, sometimes, membership in such organizations serves as an accommodation that the official recognition will be eventually accorded to the entity in question by the member states of the organizations.⁴²² However, this is just a strong indication of their intention or position, rather than a binding act on the member states. In other words, each member state of the organization is free to decide whether or not to render its formal recognition to the unrecognized entity even though the entity has already been granted access to the organization with full membership.

Going by the international practice, the recognition decisions would be put in a position where bilateral relations cannot always be kept separate from multilateral ones. From the widespread recognition in the 1990s and especially, the recent

⁴²¹ In general, declining to use recognition as a response to changes of government may have two grounds, one is resulting from doubts over effectiveness of a regime, the other one is resulting from political objections.

⁴²² See generally Angeline G. Chen, TAIWAN'S INTERNATIONAL PERSONALITY: CROSSING THE RIVER BY FEELING THE STONES, 20 Loy. L.A. Int'l & Comp. L.J. 223(1998); see also Carsten Thomas Ebenroth & Matthew James Kemner, THE ENDURING POLITICAL NATURE OF QUESTIONS OF STATE SUCCESSION AND SECESSION AND THE QUEST FOR OBJECTIVE STANDARDS, 17 U. Pa. J. Int'l Econ. L. 753, 818(1996) (noting that under the constitutive theory of state succession, recognition of a new state effectively determines its rights and duties. It affects an emerging state's right to its predecessor's property and its right to be heard in courts within recognizing States. While a state seeks recognition, it also seeks admission to the United Nations and other international organizations such as the IMF and the World Bank.).

admission into the UN of several European micro-states, we notice that many recognized entities may have not yet met certain criteria traditionally viewed as prerequisite to statehood.⁴²³ But, by so doing, it would give those entities access to foreign aid which may help them to consolidate the territory and enhance their legitimacy with the population.⁴²⁴

It is always true that the according of recognition is never a guarantee of qualifying for the requirements to be a state, but importantly it creates a viable future on the attempted integration of international law and international relations. As with the question of recognition, greater integration of globalization does raise a serious issue of whether it is necessary today for a country simply to isolate a certain entity where there are no benefits of continuing any kind of relationship with the entity. The precedent of collective recognition within the European Union (hereinafter "EU") might give us some ideas to respond to the above issue. In other words, the humanitarian concern is also a critical alternative for the recognizer while considering its recognition policy. The precedents surrounding the dissolution of the Socialist Federal Republic of Yugoslavia in particular evidenced that recognition can be

⁴²³ See David O. Lloyd. Note SUCCESSION, SECESSION, AND STATE MEMBERSHIP IN THE UNITED NATIONS, 26 N.Y.U. J. Int'l L. & Pol. 761, 791(1994) (noting that a secessionist entity, such as Bosnia-Herzegovina, whose statehood is in doubt will still be promptly recognized if this is necessary to fulfill the purposes of the Charter).

⁴²⁴ Concerned with increased claims for recognition in Eastern Europe and in the Soviet Union in the early 1990s, the Member states of the European Community adopted the guidelines on the recognition of new states in eastern European and in the Soviet Union to respect those claims and to constitute the general criteria on the process of recognizing such new states. For the "DECLARATION ON THE GUIDELINES ON THE RECOGNITION OF NEW STATES IN EASTERN EUROPE AND IN THE

decided by states together. Especially within the EU, governments endeavored to coordinate their recognition policy.⁴²⁵ There was no doubt that the concessions were not traditional but a new approach to the recognition decision. This was because they did not run to the traditional practice by considering the direct material benefit to the states offering recognition. Instead, they concerned themselves with minority rights, other human rights, and state successions, especially with regard to financial obligations and duties under force reduction. This has created a new approach to the evolution of the modern concept of recognition. In a similar vein, Taiwan is very qualified to receive respect from the international community in receiving official recognition as a state, the state of Taiwan. With that, the people of Taiwan can receive greater benefit from the recognizing world. As a matter of fact, this is just the same humanitarian concern as the international community extended to those dissolved entities of the former Soviet Union and Yugoslavia.

IV. A LEGAL ANALYSIS OF THE CURRENT POSITION OF TAIWAN

SOVIET UNION", 31 I.L.M. 1485 (1992), see supra note 415.

⁴²⁵ Though collective discipline was not entirely maintained, the European governments repeatedly expressed the view that international law required it to be and that suggests a rule may be forming. See e.g., Declaration on the "GUIDELINES ON THE RECOGNITION OF NEW STATES IN EASTERN EUROPE AND IN THE SOVIET UNION," 31 I. L. M. 1485 (1992) (laying the foundation for self-determination with respect to former Communist Bloc countries who sought independence); see also Ruth Wedgwood, NATO'S KOSOVO INTERVENTION: NATO'S CAMPAIGN IN YUGOSLAVIA, 93 Am. J. Int'l L. 828, 833 (1999) (discussing how the "Guidelines" make clear that political membership in the European- Atlantic community requires minimum guarantees for the rights of minority populations); see, e.g., Political Cooperation: EEC Moves to Recognize Georgia, EUROPEAN REPORT, March 25, 1992, at 13 (stating that Georgia has met the stated requirements in the Guideline on Recognition of New States in Eastern Europe and the Soviet Union and proceeded

A. The Nature of the Taiwan Issue: Some Factual Background

In the 17th, 18th, 19th centuries, Taiwan was under continuous colonial rule by the Portugese, the Dutch, and then the Japanese.⁴²⁶ The Dutch controlled the island of Taiwan until 1662 when Cheng Ch'eng-kung, a Ming loyalist and military leader, expelled them.⁴²⁷ In 1683, the Manchu Ch'ing Dynasty attacked Taiwan and claimed Taiwan as part of the Chinese Empire. The international community did not dispute China's claim of sovereignty over Taiwan until the end of the Sino-Japanese war.⁴²⁸ However, keeping a close eye on the relations between Taiwan and mainland China, some historical evidence taught us that Taiwan has not always been an integral part of China.⁴²⁹ For example, in 1874, in response to a legal claim brought by the Japanese,

with recognition); see also, M. J. Peterson, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE (1815-1995)*, at ch. 7.

⁴²⁶ See Parris Chang, Kok-Ui Lim, *TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP*, 1 *UCLA J. Int'l L. & Foreign Aff.* 393, 405(1997); See also Angeline G. Chen, *TAIWAN'S INTERNATIONAL PERSONALITY: CROSSING THE RIVER BY FEELING THE STONES*, 20 *Loy. L.A. Int'l & Comp. L.J.* 223, 241(1998) (stating that the Dutch, Portuguese, and Japanese settlers at various points in history maintained ports and colonies throughout Taiwan); See also Markus G. Puder, *THE GRASS WILL NOT BE TRAMPLED BECAUSE THE TIGERS NEED NOT FIGHT-NEW THOUGHTS AND OLD PARADIGMS FOR DÉTENTE ACROSS THE TAIWAN STRAIT*, 34 *Vand. J. Transnat'l L.* 481, 525 n.24(2001).

⁴²⁷ See Jonathan I. Charney and J. R. V. Prescott, *RESOLVING CROSS-STRAIT RELATIONS BETWEEN CHINA AND TAIWAN*, 94 *Am. J. Int'l L.* 453, 454(2000); see also Parris Chang, Kok-Ui Lim, *TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP*, 1 *UCLA J. Int'l L. & Foreign Aff.* 393, 418(1997).

⁴²⁸ See generally Seokwoo Lee, *THE 1951 SAN FRANCISCO PEACE TREATY WITH JAPAN AND THE TERRITORIAL DISPUTES IN EAST ASIA*, 11 *Pac. Rim L. & Pol'y J.* 63 (2002). See Kwan Weng Kin, *DESERTED ISLES AROUSED INTEREST ONLY AFTER REPORT OF OIL RESERVES*, *THE STRAITS TIMES*, September 21, 1996, at 36 ("Taiwan [was] ceded to Japan as spoils of war through the Treaty of Shimonoseki after China's defeat in the 1894-95 Sino-Japanese War."); see also Yoshio Nakagawa & Yomiuri Shimibun, *TAIWAN'S COLONIAL LEGACY REVISITED*, *The Daily Yomiuri*, May 7, 1995, at 5 (stating that Japan acquired Taiwan from China with the signing of the treaty at the end of the Sino-Japanese War); Xiao-huang Yin and Tsung Chi, *IS US PLAYING THE TAIWAN CARD BY GRANTING ITS PRESIDENT A VISA?*, *Los Angeles TIMES*, June 4, 1995, at M2 (stating that since the signing of the Shimonoseki Treaty, Taiwan has been "lost" from China).

⁴²⁹ See Charney & Prescott, *RESOLVING CROSS-STRAIT RELATIONS BETWEEN TAIWAN AND CHINA*, 94 *Am. J. Int'l L.* 453, 456(2000) (stating that Taiwan was ceded to Japan in 1895); see also Chang & Lim, *TAIWAN'S CASE FOR UNITED NATIONS' MEMBERSHIP*, 1 *UCLA J. Int'l L. & Foreign Aff.* 393, 429(1997) (asserting that while there may be civility between the two, there is

the Manchu Ch'ing Dynasty declared Taiwan to be outside of Chinese jurisdiction and refused to assume responsibility for the massacre of shipwrecked Japanese sailors killed by Taiwanese aborigines.⁴³⁰ Even in an interview regarding the issue of how Taiwanese people had to conform to Japanese ways, Mr. Mao Zedong, the former top leader of Communist China indicated that "[I]f the Koreans wish to break away from the chains of Japanese imperialism, we will extend them our enthusiastic help in their struggle for independence. The same thing applies for Formosa (Taiwan)."⁴³¹ Taiwan had been formally occupied and colonized by Japan since the time when the Manchu Ch'ing Dynasty China was forced to surrender Taiwan "in perpetuity" to Japan under the Treaty of Shimonoseki in 1895 after its defeat in the 1894 Sino-Japanese War.⁴³² Consequently, and flowing from a deep sense of despair and indignation, the people of Taiwan made an attempt to take charge of their own political destiny leading to the establishment of the Taiwan Democratic Republic, the first democratic republic country in Asia. However, without any recognition or support from the international

no strong pull to consider Taiwan as a part of China). See generally Piero Tozzi, NOTE, CONSTITUTIONAL REFORM ON TAIWAN: FULFILLING A CHINESE NOTION OF DEMOCRATIC SOVEREIGNTY?, 64 Fordham L. Rev. 1193, 1251 n.245(1995) (discussing the difficulty of forming strong identity in the middle of their "hodgepodge" history).

⁴³⁰ This is called the event of Mu-Tan-Se, which is a famous incident in Taiwanese history. See John King Fairback, CHINA: A NEW HISTORY, (Harvard University Press, 1992); see also Walter Chen, HISTORY OF TAIWAN, (<http://www.leksu.com/leksu-e.htm>).

⁴³¹ See Edgar Snow, RED STAR OVER CHINA, NY TIMES, Feb. 9, 1968 at 106-13.

⁴³² See Treaty of Shimonoseki, Apr. 17, 1895, Japan-China, art. II, reprinted in TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919, at 18-9 (John V.A. MacMurray ed., 1973). Under the Shimonoseki Treaty, the residents of Taiwan were given the treaty right to relocate in China, however, the overwhelming majority chose to remain in Taiwan. See Christopher J. Carolan, THE REPUBLIC OF TAIWAN: A LEGAL-HISTORICAL JUSTIFICATION FOR A TAIWANESE DECLARATION OF INDEPENDENCE, 75 N.Y. U.L. Rev. 429, 432(2000).

community, the Taiwan Democratic Republic completely collapsed soon after the Japanese troops landed on Taiwan.

§ 3-17 China's Occupying of Taiwan on Behalf of the Allied Powers

During the Second World War, in anticipation of Japan's defeat in the war, the Allied Powers (including China, the United Kingdom and the United States), together in the 1943 Cairo Declaration expressed their intent to return Taiwan to China. Later, in the 1945 Potsdam Proclamation "the term of the Cairo Declaration" was once again affirmed by the Allied Powers. Following Japan's defeat, Nationalist China was authorized by General Douglas MacArthur to take over Taiwan on behalf of the Allied Powers in 1945. Four years later, by the latter part of 1949, Nationalist China lost the Chinese mainland because of its defeat in the civil war by Communist China and subsequently fled to Taiwan.

Even though Nationalist China had taken control of Taiwan in 1945, it was not until 1951 that Japan formally surrendered sovereignty over Taiwan in the San Francisco Treaty of Peace with Japan (hereinafter "the 1951 Peace Treaty").⁴³³ The treaty clearly indicated the terms of surrender of Japan,⁴³⁴ but neither Nationalist China nor Communist China was authorized to control Taiwan while Japan formally gave up its sovereignty over Taiwan in the treaty. The notable absence of

⁴³³ See Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 46.

⁴³⁴ The Article 2(b) of the Treaty of Peace with Japan provides that "Japan renounces all right, title and

representatives from either side of the Taiwan Strait at the San Francisco Peace Conference⁴³⁵ gave rise to a controversy as to whether Taiwan's international status was still unresolved.⁴³⁶ There is an obvious example of this: Mr. John Foster Dulles, Secretary of State in the Eisenhower Administration, concluded that Taiwan's status was unsettled by saying that:

[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 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 [Quemoy and Matsu] which have always been Chinese territory.⁴³⁷

claim to Formosa and Pescadore." (136 U.N.T.S. at 48).

⁴³⁵ Neither the ROC nor the PRC was invited to join the San Francisco Peace Conference in 1951. More significantly, neither government concluded "the Treaty of Peace with Japan" which entered into force on April 8, 1952.

⁴³⁶ The UK Representative at the Conference for the Treaty of Peace with Japan concluded that "the Treaty itself does not determine the future of these islands (Taiwan and the Pescadore). In due course a solution must be found, in accord with the purposes and principles of the Charter of the United Nations." (Dep't of State Pub. 4392, 1951). Some scholars therefore take the position that Taiwan's status is still unsettled, i.e., see generally Parris Chang & Kok-Ui Lim, TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP, 1 UCLA J. Int'l L. & Foreign Aff. 393(1997); but other scholars take the view that Taiwan's status is settled, i.e., Hungdah Chiu, THE ONE CHINA POLICY AND TAIWAN'S INTERNATIONAL STATUS, Vol. 52, No. 2, the Law Monthly, Taipei(2001).

⁴³⁷ See John Foster Dulles, PURPOSE OF TREATY WITH REPUBLIC OF CHINA, Dep't St. Bull., Dec. 13, 1954, at 896.

Officially both Britain and France also took the similar position that Nationalist China, authorized by General Douglas MacArthur, undertook temporarily military occupation of Taiwan as a trustee on behalf of the Allied Powers. In 1955, Mr. Anthony Eden, British Secretary of State for Foreign Affairs, stated in the House of Commons that

[I]n September, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers; but this was not a cession, nor did it in itself involve any change of sovereignty. The arrangements made with Chiang Kai-shek put him there on a basis of military occupation pending further arrangements and did not of themselves constitute territory Chinese...[F]ormosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the de jure sovereignty over which is uncertain or undetermined.⁴³⁸

In 1964, Mr. Georges Pompidou, French premier, reiterated that: “ *[F]rench recognition of the PRC on January 27, 1964 in no way explicitly or implicitly recognized Beijing's territorial claim over Taiwan, and the island's status must be*

⁴³⁸ See GREAT BRITAIN, PARLIAMENTARY DEBATE (Hansard), House of Commons, Official Report, vol. 536, col. 159 (Feb. 4, 1955). Cited in J.P. Jain, THE LEGAL STATUS OF FORMOSA, 57 Am. J. Int'l L. 25 (1963); cited also in Majorie M. Whiteman, DIGEST OF INTERNATIONAL LAW, Vol. 3, 565, Washington, D.C. (1964); cited also in Gary Klintworth, TAIWAN'S INTERNATIONAL IDENTITY: 400 YEARS IN THE MELTING POT, 10 J.E. Asian Aff. 373, 383 (1996).

*decided on these days, taking the wish of the Formosa population into consideration.”*⁴³⁹

§ 3-18 Nationalist China Behaves Like a Colonial Master

For more than three decades, from 1949 to 1987, Taiwan was placed under martial law, imposed by the Chinese Nationalist government, a minority government in Taiwan. During the period, politically and culturally, the way that Nationalist China treated the people of Taiwan was more like a colonial behavior.⁴⁴⁰ A notable example was the incident of 2-28. A widespread uprising burst out on Feb. 28 of 1947, leading the Taiwanese public from expectation to disappointment and then to anger.⁴⁴¹

Regardless of the fact that the effective area of Nationalist China has been confined to Taiwan since 1949, the constitution of Nationalist China, which was drafted and ratified in mainland China, established a state called the “Republic of China,” whose boundaries include the Chinese mainland and Outer Mongolia.⁴⁴²

⁴³⁹ See SELF-DETERMINATION FOR TAIWAN IS SUGGESTED BY FRENCH PREMIER, N.Y. Times, Apr. 24, 1964.

⁴⁴⁰ An official report of U.S. State Department noted “[O]ur experience in Formosa is most enlightening. Many were forced to feel that conditions under autocratic rule [Japanese rule] were preferable [to KMT rule]...The [Taiwanese people anticipated sincerely and enthusiastically deliverance from the Japanese yoke...However, [the KMT] ruthlessly, corruptly and avariciously imposed their regime upon a happy and amenable population...There were indications that Formosans would be receptive toward the United States guardianship and the United Nations trusteeship. See Dep’t of State, U.S. Relations with China 309(1949).

⁴⁴¹ See John F. Copper, TAIWAN: NATION-STATE OR PROVINCE?, at 35 (1996) (discussing the culmination of the “2-28 Incident” through the developing feelings of rebellion and resistance to KMT rule). In the 228 Incident, the Nationalist was not only unable to reflect on it or practice democracy in accordance with the wishes of the people of Taiwan, but instead, sent troops to cruelly suppress the resulting demonstration and make widespread arrests, leaving a deep scar in the history of Taiwan. For the reflection of the 2-28 Incident, see Ma Ying-Jeou, A REFLECTION UPON THE 2-28 INCIDENT, Feb. 28, 2002, Taipei Times.

⁴⁴² Under the ROC Constitution, which was written in 1946 and implemented in 1947, two years before the Nationalist China fled to Taiwan following a defeat in the Chinese civil war by the

This assumed that any territory that was once under China's rule, after the founding of the ROC in 1912, should forever remain part of China, setting the stage for extremely confrontational relations politically that made both sides of the Taiwan Strait refuse to recognize the other as a legitimate government, but both firmly asserting that there was only one China and that Taiwan was at the same time part of China.⁴⁴³

The PRC has continuously claimed its sovereignty over Taiwan and the ROC has never denied that Taiwan is part of China. This has not only made Taiwan's status more ambiguous,⁴⁴⁴ but has also confused the international community and the people of Taiwan as to whether Taiwan is an independent state. However, it was the very thing on which the two governments of the Taiwan Strait could agree with each other politically, regardless of the fundamental difference between the two sides as to how to define the concept of "one China" and who should govern the State of China.

§ 3-19 Consequence of Nationalist China's expulsion from the UN

communist, the Nationalist China viewed Mongolia as an integral part of its territory, even though the People's Republic of Mongolia declared its independence through a referendum in 1945 and then the PRC officially recognized the Mongolian People's Republic in 1949.

⁴⁴³ See Eric Ting-lun Huang, THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION, 14 N.Y. Int'l L. Rev. 167,205(2001) (stating that it was assumed that Taiwan should be an anti-communism base for recovering the Chinese mainland so the people of Taiwan were impelled to "China-iation," with a greater emphasis on cultural homogeneity, linguistic unity, common historical tradition and ethnic identity). As a matter of fact, this is more like a fanatic of "Great China" nationalism, under this circumstance, any idea of the territory not being part of China would be deemed blasphemy. That is also the case with Tibet.

⁴⁴⁴ For example, Dr Y Frank Chiang suggested, in his essay entitled "STATE, SOVEREIGNTY, AND TAIWAN," that the reason that other states do not regard the ROC or Taiwan as a state is because the ROC government has never declared the establishment of a new state, separate from China. It asserts itself to be the government that represents the state of China or more recently part of the state of China. As the sovereignty of a state is indivisible, and a state can have only one government that exercises its sovereign power, he takes the view that the ROC's insistence on the one China policy can only reinforce the PRC government's claim that Taiwan is a renegade province (see generally 23 Fordham

After the PRC took China's seat and expelled the ROC's representative from the United Nations in 1971, the government of Taiwan consequently failed to retain its seats in numerous other international organizations. That was because the PRC successfully blocked the ROC's entrance into many of these organizations. In spite of that, the government of Taiwan has still remained or gained membership in several intergovernmental organizations, such as the Asian Development Bank (hereinafter "ADB"), the World Trade Organization (hereinafter "WTO") and so forth. More significantly, the switch of the US' official recognition from the ROC to the PRC in 1979 provided an incentive precedent for other hesitant countries to follow. Suffering from this consequence, Taiwan now maintains official relations with only twenty-seven states as of September, 2002.⁴⁴⁵ Most are Latin American and Caribbean countries, and several are tiny and poor island nations located in the South Pacific and Oceania region. Currently Taiwan retains substantive relations with most of the non-recognizing states. This realistic trend is rather extraordinary, but also predictable for Taiwan.

As the PRC preconditions diplomatic relations on non-recognition of the

Int'l L. J. 959, 2000).

⁴⁴⁵ According to information released by the ROC Government Information Office (www.gio.gov.tw). Taiwan currently has official diplomatic ties with 27 countries. Four countries in South Pacific and Oceania region: Palau, Solomon Island, Marshall Island, and Tuvalu; eight countries in Africa: Burkina Faso, Chad, the Gambia, Liberia, Malawi, Sao Tome and Principe, Senegal, as well as Swaziland; one West European country: Holy See; fourteen countries in Latin America and the Caribbean area: Belize, Costa Rica, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Saint Christopher and Nevis, as well as Saint Vincent and the Grenadines.

government of Taiwan, those among Taiwan's trading partners who recognize the PRC have been very careful to accompany any change in relations with an affirmation of the PRC's sovereignty over Taiwan. The PRC is fully aware of that and thus uses every effort to oppose Taiwan's formal diplomatic relations with other states and challenges Taiwan's participation in regional and international governmental organizations. In view of these facts, it gives rise to a concern of whether non-recognition prevents governments from treating the ROC as the de jure government of Taiwan.

The fact that Taiwan recently gave a dozen used fighter jets to Paraguay evidently is an attempt to repay Paraguay for continuing to recognize Taiwan as the Republic of China.⁴⁴⁶ As a small, poor, geographically disadvantaged Latin American state, Paraguay, through its recognition policy, successfully extracted a material concession by taking those planes from Taiwan, one of the premier trading powers of the world. This observation is particularly relevant in showing that many states, still recognizing Taiwan as the Republic of China, have extracted similar concessions.⁴⁴⁷ Given this factual background above, it is not difficult to understand why Taiwan is in an anomalous position in the world.

⁴⁴⁶ See Jane's Def., PARAGUAY WILL BE GIVEN F-5S, Weekly, Oct. 1, 1997, at p8.

⁴⁴⁷ See Tim Healy & Laurence Eyton, PERILS OF MONEY DIPLOMACY: IT'S EXPENSIVE, AND SOMETIMES IT BACKFIRES, Asia Weekly, Dec. 20, 1996, at p20. (noting that "Increasingly, the smaller nations of Africa, the Caribbean and South America feel they have the upper hand. By threatening to switch to Beijing, they can pry more cash out of Taipei.")

B. China's Stance on Taiwan's Position

§ 3-20 The 1993 White Paper: The Taiwan Question and Reunification of China

Regardless of the ROC's strong claim as a sovereign state, by assuming to be the legitimate successor government of China, the PRC government has regarded Taiwan as an inalienable part of its territory, arguing that the PRC inherited all territorial boundaries of the previous government(the ROC).⁴⁴⁸ Thus, Taiwan's issue is within its "domestic affairs" and not subject to international law. On August 31, 1993, the PRC issued a White Paper, entitled "The Taiwan Question and Reunification of China" (hereinafter "the 1993 White Paper"),⁴⁴⁹ through which the PRC reiterated its stance on Taiwan's position. In summary, the primary assertions for the PRC's claim of sovereignty over Taiwan based on the 1993 White Paper are: (1) the 1895 Shimonoseki Treaty, ceding Taiwan and the Pescadores to Japan, was rendered null and void by China's declaration of war against Japan in 1941; (2) the 1943 Cairo Declaration stated that territories stolen from China, including Taiwan and the Pescadores, should be restored to China; (3) the 1945 Potsdam Proclamation affirmed the terms of the 1943 Cairo Declaration; (4) in its instrument of surrender of

⁴⁴⁸ It is a well-established rule of international law that a shift of government in a State neither changes that State's legal personality, nor does it affect the sovereignty and territorial integrity of that State. When the PRC Government replaced the ROC Government in 1949, a matter of succession took place. This succession was not a succession of State, but a succession of Government. i.e., the new government of the PRC inherits all the rights and obligations of its predecessors, the ROC, and becomes the sole legal representative of China as a subject of international law. See Jianming Shen, SOVEREIGNTY, STATEHOOD, SELF-DETERMINATION, AND THE ISSUE OF TAIWAN, 15 Am. U. Int'l L. Rev. 1101, 1108(2000).

⁴⁴⁹ See WHITE PAPER ON THE TAIWAN QUESTION AND THE REUNIFICATION OF CHINA,

August 15, 1945, Japan undertook to carry out the terms of the Potsdam Proclamation; (5) on October 25, 1945, the Japanese surrendered Taiwan to the Chinese government in Taiwan; under Chinese law, Taiwan was restored to China on that day; (7) the civil war between the Nationalists and Communists ended in an establishment of the PRC as the sole legitimate government of China on October 1, 1949, and also established the Nationalist government on Taiwan; this is how the Taiwan question originated.⁴⁵⁰

In this sense, from viewpoints of the PRC, Taiwan is neither under colonial rule, nor subject to alien domination, rather, it originated from the Chinese civil war half a century ago and is a left-over from this war.⁴⁵¹ As the reunification of Taiwan with mainland China has been a strategic goal since 1949, the PRC would react strongly to any possible application for the people of Taiwan to exercise the right of self-determination, under international norms and principles, to achieve de jure independence. As enshrined in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, there is no basis whatsoever for the people of Taiwan to exercise the right of self-determination upon an issue that concerns the sovereignty

Aug. 31, 1993, Taiwan Affairs Office and Information Office of the State Council of China.

⁴⁵⁰ As a result of the Japanese surrender to the Chinese government on Oct. 25, 1945 and following the announcement by the representative of the Chinese government that, as of that day, Taiwan and the Pescadores had been restored to China, and all the people, land and state affairs of Taiwan and the Pescadores came under Chinese sovereignty. In terms of Chinese law, Taiwan was returned to China on the same day.

⁴⁵¹ See Su Wei, SOME REFLECTIONS ON THE ONE CHINA PRINCIPLE, 23 Fordham Int'l L. J. 1169, 1171(2000).

and territorial integrity of China as a whole.⁴⁵²

Another notable stance in the 1993 White Paper for the PRC to uphold its title to Taiwan is the legal implication of UN General Assembly Resolution 2758.⁴⁵³ It is on this very basis that the United Nations has recognized the Government of the PRC as the sole legal government representing the whole of China. Since the adoption of this resolution, all specialized agencies within the UN system have restored China's seat to the PRC and expelled the ROC's representative. As the PRC has maintained diplomatic relations with more than 160 states in the world, the international community generally recognizes the PRC as the sole legal government of China and Taiwan as part of China. It is believed that the international community must adhere to the one-China policy under international law, by recognizing the principle that a State cannot have two equally representative governments, to respect the sovereignty and territorial integrity of China, and to refrain from any act that might contribute to Taiwan's secession from China. Indeed, this is where the PRC's "one-China" concept originated.

§ 3-21 Conceptual Dimensions of the One-China Principle

⁴⁵² The Declaration provides that "immediately after affirming a people's right to self-determination, such a right is not to be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent State." DECLARATION ON PRINCIPLE OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, Doc. A/8028(1970).

⁴⁵³ See THE U.N. RESOLUTION 2758, G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8439(1971).

Primarily there are three conceptual dimensions underlying the principle of “one China,” namely, (1) the sovereignty and territory concept (the sovereignty of China includes the mainland, Hong Kong, Macao, and the Taiwan region, which is an undivided sovereignty belonging to all the Chinese people including those residing in the Taiwan region. It is not acceptable to split the sovereignty of China into “two Chinas” or “one China, one Taiwan”); (2) the concept of international space (only one Chinese government can legitimately represent the sovereignty of China in the international arena. Special regions of China like Hong Kong and Macao can be governed internally by an administration highly autonomous from China’s central government, but not to the extent that dual representation of China’s sovereignty is allowed); (3) the concept of national security (any threat to the integrity of China’s sovereignty and territory is an issue of China’s national interest and security, and thus deployment of force against Taiwanese independence and the schemes of foreign forces to interfere with China’s reunification is a part of China’s national defense).⁴⁵⁴

Under the principle of “one-China,” the PRC has adjusted its strategy first from “forceful liberation” of Taiwan, then to “peaceful reunification” with Taiwan. That is, since the 1960s, the PRC has shown its tolerance for the status quo of Taiwan’s de facto independence as long as Taiwan continues to acknowledge the

⁴⁵⁴ See generally Che-Fu Lee, CHINA’S PERCEPTION OF THE TAIWAN ISSUE, 32 New. Eng. L. Rev. 695(1998).

“one-China” policy and does not move toward de jure independence.⁴⁵⁵ Regarding the “peaceful reunification” policy which marks a critical turning point in the PRC’s orientation on domestic policy and its attitude toward Taiwan, a brief summary of the main points of the peaceful reunification follows:⁴⁵⁶

(1). To make every effort to achieve a peaceful reunification while not committing to forgoing the use of force as a last resort.

(2). To promote actively personal, economic, cultural, and other cross-strait exchanges and work for the early realization of the “three links” between the two sides of the Taiwan Strait.

(3). To conduct peaceful negotiations for reunification, where, within the overall framework of one China principle, any issue can be addressed.

(4). To adopt “one country two systems” after reunification, by which the main body of China (the mainland of China) will stick to

⁴⁵⁵ Probably considering the military solution to the Taiwan issue would be costly, in a meeting with Khrushchev on October 2, 1959, the PRC leader, Mao Zedong, stated that “we do not want to take over Taiwan and other islands all at once, they can still be placed in the hands of Chiang Kai-shek, and it does not matter if this be ten years, twenty years, or thirty years.” See Mao Zedong, *Mao Zedong Waijiao Wenxuan* [SELECTED WORKS OF MAO ZEDONG ON DIPLOMACY] 381(1994). Like Mao, another leader of the PRC, Deng Xiaoping, has also shown patience for a solution to the Taiwan issue by noting that “reunification of Taiwan should be left to the future generation.” See PRC Ministry of Foreign Affairs, *Deng Xiaoping Waijiao Sixian Yanjiu Lunwenji* [SYMPOSIUM OF THE STUDY OF DENG XIAOPING’S THOUGHTS ON DIPLOMACY] (1996), cited in Zhengyuan Fu, CHINA’S PERCEPTION OF THE TAIWAN ISSUE, 1 *UCLA J. Int’l L. & Foreign Aff.* 321(1996).

⁴⁵⁶ See WHITE PAPER ON THE ONE CHINA PRINCIPLE AND THE TAIWAN ISSUE, 2000 (hereinafter “the 2000 White Paper”), Taiwan Affairs Office and Information Office of the State Council of China; cited in Su Wei, SOME REFLECTIONS ON THE ONE CHINA PRINCIPLE, 23 *Fordham Int’l L. J.* 1169, n.75(2000).

its socialist system while Taiwan will maintain its existing capitalist system for a long time to come.

(5). To give Taiwan a high degree of autonomy after reunification while the Central Government will not station any troops or administrative personnel in Taiwan.

(6). To solve the question of Taiwan is an internal matter of China and it is up to the Chinese people themselves to find the solution without any foreign involvement.

§ 3-22 From Forceful Liberation to Peaceful Reunification

Regarding the Taiwan issue, the latest policy directive of peaceful reunification began with a proclamation in the 1979 Standing Committee of the People's Congress of the PRC.⁴⁵⁷ The concept of "one country two systems," which was deemed as a major change in China's policy toward Taiwan, first appeared in detail in the State Council's White Paper in 1993. Part III of the 1993 White Paper reiterates the PRC's basic position of peaceful unification(one country two systems). The 1993 White Paper sets out four key principles, which may be stated as follows:

(1) There is only one China, of which Taiwan is a part. The central government of China is in Beijing and the "authorities in Taipei"

⁴⁵⁷ See Jan. 1, 1979, MESSAGE TO COMPATRIOTS IN TAIWAN, Beijing Rev., Jan. 5, 1979.

are therefore not a legitimate government of China. The PRC opposes the following models: the "two Chinas" model (the mainland as one China and Taiwan as a separate China); the "one Country two governments" model (one China but one government in Beijing and a separate government in Taipei); and the "one China, one Taiwan" model (the existence of an independent Taiwan—that is, Taiwan as a separate country). The White Paper states that "Self-determination for Taiwan is out of the question."

(2) Although there is only one China, it is possible for socialist and capitalist societies to co-exist within it, so that, after reunification, Taiwan's "current socio-economic system, its way of life as well as economic and cultural ties with foreign countries can remain unchanged."

(3) After reunification, Taiwan will enjoy a high degree of autonomy as a special administrative region. It will have its own administrative and legislative powers, and independent judiciary and right of adjudication and "will run its own party, political, military, economic and financial affairs." It will, to some extent, be able to conclude agreements with foreign countries (but not, of

course, as a sovereign nation). Government representatives in the Taiwan special administrative region will be eligible for appointment to senior posts in the central government.

(4) Economic and other links between mainland China should be rapidly expanded and negotiations towards reunification commenced as soon as possible.

Part III of the White Paper also states that the “Taiwan issue” is a domestic affair, involving no foreign government—that it is not analogous to the Korean and German “divided country” situations, and that the PRC reserves the right to use military force to uphold its sovereignty and territorial integrity over Taiwan.⁴⁵⁸

§ 3-23 Localization of Taiwan’s Current Status

Truly, as mentioned above, under the basic content of China’s stance on Taiwan’s position, Taiwan is a special local government that has separately administered itself under a different political system from that of Beijing and without affecting the entire sovereignty of the State of China. As a sole legitimate government representing China as a whole, the PRC is obviously promising that the legitimate right and interests of the Taiwanese people would be guaranteed, regardless of whatever political differences that remain between the two sides.

⁴⁵⁸ Cited in Sean Cooney, WHY TAIWAN IS NOT HONG KONG: A REVIEW OF THE PRC’S “ONE COUNTRY TWO SYSTEMS” MODEL FOR REUNIFICATION WITH TAIWAN, at 503-4, 6 Pac.

C. Legal Analysis of Taiwan's Status

Given the fact that such instruments as the Cairo Declaration and the Potsdam Proclamation are only the form of joint declarations to express the Allied Powers' common foreign policy, unlike treaties which have a binding effect on parties, it is clear that both of the two documents have no binding effect under international law. Thus, we may say that the two declarations have no legal authority to dispose of territory of a sovereign country like Japan, nor did the Allied Powers have the right to enforce such a transfer.

§ 3-24 The Status of the 1943 Cairo Declaration & the 1945 Potsdam Proclamation

The 1943 Cairo Declaration and the 1945 Potsdam Proclamation served as a basis for Nationalist China to take over Taiwan after Japan's surrender in the second World War. As mentioned above by Mr. John Foster Dulles (the former U.S. Secretary of State), Mr. Anthony Eden (the former British Foreign Secretary), and Mr. Georges Pompidou (the former French Premier), the occupation of Taiwan by China was only on behalf of the Allied Powers, not for the exercise of China's sovereignty. This is because Japan had not formally and legally renounced its authority over Taiwan until 1951 while concluding the San Francisco Peace Treaty with the Allied Powers. This is also because the 1952 Peace Treaty did not determine the future of Taiwan, rather, it

only indicated the term that Japan formally gave up its sovereignty over Taiwan.

§ 3-25 An Occupying Power

At this point, during the period between 1945 and 1951, Nationalist China was only an Occupying Power in Taiwan, pending a postwar settlement which meant that it must abide by “the 1907 Hague Regulations on Land Warfare” and “the 1949 Geneva Conventions on Protection of Civilians” to maintain the public order and safety of Taiwan without any change in the status of Taiwan.⁴⁵⁹ That is, after Japan formally renounced all its rights, title and claim to Taiwan under the 1952 Treaty of Peace with Japan, the future of Taiwan would be decided at an opportune time in accordance with the principles of the UN Charter, notably the principles of self-determination of people and non-use of force in settling territorial or other disputes. This is a situation involving the international legal principle of self-determination that cannot be excluded from the jurisdiction of the United Nations by a claim of domestic jurisdiction. As such, international customary law is binding on all states regardless of consent. In any event, states have bound themselves under the Charter to respect this principle.⁴⁶⁰

⁴⁵⁹ For a detailed discussion on the rights and duties of the Occupying Power, see Lilian C. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, at 246-57, (Manchester University Press, 1998).

⁴⁶⁰ As enshrined in the concept of Article 1(4) of Additional Protocol I to the 1949 Geneva Conventions, such conflicts with respect to peoples engaged in resisting the suppressing of their right of self-determination are regarded as international conflicts. See Eric Ting-lun Huang, *THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION*, 14 N.Y. Int'l L. Rev. 167, 201(2001).

Indeed, this was such an opportunity in 1971 when the United States proposed a compromise to resolve the Chinese representation question in the UN. Under this proposed formula, the PRC would have taken over China's seat in the Security Council, and the two Chinas would have been represented in the General Assembly as separate states in the UN. However, it was unsuccessful because both Nationalist China and Communist China asserted that there was only one China, and that it included Taiwan as well as the mainland.⁴⁶¹

§ 3-26 The 1951 San Francisco Peace Treaty & the 1952 Japan-ROC Peace Treaty

Regardless of the issue of Taiwan's undetermined status, Cold War politics, especially the outbreak of the Korean War in 1950, made it difficult for the non-communist bloc of western states to abandon Nationalist China in Taiwan. Rather, they upheld the government of Taiwan effectively and supported its claim as China's sole legitimate government in the world. By this logic, the Treaty of Peace between the ROC and Japan, that referred to the terms in the 1951 Peace Treaty, was signed in 1952 (hereinafter "the 1952 Peace Treaty").⁴⁶² In spite of no specific provision for the transfer of Taiwan to the ROC government, it is beyond any doubt that, with the entry into force of the 1952 Peace treaty, by recognizing that Japan had abandoned

⁴⁶¹ See Kirgis, *INTERNATIONAL ORGANIZATIONS AND SELECTED DOCUMENTS*, 180-81 (2nd ed. 1993); also see generally Lung-chu Chen, *TAIWAN'S CURRENT INTERNATIONAL LEGAL STATUS*, 32 *New Eng. L. Rev.* 675(1998).

⁴⁶² See Treaty of Peace between the ROC and Japan, Apr. 28, 1952, 138 U.N.T.S. 3.

Formosa, the ROC acquired the title to Taiwan and the establishment of permanent sovereignty over Taiwan. This is because the ROC exceeds all the requirements of international law for the acquisition and maintenance of territorial title either by way of occupation or prescription.⁴⁶³

§ 3-27 The Case of Lai-Chin-Jung-Yi

After its renouncement of its sovereignty over Taiwan in the 1951 San Francisco Peace Treaty and the 1952 Japan-ROC Peace Treaty, Japan took no-committed position on the issue of Taiwan's sovereignty. Instead, it just stated that Japan "understands and respects" the PRC position.⁴⁶⁴ This view has been firmly upheld by Japanese judicial opinions as in the case of Lai-Chin-Jung-Yi, for example. In 1956, the Supreme Court of Japan decided that:

[T]he determination as to whether the parties have lost the Japanese nationality they had once held should be made on the basis of the Formosan Register of Personal Status Established for the Formosans as a special category, separately from the Family Register of Japan, ever since the establishment of Japanese

⁴⁶³ See generally Hungdah Chiu, THE ONE CHINA POLICY AND TAIWAN'S INTERNATIONAL STATUS, Vol. 52, No. 2, the Law Monthly (Taipei, 2000).

⁴⁶⁴ Dr. Takakazu Kuriyama suggested in his essay, entitled "SOME LEGAL ASPECTS OF THE JAPAN-CHINA JOINT COMMUNIQUE (17 Japanese Annual of Int'l L. 42)," that "[J]apan is unable to pronounce independently on the question as to whether or not Taiwan is part of China, it is perfectly consistent with the past history as well within the Peace Treaty for Japan to take the position that Taiwan should be returned to China as intended by Cairo and Potsdam Declaration." Cited in Tzu-Wen Lee, THE INTERNATIONAL LEGAL STATUS OF THE ROC ON TAIWAN, 1 UCLA J. Int'l L. & Foreign Aff. 351(1996).

*Sovereignty over Formosa. It is therefore proper to understand that those who held such personal status in the Register referred to above have lost Japanese nationality and acquired the nationality of the Republic of China with the establishment of permanent sovereignty of the Republic of China, i.e., with the entry into force of the Peace Treaty in 1952 when the de jure change of sovereignty over that territory.*⁴⁶⁵

§ 3-28 The Case of Maersk Dubai

Notably, since the PRC was established in 1949, it has never exercised control over Taiwan for a single day. In this sense, without actual possession or control over Taiwan, the PRC cannot assert jurisdiction over Taiwan, such as in the 1996 Maersk Dubai case.⁴⁶⁶ As Dr. Angeline G. Chen noted:

⁴⁶⁵See Material on Success of States, UN Doc. ST/LEG/SER.B/14(N.Y./U.N., 1967), cited in supra note 102, Hungdah Chiu, THE ONE CHINA POLICY AND TAIWAN'S INTERNATIONAL STATUS.

⁴⁶⁶See *State of Romania v. Cheng*, (1997), N.S.R.2nd 13, 45 (Can.). The Maersk Dubai case was cited in Elissa Steglich, HIDING IN THE HULLS: ATTACKING THE PRACTICE OF HIGH SEAS MURDER OF STOWAWAYS THROUGH EXPANDED CRIMINAL JURISDICTION, 78 Tex. L. Rev. 1323(2000); cited also in Moira McConnell, "FORWARD THIS CARGO TO TAIWAN": CANADIAN EXTRADITION LAW AND RELATING TO CRIME ON THE HIGH SEAS, 8 Crim. L.F. 335(1997); cited also in supra note 47, Angeline G. Chen, TAIWAN'S INTERNATIONAL PERSONALITY: CROSSING THE RIVER BY FEELING THE STONES. In early 1996, six Taiwanese sailors from the merchant container ship Maersk Dubai were arrested in Nova Scotia Canada. They - all officers - were accused of murdering three Romanian stowaways on the high seas. This incident became the focal point of a diplomatic tussle between Canada, Romania, China, and Taiwan over who had jurisdiction over the matter. Canada initially sought to extradite those suspects to Romania, with which it has an extradition treaty. Taiwan, however, opposed the extradition attempts and offered instead to prosecute them in Taipei. Meanwhile, the PRC attempted to intervene, claiming sovereignty over the suspects and the case because Taiwan is part of China and is an integral part of China's territory and thus emphasize that Taiwan has no part to play without jurisdiction. The PRC insisted that extradition could take place only between two sovereign states, not "between a province of a country and another country." Despite China's position, the Nova Scotia Supreme Court decided to return those officers to Taiwan to stand trial there. Taiwan welcomed the decision by saying that "the decision not only complies with international law and practice, but also shows Canada's respect for our judicial system."

The Maersk Dubai case illustrates the ambiguity created by Taiwan's indeterminate status within the international community. Nevertheless, the statements issued by the Chinese officials are accurate: under international law, one sovereign state cannot extradite an individual to anything other than another sovereign state. If Taiwan did not hold the attributes of a nation-state independent and apart from China, the officers could not have been released from the Canada courts to stand trial in Taiwan.⁴⁶⁷

Indeed, what Dr. Angeline suggested resulted from the developments in customary international law that bears directly on territorial sovereignty. Thus, even though international recognition of the PRC and many countries have “acknowledged,” “understood,” or “noticed” China’s position that Taiwan is an integral part of China, it cannot be concluded that legal recognition of Chinese sovereignty or that the PRC’s jurisdiction over Taiwan has been conferred. At this point, it is notable that conflicts of territory are inevitably matters of international concern, not just a domestic issue.

Although the international status of Taiwan would be derived from the situation of a choice between the ROC and the PRC, as mentioned above, recognition itself is

⁴⁶⁷ See id.

considered more to be a matter of political decision on the part of recognizing States than to be constituted of the government or State in question. However, it is the common consent of the civilized States that a State is and becomes an international personality through recognition.⁴⁶⁸ In this regard, self-recognition is critical to Taiwan.

§ 3-29 New Claims of Territorial Sovereignty

As enshrined in the ROC constitution, the boundaries of the ROC's territory are defined to be "the country's existing territory."⁴⁶⁹ The vagueness and absurdity of this definition are self-evident. In order to bring the legal concept into line with current reality that mainland China is an area under control by Communist China, rather than the government of Taiwan, the ROC has redefined the original boundaries of the ROC's territorial claims as only the total area of the Taiwan Islands (including Pescadores, Kinmen, and Matsu), and recognized that the PRC is the legitimate government of mainland China in 1991. In 1994, Taiwan officially announced that it would no longer compete with the PRC for the right to represent China in international society. Moreover, in response to a question during an interview by German journalists in 1999, Taiwan President Lee made an unprecedented remark that the relations across Taiwan Strait should be "State-to-State relations" or at least

⁴⁶⁸ See supra note 405, L. Oppenheim, *INTERNATIONAL LAW*, at 125; see also Huang-ch'ih Chiang, *INTERNATIONAL LAW AND TAIWAN*, at 99, (Taipei, 2000).

"special State-to-State relations."⁴⁷⁰ Notably, these new claims of territorial sovereignty are good circumstantial evidence to prove that the government of Taiwan is fully aware of self-recognition. In fact, such an official declaration can be deemed as a declaration of the establishment of a state.⁴⁷¹ For the purpose of this point, under the concept of recognition of governments, if the ROC continues to claim to represent the State of China, then it would be impossible for Taiwan to gain formal recognition from a majority of the international community. This is because it becomes only an issue of choosing the government to represent the State of China, and thus the PRC, instead of the ROC, should be the one to survive.

§ 3-30 Self-Governance and People's Sovereignty

The effort of impelling political reform has transformed Taiwan into profound self-governance. Since the 1970s, an increasing political consciousness of self-governance by the indigenous population of Taiwan has led to the commencement of democratic reform in Taiwan. As a result, martial law was abolished in 1978 and therefore, the people of Taiwan are able to present a strong

⁴⁶⁹ See Constitution of the Republic of China, art. 4.

⁴⁷⁰ In response to a question during an interview with a German radio station, Deutsche Welle, on July 9 of 1999 that "the Beijing government views Taiwan as a renegade province," President Lee remarked: "the cross-strait relationship is a "special state-to-state relationship." See The Position Paper To Elaborate On The Controversial State-To-State Remarks Made By President Lee Teng-Hui To Define Relations Between Taiwan And Mainland China, issued by the Mainland Affairs Council, ROC, on Aug. 1 of 1999. After this unpredictable statement, Mr. Lee was regarded as a naked separatist by moving towards creating "two Chinas" or "one China, one Taiwan."

⁴⁷¹ As Professor D.P. O'Connell noted in "FORMOSA AND THE CHINESE RECOGNITION PROBLEM (50 AM. J. Int'l L. 405, 1956)," that "a government is only recognized for what it claims to be." By this logic, statehood is a claim of right and in the absence of any claim to secession, the status of Taiwan can only be part of the State of China under separate administration.

desire to push the government toward "Taiwanization" in a democratic manner. The notable example is that Taiwan has peacefully held its direct election of its President since 1996. Full-fledged democratic governance in Taiwan is regarded as a universal principle in the context of internal self-determination.⁴⁷² Moreover, Taiwan's political achievement has earned it more respect from the international community. This is because the people of Taiwan have successfully exercised their right of internal self-determination and transformed Taiwan from a dictatorial regime into a representative sovereign government.

Taiwan has a stable population of over twenty-two million people. The government of Taiwan has been in effective control over an area of roughly 36,000 square miles, defined by Taiwan and its outlying islands of the Pescadores, Kinmen and Matsu since 1945, when the territories were controlled by the ROC at the end of the World War II. In addition, Taiwan has its own independent and representative government (the ROC) which was established in 1912. Despite the fact that many states do not recognize Taiwan, the government of Taiwan presents itself to enter into treaties in bilateral and multilateral settings with these states.

⁴⁷² See Eric Ting-lun Huang, THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION, 14 N.Y. Int'l L. Rev. 167, 211-2 (stating that since a people's domestic right to self-determination is regarded as a universal principle in the context of internal self-determination, the fact that Taiwan has evolved into full-fledged democratic governance by Taiwanization and Democratization, therefore makes it clear that the people of Taiwan have successfully exercised their right of internal self-determination and transformed Taiwan from a dictatorial regime to a representative government of internal and external sovereignty).

§ 3-31 Qualifying the Objective Criteria for Statehood

There is no doubt that Taiwan meets the objective criteria for statehood, namely, a permanent population, a defined territory, a functioning government that is in effective control of that territory, and the capacity to engage in international relations with other states.⁴⁷³ Although a state can withhold recognition of the entity's government, interaction with it creates rights and obligations for that unrecognized entity.

For this practical reason, countries treat Taiwan as a de facto state for purposes of enforcing Taiwan's rights and duties under international law. Therefore, numerous states have entered into commercial treaties with Taiwan despite an absence of diplomatic relations. These agreements, such as the airspace agreements, illustrate the legal effect of sovereignty that implies the recognition of Taiwan's international status. This is because, under the Convention on International Civil Aviation, "*every state has complete and exclusive sovereignty over that airspace above its territory.*"⁴⁷⁴

§ 3-32 The Convention on International Civil Aviation

When states conclude agreements with Taiwan, it is for the purpose of direct flights, instead of seeking the permission of the PRC. This accurately indicates that

⁴⁷³ See CONVENTION ON THE RIGHTS AND DUTIES OF STATES, art. 1, 49 Stat. 3097, 3100, T.S. No. 881 (1933).

⁴⁷⁴ See CONVENTION ON INTERNATIONAL CIVIL AVIATION, art. 1, 61 Stat. 1180, 15 U.N.T.S. 259.

they recognize the complete and exclusive sovereignty of the ROC over Taiwan's airspace. It is strong evidence to show intent to recognize Taiwan as a state.

§ 3-33 The equivalent of official relations between US and Taiwan

An example disregarding the legal consequence of non-recognition is the Taiwan Relations Act of 1979 (hereinafter "TRA"), ratified by the US, which rendered the US-Taiwan relations nearly the equivalent of official relations soon after the time when the US switched its formal recognition from the ROC to the PRC on January 1, 1979.⁴⁷⁵ As Prof. Dr. Hungdah Chiu observed: "*the effect of this legislation is to treat Taiwan as a state and its governing authorities there as a government, despite the lack of formal recognition for the ROC on Taiwan.*"⁴⁷⁶

With the lack of effective control, the PRC's current claim to be the legitimate government of Taiwan is much more suspect in both international law and states practices than the ROC's past claim to be the legitimate government of the Chinese mainland. Although the majority of the people of Taiwan still appear to favor eventual reunification with mainland China, the people of Taiwan desire a continuation of the status quo under the principle of sovereign equality. This principle of sovereign equality cannot be changed with time and continued progress in cross-strait interactions between Taiwan and China.

⁴⁷⁵ See TAIWAN RELATIONS ACT, Pub. L. No. 96-8, 93 Stat. 14(1979).

⁴⁷⁶ See generally Hungdah Chiu, THE INTERNATIONAL LAW OF RECOGNITION AND THE

V. COMMENTARY ON “ONE COUNTRY TWO SYSTEMS” MODEL FOR

REUNIFICATION POLICY

§ 3-34 The Special Administrative Region

Since 1997, Hong Kong has become the Special Administrative Region (hereinafter “Hong Kong SAR” or “HKSAR”) of the People’s Republic of China. After its transfer of full sovereignty over Hong Kong⁴⁷⁷ and Macau,⁴⁷⁸ the PRC faces one remaining obstacle to its goal of national reunification, what is called the “Taiwan issue.” Since the PRC links the resolution of Hong Kong and the Taiwan issue together, the policy for the PRC to achieve peaceful reunification of the Chinese mainland and Taiwan would be similar logic to that applied in Hong Kong, which is well known as “one country two systems”(Hong Kong model).⁴⁷⁹ Thus, the success or failure of “one country two systems” is critical to the PRC’s reputation and its hope

STATUS OF THE ROC, 3 J. Chinese L. 193(1989).

⁴⁷⁷ See Dec. 19, 1984 “JOINT DECLARATION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA ON THE QUESTION OF HONG KONG”, U.K.– P.R.C., U.N.T.S. No.26 (1984). In the 1800s, the United Kingdom defeated China in the Opium War and China consequently relinquished Hong Kong to the British. Since then, Hong Kong had been under the control of the United Kingdom until July 1, 1997. The 1984 joint declaration outlines the parties’ plans for Hong Kong. In addition, there are three annexes. Annex 1 contains 14 paragraphs specifying China’s basic policy with respect to Hong Kong; annex 2 establishes a Sino-British liaison group to supervise transfer of sovereignty; annex 3 describes treatment of land leases in Hong Kong after 1997.

⁴⁷⁸ In 1887, the Portuguese agreed to rule over Macao from Chinese Manchu Dynasty under the Sino-Portuguese Treaty of Reconciliation and Trade. In April 1987, China and Portugal signed the Sino-Portuguese Joint Declaration concluding that Macao is Chinese territory and the Chinese government would resume the exercise of sovereignty over it from Dec. 20, 1999. For details, see He Qing, DENG XIAOPING AND THE RETURN OF MACAO; also see Ren Min, MOCAO IN HISTORY OF CHINESE TERRITORY, Beijing Review, Vol.42 No.51, Beijing, Dec.20, 1999.

⁴⁷⁹ So far, the “one country two systems” model has been implemented in relations between Beijing as well as Hong Kong and Macau, by enacting the *“Basic law of the Hong Kong Special Administrative*

of creating a model to settle the Taiwan issue. In this respect, Taiwan would, like Hong Kong, become a "special administrative region" under the authority of the PRC central government.⁴⁸⁰

Although the PRC does not provide clear details of how this Hong Kong model will work in practice in the case of Taiwan, it is understood that the result of negotiation between the PRC and the United Kingdom regarding the future of Hong Kong led the PRC to adopt the "one country two systems" principle as the basis for regulating the relations between Hong Kong and the PRC central government following its resumption of sovereignty.⁴⁸¹ Accordingly, the PRC adopted the Basic Law of Hong Kong (hereinafter "Basic Law")⁴⁸² to apply in Hong Kong when Hong Kong returned to China. The purpose of the Basic Law is to further guarantee autonomy and capitalism in Hong Kong after 1997.⁴⁸³

Region" and the "Basic law of the Macau Special Administrative Region."

⁴⁸⁰ The "one country two systems" model, as a proposed framework for the unification of Taiwan was recently reaffirmed in September 1997 of PRC President Jiang Zemin at the 15th Party Congress, at which he highlighted: "The concept of "one country two systems" is an important component of Deng Xiaoping theory. The basic idea is that on the premise of national reunification, the main part of China will stick to the socialist system while Taiwan, Hong Kong and Macau will retain the current capitalist system and way of life for a long time to come. This concept is the basic policy for promoting the great cause of the peaceful reunification of the Motherland, because it not only embodies the principled position of achieving national reunification and safeguarding state sovereignty, but also embodies a high degree of flexibility. The adoption of the policy of 'one country, two systems' is in the interest of the reunification of the Motherland and the reunification of the Chinese nation and conducive to world peace and development." For "Full Text of Jiang Zemin's Report at 15th Party Congress", see XINHUA NEWS AGENCY, Sept. 21, 1997.

⁴⁸¹ See Brian Tamanaha, POST-1997 HONG KONG: A COMPARATIVE STUDY OF THE MEANING OF HIGH DEGREE OF AUTONOMY, 20 Cal. W. Int'l L.J. 41(1989).

⁴⁸² The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, was passed by the Seventh National People's Congress of the People's Republic of China at its Third Session on Apr. 4, 1990.

⁴⁸³ See Patricia Homan Palumbo, ANALYSIS OF THE SINO-BRITISH JOINT DECLARATION AND THE BASIC LAW OF HONG KONG: WHAT DO THEY GUARANTEE THE PEOPLE OF HONG KONG AFTER 1997, 6 Conn. J. Int'l L. 667 (1991).

§ 3-35 The Basic Law of Hong Kong & High Degree of Autonomy

Under the Basic Law, it would be permitted to enjoy a “high degree of autonomy” in executive, legislative, and judicial matters, and its capitalist way of life would be preserved for an indefinite period.⁴⁸⁴ Even, in the view of the 1993 White Paper, the central feature of the “one country two systems” model for Taiwan suggested that the Taiwanese people would enjoy greater autonomy than the people of Hong Kong in that Taiwan would retain its military, parties and political system after reunification.⁴⁸⁵ The PRC has repeatedly stated that the basic principles of the Hong Kong model are applicable to Taiwan since the fundamental concepts would be the same as in the case of Hong Kong and, therefore, the Hong Kong experience of “one country two systems” model is viewed as having great significance for Taiwan. As the Hong Kong model is based on the premise that Hong Kong is part of the PRC, at this point, an analysis of the Hong Kong model thus would indicate some important differences between the application of this model to Taiwan and Hong Kong.

Generally speaking, the original logic for applying the Hong Kong model to the case of Taiwan comes from the 1993 White Paper. The PRC claims that there is only one China, of which Taiwan is part, and the central government is in Beijing. That

⁴⁸⁴ According to the 1987 Sino-British Joint Declaration, the people of Hong Kong have been promised both autonomy and capitalism for fifty years by Chinese and British governments.

⁴⁸⁵ George E. Edwards, APPLICABILITY OF THE “ONE COUNTRY TWO SYSTEMS” HONG KONG MODEL TO TAIWAN: WILL HONG KONG’S POST-REVERSION AUTONOMY, ACCOUNTABILITY, AND HUMAN RIGHTS RECORD DISCOURAGE TAIWAN’S

means the authorities in Taipei, therefore, are not a legitimate government of China; rather, the authorities in Beijing are the sole legitimate government of China. Although the Hong Kong model has been implemented first in Hong Kong, the argument here is that the imposition of this “one country two systems” model on Taiwan would radically reduce the degree of autonomy and accountability which currently exists in Taiwan’s political system.⁴⁸⁶ This is because the authorities in Taiwan, which describe themselves as the government of the Republic of China, have continuously been a sovereign state since 1912.⁴⁸⁷ Regarding the Hong Kong model, it would pull Taiwan back from the proximity of independence and might then take a significant amount of time to re-establish the status quo if Taiwan found this arrangement of “one country two systems” unacceptable, especially, since China, at present, is divided into two areas under two political entities, the government of the ROC and the government of the PRC, each having exclusive rights in the territory under its control.

§ 3-36 Not a Political System of Self-Governance

REUNIFICATION WITH THE PEOPLE’S REPUBLIC OF CHINA, 32 New Eng. L. Rev. 751 (1998).

⁴⁸⁶ Officially the authorities in Taipei has consistently rejected the Hong Kong Model and argued that the Hong Kong Model would bring about the loss of the way of life and basic human rights the Taiwanese presently enjoy and eventually force Taiwan to abandon its liberal democratic system of government in favor of the PRC form of socialism. In this respect, the authorities in Taipei regard this model as “the biggest obstacle to reunification” which is “objectively unfeasible and subjectively absolutely unacceptable.” For detail, see OUR VIEWS AND STATEMENT ON MAINLAND CHINA’S WHITE PATER, Feb. 22, 2000, issued by Mainland Affairs Council of the ROC.

⁴⁸⁷ In 1644, the Manchus destroyed the Chinese *Ming Dynasty* and established the Manchu Ching Dynasty in Beijing. From then, the Manchu Ching Dynasty ruled China for 268 years until 1912 when its regime was replaced by the Republic of China, led by Sun Yat-sen.

In spite of the fact that the government system of Hong Kong was reformed during the 1980's and early 1990's, comparing it with Taiwan, the changes in Hong Kong have not been as fundamental as those in Taiwan. Since the wake of political liberation,⁴⁸⁸ the reform of the constitutional system in Taiwan has transformed Taiwan into a full-fledged democratic government. Since the elections of 1996, the President of the ROC has been directly elected by universal suffrage. The Premier, although not directly elected, is appointed by the President with the consent of the Legislative Yuan, which is also directly elected by the people of Taiwan. In contrast to the case of Taiwan, the people of Hong Kong only enjoyed a little autonomy under British rule which was a creation of the British authorities, not the people of British colonial Hong Kong.⁴⁸⁹ The People of Hong Kong were largely denied the right to exercise control over the institutions in Hong Kong and the power to determine the constitutional structure of Hong Kong. This denial culminated in the agreement of the United Kingdom to return Hong Kong to China without first obtaining the consent of

⁴⁸⁸ Before the authorities in Taipei conducted the political reforms in 1980's, there were many similarities between Taiwan during martial law period and Hong Kong during its period as a British colony. Although, unlike Hong Kong that was ruled as a colony, Taiwan was regarded as a part of China, but in many ways, the people of Taiwan were treated as though they had been colonized.

⁴⁸⁹ The formal constitution of Hong Kong consisted of Letters Patent, supplemented by Royal Instructions, which was passed by exercise of the prerogative power of the Crown to establish a government of British colonial Hong Kong, these documents could be amended at any time by the Crown without reference to the wishes of the people of Hong Kong. Amendments to the formal constitution of Hong Kong may be effected by the Parliament of the United Kingdom, but not by elected representatives of Hong Kong. The fundamental purpose of the Hong Kong formal constitution was to announce and preserve control over British colony by metropolitan power. For detail see generally Sean Cooney, WHY TAIWAN IS NOT HONG KONG: A REVIEW OF THE PRC'S "ONE COUNTRY TWO SYSTEMS" MODEL FOR REUNIFICATION WITH TAIWAN, 6 Pac. Rim L. & Pol'y J. 497(1997).

the people of Hong Kong to that decision, or to the terms upon which the return would occur.⁴⁹⁰ It is believed that Hong Kong has never experienced a system of self-governance. What is so clear in this connection is that the formal constitution of Taiwan has so little in common with that of Hong Kong.

Notably, the authorities of both the ROC and the PRC officially consider Taiwan to be part of one-China; the two sides only disagree on who should control this unified China and on what political principle it should be unified. As a matter of international law, this concept of one-China is essentially a modern notion. However, the "one country two systems" policy has been predicated on the subordination of the people of Taiwan to the central government of the PRC as is the case with Hong Kong. The relationship between the people of Taiwan and their government can no longer be characterized as subordination. The continuity in the nature of government achieved in Hong Kong is not now possible in Taiwan.

As mentioned above, in contrast to the rest of China, the Hong Kong model practices a capitalist, rather than a socialist economic system. Under the Basic Law, the people of Hong Kong can exercise a high degree of autonomy including executive,

⁴⁹⁰ As the treaties under which the United Kingdom ruled Hong Kong were certainly as valid as every treaty under which the United Kingdom ruled states in Africa or Asia, some scholars have thus argued that the people of Hong Kong, as a "distinct community" and a "distinct people," should enjoy the right to self-determination. Regardless of all the debate as to whether or not the people of Hong Kong should have a right to self-determination, for approximately 150 years until 1997, Hong Kong was a Crown Colony of the United Kingdom, and any attempts by the people of Hong Kong to assert a claim for self-determination were abruptly quashed by both the United Kingdom and China, each of which selfishly endeavored to enjoy their respective period of control over Hong Kong. See Nihal Jayawickrama, *THE RIGHT OF SELF-DETERMINATION IN HONG KONG'S BASIC LAW*:

legislative and independent judicial power. That means the region of Hong Kong has its own currency, is a separate customs territory, issues its own passports, maintains its own education system and so forth. Still, it can retain its economic and cultural relations with foreign countries under the name "Hong Kong, China." If these provisions were applied to Taiwan, its people could clearly, on one level, continue to enjoy control over many aspects of their social, economic, legal and political life. Reunification on those terms might in turn lead to relatively little surface change. Yet, other provisions in the Basic Law indicate that, in constitutional terms, reunification on the PRC's terms would significantly reduce Taiwan's state sovereignty. For example, Taiwan cannot represent itself on an equal footing with the PRC in international affairs.

Article 68 of the Basic Law provides guidelines for elections to the Hong Kong Special Administrative Region Legislative Council, as follows:⁴⁹¹

The Legislative Council of the HKSAR shall be constituted by election. The method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The

PROBLEMS AND PROSPECTS, (Peter Wesley-Smith ed., 1990).

⁴⁹¹ See generally Patricia Homan Palumbo, ANALYSIS OF THE SINO-BRITISH JOINT DECLARATION AND THE BASIC LAW OF HONG KONG: WHAT DO THEY GUARANTEE THE PEOPLE OF HONG KONG AFTER 1997, 6 Conn. J. Int'l L. 667 (1991).

ultimate aim is the election of all the members of the Legislative Council by universal suffrage. The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II, which provides "an electorate formula for the first Legislative Council of the HKSAR. This formula, which is not dissimilar to that used in the 1995 Legislative Council elections, provides that the Legislative Council shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies."

§ 3-37 A Local Government

Thus, it is understood that the legislative powers, even the executive powers, in Hong Kong are not fully and directly accountable to the people of Hong Kong, nor is the Chief Executive directly elected by the people of Hong Kong.⁴⁹² This is because, without directly and fully reflecting the will of the people of Hong Kong, the Basic Law does not promise immediate universal suffrage by using the proportional

⁴⁹² See generally George E. Edwards, APPLICABILITY OF THE "ONE COUNTRY TWO SYSTEMS" HONG KONG MODEL TO TAIWAN: WILL HONG KONG'S POST-REVERSION AUTONOMY, ACCOUNTABILITY, AND HUMAN RIGHTS RECORD DISCOURAGE TAIWAN'S REUNIFICATION WITH THE PEOPLE'S REPUBLIC OF CHINA, 32 New Eng. L. Rev. 751 (1998). Dr. George E. Edwards argued that what the Hong Kong model provides was not really a high degree of autonomy, because this system is not accountable to the people of Hong Kong, and he believed that "accountability" should be defined as the extent to which Hong Kong government officials and Legislative Council were selected by, responsible to, and answerable to the people of Hong Kong.

representation list system, but decreases Hong Kong's autonomy; universal suffrage is only the "ultimate aim." It is clear that the right of the people of Hong Kong to universal suffrage is in accord with both international covenants on human rights (the Covenant on Civil and Political Rights; and the Covenant on Economic, Social and Cultural Rights),⁴⁹³ which apply to Hong Kong by virtue of having been ratified by the United Kingdom and extended to protect the people of Hong Kong in 1976. In this respect, truly, the fundamental concept of the Basic Law is not a state in a federal system, but rather a "local government" directly under the authority of the PRC.

Hence, under the similar logic of the Basic Law system, Taiwan clearly would have no sovereignty of its own and thus, the people of Taiwan would be subject to the PRC rule whether or not they so choose. As a result, neither the Basic Law nor any other PRC legislation gives the people of Taiwan the right to secede should they express such a desire, for instance, through a referendum which is a device to make important decisions by the people. Simultaneously, it is difficult to see how the PRC government could allow a situation to occur in which the head of the Taiwanese administration is a person who was both popularly elected and actively denounced communism and the central government.⁴⁹⁴

⁴⁹³See International Covenant on Civil and Political Rights, 993 U.N.T.S. 171(1966); See International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3(1966).

⁴⁹⁴ Article 23 of the Basic Law of Hong Kong provides that the Legislative Council must enact laws under the situation "to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from

§ 3-38 The Sino-British Joint Declaration

It is not to mention that the Hong Kong constitutional changes required for the Basic Law to become operational were made by the British and PRC governments rather than by the consent of the people of Hong Kong. At the very least, the position of Hong Kong is based on the Sino-British Joint Declaration which is an international agreement similar to a treaty under international law and should be accorded the same treatment as a treaty. That is, it has the binding effect on China under international law.⁴⁹⁵ By contrast, in the case of Taiwan, there would be no international restraint on the PRC amending a Basic Law of Taiwan. Accordingly, if a Basic Law of Taiwan is to be implemented in accordance with the above existing procedures in Hong Kong, then, to be sure, it is feasible that the ROC Constitution would be altered in order to maintain a unitary system under the concept of the “one country two systems” model. By this logic, to surrender entire control over the political structure of Taiwan to the PRC is definitively the only result without any consideration regarding the will of the people of Taiwan. Obviously, Taiwan will never settle for anything less than full democracy.

conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.” For THE BASIC LAW OF HONG KONG, see the Government Information Centre of HK Special Administrative Region of the PRC. (www.info.gov.hk).

⁴⁹⁵ In 1984, China and the United Kingdom signed the Joint Declaration on the Question of Hong Kong, a treaty ratified in 1985 by both parties and registered with the United Nations. For detail, see Paul Vitrano, HONG KONG 1997: CAN THE PEOPLE’S REPUBLIC OF CHINA BE COMPELLED TO ABIDE BY THE JOINT DECLARATION, 28 Geo. Wash. J. Int’l & Econ. 445 (1995).

As discussed above, a fundamental reason why the “one country two systems” model cannot feasibly be implemented in Taiwan has been identified. In a similar vein, it will not be a feasible plan for the peaceful reunification of China. This is because not only was the model originally designed to deal with a colonial regime like Hong Kong, but also transfers ultimate state sovereignty over constitutional matters to the PRC that may deny the right that is already being enjoyed by the people of Taiwan to conclusively determine their own future. In the discussion of the Sino-British Joint Declaration above, it must be kept in mind that the announced PRC policy to establish such a special administrative region is only “when necessary” implying that the special administrative region in Hong Kong presumably will be abolished when the situation is no longer needed, such as in the case of the 1949 Shanghai event.⁴⁹⁶

Also, another notable example is Tibet, which in the early 1950s was promised autonomy in return for its “peaceful liberation.” By the mid-1950s, however, the PRC broke its promise of just deploying its Chinese troops at the border and used military force to occupy Tibet that led the Tibetan independent militia eventually to be disbanded under the direction of the Communist Chinese Army.

There is no indication under the joint declaration showing who, after 50 years, is

⁴⁹⁶ In 1949, when the PRC was being established as a Socialist state in China, the Shanghai Capitalists were promised that their forms of business would be tolerated under the new Socialist state. In utter disregard of the above promise, those Shanghai Capitalists and their businesses, within five years, were effectively and, in some cases, personally wiped out. This experience is still very vivid in the minds of people in both Hong Kong and Taiwan.

to make the decision. On this point, this leaves open the question of what is there to guarantee the continued enjoyment of the special privileges promised by the PRC.

§ 3-39 Taiwan's Ultimate State Sovereignty vs. Hong Kong's High Degree of
Autonomy

In comparison with the current position of Taiwan, where the people of Taiwan exercise final control over their own government exclusively, the model of "one country two systems" as reflected in the Basic Law of Hong Kong is not appropriate for Taiwan. After all, the Hong Kong model is to promote, not independence, but what is called a "high degree of autonomy," which is to function "directly under the authority" of the Central Government of the PRC. This shows that the Hong Kong model represents a situation where unification under the concept of "one country two systems" is not applicable to Taiwan.

One major benefit is that as a result of the basic principle of "one country two systems," the smooth return of Hong Kong and the maintenance of its long-term prosperity and stability will undoubtedly create favorable conditions for the settlement of the Taiwan issue on both sides of the Taiwan Strait. It is difficult to conclude whether the "one country two systems" model has been a success in Hong Kong. However, it is the key for the people of Taiwan to take the Hong Kong reversion as a case to examine the commitments of the PRC. Despite the fact that history gives us

several other negative explanations, this experience of the Hong Kong model may make the Taiwanese people very reluctant to trust the Communists on the mainland of China again. If that is the case, this reflects something meaningful not only to the people of Hong Kong, but to the people of Taiwan in their future as well.

VI. CONCLUSION

The government of Taiwan, since its break from mainland China in 1949, has existed functionally as an independent sovereign state. It is enshrined in the principle of “people’s sovereignty” described earlier that state sovereignty itself is a collective right that can only be possessed and exercised by the entire population of the land constituting the territory of that State. Successful self-governance in Taiwan represents the concept that the sovereignty of Taiwan belongs to the Taiwanese people.⁴⁹⁷ This implies the common will of the people of Taiwan to establish a state. With a population of over twenty-two million (more people than over three-quarters of the UN member states), not only has Taiwan the political will of its people to sustain its sovereignty, but also, judged by the international legal concepts of state sovereignty and statehood, it possesses virtually all the elements of a defined State

⁴⁹⁷ See generally Paul R. Williams, CREATING INTERNATIONAL SPACE FOR TAIWAN: THE LAW AND POLITICS OF RECOGNITION, 32 New Eng. L. Rev. 801(1998). Professor Paul noted that “[I]n the case of Bosnia in particular, the US or the EU required that Bosnia hold a referendum before it would consider granting Bosnia recognition as a state. Taiwan might be able to successfully rely upon this precedent to assert that any declaration of independence would not be an affront to the

and qualifies as a sovereign state legally.

§ 3-40 The Duty of According Recognition to Taiwan

According to the legal doctrine and states practices mentioned above, although recognition is used in different ways, to qualify as a state, the recognition by other states is not a requirement under customary international law. More importantly, the denial of recognition is not meant to effect political change but rather is the result of either (1) the observation that the putative government simply does not control the state; or (2) a government comes to power by means of violating international law. i.e., once a political entity has met the criteria which are that it posses a territory and a population that is subject to the control of the authority which is sovereign, it is a duty of the international community to consider that entity as meeting the first threshold for recognition. In a similar move, as a matter of the interest of international relations, Taiwan should be recognized as a state and its status should be acknowledged.

Perhaps it is too much to hope that the majority of the international community will move to consider Taiwan's entitlement to the rights and privileges of being a State and then recognize Taiwan as an independent state separated from China in the near future. This is because politically, rather than legally, most states of the world have found it difficult to consider the status of Taiwan without an eye to its bearing on

territorial integrity of China, so long as it was supported by a public referendum in Taiwan.

general relations with the PRC, despite the fact that Taiwan should be given the status it deserves. Thus, if it were not for the stated or anticipated objection of the PRC, the international community would recognize Taiwan as a state. Going by this logic, although Taiwan has been an independent state with full legal sovereignty and posed on the periphery of independence separating from China politically, its international status is much more influenced by the China-Taiwan relations than its other international relations. Obviously, not surprisingly, Taiwan's current diplomatic difficulties caused by the PRC's one-China principle are not likely to be over soon. Yet, the possibility of settlements for political sovereignty disputes between the PRC and the ROC cannot be ruled out, though such settlements may take a while before materializing.

§ 3-41 Dual Participation & Dual Recognition

Currently Taiwan is at once recognized as a state by some and not by others. That makes the integration of recognition a choice between two competing governments (the ROC and the PRC) in some important ways critical to Taiwan. Historically, by going with the mistaken assumption of having the exclusive political sovereignty over the whole of China, the ROC rejected any attempt at dual recognition or dual participation in the international community. Yet, by deciding to compete no longer with the PRC for the right to represent China, the ROC has shown

a degree of flexibility to accept the principle of “dual participation” in its efforts to join international organizations by using titles other than its official designation “Republic of China.” For example, it is called “Chinese Taipei” at the APEC Forum, “the Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” at the GATT before and the WTO now, “Taipei, China” at the Asian Bank and so forth. Simultaneously, the ROC adopts the similar logic of “dual recognition” in its relations with other countries. In spite of the enormous cost of the flexible diplomacy,⁴⁹⁸ Taiwan has been effective in maintaining its relations with numerous countries by establishing nominally private organs, which nonetheless perform the equivalent of official function and enjoy a certain degree of diplomatic privileges and immunities.⁴⁹⁹

As noted earlier, for the PRC, the “one country two systems” model (as applied to Hong Kong) could be considered a success as long as the transition of power went smoothly, the government of the Hong Kong SAR was tightly controlled, and Hong Kong’s society and economy remained stable. However, this Hong Kong model

⁴⁹⁸ See Charles R. Irish Book Review and Note THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS, 92 Am. J. Int’l L. 167, 168-9(1998). (discussing Taiwan’s use of informal diplomacy with other nations to counteract China’s efforts to isolate Taiwan, and concludes that the enormous costs of informal diplomacy has successfully effectuated and even improved Taiwan’s influence in the international community).

⁴⁹⁹ For instance, following its switch of formal recognition from the ROC to the PRC in 1972, Japan founded a semi-official organ, “the Interchange Associate,” to maintain its relations with Taiwan. Likewise, the ROC established a similar organization, “the Association of East Asian Relations,” to manage its relation with Japan. Simultaneously, the United States and the ROC adopted a similar step to the model of ROC-Japan relations by setting up “the American Institute in Taiwan” as well as “the Coordination Council for North American Affairs” to maintain their relation with each other when the US granted recognition to the PRC and, at the same time, withdrew its recognition of the ROC in 1979. Indeed, the model of either ROC-Japan relations or US-Japan relations presents a notable example that two countries can substantially maintain semi-official relations without establishing an official relationship.

would only be suitable for Taiwan if Taiwan were to abandon control over its own destiny. The reason that the Hong Kong model is not applicable to Taiwan is because of the distinct difference between Hong Kong and Taiwan both historically and geo-politically. If Taiwan is to reunify with China, it must do so under a different model perhaps under a model where Taiwan might find it possible to retain its legal sovereignty. At this point, it is certain that Hong Kong will not serve as an example for unifying Taiwan with China as the PRC hopes. Hence, the PRC now needs to take a different view. If negotiations between the two sides of the Taiwan Straits are to progress, and the PRC's stated preference for peaceful reunification remains a realistic goal, the substance of the Hong Kong model will need to be transformed.

Given the potential conflicts which may arise under a diverse economic and social system under an integrated Chinese State, more important in connection to these, are the issues of sovereignty and self-determination as perceived by both sides. This concept has come very close to be what has been termed "associated statehood" within the UN system, which is one of the options through which a people can exercise their right to self-determination.⁵⁰⁰ Another possible alternative under UN norms for the exercise of self-determination is that of complete integration with

⁵⁰⁰ The U.N. General Assembly Resolution 1514 of 1960, the Granting of independence to Colonial Countries and Peoples, provides that the state with which a territory is to become associated should respect the individuality and cultural characteristics of the territory. Associated statehood status can only be entered into as a result of free elections and must be based on the consent of the people concerned.

another state, which should be on the basis of complete equality between the peoples of the former territory and the state concerned, and again, should only come about if these criteria are met, i.e., the integrating territory should attain an advanced stage of self-government with free political institutions resulting from the freely expressed wishes of the people through elections.⁵⁰¹

§ 3-42 A Divided State

The founding of the PRC in Beijing and the relocation of the ROC to Taipei in 1949 gave the former control of the Chinese territory of the mainland area and the latter control of the Chinese territory of the Taiwan area. It is accurate that the State of China(the ROC) has been divided into two parts, ruled by separate governments with full sovereignty, rather than a succession of a State or Government. In this sense, the current position of Taiwan is part of a divided State of China similar to Korea or pre-reunification Germany.⁵⁰² It is the result of particular historical circumstances following the Chinese Civil War. As a matter of international law, divided statehood is a legal concept that can be widely recognized as “a state divided into two entities, each equipped with an operative government.”⁵⁰³ Practically, in the German and

⁵⁰¹ For details, see Kevin M. Harris, THE HONG KONG ACCORD AS A MODEL FOR DEALING WITH OTHER DISPUTED TERRITORIES, 80 Am. Soc’y Int’l L. Proc. 348(1986).

⁵⁰² West and East Germany officially united to form a single, enlarged Federal Republic of Germany in 1990, this unification occurred in accordance with the Treaty on the Establishment of German Unity of Aug. 31, 1990. See Albrecht Randelzhofer, GERMAN UNIFICATION: CONSTITUTIONAL AND INTERNATIONAL IMPLICATIONS, 13 Mich. J. Int’l L. 122(1991).

⁵⁰³ See Gerhard von Glahn, LAW AMONG NATIONS, pp. 126-7, (3d. ed. 1976).

Korean cases (Germany was divided into the Federal Republic in the West and the Democratic Republic in the East; Korea was divided into the Republic of Korea in the South and Democratic People's Republic of Korea in the North). Despite the divided statehood of the two parts being in dispute, both were admitted to the United Nations, meaning that these divided states could be recognized as independent states by the outside world without any preclusion at the same time.⁵⁰⁴ Another possible example is the People's Democratic Republic of Yemen (South Yemen) and the Yemen Arab Republic (North Yemen) before their unification in 1990.⁵⁰⁵ Given these precedents, it must at the very least be a perfectly logical step to provide a guideline in the direction that the presence of the one-China policy should not preclude the existence of Taiwan as an independent, sovereign state. That is to say, the position of the China-Taiwan ties across the Taiwan Strait should be defined as "one country on each side with its own state sovereignty."

⁵⁰⁴ Both the Federal Republic and the Democratic Republic were admitted to the United Nations in 1973, and achieved eventual reunification in 1990; both the Republic of Korea and the Democratic People's Republic of Korea were admitted to the United Nations in 1991.

⁵⁰⁵ See THE AGREEMENT ON THE ESTABLISHMENT OF THE REPUBLIC OF YEMEN, 30 I. L. M. 820, 822(1991). Before both sides of the South Yemen and the North Yemen agreed to form a

CHAPTER FOUR

TAWAIN'S STATUS IN THE UNITED NATIONS IN A CHANGING WORLD: TAIWAN'S CASE IN THE QUESTIONS OF REPRESENTATION AND MEMBERSHIP

I. INTRODUCTION

In 1945, countries from around the world came together to form the United Nations (hereinafter "UN") to give all members a voice on international issues and help in case of conflicts.⁵⁰⁶ The founders hoped that the United Nations would live up to its promise, but attaining this goal has not been easy.⁵⁰⁷

§ 4-1 The Ideal of Establishing the UN

Among the most important contributions of the UN to world problems and needs are the provision of channels for seeking consultation and the development of common interests. With many states achieving formal independence as a result of the rapid de-colonization that commenced in the 1950s leading to a significant increase in membership of the UN, demands for effective international management have arisen as a major issue in UN programs. Moreover, the collapse of the Soviet Union has deprived the world community of a counterbalancing force that was there for many decades. Hence, the changing world underscores the necessity for cooperative action

⁵⁰⁶ See Major Bialke, UNITED NATIONS PEACE OPERATIONS: APPLICABLE NORMS AND THE APPLICATION OF THE LAW OF ARMED CONFLICT, 50 A.F.L. Rev. 1, 6(2001)(Noting that following World War II, the drafters of the UN Charter presumed the victors, acting perhaps out of enlightened self-interest, would continue to cooperate with each other, in light of their recent successful joint effort). See Kimberly D. Barnes, INTERNATIONAL LAW, THE UNITED NATIONS, AND INTERVENTION IN CIVIL CONFLICTS, 19 Suffolk Transnat'l L. Rev. 117, 128(1995)(Noting that because the Charter's drafters were concerned with war as they knew it—namely international war—the United Nations primary purposes, stated in the Preamble and Article 1, focus on international, rather than international, peace and security).

⁵⁰⁷ See Thomas G. Weiss, David P. Forsythe & Roger A. Coate, THE UNITED NATIONS AND CHANGING WORLD POLITICS, Westview Press, 1997, pp.46-63(Noting that for a brief time after World War II, an improved international order seemed feasible. The Soviet Union's establishment of a Communist bloc in Eastern Europe quickly ended the big-power cooperation. With its members polarized into two camps, the UN was unable to maintain the peace and prevent conflict as was originally intended. Superpower support in any given case meant that UN conflict management was

among the UN member states in attacking the common problems of humanity which often are the issues of economic and social needs. In response to this environment, the UN must adapt to the needs of its growing modern role. This requires changes in approach to a new balance between the authority of states and the authority of the international society.

§ 4-2 Major Trend of the New World Order

Greater international dialogue and economic cooperation have become major trends of the new world order. Going by that, what we see is an increasing number of issues including environmental protection, terrorism prevention, human rights, the well-being of mankind, financial cooperation, economic development and the various aspects of democracy, which require worldwide cooperating and planning, especially, the participation of every member of the United Nations. The complexity of the above issues is much more evident in a developing economy. At this point, Taiwan's current economic prosperity coupled with its full-fledged democracy can play a critical role in helping the UN to fulfill its modern function.

Following World War II, several countries were divided. Germany was divided into the democratic West and the communist East; Korea was divided into the democratic South and the communist North; and also China was split into the

problematic because either the US or the Soviet Union would block effective UN involvement.)

Republic of China(hereinafter "ROC") and the People's Republic of China(hereinafter "PRC").⁵⁰⁸ How to admit applicants from divided countries into the UN presented a great challenge to the foundations of the world organization and the legal concept of sovereignty. As a matter of fact, the question of representation for divided countries is one of the most difficult issues faced by the UN. In view of the need for all people in the world to be free from exclusion and discrimination, and for all to be represented in the United Nations system, the issue of state sovereignty arose regarding the question of representation. This was the case with the Chinese seat at the UN. The issue of representation for divided countries and who is entitled to sit at the UN turned out to be a tough task.

§ 4-3 The Question of Representation for Divided Countries

Distinct from the problem of admitting new members is that of determining the representation of states that are already members. The decision of the UN to deny the right of a delegation to represent a state may have the same practical consequences as a decision not to admit a state to membership.⁵⁰⁹ Even now, this issue has not been

⁵⁰⁸ As a result of civil war in 1949, the Republic of China was divided into two governments: the ROC on Taiwan and the People's Republic of China located in the Chinese mainland. See Su Wei, SOME REFLECTIONS ON THE ONE CHINA PRINCIPLE, 23 Fordham Int'l L. J. 1169, 1170(2000)(noting that in October 1949, the Chinese people won their New Democratic Revolution and established a new central government called the People's Republic of China); see also Tzu-wen Lee, THE INTERNATIONAL LEGAL STATUS OF TAIWAN: THE INTERNATIONAL LEGAL STATUS OF THE REPUBLIC OF CHINA ON TAIWAN, 1 UCLA J. Int'l L. & Aff. 351, 353(1996)(discussing that the forces of the Republic of China finally retreated to Taiwan on December 8, 1949, leaving Mao Zedong and the People's Republic in control of the mainland); see also Shen, supra 72, at 1117 (discussing the civil war and how it caused the regime of the Republic of China to be overthrown by the People's Republic of China).

⁵⁰⁹ See Leland M. Goodrich, THE UNITED NATIONS, 1959, PP.99-102(Noting that the problem of

resolved completely since Taiwan is still outside the UN.

The Republic of China was one of the founding members of the United Nations.⁵¹⁰ For over twenty years the ROC served as a permanent member of the UN Security Council.⁵¹¹ After the ROC lost its seat in the UN in 1971, it consequently failed to retain its seats in numerous other international organizations. Although the ROC has been out of the UN since 1971, it did not simply disappear. On the contrary, the government of Taiwan has been a very active member of the international community and maintains close ties and friendly relations with more than 140 nations.⁵¹² Currently the ROC on Taiwan only maintains membership in very few intergovernmental organizations, such as the Asian Development Bank(hereinafter “ADB”),⁵¹³ the Asia- Pacific Economic Cooperation Forum(hereinafter “APEC”),⁵¹⁴

representation did not arise in the UN until Nov., 1949 when in a cablegram to the President of the General Assembly the Foreign Minister of the Government of the PRC, the Communist regime which had succeeded in driving the Nationalist Government from the mainland, stated that his government repudiated the legal status of delegation headed by T. F. Tsiang, appointed by the National Government seated on Taiwan, and held that it could not represent China and had no right to speak on behalf of the Chinese people in the United Nations).

⁵¹⁰ Delegates from the ROC government signed the UN Charter on June 26, 1945 in San Francisco.

⁵¹¹ From 1950 to 1971, the UN attempted to resolve the dispute over a UN seat for China, which since 1949 had been divided into two antagonistic political entities, the ROC on Taiwan and the PRC on mainland, each having its own territory, people, and government.

⁵¹² See, FOREIGN RELATIONS, The Republic of China Yearbook-Taiwan 2002, Government Information Office of the ROC on Taiwan(www.gio.gov.tw)(Noting that The Republic of China maintains its own national defense and conducts its own independent foreign policy, including full diplomatic relations with nearly 30 countries and substantive ties with more than 140 others).

⁵¹³ See Peter J. Illig , THE ROLE OF NON-GOVERNMENT ORGANIZATIONS IN THE DEVELOPMENT OF ENVIRONMENTAL POLICY AT THE ASIAN DEVELOPMENT BANK , 1 Buff. J. Int'l L. 47, 47(1994)(Noting the Asian Development Bank(ADB) was founded in 1966 to meet the urgent needs of more than 700 million people living in poverty in the Asia-Pacific region. The ADB is charged with designing and providing a source of funding for regional economic development projects. These projects are structured to alleviate poverty and stimulate economic growth, while at the same time ensuring the viability of the region's ecosystem).

⁵¹⁴ Asia Pacific Economic Cooperation(APEC) forum had its origins in a 1989 proposal by Australian Prime Minister R.J. Hawke. APEC is the result of a clear recognition of the importance of economic cooperation and consultation in the region to sustain its dynamic economic development, See Kenneth

and the World Trade Organization(hereinafter “WTO”).⁵¹⁵ Through membership in international organizations that do not require statehood, the ROC on Taiwan can best exercise its independent authority.⁵¹⁶

§ 4-4 Taiwan’s bid for UN Membership

The ROC on Taiwan has sought admission to the United Nations and proposals to that effect consistently have been made in the past ten years. Taiwan’s move has attracted worldwide attention to the principle of representation and the principle of membership universality.⁵¹⁷ However, the government of Taiwan continues to be

W. Abbott & Gregory W. Bowman, *ECONOMIC INTEGRATION FOR THE ASIAN CENTURY: AN EARLY LOOK AT NEW APPROACHES*, 4 *Transnat’l L. & Contemp. Probs.* 187, 213-5(1994)(Noting APEC’s leaders reached an uneasy compromise in 1993 regarding the structure of APEC itself and its relations with other Asia-Pacific organizations as follows: (1) APEC will remain an informal organization, without any formal treaty or other constitutional document; (2) APEC will remain institutionally decentralized and non-hierarchical; (3) APEC will not supersede other organizations within the Asia-Pacific region, such as PECC, ASEAN, and the EAEC).

⁵¹⁵ In 1944, at Bretton Woods, New Hampshire, a comprehensive economic and financial plan was proposed for post-World War II reconstruction and development. It was the formation of three international economic and financial institutions. (Two of them, the World Bank and the International Monetary Fund, were created to address development and monetary issues.) The International Trade Organization rounded out the institutional triad and GATT was first concluded in 1947 to serve as an interim agreement until the most important of the Uruguay Round agreements were concluded. The Uruguay Round agreements is the Agreement Establishing the World Trade Organization under which the institutional functions of GATT are replaced by the World Trade Organization. The function of the GATT-WTO system is to open international markets for goods, services, and capital. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5), (6), 55 U.N.T.S. 194; Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1, see also generally Kevin C. Kennedy, *THE GATT-WTO SYSTEM AT FIFTY*, 16 *Wis. Int’l L.J.* 421, 443-4(1998).The membership in these organizations is not based on state-hood; otherwise, it would be opposed by the PRC.

⁵¹⁶ This is because the PRC regards the ROC on Taiwan as a renegade province, not a state and does not allow countries to have any official contacts with Taiwan. At this point, the PRC also pressures those countries with whom it is in relations to exclude Taiwan from any international organization in which statehood is required. Taiwan’s acceptance of international obligation, through participation in international organizations that requires statehood, as if it were a state, will create a growing impression of independence.

⁵¹⁷ For the past few years, Taiwan has continually sought to enter the UN. Usually Taiwan’s small number of allies sponsor a proposition to put Taiwan’s status in the UN up for discussion at the UN General Assembly. For example, in 1999, one of Taiwan’s allies, Solomon Islands, spoke at the UN General Assembly general debate session to reiterate its country’s support for Taiwan’s membership in the UN by indicating that Taiwan’s brilliant economic achievement allows it to play a positive role in promoting international trade and annihilating poverty, citing the fact that Taiwan has long provided assistance in terms of skills training and technology transfers to Solomon Islands and many other

excluded from membership of the UN because of strong opposition from the PRC.⁵¹⁸

The PRC even successfully blocked the UN from accepting humanitarian financial aid from Taiwan⁵¹⁹ that was offered to help Rwandan refugees and the Turkish Kurds in the aftermath of the Iraqi invasion.⁵²⁰ The PRC argued that such involvement from Taiwan in UN activities would grant *de facto* recognition to the ROC.

The language of Article 4 of the UN Charter suggests that the procedure concerning the admission of new members to the United Nations include not only that a state wishing to become a member of the UN should be a peace-loving State, accept the obligations contained in the UN Charter and be able and willing to carry out these obligations, but also that a decision of the General Assembly should be upon “the recommendation of the Security Council.”⁵²¹

As mentioned above, without the recommendation of the UN Security Council, an applicant such as the ROC cannot qualify to become a member state of the United

developing countries. (For detail, see China Times, October 2, 1999).

⁵¹⁸ See TAIWAN’S U.N. BID BLOCK, New York Times, Sep. 12, 2002 (Noting that envoys from nearly 90 of 190 member nations, most of them opposed to Taiwan’s membership, spoke on the matter during several hours of committee debate. Taiwan has tried to join the United Nations since 1993, but China and its supporters have kept it off the agenda).

⁵¹⁹ Geographically, the term “Taiwan” refers to the islands of Taiwan area, including a group of islands consisting of Formosa (Taiwan) and its outlying islands of Pescadores, Kinmen, and Matsu. The word “Taiwan” in political terms may refer to “the Republic of China,” or “the Republic of China on Taiwan,” or “the ROC on Taiwan,” which is used to refer to the political entity existing on the islands of the Taiwan area.

⁵²⁰ See Mark S. Zaid, TAIWAN: IT LOOKS LIKE IT, IT ACTS LIKE IT, BUT IS IT A STATE? THE ABILITY TO ACHIEVE A DREAM THROUGH MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS, 32 NENGLR 805, 814 (1998).

⁵²¹ In Article 4, the UN Charter states that: (1) membership in the UN is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations; (2) the admission of any such state to membership in the UN will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Nations. This is because any attempt at linking the implementing of Taiwan's UN membership bid would invite antagonism and pressure from the PRC. As a permanent member of the UN Security Council with its double veto power,⁵²² the PRC's impeding of Taiwan's entry into the UN has significantly aroused this curiosity: "how can Taiwan become a member state in the United Nations? Is it possible?" "What happens if there is a dramatic change in the Taiwan Strait that leads to an armed conflict affecting or threatening international peace? When will the UN make the decision to enforce the peace?" These are the types of questions to be faced by the United Nations.

Before answering such questions, absolute priority should be given to supporting the notion that membership issues must not be a substitute for objective standards. Such objective standards (like peace-making and peace-keeping) are influenced not only by the political issue between China and Taiwan, but also by the obvious problem relating to the status of Taiwan itself and the possibility of an armed conflict with China. That is to say, Taiwan's bid to improve its position in the UN should not just be deemed as a zero-sum game in which "the PRC won and the ROC lost," or

⁵²² What procedure to follow in deciding the preliminary question which is based on whether a given proposal is a matter of procedure requiring a simple majority of seven members, or a matter of substance requiring a qualified majority of seven members, including the votes of the five permanent members. If it is decided that the preliminary question is governed by the principle of unanimity of the five permanent members, then any permanent member may establish the non-procedural character of a given proposal by use of the veto and then may veto the proposal itself. This has come to be called, in and out of the Security Council, the double veto. For related issues regarding the double veto, see generally Leo Gross, *THE DOUBLE VETO AND THE FOUR POWERS STATEMENT ON VOTING IN THE SECURITY COUNCIL*, 67 Harv. L. Rev. 251, 251-80(1953).

“the ROC won and the PRC lost.” Rather, it should be viewed as a mission to prevent the situation from triggering a serious armed conflict on a massive scale.⁵²³

In efforts to provide for adequate and optimistic views as applying to Taiwan’s UN membership issue, no attempt will be made to isolate the related subjects discussed in this chapter from the political and legal realities to which they are inextricably related. This is because legal concerns and political activities in the UN sometimes cannot be distinguished completely.

This chapter starts with an overview of basic conceptual issues about the UN and its modern function. The focus on this part will be the concepts of representation and membership universality. After we get to better understand the UN, some discussions then follow, all of which deal mainly with such issues as “the ROC’s exclusion from the UN is inconsistent with the universal principle of representation,” “Taiwan’s efforts to join the UN,” “the increasing importance to improve Taiwan’s status in the UN,” and “the UN’s considerable benefits to access Taiwan’s UN entry bid.”

In addition to the issue of reexamining the significant UN Resolution 2758, the most complicated part of this chapter is that Taiwan’s position in the UN is obviously influenced by Taiwan’s relations with China. However, in spite of the obstacles and

⁵²³ The threat of force by China has brought the Taiwan issue into the lime-light. It is listed with the North Korean and Kashmiri issues as the three destabilizing factors that might suddenly burst into full fledged crises in Asia. See Robert A, *HERE COMES THE ASIAN CENTURY*, China Post, Taipei, Dec. 29, 1999.

limitations from the PRC, there is substantial room for improvement with regard to the membership issue. In a spirit of compromise, it is from the viewpoint of the whole world's best interest to see Taiwan breaking out from the current international isolation and playing a valuable role in the United Nations. That will be highly meaningful in the enhancement of the legal status of Taiwan and regional security. Accordingly, this chapter is organized into seven parts, which are: part one - introduction; part two - role of the United Nations in a changing world; part three - the membership issue in the United Nations; part four - the United Nations Resolution 2758 and the question of representation; part five - commentary on the United Nations Resolution 2758; part six - Taiwan's case for the United Nations membership; and part seven - conclusion.

II. ROLE OF THE UNITED NATIONS IN A CHANGING WORLD

Just as World War I led to the formation of the League of Nations,⁵²⁴ World War II was the catalyst for the establishment of the United Nations.⁵²⁵ The UN was

⁵²⁴ The end of World War I brought an initial attempt to unify nation-states into an international organization to maintain world peace. The Treaty of Versailles, signed in 1919, included a provision for a "League of Nations," an international organization created by thirty-two nations. The League, as the first definitive and statutory organ of international cooperation attempted to substitute arbitration, mediation, and judicial settlement for war. Despite its efforts, the League failed to maintain international peace and security and could not prevent the course of events that ultimately led to the start of World War II. (See Brian M. Spaid, *COLLECTIVE SECURITY v. CONSTITUTIONAL SOVEREIGNTY: CAN THE PRESIDENT COMMIT U.S. TROOPS UNDER THE SANCTION OF THE UNITED NATIONS SECURITY COUNCIL WITHOUT CONGRESSIONAL APPROVAL?* 17 U. Dayton L. Rev. 1055, 1060-3, 1992).

⁵²⁵ On October 30, 1943, the foreign minister of the USSR and the United Kingdom, Secretary of State Hull, and the Chinese ambassador to the Soviet Union issued a declaration in Moscow that, for the first

organized in 1945 based on the UN Charter which was a form of multilateral treaty that was regarded as the constitution of the world body. At the time of its founding, the UN had a membership of 51 states.⁵²⁶ Since then, the number has grown year by year and currently the total number of member states is 190, including all the world's independent nations. Only Taiwan and a few mini-states are not UN members yet.

The UN Charter outlines all the UN's subsequent relations and programs. As a written constitution, the Charter provides for the UN's organizational structure, function, principles and purposes along with a set of standards, and so forth. The Charter itself is a multilateral treaty establishing the pattern of agreements among and obligations of its members. It is subject to interpretation by the member states and by each organ of the UN on new meanings with widely accepted interpretation and resulting practice. Hence, it is an important addition to international law.⁵²⁷

time, clearly pledged their efforts for the establishment of a general international organization. One month after the Moscow Declaration, President Roosevelt, Premier Stalin, and Prime Minister Churchill, meeting in Teheran, announced in their final communiqué: We recognize fully the supreme responsibility resting upon us and all the United Nations to make a peace which will command the goodwill of the overwhelming masses of the peoples of the world and banish the scourge and terror of war for many generations... We shall seek the cooperation and active participation of all nations large and small... [for] the elimination of tyranny and slavery, oppression and intolerance. We will welcome them, as they may choose to come, into a world family of Democratic Nations (For detail, see A. LeBoy Bennett, *INTERNATIONAL ORGANIZATIONS*, 1995, pp.47-8).

⁵²⁶ The United Nations Conference on International Organization (UNCIO) was held in San Francisco on April 25, 1945, all forty-six states that had adhered to the United Nations Declaration and that had declared war on one or more Axis powers accepted invitations to participate and, by agreement of the participants, Argentina, Byelorussia, the Ukraine, and the Denmark were added to the roster. The Soviet Union urged the inclusion of the provisional government of Poland, but that recommendation was rejected, although Poland was subsequently allowed to sign the Charter as an original member. (See A. LeBoy Bennett, *INTERNATIONAL ORGANIZATIONS*, 1995, p.51).

⁵²⁷ As a multilateral treaty that prescribes principles for the member states and that is subscribed to by most national governments, the UN is a part of the developing body of international law. International law may emerge from many sources within the United Nations. Not only do agencies such as the ICJ and Int'l Law Commission play a major role in developing law, but some of the decisions of other organs gradually acquire the status of law as well.

A. The UN's Basic Principle and Position

The world body was founded on the principles of universality, equal rights, democracy, freedom, and self-determination⁵²⁸ and thus, its ultimate goal is to serve all mankind in the world. The UN system has made positive contributions to the use of international channels for conflict resolution. The relevance to use UN channels may result from a desire by the member states to fulfill the above ultimate goal. The preamble to the UN Charter contains an affirmation by the signatories' lofty ideals:

*"we the peoples of the United Nations ... reaffirm faith
in fundamental human rights, in the dignity and worth
of the human person, in the equal rights of men and
women and of nations large and small."*

The nation is recognized as the agency through which the international community would be understood to have transferred rights to individuals. That is, without representation in the United Nations, those rights are threatened.

§ 4-5 Maintenance of International Peace and Security

The UN Charter⁵²⁹ lays down principles that aim to accomplish certain common desires,⁵³⁰ the most significant of which is the promise of all members to

⁵²⁸ Regarding the concept of self-determination, see generally, Eric, Ting-lun Huang, THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION, 14 N.Y. Int'l L. Rev. 167(2001).

⁵²⁹ See UN Charter, art. 1.

⁵³⁰ In Article 55 of the UN Charter, with a view to the creation of conditions of stability and well-being

maintain international peace and security. Undoubtedly, this is because the United Nations was created near the end of the greatest world war and thus, the multifunctional organization was defined as an instrument for eliminating armed conflict and for strengthening means for conflict control and resolution. Whether achievable or not, these common desires point the direction for action and give shape to the program of the world body through the development of friendly relations among nations; the achievement of international cooperation in solving international problems of economic, social, cultural and humanitarian character;⁵³¹ and the promotion of human rights and fundamental freedoms for all human beings without discrimination.⁵³² The means for achieving the common desire include peaceful settlement of disputes and collective measures for the prevention and removal of threats to peace or acts of aggression.⁵³³

§ 4-6 International Constitutional Supremacy

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 UN highlights the common desire as follows: (1) to promote higher standards of living, full employment, and conditions of economic and social progress and development; (2) to promote solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (3) to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

⁵³¹ The social goals of the UN are best summarized in the phrase from the preamble of the Charter "to promote social progress and better standard of life in larger freedom.

⁵³² Conventions on economic and social rights have been developed by the UN and its affiliated institutions such as the International Labour Organization (hereinafter "ILO"). Besides, the UN also has reached numerous treaties addressing economic and social rights which can be distinguished between two types of rights: (1) social rights referring to the adequate standard of living; (2) economic right referring to the right to property. For example, see generally Universal Declaration of Human Rights (hereinafter "UDHR"), at art. 25, 17, and 23.

⁵³³ Closely related to the primary goal of the United Nations to maintain international peace and security are the twin principles that all members states (1) shall refrain from the threat or use of force in any manner inconsistent with United Nations purposes, and (2) shall settle their international disputes

The UN Charter contains a supremacy clause providing 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."⁵³⁴ Apparently, this principle, giving it a status on the international stage roughly comparable to that of a national constitution in domestic law, represent the most fundamental obligations of members of the United Nations and are the basic legal standards to which they promise adherence. In this sense, it is remarkable to note that establishing justice and respect for international law is the vague goal of the United Nations.

Since enforcement is dependent upon the actions of the individual members, without the cooperation of member states, any assurance of action by the United Nations is diminished. The tradition of state sovereignty as practiced in international conferences and treaty making requires unanimity among all parties according to the principle that no state could be bound without its own consent. For this purpose, evolving and implementing more effective international laws are important goals of the UN. Therefore, the UN Charter contains an essential and self-evident principle in Article 2(2) providing for the obligation of all members to fulfill in good faith all the obligations assumed by them in the Charter.

by peaceful means.

⁵³⁴ See UN Charter, Art, 103.

In general, consent is most often demonstrated either through written agreement (such as treaty, convention and so forth) or through customary practice. In other words, the primary sources of international economic and social rights are treaties, customs and general principles of international law that states have obligations to respect, protect and fulfill. As a matter of international law, this is a huge increase given by the world body that member states move to implement the achievement. As the former UN secretary-general Boutros Ghali highlighted: "The time of absolute and exclusive sovereignty has passed; its theory was never matched by reality. It is the task of leaders of states today to understand this and find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."⁵³⁵ Indeed, nowadays movements toward promoting and protecting human rights across borders is a critical example to match Ghali's above comment that states have used their sovereignty to create international obligations that in turn have restricted their operational sovereignty.

§ 4-7 Six Principal Organs

According to the UN Charter, there are six principal organs in the UN, which are the General Assembly,⁵³⁶ the Security Council,⁵³⁷ the Economic and Social

⁵³⁵ See Boutros Ghali, *AN AGENDA FOR PEACE 1995*, New York: United Nations, 1995, para. 17.

⁵³⁶ The General Assembly is the only UN organ in which all members have the right to be represented and to vote in the annual General Assembly sessions, which last at least three months and which occasionally may be prolonged for most of the year. In light of the UN Charter Art. 10, the General Assembly has plenary powers in the sense that it "may discuss any question or any matter within the

Council,⁵³⁸ the Trusteeship Council,⁵³⁹ the International Court of Justice,⁵⁴⁰ and Secretariat.⁵⁴¹ Some of these bodies have numerous subsidiary organs. UN agencies have made major contributions to the positive accomplishments of the organization.

Member states may have not more than five representatives in the General Assembly

scope of the Charter." That is, the General Assembly exercises coordinating and supervisory functions for all other agencies within the United Nations.

⁵³⁷ According to the UN Charter Art. 24(1), the Security Council has "primary responsibility for the maintenance of international peace and security." It consists of 15 member states, five of them permanent members which are China, France, USSR, United Kingdom, and the US; the remaining members are elected to two-year terms in accordance with a formula that is designed to ensure an equitable geographic representation. The reform of the Security Council has been a much debated topic in recent years, most of the attention has been focused on permanent seats for Germany and Japan as well as the area of reducing the damaging potential of the veto. In fact, the voting formula in the Security Council was reached in 1945 Yalta meeting by Roosevelt, Churchill, and Stalin. Under this formula, unanimity of the big powers would be required on substantive matters, including any enforcement action in response to a breach or threat to the peace or act of aggression, but none of the permanent members could use the power of veto to block a procedural vote, and a party to a dispute was required to abstain on a decision by the Security Council to discuss the dispute.

⁵³⁸ The Economic and Social Council (ECOSOC) consists of 54 member states elected by the General Assembly to three-year terms. The function of ECOSOC is to deal with its responsibilities in the economic, social and humanitarian areas. In furtherance of this purpose, the ECOSOC has established a large number of subsidiary organs with specialized competence in those fields. Among these are regional economic commissions and bodies, including the UN Commission on Human Rights and the UN Commission on the Status of Women.

⁵³⁹ In the early days of the UN, the Trusteeship Council supervised the administration of many so-called non-self-governing territories. Today all of these territories are independent states and the Trusteeship Council has become an organ with greatly diminished responsibilities.

⁵⁴⁰ The International Court of Justice (ICJ) is the principal judicial organ of the UN that came into being in 1945. According to the UN Charter Art. 92-94, all member states of the UN are parties to the Statute of the Court. The Statute of the Court is annexed to and forms an integral part of the UN Charter. States that are not UN members may adhere to the Statute under conditions that the UN has prescribed. The ICJ consists of 15 judges, no two of whom may be nationals of the same state. The judges are elected by the UN General Assembly and the Security Council; they have to receive an absolute majority of the votes in both bodies. The regular term of the judges is nine years; and they may be reelected. In light of UN Charter Art. 34(1), the contentious jurisdiction of the ICJ applies only to disputes between states which accepted that jurisdiction. The Court lacks contentious jurisdiction to deal with disputes involving individuals or entities that are not states. In addition to hearing cases, the ICJ is authorized to give advisory opinions on legal questions. The UN Charter provides that the General Assembly and the Security Council may request such opinions and that the General Assembly may authorize other organs and the specialized agencies to request opinions on legal questions within the scope of their activities.

⁵⁴¹ As enshrined in the UN Charter Art. 97, the Secretariat shall comprise a Secretary-General and such a staff as the Organization may require. The Secretary-General is elected to a five-year term by the General Assembly upon the recommendation of the Security Council. As that recommendation is subject to the veto power, the Secretary-General can be elected only with the acquiescence of the five permanent members of the Security Council. Moreover, as the chief administrative officer of the Organization, the Secretary-General has the power under article 99 of the UN Charter to "bring to the attention of Security Council any matter which in his opinion may threaten the maintenance of international peace and security." This right of initiative is potentially a very powerful political weapon, although it has not been used to any significant extent. For detail, see Thomas Buergenthal & Harold G.

and one each in the Security Council, Economic and Social Council, and Trusteeship Council. The UN's growing importance is amply illustrated by the fact that the UN headquarters is the closest approximation to a world capital and serves as a neutral territory where negotiations can take place without loss of prestige by any party to the negotiations. At this point, the national missions of the UN are more important than embassies to individual countries.

B. The UN's Modern Function: Integrating Global Economy and Implementing Democratization

Since the dissolution of the former Soviet Union⁵⁴² and the former Yugoslavia⁵⁴³

which led to the end of the Cold War, the UN is no longer a place for confrontation,

Maier, *Public International Law*, 1990, pp. 38-41.

⁵⁴² The definitive stages of the break-up of the former Soviet Union began with the failed coup by hard-line Communists in August 1991 that sparked declarations of independence from all of the republics of the former Soviet Union except Russia and Kazakhstan. In the midst of these declarations of independence, the Soviet Government formally recognized the independence of the Baltic States of Estonia, Latvia, and Lithuania on September 6, 1991, but attempted to keep the other twelve republics together in a Union of Sovereign States with both the Union and the individual republics maintaining international personalities. As a result of a referendum, affirmed by 90% of the vote that doomed the Union Treaty at the outset, the Republics of Ukraine, Belarus, and Russia formally declared that the Soviet Union had disintegrated and announced the formation of the Commonwealth of Independent States. By December of 1991, all of the republics except Georgia had agreed to membership in the Commonwealth and the Soviet Union was considered dissolved. See generally Urs W. Saxer, *THE TRANSFORMATION OF THE SOVIET UNION: FROM A SOCIALIST FEDERATION TO A COMMONWEALTH OF INDEPENDENT STATES*, 14 *Loy. L.A. Int'l & Comp. L.J.* 581, 670 (1992); see also Paul R. Williams, *THE TREATY OBLIGATIONS OF THE SUCCESSOR STATES OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA: DO THEY CONTINUE IN FORCE?*, 23 *Denv. J. Int'l L. & Pol'y* 1, 3(1994).

⁵⁴³ See *id.*, Paul R. Williams, *THE TREATY OBLIGATIONS OF THE SUCCESSOR STATES OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA: DO THEY CONTINUE IN FORCE?*, at 4-6. See also Svetozar Stojanovic, *THE DESTRUCTION OF YUGOSLAVIA*, 19 *Fordham Int'l L. J.* 337, 358(1995) (discussing that the secessions from Yugoslavia was viewed as self determination movements); see also Gideon A. Moor, Note, *THE REPUBLIC OF BOSNIA-HERZEGOVINA AND ARTICLE 51: INHERENT RIGHTS AND UNEMT RESPONSIBILITIES*, 18 *Fordham Int'l L. J.* 870, 873-4(1995) (discussing the fall of communism in 1989, the changing face of Eastern Europe in the early 1990s and the nationalist self-determination movement). See generally John Tagliabue, *CONFLICT IN YUGOSLAVIA*, *N.Y. TIMES*, July 3, 1991, at A6 (describing political successors in Yugoslavia as former communists who evoke old national

but has been transformed into a forum for reaching real decisions that matter to the real world.⁵⁴⁴

§ 4-8 Aftermath of the Cold War

More importantly, national political leaders cling stubbornly to national sovereignty and independence in a world in which traditional approaches are inadequate to the needs of humankind. Contrary to earlier practice in the UN, in fact, going beyond the traditional peacemaking and peacekeeping techniques that have been applied both to disputes between states and to internal conflicts, there is a growing realization that, for these to be effective, integrating the global economy and implementing democracy is an idea whose time has come.

Although a large proportion of the world population still suffers from severe deprivation of human welfare including widespread poverty, illiteracy, hunger, and disease, the rapid growth of multinational cooperation has contributed to development of common economic policies among the member states. In this respect, the UN is a useful step toward the world's new economic order in spite of the fact that there is no guarantee of rapid progress in economic development. Significantly, the mapping out of advance strategies for the promotion of common interests often leads to the application of efficient methods for maximum progress. In reality, the majority of the

aspirations as a way of casting off that which originally gave rise to communism).

⁵⁴⁴ See Christoph Schreuer, THE CHANGING STRUCTURE OF INTERNATIONAL

world has always shared a common interest in focusing on economic issues. The international community may be willing to seek accommodation through the UN for the strengthening of international means for assuring this common interest in order to satisfy this crucial need which is a process of arrangements for global cooperation between national and international economies. Under the circumstances, in such an increasingly interdependent world, those UN member states with strong economic power must provide their efforts to assist the UN regarding these modern issues.

§ 4-9 Improving the Well-Being of Mankind

In response to the concerns mentioned above, the UN, as a multifunctional organization, must focus its particular attention on the basic needs of its member states so that the progress of national implementation of this common interest can therefore assure minimum levels of basic rights to the citizens of each member state. Accordingly, this involves cooperation and coordination within the UN system. For this purpose, the UN clearly has a primary role in creating conditions whereby the integration of the global economy becomes achievable with every member state being able to take appropriate measures to improve the well-being of its citizens by implementing the UN approved projects or policies.

Since the economic rights of every human being should be treated equally under

the concept of equality of international law⁵⁴⁵ and an entity with “economic sovereignty” is the key actor for the economic globalization in international organization,⁵⁴⁶ a legal approach to guaranteeing these basic rights generally encounters a substantial overlap between economic rights and political rights. It is impossible to separate completely economic issues from political matters. Hence, besides the function of the international global economy which is to guarantee the economic right of every member state, the enhancing of the UN’s mediating function to implement democratization in its member states is also part of the expanded role of the UN in the modern world. After all, the UN and its agencies are organized around both economic and political concerns.

In fact, the concept of “implementing democratization” rests on the assumption that every state is entitled to protect the full and equal enjoyment of political rights both on the domestic and international planes, which should be respected and recognized by other states since there is a primary interest in

⁵⁴⁵ International law is deficient in several of the attributes that contribute to the effectiveness of national legal systems. Traditionally, only states have been considered the subjects of international law although, in recent years, in such areas as human rights, a trend toward the applicability of international law to individuals has been emerging.

⁵⁴⁶ See Eleanor D. Kinney, THE EMERGING FIELD OF INTERNATIONAL ADMINISTRATIVE LAW: ITS CONTENT AND POTENTIAL, 54 Admin. L. Rev. 415, 417(2002)(Noting that the development and existence of public international organizations to regulate aspects of the global economy or environment is a relatively recent phenomenon). See also John W. Head, THROWING EGGS AT WINDOWS: LEGAL AND INSTITUTIONAL GLOBALIZATION IN THE 21ST-CENTURY ECONOMY, 50 U. Kan. L. Rev. 731, 732(2002)(Noting that there are numerous definitions of globalization and an overwhelming proliferation of books, articles, symposia, and hand-wringing over various aspects of it; but the most important aspect is economic in character, largely because it is in the economic sphere where we see globalization having the most profound legal and institutional ramifications).

maintaining peace and a fundamental value of human rights guaranteed under international law. That is to say, the scope of the international guarantee of human rights should be seen as a contribution to the maintenance of peace among nations.⁵⁴⁷

In this sense, regardless of the difference between *de facto* and *de jure* government,⁵⁴⁸

all the member states must agree in advance that the legal equality of rights refers to the enjoyment of economic and political rights which is without distinction of any kind.

§ 4-10 Accommodating of States with Popular Sovereignty to Join the UN and Its

Specialized Agencies

Popular participation and cross-cultural dialogue is essential for the implementation of global integration economically and politically. Accordingly, the UN must open up its participatory procedure in order to accommodate any *de facto* or *de jure* government with popular sovereignty to join the UN and its specialized

⁵⁴⁷ See for example, RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS: REPORT OF THE SECRETARY-GENERAL, 24 U.N. GAOR Annex (Agenda Item 61) at 10, U.N. Doc. A/7720 (1969) (Noting that the Second World War gave conclusive proof of the close relationship which exists between outrageous behavior of a Government towards its own citizens and aggression against other nations, thus between respect for human rights and the maintenance of peace).

⁵⁴⁸ A *de facto* government is one in actual control of the governmental machinery of the State and exercising its authority without substantial opposition. (P. K. Menon, THE LAW OF RECOGNITION IN INTERNATIONAL LAW, 1994, P.83,92). In response to a question with regard to the principles of recognition, British Foreign Secretary, H. Morrison indicated in the House of Commons: "The conditions under international law for the recognition of a new regime as the *de facto* Government of a State are that the new regime has in fact effective control over most of the State's territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the *de jure* Government of a State are that the new regime should not merely have effective control over most of the State's territory, but that it should, in fact, be firmly established." (Hansard, House of Commons, Vol., 485, March 21, 1951). In fact, there are few meaningful distinctions between a *de facto* and a *de jure* recognition (Malcolm N. Shaw, INTERNATIONAL LAW, 1991, 249-57).

agencies.⁵⁴⁹ This would help the UN in fulfilling its modern function. In the sense that the effectiveness of the Organization would be increased by the achievement of universality, one possible approach is to develop an international right to popular sovereignty of individual states that can act as a standard and be applied to each situation in attempting to promote membership universality. That is, one efficient way of implementing democratization and economic globalization at the individual country level is for the UN to proceed with its membership admission process with justice and fairness so that all mankind can be substantively served by the world body. Only when the UN system does have this kind of achievement, can the goal of establishing a truly democratic and prosperous society be realized.

III. THE MEMBERSHIP ISSUE IN THE UNITED NATIONS

The United Nations is an universal organization.⁵⁵⁰ The universality principle means that all states and all persons should be properly represented in the world body.

⁵⁴⁹ See Thomas Buergenthal & Harold G. Maier, PUBLIC INTERNATIONAL LAW, West Group, 1998, pp. 45-6.(Stating that despite their names, the so called specialized agencies of the UN are neither organs nor subsidiary organs of the UN. They are autonomous international organizations having an institutional affiliation with the UN....[M]ore than a dozen international organizations have obtained specialized agency status by concluding the necessary agreements with the UN. Some of these organizations predate the UN itself, among them the International Telecommunications Union(ITU), the Universal Postal Union(UPU), and the International Labor Organization(ILO). Other well known specialized agencies are the United Nations Educational, Scientific and Cultural Organization(UNESCO), the International Civil Aviation Organization(ICAO), the World Health Organization(WHO), and the Food and Agriculture Organization(FAO). The two major international financial institutions: the World Bank and the International Monetary(IMF), also have specialized agency status.)

⁵⁵⁰ See J.A. Lindgren Alves, THE UNITED NATIONS, POSTMODERNITY, AND HUMAN RIGHTS, 32 U.S.F. L. Rev. 479, 486-7(1998)(Noting that the United Nations is still the only existing universal body for dealing with the problems of the contemporary scene on a global scale)

Article 4 of the UN Charter states that the UN membership is "open to all the peace-loving states who are willing to accept the obligations in the Charter." Evidently, UN membership presupposes statehood.⁵⁵¹ In an Advisory Opinion of the International Court of Justice(hereinafter "ICJ") on Conditions of Admission of a State to membership in the United Nations, the Court pointed out that additional considerations, over and above that of statehood, apply when membership of the UN is at stake. In terms of article 4(1) of the UN Charter, the aspiring member must:⁵⁵²

(1) be a state;⁵⁵³ (2) be peace loving; (3) accept the obligations of the Charter;

(4) be able to carry out those obligation, and willing to do so.

At the earlier stages of the UN, regardless of the fact that the applicants could meet the standards for admission, many unsuccessful candidates were the victims of a Cold War political contest in which the United States and the Soviet Union each managed to block the candidates favored by the other through voting requirements in

⁵⁵¹ See van der Vyver, STATEHOOD IN INTERNATIONAL LAW, 5 Emory. Int'l L. Rev. 9, 26-7(1991)(Noting that the view that UN membership presupposes statehood is shared by, among others, Frowein: "[I]t is clear that the quality of State of a UN member cannot be denied."(H. Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS,1951, pp. 946-48); Philip Jessup agreed that the criteria of statehood were included in those of UN membership, but the opposite, is not the case. (P. Jessup, A MODERN LAW OF NATIONS: AN INTRODUCTION, 1968, p. 47)).

⁵⁵² See ADMISSION OF A STATE TO THE UNITED NATIONS, Advisory Opinion, 1948 ICJ REP. 57, 61 (May 28).

⁵⁵³ Non-self-governing political units or autonomous states are sometimes considered as the units eligible for membership in the UN, despite the fact that the principle of sovereignty is one of the cornerstones upon which the United Nations is constructed. For instance, the UN granted exceptions to the requirement of statehood in its list of original members. The Soviet Union claimed a right of separate membership for each of its sixteen union republics. The concession to include the Ukraine and Byelorussia as original members did not meet generally accepted standards of statehood. India and the Philippines were also accorded the status of original member prior to the transfer of sovereignty. See A. LeBoy Bennett, INTERNATIONAL ORGANIZATIONS,1995, p.59.

the Security Council. This deadlock in membership applications led to a request from the General Assembly to ask the ICJ for an advisory opinion. The request raised two major questions: one was with regard to whether a member state is juridically entitled to make its consent to the admission of a new member dependent on conditions not expressly provided by Article 4 of the UN Charter. The other one was whether a member can make its consent subject to the condition that other states be admitted at the same time.

In response to these substantive issues raised by the General Assembly in 1948, the Court advised that the conditions for admission of members specified in Article 4 of the Charter were exhaustive and that members were not justified in adding other conditions. Following this conclusion, the Court continued to indicate that the admission of one member cannot be made contingent upon the admission of another, and that each member's admission should be based solely on its own qualifications. Another attempt to clarify the issues behind the admission process was the request made by the General Assembly in 1949 regarding the question as to whether the General Assembly could admit a state to membership in the absence of a positive recommendation by the Security Council. The Court replied that such a procedure would violate the clear intent of the Charter.

§ 4-11 The Principle of Membership Universality

In general, the principle of membership universality may be achieved if three conditions are present: (1) if the procedures for admission are not too difficult or rigid; (2) if the existing members are cooperative and committed to achieving universality, and (3) if nonmembers are willing to seek membership.⁵⁵⁴ In this respect, the principle of membership universality can reinforce legality in two types of cases. One is the admission of Monaco, whose statehood had for long been doubted by scholars and who once filed but then withdrew an application for admission to the League of Nations. Membership for Monaco, an entity that was already a member of a number of international organizations and generally recognized by other states, became more understandable in the light of the principle of universality. The other one is the case of the admission of the Congo, illustrating the admissions decisions rendered without regard to the traditional definition but in accordance with the principle of self-determination. In fact, the principle of self-determination has been frequently mentioned in the UN by member states in favor of those admissions.⁵⁵⁵ Both types of cases mentioned above presents strong evidence that the United Nations is becoming almost universal. Obviously, the principle of universality could provide flexible reinforcement for exceeding the proper limits of the traditional conditions for

⁵⁵⁴ See A. LeBoy Bennett, *INTERNATIONAL ORGANIZATIONS*, 1995, p. 78.

⁵⁵⁵ See generally Frederick, Tse-Shyang Chen, *THE MEANING OF "STATES" IN THE MEMBERSHIP PROVISIONS OF THE UNITED NATIONS CHARTER*, 12 *Ind. Int'l & Comp. L. Rev.* 25, 25-51(2001).

application to UN membership.

When states are represented in the United Nations, they are equally represented. No state possesses a higher status than another state. The sovereign equality of the members refers to legal status rather than to size, power, or wealth. However, there are millions of people in the world who are trying to be represented in the UN, e.g., the people of Taiwan. But this universal organization cannot be of benefit to these people due to the gap of membership. There is the need for the UN to seek solutions to these problems.

§ 4-12 Admission to Membership

As mentioned above, membership in the UN is open to all “peace-loving” states. To declare a nation “peace-loving,” it is necessary to prove that it is ready and able to accept and fulfill the obligations of the UN Charter. Moreover, the elements of statehood comprise one of the basic conditions for membership. Traditionally, a valid claim to statehood requires the satisfaction of four criteria: a permanent population; a defined territory; a self-government, and the capacity to enter into formal relations with other states.⁵⁵⁶ However, the principle of admission membership can possibly be subject to political considerations.⁵⁵⁷ At this point, before examining the legal

⁵⁵⁶ See art. 1, Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force, Dec. 26, 1934) (hereinafter Montevideo Convention)

⁵⁵⁷ See Igor Janev, LEGAL ASPECTS OF THE USE OF A PROVISIONAL NAME FOR MACEDONIA IN THE UNITED NATIONS SYSTEM, 93 Am. J. Int'l L. 155, 155(1999)(Noting that the conditions for the admission of states were the subject of exhaustive political and legal

conditions of membership, it is important to understand that the issue of the admission of members to the UN is based on partly legal and partly political considerations as noted above. Hence, which political entities constitute "state" and which ones are "peace-loving" or deemed "able and willing to carry out international obligation" are sometimes highly based on political decisions. In particular, during the period of the Cold War, politics often overpowered legalities.⁵⁵⁸

In order to break the deadlock in membership applications, the Australian representative proposed that: when the Security Council initially considered its procedure in dealing with membership questions, the applications should be first considered by the General Assembly, that the Security Council should only consider and make recommendations with respect to matters relating to peace and security, and that decisions on membership should be taken by the Assembly alone. However, this view did not gain support from other members of the Council as being consistent with Charter Provisions.⁵⁵⁹

§ 4-13 Procedures for Granting UN Membership

Under the UN Charter, as discussed earlier, states can only be granted UN

deliberations at the United Nations during the 1940s when many states were applying for membership); See Ibrahim J. Gassama, *WORLD ORDER IN THE POST-COLD WAR ERA: THE RELEVANCE AND ROLE OF THE UNITED NATIONS AFTER FIFTY YEARS*, 93 *Am. J. Int'l L.* 155, 330(1999)(FN150)(Noting that UN practice generally has been to treat the issue of membership in purely political terms with little attention paid to the character of the national government or to its treatment of its citizens).

⁵⁵⁸ See Frederic L. Kirgis, Jr., *International Organizations*, 1993, p.138.

⁵⁵⁹ See UN Security Council, *OFFICIAL RECORDS*, 50th Meeting(Aug. 28, 1946), pp. 47-60. See also Leland M. Goodrich, *THE UNITED NATIONS*, 1959, P.91.

membership with a decision of the General Assembly, reached by a two-thirds majority upon the recommendation of the Security Council, where five states hold veto powers on nonprocedural matters.⁵⁶⁰ Therefore, any one of the five "great powers" can single-handedly block any aspiring state from joining the United Nations.⁵⁶¹ In fact, it did happen in the early history of the United Nations. During the time of the Cold War, the admission of members to the UN became a battleground issue between the Soviet Union and the West. It is noted that all pro-Communist(pro Soviet Union) candidates were blocked by the Western states under the US leadership, and all non-Communist(pro United States) applications were vetoed by the Soviet Union.⁵⁶² Charter criteria for admission were robbed of significant meaning by consent for political power in the United Nations. Since the admissions problem was

⁵⁶⁰ The specific procedures for application are as follows: In accordance with rules 58-60 of the Provisional Rules of Procedure of the Security Council, a State desiring U.N. membership must submit its application to the Secretary General, who places the application upon the Security Council's provisional agenda. Unless the Council decides otherwise, the application is submitted to the Committee on the Admission of New Members, comprised of a representative of each Council member, for its report. After considering the Committee's report, the Council votes on whether to recommend the applicant for membership. Votes on admitting new members are subject to veto. In evaluating the applicant, the Council may consider "any factor which it is possible reasonably and in good faith to connect with the conditions laid down" in the advisory opinion of the ICJ on Conditions of a State to Admission in the United Nations. If the Council recommends membership, it forwards its recommendation to the General Assembly. Article 18(2) of the Charter requires that admission decisions be made by a two-thirds majority of the General Assembly members present and voting. (See generally Michael P. Scharf, *MUSICAL CHAIRS: THE DISSOLUTION OF STATES AND MEMBERSHIP IN THE UNITED NATIONS*, 28 *Cornell Int'l L. J.* 29, 69, 1995).

⁵⁶¹ In recent years, due to an increase in large numbers of the UN members, it has become more difficult than before for any great power to manipulate the General Assembly. In this respect, resulting from the realization of a common interest, the General Assembly has started making efforts to influence the Security Council to eliminate certain categories of questions from the exercise of the veto power. The admission of members is one of the certain categories.

⁵⁶² As like other big powers, the Soviet Union used its veto right to protect the vital interests. During the earlier years of the UN, the Soviet Union's vital interests were frequently threatened because of western control of the issues in the Security Council and because of the minority position of the Soviet Union. Since 1970, the US increasingly resorted to the veto, while the Soviet Union seldom needed recourse to this device.

basically political rather than procedural, compromise of competing interests had to be the final solution in the form of a “package deal.”

Notwithstanding that Article 5 and 6 of the UN Charter provide for suspension and expulsion of members from the UN,⁵⁶³ there is no provision made in the Charter regarding the issue of withdrawal from membership. In all of UN’s history, only one state, Indonesia, has ever announced its withdrawal due to the election of Malaysia to a Security Council Seat, but after an absence of twenty months, it returned to full participation. Regarding the issue of Indonesia’s returning to the UN, no readmission process was deemed necessary. This is because the withdrawal of Indonesia from the UN was only a statement of intent but no official acceptance of this withdrawal had been issued by the United Nations.

§ 4-14 Observer Status and the Case of the Palestine Liberation Organization

Observer status does not appear in the UN Charter, but the UN General Assembly has granted it to some nonmember states and to an international organization. In 1990 the UN General Assembly accorded observer status to the International Committee of the Red Cross, a non-governmental organization. A number of UN specialized agencies have also adopted the practice of granting observer status to some entities that do not qualify for full membership.

⁵⁶³ According to Articles 5 and 6 of the Charter, the General Assembly may suspend or expel a member by a two-thirds vote upon the recommendation of the Security Council. So far, no action has

On October 14, 1974, the UN General Assembly invited the Palestine Liberation Organization(hereinafter "PLO")⁵⁶⁴ to participate "in the debate relative to the Palestine question."⁵⁶⁵ Later, in November 22 of the same year, the UN accorded to the PLO the status of an observer by adopting General Assembly Resolution 3237 which invited the PLO to "participate in the sessions and the work of the General Assembly in that capacity." Since then, the PLO has continued to enjoy its observer status without interruption and has maintained its Mission to the UN without trammel. In 1975, the UN General Assembly established a Committee on the Exercise of the Inalienable Rights of the Palestinian People to help with the settlement of the Palestine problem.⁵⁶⁶

However, due to the US declaring that the PLO was a terrorist organization,⁵⁶⁷ the right of the PLO's participation in the UN turned to be a huge challenge to UN

ever been taken under this principle.

⁵⁶⁴ The creation of the PLO in 1964 was authorized at an Arab summit conference pursuant to a previous Arab League council decision to affirm a Palestinian entity and place the cause of liberation in the hands of the Palestinians themselves. In the same year, the PLO was defined by a Palestine National Congress as a responsible organization for the direction of the Palestinian people in their struggle for the liberation of their homeland, in all liberational, political, and financial fields and also for whatever measures may be required by the Palestine case on the inter-Arab and international level. The Congress immediately notified the UN that the PLO would be "the only legitimate spokesman for all matters concerning the Palestine people." Today, the PLO retains the support of the Arab League.

⁵⁶⁵ See Beth DeBernardi, CONGRESSIONAL INTENT AND CONFLICTING TREATY OBLIGATIONS: UNITED STATES v. PALESTINE LIBERATION ORGANIZATION, 23 Cornell Int'l L. J. 83, 89(1990).

⁵⁶⁶ In 1976, the Committee recommended that the UN Security Council establish a timetable for Israeli evacuation of the occupied territories, and that "[t]he evacuated territories, with all property and services intact, should be taken over by the United Nations, which with the co-operation of the League of Arab States, will subsequently hand over these evacuated areas to the Palestine Liberation Organization as the representative of the Palestinian people." (See 31 GAOR Supp. No. 35, at 15, 1976)

⁵⁶⁷ According to § 5201(b) of the US Anti-Terrorism Act, the PLO was stated to be "a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.

practices. For instance, in 1987, the US Congress enacted the Anti-Terrorism Act(hereinafter "ATA")⁵⁶⁸ to force the PLO mission to close within the jurisdiction of the United States. This prompted the UN General Assembly to take the position overwhelmingly that the US would be violating the 1947 Headquarters Agreement and therefore, requested a legal opinion from the ICJ.

§ 4-15 The 1987 Anti-Terrorism Act & the 1947 Headquarters Agreement

The Court unanimously issued an opinion that the US legislation was in violation of the Headquarters Agreement and under an obligation to enter into arbitration for the settlement of the dispute between itself and the UN.⁵⁶⁹ This position was also sustained in a New York federal district court case.⁵⁷⁰ Again, in December 1988, despite the fact that the UN invited Mr. Yasir Arafat, the Chairman of the PLO, to address the UN General Assembly in New York, the US denied a visa to Mr. Arafat to prevent him from entering the United States in order to safeguard its own security.⁵⁷¹ In response, the General Assembly reconvened its session in Geneva

⁵⁶⁸ See ATA, 22 U.S.C. §§ 5201-5203.

⁵⁶⁹ Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947(See I.C.J. 12, 35, 1988).

⁵⁷⁰ Despite the State Department's concession and the UN General Assembly support for the right of PLO mission to remain, the US Department of Justice brought an action in federal district court in New York to evict the PLO. After the New York district court dismissed the action, a conflict developed within the U.S. government over whether or not to appeal. The Justice Department wanted to appeal, but the State Department did not. President Regan had to resolve the conflict. He decided that no appeal would be undertaken.

⁵⁷¹ The U.S. Government presented evidence declaring that PLO elements engaged in terrorism against Americans and others. This evidence includes a series of operations undertaken by the Force 17 and the Hawari organizations since the PLO claimed to forswear the use of terrorism in the Cairo declaration of November 1985. As Chairman of the PLO, Mr. Arafat is responsible for actions of these organizations which are units of Fatah, an element of the PLO of which he also is chairman and which is under his control. For details, see generally Frederic L. Kirgis, Jr. INTERNATIONAL

to hear Mr. Arafat's address. This consequently made the US open the negotiations with the PLO on the basis that Mr. Arafat had modified and clarified his positions on terrorism and Israel's right to exist, the grounds for denial of the visa. As mentioned above, to sum up, it is particularly significant that the language of the 1947 Headquarter Agreement⁵⁷² restrains the US from interference with the PLO Observer Mission in the discharge of its functions at the United Nations. Therefore, the PLO has continued to enjoy the opportunity to make its positions known to the membership of the UN.

Regardless of the fact that the PLO did not qualify for full membership, the PLO asked to be allowed to participate in the general debate that gave rise to a controversial issue in the UN as to whether or not only representatives of Member states are qualified to participate in the general debate. The question of PLO's participation has also come up in the UN Security Council. In fact, the request for the participation of the PLO was faced with the situation that there is an inherent difference between the PLO and a sovereign State, to the extent that the PLO lacks statehood but is a body which has been granted an official status within the UN, namely, the status of permanent observer, as the sole legitimate representative of the

ORGANIZATIONS IN THEIR LEGAL SETTING, 2nd edition, 1993, p.114

⁵⁷² See, for example, Section 11 of the Headquarters Agreement reads, in part, "The federal, state or local authorities of the US shall not impose any impediments to transit to or from the headquarters district of : (1) representatives of Members ..., (5) other persons invited to the headquarters district by the United Nations ... on official business."(Frederic L. Kirgis, Jr. INTERNATIONAL

Palestinian people. After very careful examination of the Charter, the rules of procedure of the UN General Assembly⁵⁷³ and the Security Council⁵⁷⁴ as well as the spirit of this Organization, theoretically, it would be inappropriate to accord an observer(such as the PLO) the right of reply to any member in the general debate because the right to speak in the general debate is enjoyed by member states. In the case of the Security Council, an observer(such as the PLO) would be granted permission to speak only if the request complies with Rule 39 of the Security Council's provisional rules of procedure.

§ 4-16 Granting of PLO's Participation in the General Debate and the Security

Council

However, in the UN existing practice, the PLO, as a UN observer, has been granted permission to speak both in the General Assembly and in the Security Council.⁵⁷⁵ In spite of that, as a matter of the basic principle of the UN Charter, the PLO's UN position should not be taken as a change in the observer status of the PLO

ORGANIZATIONS IN THEIR LEGAL SETTING, 2nd edition, 1993, p.110)

⁵⁷³ Articles 3 and 4 of the UN Charter highlights that only states can be Members of the Organization. Moreover, the language of Rule 73 of the rules of procedure of the General Assembly provides the right of reply in the plenary Assembly available to Members.

⁵⁷⁴ Rule 37 and 39 of the Security Council's provisional rules of procedure provides: Any Member of the United Nations which is not a member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without vote, in the discussion of any question brought before the Security Council when the Security considers that the interests of that Member are specially affected, or when a Member brings a matter to the attention of the Security Council in accordance with Article 35(1) of the Charter(Rule 37). The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence(Rule 39).

⁵⁷⁵ In the case of the participation of the Security Council, a proposal indicating that "there should be accorded an invitation to the PLO to participate in this debate, and that invitation will confer upon it the same rights of participation as are conferred when a Member State is invited to participate under rule

at the UN or the recognition of any State of Palestine,⁵⁷⁶ although some commentators have argued that Palestine is a state for meeting all the four traditional criteria for statehood.⁵⁷⁷

Since the UN General Assembly's grant of observer status to the PLO in 1974, the PLO, as the sole, legitimate representative of the Palestinian people, has increasingly been allowed to act on the international plane as the exclusive agent of the Palestinian people. It has been accepted as an observer member of the organization of non-aligned countries, and has been invited to participate in numerous international conferences. This is because the UN General Assembly Resolution 3236⁵⁷⁸ identified the PLO as "the representative of the Palestinian people," reaffirmed "the inalienable rights of the Palestinian people in Palestine, including: (a) the right to self-determination without external interference; (b) the right to national

³⁷⁷ was adopted to resolve the conflict.

⁵⁷⁶ See Frederic L. Kirgis, Jr., *ADMISSION OF "PALESTINE" AS A MEMBER OF A SPECIALIZED AGENCY AND WITHHOLDING THE PAYMENT OF ASSESSMENTS IN RESPONSE*, 84 *Am J. Int'l L.* 218, 219-20(1990)(Noting that even though the Palestine National Council has declared "the establishment of the State of Palestine," and even though many governments have apparently recognized such a state, several other governments have withheld recognition on the ground that "Palestine" does not meet the conditions required to be a state. When the United Nations General Assembly adopted its resolution on the "Question of Palestine" in December 1988, it did not recognize a Palestinian state; nor did it call the PLO a provisional government. Instead, it acknowledged that the Palestine National Council had proclaimed the State of Palestine, affirmed the need to enable the Palestinian people to exercise sovereignty over the occupied territories, and changed the PLO's designation to "Palestine" in the UN system).

⁵⁷⁷ See Frederic L. Kirgis, Jr. *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING*, 2nd edition, 1993, p.380(Noting that (a) the territory does not have to be determinate, as shown by the fact that Israel is recognized as a state despite its lack of fixed territorial boundaries(except with Egypt); (b) the Palestinian people constitute the population, and have for centuries; (c) the PLO serves as the provisional government of Palestine, effectively controlling substantial sections of the territory and providing public services to Palestinians in Palestine and abroad; and (d) Palestine's capacity to enter into international relations is shown by the fact that more than 100 states had recognized it as a state within two years of the Proclamation of Independence, and by the General Assembly resolutions.)

⁵⁷⁸ See Nov. 22, 1974, 29 GAOR Supp. No. 31, at 4.

independence and sovereignty,” and recognized “the right of the Palestinian people to regain its rights by all means in accordance with the purposes and principles of the Charter of the United Nations.”

In 1989, the UN General Assembly adopted its Resolution 43/177⁵⁷⁹ to acknowledge the proclamation of the State of Palestine by the Palestine National Council on November 15, 1988, and decided that the designation “Palestine” should be used in place of the designation “Palestine Liberation Organization” in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system.

As discussed above, except the right to vote in official UN sessions, there is no doubt that representatives of observer missions have access to UN facilities in the headquarters district and to all open sessions of the UN General Assembly. On certain occasions, they are even entitled to speak in official UN sessions.

IV. UNITED NATIONS RESOLUTION 2758 AND THE QUESTION OF REPRESENTATION

At the inception of the United Nations in San Francisco in 1945, the Republic of China was a founding member and one of the five permanent members of the UN

⁵⁷⁹ See G.A. Res. 43/177, 43 GAOR Supp. No. 49(A/43/49), at 62.

Security Council.⁵⁸⁰ Consistent with the basic principle of the sovereignty of members, the UN Charter does not specify any qualifications for representation. The question of representation came up in the United Nations when the Soviet Union proposed a Security Council resolution that would have rejected the credentials of the Republic of China representative in 1950. From then on, the Soviet Union had argued that the ROC did not have the right to represent the seat of China in the United Nations. This is because, in 1949, after the ROC lost the civil war, the ROC also lost control over mainland China.

§ 4-17 Background: Draft Resolution by the Soviet Union

After the Chinese civil war resulting in the emergence of two governments in the Chinese nation, the issue of who should sit in the United Nations to represent China - whether the ROC or the PRC - came up and became disputable. In January 1950, a draft resolution that would have denied the credential of the ROC representatives was first raised by the Soviet Union in the Security Council. Without support by the majority of members, the draft resolution was defeated. That led to the boycott of the UN Security Council by the Soviet Union for a few months in 1950 as a way of protesting the continued sitting of the ROC representatives.⁵⁸¹

⁵⁸⁰ In Article 23 of the UN Charter, the Republic of China was named among the five permanent members of the UN Security Council.

⁵⁸¹ See UN ANNUAL REPORT: 1 JULY 1949- 30 JUNE 1950, 5th Sess. Supp. 1 (A/1287), pp. 31-33.

Coincidentally, the Korean armed conflict broke out at the same time.⁵⁸² Hence, without the presence of the Soviet Union, a series of UN resolutions⁵⁸³ relating to the Korean crisis (including the offer of necessary assistance to the Republic of Korea to repel the armed attack by North Korea, as well as the recommendation that all Members provide military forces to a unified command under the United States to restore international peace and security in the area due to the increase of intervention by the Chinese Communist military units in Korea) were adopted in the Security Council.⁵⁸⁴ During the Soviet absence, a unified UN command was established. In reality, this command deputized the United States to lead the defense of South Korea in the name of the United Nations.⁵⁸⁵

§ 4-18 The Question of Representation

As a matter of fact, the question of Chinese representation was regarded as a unique case in the history of the United Nations since it involved a revolutionary

⁵⁸² World War II left Korea divided with Soviet forces occupying the North and US forces, the South. A UN call for withdrawal of foreign troops and elections throughout a unified Korea was opposed by the Communist government, leading to elections only in the South and the withdrawal of most US troops. In June 1950, force from North Korea (the Democratic Republic of Korea) attacked South Korea (the Republic of Korea). The Soviet Union, the PRC and the rest of the Communist world supported the North.

⁵⁸³ See the 1950 UN Security Council Resolution 82, 83, 84, and 85.(RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL, 1946-1992, edited by Karel C. Wellens, Kluwer Academic Publisher, US, 1993, pp.323-327) (hereinafter: RESOLUTIONS OF THE UN SECURITY COUNCIL).

⁵⁸⁴ Only the accident of Soviet absence, piqued over the Chinese-representation issue, allowed the Security Council, in 1950, to authorize collective action in Korea. The return of the Soviet representative to the Council table on August 1, 1950, precluded any further agreement on the basic issues in Korea.

⁵⁸⁵ See Thomas G. Weiss, David P. Forsythe & Roger A. Coate, THE UNITED NATIONS AND CHANGING WORLD POLITICS, Westview Press, 1997, pp.47-8.(Noting that the defense of South Korea was not a classic example of collective security.)

change of government and the first time the two rival governments coexisted. In 1950, the UN Secretary-General Trygve Lie made public a memorandum, entitled "Legal Aspects of Problems of Representation in the United Nations,"⁵⁸⁶ which mentioned that the question of representation was linked to the question of the recognition by Member States; the Chinese case is unique in the history of the UN, not because it involved a revolutionary change of government, but because it was the first time in which two rival governments existed.⁵⁸⁷ In the same year, a subcommittee of the General Assembly's Ad Hoc Political Committee worked out a draft resolution related to the representation as follows:⁵⁸⁸

(a) That whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations, it should be considered in the light of the purposes and principles of the Charter and the circumstances of each case;

⁵⁸⁶ See Frederic L. Kirgis, Jr., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING*, 2ND edition, 1993, pp.177-178.

⁵⁸⁷ In his memorandum, Mr. Trygve Lie also pointed out that it is quite possible that such a situation will occur again in the future and it is highly desirable to see what principle can be followed in choosing between the rival. For detail, see U.N. Doc. S/1466 (1950).

⁵⁸⁸ This resolution adopted by the UN General Assembly included paragraph (a) as its first operative paragraph but did not contain any other standards by which to determine such questions.

(b) That the following should be among the factors to be taken into consideration in determining any such question:

(i) The extent to which the new authority exercises effective control over the territory of the Member State concerned and is generally accepted by the population;

(ii) The willingness of that authority to accept responsibility for the carrying out by the Member State of its obligations under the Charter;

(iii) The extent to which that authority has been established through internal processes in the Member State.

Before 1960, for ten years, the proposal sponsored by Albania and twenty other member states, calling for the seating of the PRC as the only legitimate representatives of China and the expulsion of the representatives of the ROC, was avoided in the UN General Assembly agenda by adopting a resolution to postpone considering the matter in the UN General Assembly. After 1960, due to the expansion of UN membership by the admission of newly independent states, the Western powers

no longer dominated the UN as before. Thus, more and more member states began to contemplate the Chinese representation question. In 1961, for the first time, the issue was put before the UN General Assembly. In the meantime, a draft resolution, sponsored by the US, that declared the expulsion of the ROC as an “important question” (meaning it should be made by a two-thirds majority for approval)⁵⁸⁹ was adopted in the UN General Assembly. From then on, the United States had successfully used such a resolution to keep the PRC out and the ROC in until 1971. This is because any attempt to change the Chinese representation would have collected a simple majority to admit the PRC, but no majority could be mustered.

Because of its commitment to the Chiang Kai-shek regime of the ROC,⁵⁹⁰ the US for more than two decades led the fight to save the ROC by using procedural tactics. However, it could not ignore the fact that the PRC was the regime effectively in control of the Chinese mainland. In this regard, it became more difficult for the US to fight for the ROC on the issue of Chinese representation⁵⁹¹ on the grounds that

⁵⁸⁹ Decisions of the General Assembly on important questions shall be made by a two-third majority of the members present and voting. Admission of new Member to the United Nations is deemed as an important question under Article 18(2) of the UN Charter. For detail of Article 18, see 1945 Can. T. S. 7; 1945 S.A.T.S. 6.

⁵⁹⁰ See A. LeRoy Bennett, *INTERNATIONAL ORGANIZATION: PRINCIPLES AND ISSUES*, Prentice Hall, US, 1995, p.86.

⁵⁹¹ In order to hold a seat in the UN for Taiwan, the US proposed a compromise by favoring a Security Council seat for the PRC so that both Chinas can sit at the UN at the same time. But the proposal was defeated by both Chinese regimes because of the assertion of one China policy. See Frederic L. Kirgis, Jr., *INTERNATIONAL ORGANIZATION*, West Publishing Co., US, 1993, p.180.(Hereinafter: Kirgis, *INTERNATIONAL ORGANIZATIONS*). Regarding the Chinese dual representation issue, see generally James Wang, *WHO LOST THE UN*, Taipei Times, August 1, 2002(Noting that, instead of fighting for a seat for the ROC in the UN, Chiang Kai-shek was competing with the PRC for the legitimacy of representing “the whole of China.” That is, he would rather have lost the ROC’s UN seat than co-exist with the PRC in the world body.)

more and more member states were convinced that the PRC was the government exercising effective authority within the territory of China and thus, should represent the State in the United Nations. The changing world situation made it unfeasible for the ROC to preserve its seat in the UN, despite efforts made by the United States. As a result, in 1971, the issue of Chinese representation took an about turn and was no longer characterized as an important question under Article 18 of the UN Charter by the majority of the members present and voting in the UN General Assembly.⁵⁹² At this point, the ROC Delegation left the General Assembly Hall. Realizing the imminence of the PRC's entry to assume China's seat in the UN at the next subsequent ballot on a substantive "unimportant" question, the ROC representatives announced its gracious withdrawal from the United Nations. Resolution 2758,⁵⁹³ no longer requiring a two-thirds majority and without any recommendation from the Security Council, was adopted within minutes by a simple majority with the immediate effect to admit the PRC to take China's seat and "expel" the Chiang Kai-shek representatives from the United Nations.

Because of the resolution, the ROC, representing the people on Taiwan, has been

⁵⁹² The key decision that signaled the United States' defeat came when the General Assembly voted, 59 to 55 with 15 absentees, to reject the American draft resolution. An analysis of the voting showed that the abstention of eight nations that had been thought almost to the last to be leaning toward the United States position had been fatal to the American cause. Had they voted with the United States, the American "important question" resolution would have been adopted, 63 to 59. For detail, see New York Times, October 26, 1971. (www.nytimes.com/library/world/asia/102671china-relations.html)

⁵⁹³ The UN General Assembly Resolution 2758 was passed in the 26th session of the UN General Assembly to admit Beijing to replace Taipei to sit in the United Nations and its Security Council. For details about the resolution, see *G.A. Res. 2758, 26 GAOR Supp. 29 (A/8429), at 2*, United Nations

deprived of appropriate and effective representation in the United Nations as well as the right to participate in the political, economic, cultural and social development activities within the UN system.

§ 4-19 The UN General Assembly Resolution 2758

The General Assembly,

Recalling the principle of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that United Nations must serve under the Charter,

Recognizing that the representatives of the Government of the People's Republic of China is the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of Security Council,

Decides to restore all its rights to the People's

*Republic of China and to recognize the representatives
of its government as the only legitimate
representatives of China to the United Nations, and to
expel forthwith the representatives of Chiang Kai-shek
from the place which they unlawfully occupy at the
United Nations and in all the organizations related to
it.*

V. COMMENTARY ON THE UNITED NATIONS RESOLUTION 2758

Since the UN adopted the UN GA Resolution 2758, apparently whether or not an authority can be regarded as an effective government to represent a member state in the UN should be based on two considerations: (1) to exercise effective control over the territory; and (2) to be accepted generally by the population of the territory.⁵⁹⁴ However, many arguments were raised after the adoption of this resolution, because the resolution only resolved the representation issue for the people of mainland China but not for the people of Taiwan.⁵⁹⁵

⁵⁹⁴ See Ibrahim J. Gassama, WORLD ORDER IN THE POST-COLD WAR ERA: THE RELEVANCE AND ROLE OF THE UNITED NATIONS AFTER FIFTY YEARS, 20 Brook. J. Int'l L., 255, 330(1994)(Noting that Secretary-General Trygve Lie's memorandum dated 8 March 1950 on the credentials issue advocated the adoption of the "effective control" standard because the United Nations is not an association limited to like-minded States and governments of similar ideological persuasion (as in the case of certain regional associations). As an organization which aspires to universality, it must of necessity include States of varying and even conflicting ideologies.)

⁵⁹⁵ For instance, Dr. Frederic L. Kirgis, Jr. argued the adoption processes of Res. 2758 concerning China's admittance into the UN by saying that "if political considerations determined the outcome of

In short, it could only affirm the right of the PRC to represent the people who were under its effective control. Admittedly, part of the rationale enabled the PRC to take over China's seat in the UN since the ROC no longer effectively controlled the Chinese mainland. Conversely, the people of Taiwan have never been under the control of the PRC for any single day but have been ruled by the ROC since 1945. *A fortiorissime*, the same rationale should equally apply to the case of Taiwan with a population of twenty-three million to be represented at the United Nations. As mentioned above, for the sake of justice and universality, it is necessary for the UN to review its Resolution 2758. Otherwise, the absence of representation of Taiwan in the UN has weakened the implementation of adopted resolutions and introduced an element of uncertainty into the fact showing that universal membership is only a vague goal but not a basic principle in the United Nations.

§ 4-20 Re-evaluating the UN General Assembly Resolution 2758

The adoption processes of the UN General Assembly Resolution 2758 in 1971 was a product of ideological confrontation which was developed during the Cold War era. It did not constitute a complete solution to the issue of China's representation resulting from China's division in 1949, but provided only for the international

the issue, why did the representatives waste their time with arguments about specific provisions of the Charter or about precedents? Does the General Assembly Resolution 2758 make any reference to Taiwan's situation? If the ROC on Taiwan were now to seek separate representation for Taiwan in the General Assembly, would it be proper to treat its request simply as a representation matter? Or would the ROC on Taiwan have to apply for membership under article 4?" See Frederic L. Kirgis, Jr., 1993,

representation of the territory under the jurisdiction of the PRC. The issue of the Chinese seat at the UN was presented in the General Assembly as a matter of credentials and thus, it is one of representation issues rather than one of membership issues. Specifically, the present international environment and the relations between the ROC and the PRC are clearly different from those prior to 1971 because not only has the Cold War come to an end, but international dialogue and economic cooperation have become the major trends as well. Moreover, the government of Taiwan has officially made clear that its sovereignty and legitimacy are over the Taiwan area only, instead of recognizing Taiwan as a part of China and claiming that ROC's authority extends to all of China.

Resulting from the legal obligation found in human rights law,⁵⁹⁶ states are bound to respect and protect the right that all people are entitled to be represented in the UN. The UN should not deny a state such as Taiwan the right to participate in its system by respecting and accepting the credentials of that state's representation. As explained in the previous discussion of universal membership and representation issues, the revocation of the UN General Assembly Resolution 2758 is highly an unsettled issue that the world body has to respond to. With this background, we expect

p.180.

⁵⁹⁶ With a US\$ 250 billion GNP and an annual per capita income exceeding US\$ 12,000, the ROC on Taiwan is not only a prosperous state, but also has been a leading holder of foreign exchange reserves for years.

more specific efforts of the UN to transform theories and principles into practical programs for solving such issues. After all, the desire of every state to belong to the UN is a beginning toward further development of world order.

In fact, in view of the UN's history, there are precedents for the UN General Assembly to review its own outdated resolutions. For instance, due to the different political climate of 1950, the UN General Assembly passed Resolution 386(V) to revoke its Resolution 39⁵⁹⁷ which recommended that the Franco Government of Spain be debarred from membership in UN agencies and from participation in UN activities.⁵⁹⁸ More recently, in 1991, in efforts to repeal UN General Assembly Resolution 3379⁵⁹⁹ equating Zionism with racism, the General Assembly adopted Resolution 46/86 to revoke its former recommendation.⁶⁰⁰

VI. TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP

⁵⁹⁷ See U.N. GEN. ASS. OFF. REC. 1st Sess., 1st pt., Resolutions 39 (A/64) (1946).

⁵⁹⁸ When the Security Council failed to act on the continuation in power of Franco's Government in Spain in 1946, the General Assembly gave comprehensive guidance to UN organs and members regarding their relationship with Franco's regime and recommended that the "Franco Government of Spain be debarred from membership in international agencies established by or brought into relationship with the United Nations." Due to the different political climate of 1950, especially after the United Nations action against aggression in Korea, the 50th session of the General Assembly reconsidered the question of relations with Spain, and adopted a resolution revoking the former recommendation. See, Louis B. Sohn EXPULSION OR FORCED WITHDRAWAL FROM AN INTERNATIONAL ORGANIZATION, 77 Harv. L. Rev. 1381, 1402-4(1964). See also Jane D. Weaver, THE UN CHARTER AS HISTORY, 89 Am. Soc'y Int'l L. Proc. 45, 48(1995).

⁵⁹⁹ See U.N. GAOR 3d Comm., 30th Sess., Supp. No. 34, at 83-84, U.N. Doc. A/10034 (1975).

⁶⁰⁰ See G.A. Res. 46/86, U.N. GAOR, 46th Sess., U.N. Doc A/Res/46/86 (1991); see also Kumiko Matsuura, Joachim W. Muller & Karl P. Sauvart, ANNUAL REVIEWS OF UNITED NATIONS AFFAIRS, 1991, Vol. I, p.19.

As the world's 14th largest trading and 16th largest economic nation,⁶⁰¹ the ROC on Taiwan is well known as a major economic player in the Asian-Pacific and world economies, that making it a member of the international community is something that should not be neglected. Given its solid economic strength, the ROC on Taiwan has an important role to play in the international community.⁶⁰² With such an achievement, the ROC on Taiwan has a strong desire, and sufficient capability to play a prominent and responsible role in the world body. Moreover, membership in the UN will not only provide ROC on Taiwan with a channel for formal contacts with many important countries(including the People's Republic of China), but it will also have a very positive effect in raising Taiwan's international status.

In 1991, the ROC on Taiwan recognized that the PRC controls the Chinese mainland while the ROC's jurisdiction includes only Taiwan and other small islands which are Penghu, Kinmen, and Matsu.⁶⁰³ Progress toward Taiwan's independence has been furthered and expedited by this official statement. Hence, the ROC on Taiwan would no longer compete with the PRC for the right to represent China. Since

⁶⁰¹ According to a survey of the world's top 100 economic entities of 2000, released by the UN Conference on Trade and Development, Taiwan ranked 16th with a GDP of US\$309 billion. See China Times, Taiwan, August 9, 2000.

⁶⁰² With a view to promoting international cooperation, the ROC government set up the International Cooperation and Development Fund(ICDF) on July 1, 1996, under the supervision of the Ministry of foreign Affairs. Major applications of the fund are: (1) technical cooperation, (2) loans, (3) international investments and (4) donations, including all equipment. The ICDF focuses its cooperation on countries in Central and South America, the Caribbean region and Africa with which the ROC has diplomatic relations. The ICDF also expanded its investment projects with neighboring countries in Asia in order to further enhance the substantive relations between the ROC and the countries of this area. For detail see the website of the ROC's Ministry of Foreign Affairs (www.mofa.gov.tw).

⁶⁰³ See generally Government Information Office, ROC, 1995, THE REPUBLIC OF CHINA

1993, Taiwan has put in a bid for UN membership annually and its allies have continually suggested that the UN should address the issue of the representation of the ROC on Taiwan in international organizations by re-examining the General Assembly Resolution 2758 and the importance of Taiwan's geographical location to regional stability, security, and prosperity.⁶⁰⁴ More importantly, the government of Taiwan made pronouncements on a new "One China Two Governments" policy to accommodate its bid to enter the UN under the divided China position.⁶⁰⁵ It is pertinent to reiterate that there exists a genuine desire or a preference for the status quo – an independent Taiwan seeking a form of parallel representation as a separate country from the PRC through membership in the UN system, and promoting itself wherever possible as if it were an independent state.

§ 4-21 A Joint Proposal Made by Twelve UN Member States to the UN⁶⁰⁶

Upon the instruction of our respective governments,

we have the honour to request, pursuant to the rule 14

YEARBOOK(1995).

⁶⁰⁴ See "A JOINT LETTER, DATED 8 AUGUST 2001, TO THE UN SECRETARY GENERAL," information released by the ROC Foreign Ministry(<http://www.mofa.gov.tw>).

⁶⁰⁵ This policy can be seen in an address by Taiwan's Premiere Lien Chan, entitled "HEADING FOR THE 21ST CENTURY," to the 85th Annual Convention of the Rotary International on June 12, 1994. See also Parris Chang & Kok-Ui Lim, TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP, 1 UCLA J. Int'l L. & Foreign Aff. 393, 424-5(1997)(Noting that the government of Taiwan proposes that Taiwan might join the UN under parallel representation alongside the PRC by arguing China is currently divided and ruled by two separate and equal political entities: the PRC on mainland, and the ROC on Taiwan.)

⁶⁰⁶ The joint proposal dated 3 August 2000 from the representatives of Burkina Faso, the Gambia, Honduras, Malawi, the Marshall Islands, Nauru, Nicaragua, Saint Vincent and the Grenadines, Senegal, Solomon Islands and Swaziland to the United Nations, requesting for the inclusion of a supplementary items in the agenda of the fifty-fifth session. For related information, see the website of ROC Ministry of Foreign Affairs(www.mofa.gov.tw).

of the rules of procedure of the General Assembly, the inclusion in the agenda of the fifty-fifth session of the Assembly of a supplementary item entitled "Need to Examine the Exceptional International Situation Pertaining to the Republic of China on Taiwan, to Ensure that the Fundamental Right of its Twenty-Three Million People to Participate in the Work and Activities of the United Nations is Fully Respected."

Pursuant to rule 20 of the rules of procedure of the General Assembly, we attach an explanatory memorandum and a draft resolution.

Explanatory Memorandum

1. The Republic of China is a democratic country and its democratically elected Government is the sole legitimate one that can actually represent the interests and wishes of the people of Taiwan in the United Nations.

2. The exclusion of the Republic of China from the United Nations and its related agencies has created a

major and serious obstacle for both the Government and the people of the Republic of China in their pursuit of normal participation in international organizations and activities.

Draft Resolution

The General Assembly,

Considering the fact that the twenty-three million people of the Republic of China on Taiwan are the only remaining people in the world that still do not have actual and legitimate representation in the United Nations,

Recognizing that since 1949 the Government of the Republic of China has exercised effective control and jurisdiction over the Taiwan area while the Government of the People's Republic of China has exercised effective control and jurisdiction over the Chinese mainland during the same time period,

Acknowledging that the Republic of China on Taiwan is a constructive and responsible member of the international community, with a democratic system

and a strong, dynamic economy,

Observing that the strategic location of Taiwan is vital to the peace and security of the East Asian and Pacific regions and the world,

Understanding that the determination of future relations between the Republic of China on Taiwan and the People's Republic of China should fully respect the free will of the people on both sides and be implemented in a peaceful way,

Mindful of the fact that the Republic of China has committed itself to peaceful resolution of differences with the People's Republic of China and has repeatedly offered friendly and conciliatory gestures towards the leadership of the People's Republic of China,

Noting the declaration of the Government of the Republic of China on Taiwan that it accepts without condition the obligations contained in the Charter of the United Nations, that it is able and

willing to carry out those obligations, and that it is fully committed to observing the principles and spirit of the Universal Declaration of Human Rights,

Affirming the significance that recognition of and respect for the fundamental rights of the twenty-three million people of the Republic of China on Taiwan would have for upholding the principles and spirit of the Charter of the United Nations,

Decides:

(a). To respect fully the choice of the people on both sides of the Taiwan Strait with regard to their future relations and to reject any unilateral arrangement or forced resolution of their difference by other than peaceful means;

(b). To express its concern about cross-strait tension and its possible impact upon regional peace, stability and prosperity, and to encourage the Republic of China on Taiwan and the People's Republic of China to resume their dialogue and communication on a peaceful basis and equal footing.

Regardless of the fact that Taiwan's participation in the UN absolutely is to fulfill its international responsibility and contribute to global peace as well as enhance the increasing integration of the global economy, without gaining acceptance in the UN General Assembly Steering Committee,⁶⁰⁷ the perennial proposal has been excluded from the UN General Assembly agenda because Beijing was able to rally its allies to voice their opposition against Taiwan.⁶⁰⁸ The risk of the PRC and its succession to China's seat in the UN and its systems such as the World Bank and the IMF (not to mention the near universal recognition of the PRC by foreign governments as the legitimate government of China) has made Taiwan very defensive and very cautious notwithstanding that China is a divided country, much as Germany was until a decade ago, or Korea is today.

§ 4-22 Taiwan's Popular Sovereignty

As a matter of international law, there is no doubt that the ROC on Taiwan meets the requirements for the common indicators of statehood⁶⁰⁹ and the inherent rights

⁶⁰⁷ The committee, which organizes the agenda for the session, hears speakers for and against seating Taiwan. As a result of intensive lobbying by the PRC, opponents invariably outnumber supporters of Taiwan and a decision is made, without a vote, not to inscribe the item on the agenda.

⁶⁰⁸ The PRC continuously objected to Taiwan's application, and blocked the application from being included on the daily agenda of the General Assembly for discussion and a possible vote. This is because Taiwan UN membership will raise fundamental questions about national sovereignty that is profoundly against the PRC's so-called "one China" policy. See Angeline G. Chen, TAIWAN'S INTERNATIONAL PERSONALITY: CROSSING THE RIVER BY FEELING THE STONES, 20 Loy. L.A. Int'l & Comp. L.J. 223, 245-8(1998). Regarding the issue that the UN Charter Article 4 further mandates that the Security Council must approve any membership vote by the General Assembly, Dr. Angeline has indicated that "even assuming that the General Assembly approved Taiwan's membership to the UN, the PRC could veto this vote because it retains a permanent seat on the Security Council."

⁶⁰⁹ The four-part test(a permanent population, a defined territory, a effective government with the capacity to have relations with outside world) is set out in the Montevideo Convention which establishes objective criteria of statehood, the Montevideo Convention itself is generally accepted as

that can be enjoyed by the entire population of the land of Taiwan.⁶¹⁰ Resulting from the political process of democratization in Taiwan,⁶¹¹ the ROC's government is an effective authority with legal capacity and rights to act on behalf of the "State" in the international system. It is enshrined in Article 21(3) of the 1948 Universal Declaration of Human Rights that "the will of the people shall be the basis of the authority of government."⁶¹² With a full-fledged democracy, the ROC on Taiwan is an established people's sovereign state. That is, even Taiwan has a right to join the UN as a new state under the name "Taiwan."

With a population of twenty-three million, the issue of Taiwan's UN bid does not only relate to the principle of membership universality, but also relates to the humanitarian concern for those twenty-three million people of Taiwan. At this point, the UN General Assembly should establish an "Ad Hoc Committee" to consider the difficult situation imposed upon the people and to give effect to the popular

reflecting the requirements of statehood at customary international law.

⁶¹⁰ The government of Taiwan, since its break from mainland China in 1949, has existed functionally as an independent sovereign state. As enshrined in the principle of "people's sovereignty," sovereignty itself is a collective right that can only be entitled to and exercised by the entire population of the land constituting the territory of that State. Successful self-governance in Taiwan represents the concept that sovereignty of Taiwan belongs to the people of Taiwan and implies that the common will of the people of Taiwan to establish a state. For detail, see generally Chapter Three of this dissertation.

⁶¹¹ Thanks to the efforts of impelling political reforms, the people of Taiwan have achieved profound self-governance through the processes of democratization and Taiwanization. This continuing processes of Taiwanization and democratization created a new milestone in 1996 when the people of Taiwan directly elected their President for the first time in history. For detail, see Eric, Ting-lun Huang, *THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION*, 14 N.Y. Int'l L. Rev. 167, 204-12(2001).

⁶¹² The International Bill of Rights consists of three important documents: (1) the 1948 Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at (1948); (2) the 1966 International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); (3) the 1966 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N.

sovereignty(the ROC on Taiwan) by thoroughly reviewing the representation principle involved in the UN Resolution 2758. Only in this way can the principle of membership universality be really fulfilled as expected.

§ 4-23 UN's Response to an Armed Conflict in the Taiwan Strait

Seriously considering the importance and urgency of establishing a referendum legal system is the ROC's current policy,⁶¹³ and thus it would be easily accomplished in the near future. As mentioned earlier in the introduction to this chapter, the PRC has repeatedly threatened to use force against any separatist movement in the name of self-determination in Taiwan,⁶¹⁴ hence, if people of Taiwan from a pro-independence background were to use a referendum to assert Taiwan's current position as an independent state, the result could definitely provoke China into using military force against Taiwan. In a typical case where such an armed conflict is caused by a self-determination movement, an intervention by the UN in a peacekeeping operation would be conducted to deliver humanitarian assistance and to prevent a deterioration

Doc. A/6316 (1966).

⁶¹³ In a speech to the World Federation of Taiwanese Associations, Taiwan's President, Chen Shui-bian publicly called for the establishment of a referendum legislation as a policy strategy. If China were to threaten Taiwan militarily, then Taiwan's residents could choose their own future path by referendum. In other words, the referendum law will be designed to settle the matter of unification or independence. For detail, see Trong Chai, REFERENDUM LAW COULD BE PRECIOUS WEAPON, Taipei Times, August 7, 2002.

⁶¹⁴ See James R. Lilley, Face-off over Taiwan; Uncle Sam is the Middle as the Two Chinas Escalate Their War of Words and Threats, THE SAN DIEGO UNION- TRIBUNE, March 19, 2000, at G1 (comparing the ways that American and Chinese leadership view democracy, self-determination and sovereignty); see also China Warns Taiwan Of Independence "Disaster," supra note 293 ("China would do its best to achieve peaceful reunification" but would not rule out the use of force."); see also Yates, supra note 291 (noting China's method of imposing its will through force or intimidation).

of the situation.⁶¹⁵ This is because the principle of self-determination has become the very purpose for the UN to maintain international peace and security.

Accordingly, as Taiwan is recognized as having the entitlement to request the UN Security Council to take measures necessary for restoration of international peace and security, preventive deployment (meaning to deploy the UN authorized military, police or civilian personnel in conditions of crisis within an area where military conflicts has occurred with the expectation of alleviating suffering and to limit or control violence) from the UN could take place when requested by a Taiwan threatened by China's military attack. Alternatively, in a response to the request for deployment of a UN peace-keeping force from Taiwan, the UN would continue to decide what type of necessary measures would be used to deter the repression by the Chinese army and to deliver humanitarian assistance.⁶¹⁶ This is regardless of the fact that currently Taiwan is not a member state in the UN. As a guarantor of international peace and security,

⁶¹⁵ See Halperin, Scheffer, & Small, *supra* note 165, at 105-111 (discussing the legitimacy of claims by sub-state groups by posing alternatives to the "internal" and "external" self-determination categories); see also Stephan A. Wangsgard, *SECESSION, HUMANITARIAN INTERVENTION, AND CLEAR OBJECTIVES: WHEN TO COMMIT UNITED STATES MILITARY FORCES*, 3 *Tulsa J. Comp. & Int'l L.* 313, 315-23(1996) (analyzing the doctrine of self-determination within the context of human assistance and intervention). See generally Yogesh K. Tyagi, *THE CONCEPT OF HUMANITARIAN INTERVENTION REVISITED*, 16 *Mich. J. Int'l L.* 883, 891-4(1995) (highlighting the differences between humanitarian intervention and humanitarian assistance, specifically stating that pursuant to Article 2(5), it is a duty of all member states to extend every assistance to the United Nations to promote fundamental freedoms).

⁶¹⁶ In general, a proportional military intervention by the UN in response to an armed conflict caused by a non-colonial self-determination movement will be considered as a necessary measure. Regarding the issue of the potential of an armed conflict in the self-determination movement of Taiwan, see Eric, Ting-lun Huang, *THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF PEOPLE OF TAIWAN TO SELF-DETERMINATION*, 14 *N.Y. Int'l L. Rev.* 167, 212-23(2001). (Noting that if the need and feasibility of protecting humanitarian imperatives and maintaining international peace and security can be proven, a proportional military intervention by the UN in response to an armed conflict caused by a non-colonial self-determination movement will be

the UN must fulfill its duty to find a way to address this concern about future changes in the Taiwan Strait.

Despite the fact that the self-determination movement in Taiwan could easily trigger an aggression by China, it is anticipated that this claim by the people of Taiwan for a free choice of Taiwan's status will unavoidably continue unless the dispute of Taiwan's sovereignty is amicably and smoothly settled by both sides of the Taiwan Strait.⁶¹⁷ Since a potential armed conflict in the Taiwan Strait has been listed together with the Kashmiri and North Korean issues as the most troubled in Asia, a continuously hostile tension in the Taiwan Strait is therefore likely to endanger the maintenance of international peace and security.⁶¹⁸ In view of that, the situation should be monitored by the United Nations, because a peaceful Taiwan Strait is a

considered a necessary measure.)

⁶¹⁷ See Christopher J. Carolan, *THE REPUBLIC OF TAIWAN: A LEGAL HISTORICAL JUSTIFICATION FOR TAIWANESE DECLARATION OF INDEPENDENCE*, 75 N.Y.U. L. Rev. 429, 465 (stating the absence of war between Taiwan and China does not point to the presence of peace, indicating that until a solution is found that resolves the status of the island, there will be no peace); see also Christopher C. Joyner, *THE SPRATLY ISLANDS DISPUTE: WHAT ROLE FOR NORMALIZING RELATIONS BETWEEN CHINA AND TAIWAN?*, 32 New Eng. L. Rev. 819, 837 (discussing how the issue of sovereignty represents different social and political dimensions for Taiwan and China); see also James Lilley, *THE UNITED STATES, CHINA, AND TAIWAN: A FUTURE WITH HOPE*, 32 New Eng. L. Rev. 743, 744-5 (describing tensions between China and Taiwan as further exacerbated because China blames Taiwan for the major downturn in U.S.-Chinese relations in 1995).

⁶¹⁸ See Charney & Prescott, *supra* note 81, at 477 ("Unfortunately, the serious differences of opinion across the Taiwan Strait stem from deep cultural, political, and historical foundations. These differences might make war inevitable."); see also Jainming Shen, *SOVEREIGNTY, STATEHOOD, SELF-DETERMINATION, AND THE ISSUE OF TAIWAN*, 15 Am. U. Int'l L. Rev. 1101, 1161 (2000) ("Independence for Taiwan is a dead-end. It is not only a legal impossibility, but also an actual impracticability, because the PRC Government will not allow that to happen or succeed."). See generally Charles R. Irish, *THE "REPUBLIC OF TAIWAN": A LEGAL-HISTORICAL JUSTIFICATION FOR A TAIWANESE DECLARATION OF INDEPENDENCE*, 75 N.Y.U. L. Rev. 429, 465 (2000) (discussing tension throughout Taiwan).

common desire of the international community.⁶¹⁹

According to Article 11(3) of the UN Charter, the General Assembly may call the attention of the Security Council to situations that are likely to endanger international peace and security.⁶²⁰ In order to have a clearer understanding of the potential conflict in the Taiwan Strait, the UN General Assembly needs to build a "pre-warning system" by setting up a special committee to monitor any self-determination movement in Taiwan as well as the potential reaction from China.⁶²¹ The Assembly can then effectively call the attention of the Security Council to help in managing the increasing tensions before they result in a devastating war as was the case in the 1996 missile crisis in the Taiwan Strait.⁶²² The function of this committee is to create the

⁶¹⁹ See Omar Saleem, THE SPRATLY ISLANDS DISPUTE: CHINA DEFINES THE NEW MILLENNIUM, 15 Am. U. Int'l L. Rev. 527, 536(2000)(recognizing the important implications of China accepting Taiwan as independent state); see also Carolan, supra note 229, at 465 ("Not to recognize Taiwan's claim would be to dilute the product of decades of international legal development, something that states would be hesitant to do.").

⁶²⁰ See The New Security Council, N. J. L. J., September 19, 1994, at 16 (discussing how the Security Council's powers have been redefined by allowing them to permit intervention into the internal domestic affairs of member states in order to protect people from human rights abuses); Charter Committee Reports Progress Regarding UN Fact-Finding Process, 27 UN CHRONICLE 2, 32 (1990) (discussing the role of the Security Council in dealing with threats to international peace and security in the framework of the UN as a whole); see, e.g., Thomas L. Friedman, U.S. May Back International Talks if Israel Stymies Vote Plan, N.Y. TIMES, July 9, 1989(stating the UN's plan for calling an international peace conference because of an international situation which is likely to endanger international peace).

⁶²¹ See Coffey, KEYNOTE ADDRESS: RULE OF LAW AND REGIONAL CONFLICT, 19 Whittier L. Rev. 257, 273(1997)(discussing the importance of early warning systems being institutionalized on the multi-lateral level.); see also Ambassador David J. Scheffer, THE INTERNATIONAL CRIMINAL TRIBUNAL FORWARD: DETERRENCE OF WAR CRIMES IN THE 21ST CENTURY, 23 Md. J. Int'l L. & Trade 1, 1(1999) (stating President Clinton's concern with the establishment of a formal mechanism in the U.S. Government to facilitate early warning of atrocities and to consider means to prevent or respond to them as quickly and effectively as possible); see also John Shattuck, PREVENTING GENOCIDE: JUSTICE AND CONFLICT RESOLUTION IN THE POST-COLD WAR WORLD, 3 Hofstra L. & Pol'y Symp. 15, 18(1999) (recognizing the importance of early warning and preventive in an effort to prevent the recurrence of future problems like what happened in Bosnia and Rwanda).

⁶²² See Why Did So Many People Look the Wrong Way?, ECONOMIST, May 29, 1999, at 1 (categorizing the Taiwan missile crisis of 1996 as a "world changing event"); see also George Wehrfritz,

necessary condition for a pre-warning mechanism, based on information gathering and fact-finding without getting involved in the dispute as to Taiwan's status.⁶²³ It is conceivable that a proposal for creating such a special committee will be accepted by the UN General Assembly because it is deeply related to the interests of most member states of the UN.⁶²⁴

§ 4-24 Taiwan's Accession to the WTO & Cross-Strait's Economic Integration

As a result of the PRC's Three NOs policy⁶²⁵ that refers, in part, to "no support for Taiwan's membership in international organizations in which statehood is required," regardless of its continuous efforts to the bid for UN membership in the past decade, Taiwan is still excluded from the UN specialized agencies, especially the two major international financial institutions: the IMF and the World Bank.⁶²⁶

Blaming the Messenger, NEWSWEEK, December 30, 1996, at 33 (classifying 1996 as a bad year for China, due to several factors including the missile crisis in the Taiwan Strait). See generally John Pomfret, Business Takes Back Seat on China Trip; U.S. Firms Find Access at Low Ebb, WASH. POST, June 26, 1998, at F01 (stating that government-to-government ties between the United States and China have improved since the 1989 crackdown on student-led protests in Tiananmen Square and the Taiwan missile crisis of 1996).

⁶²³ See Lucia Mouat, Taiwan Looks for a Seat in the House of Nations, CHRISTIAN SCI. MONITOR, August 25, 1994, at 7 (discussing how Taiwan has gained a much more democratic status in the eyes of the UN as well as the international sphere); see also Marilyn Greene, Taiwan Campaigns for United Nations Status, USA TODAY, September 17, 1993, at 4A (noting Taiwan's efforts to gain status in the U.N. after two decades of exclusion); Taiwan Offers \$1 Billion to UN for Membership, Telegraph, BALTIMORE SUN, June 27, 1995, at 6A (discussing Taiwan's rigorous efforts to try and end its outcast status in the UN).

⁶²⁴ See *id.*, Mouat, (stating that Taiwan's status is an important issue for the UN); see also *id.*, Greene, (explaining that the issue of Taiwan's status is important to UN members). But see Wen-Yen Chen, Earthquake Illustrates Importance of Recognizing Taiwan, WASH. TIMES, October 2, 1999, at A-11 (recognizing the disappointment of Taiwanese-Americans at the fact that the UN waited to get China's approval before sending relief assistance to Taiwan after the massive earthquake of 1999).

⁶²⁵ The "THREE NO'S" refers to: 1) no support for Taiwan's independence, 2) no support for "two Chinas" or "one China, one Taiwan" and 3) no support for Taiwan's membership in international organizations in which statehood is required.

⁶²⁶ The International Monetary Fund (IMF) and the World Bank, also known as the Bretton Woods Institutions (BWIs), were formed in Bretton Woods in 1944 on the eve of the end of World War II. They were precursors to the United Nations and other multilateral institutions formed after World War

In order to break through this limitation imposed by the PRC, Taiwan has adopted pragmatic diplomacy to ensure its international position by being an active member in international economic organizations, such as APEC and the Asian Bank, by using titles other than its official designation and accepting dual recognition from foreign governments. Apparently, China is somewhat comfortable with this pragmatic policy as it acknowledges that China's obstacle on Taiwan's participation in international economic organizations does not resolve the differences between the two sides of the Strait. On the contrary, given the fact that Taiwan's economy is much more developed than China's, it would be likely to have a negative economic impact on the Chinese and Taiwanese people. Taiwan's numerous economic achievements brought by Taiwan's democratization is precisely the direction that China can follow in its economic development, especially along with the opening up and liberation of the Chinese market.

II and reflected the new spirit of cooperation between nations, especially in economic matters. See generally Sandra Blanco & Enrique Carrasco, Symposium, *The FUNCTIONS OF THE IMF AND THE WORLD BANK*, 9 *Transnat'l L. & Contemp. Probs.* 67, 67(1999). See also generally Dominique Carreau, *WHY NOT MERGE THE INTERNATIONAL MONETARY FUND (IMF) WITH THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (WORLD BANK)?* 62 *Fordham L. Rev.* 1989, 1989 (1994). Both the IMF and the World Bank now address human rights, which involves a number of civil, political, economic, social, and cultural rights, in their relations with member countries. This development-oriented operations by the two UN specialized agencies have enabled it to influence human rights situations in Member States. At this point, to open up the membership of the UN system to either *de facto* or *de jure* political entities would assist in developing the concept of "implementing democracy" as a whole. In this sense, the ROC on Taiwan is well known as a major economic player in the Asian-Pacific and world economy. As a trade-oriented and major investor state, Taiwan is more qualified than most other developing countries to join the UN and its specialized agencies, such as the World Bank and the IMF. Regarding the critical issues facing the Bretton Woods System, see Enrique R. Carrasco, *CAN THE IMF, WORLD BANK, AND THE GATT/WTO PROMOTE AN ENABLING ENVIRONMENT FOR SOCIAL DEVELOPMENT?* 6 *Transnat'l L. & Contemp. Probs.* I, i-xx(1996); see also Daniel D. Bradlow, *THE WORLD BANK, THE IMF, AND HUMAN RIGHTS*, 6 *Transnat'l L. & Contemp. Probs.* 47, 47-90.

After twelve years of negotiations, Taiwan was admitted as a full member of the World Trade Organization on January 1, 2002. The WTO admission of both sides of the Taiwan Strait has created a new opportunity for the further development of cross-strait relations. This is because not only will there be closer cross-strait trade and economic relations, but both sides will also be able to use the WTO spirit of consultation to handle other issues resulting from promoting cross-strait trade normalization. Although the WTO is not a place to discuss political affairs, the two sides of the Strait can reduce political tensions and gradually increase economic cooperation through their repeated contacts at WTO meetings.

§ 4-25 Taiwan's Accession to the IMF and the World Bank

Taiwan's membership in the APEC, the Asian Bank and the WTO are evidences that the two sides' mutual interest lies in economic cooperation and any issue relating to economic sovereignty is no longer a sensitive issue to cross-strait relations. The PRC apparently does not regard these efforts by Taiwan to maintain its political economic sovereignty as an affront to its one-China policy. In this respect, allowing Taiwan's presence in international financial institutions will not only be conducive to the process of growing global concern on the issues of the humanitarian level and economic integration, but also serves the best interest of all people of both sides of the Taiwan Strait in terms of economic prosperity. Hence, the model of Taiwan's WTO

membership provides a good example to help Taiwan access to the IMF and the World Bank which can benefit by having another economically viable member. As for a long-term solution, if such a bid for Taiwan to join the IMF and the World Bank can succeed, as a matter of economic integration, it would create an evolution of the concept of political economic sovereignty that might be useful to some of the arrangements between Taiwan and China, without affecting each side's territorial sovereignty and integrity, in which people on both sides can enjoy reciprocity and prosperity. As such, both sides of the Taiwan Strait can improve bilateral relations with each other through contacts within the IMF and the World Bank systems.

VII. CONCLUSION

In 1945, the ROC affirmed its commitment to these ideals when it signed the UN Charter in San Francisco and thus originally become a UN founding member in the General Assembly and the Security Council until 1971. As a founding member of the UN, the ROC played a very positive, constructive role during its 26-year-long ties with this world body.

Since leaving the UN in 1971, the ROC has encountered many diplomatic frustrations and weathered an array of crises.⁶²⁷ In order to respond to these

⁶²⁷ See Jianming Shen, SOVEREIGNTY, STATEHOOD, SELF-DETERMINATION, AND THE ISSUE OF TAIWAN, 15 Am. U. Int'l L. Rev. 1101, 1121-1 (Noting that more States recognize the PRC

challenges, the ROC must blend its political status into its economic position by working for long-term development focusing on domestic, economic, political and social growth.⁶²⁸ Currently, the ROC has transformed Taiwan into a model of freedom, democracy and equitable prosperity in developing countries.⁶²⁹ Taiwan is willing to share its economic success with the world community and to contribute to international development. However, while Taiwan's economic achievement has reshaped its role on the global economic stage, it has not been sufficient in strengthening its political position in the global context.

§ 4-26 Parallel Representation of Divided Countries

Government instead of the "ROC." In 1949, eight States entered into diplomatic relations with the newly established PRC. By 1956, twenty-five States established diplomatic relations with the PRC Government. By 1969, the number doubled to some fifty States. In 1972, particularly following the resumption of China's representation at the United Nations, the number of States with diplomatic relations with the PRC dramatically increased to about eighty-eight. In 1979, more than 110 States maintained such relations with Beijing. The number kept growing at a steady pace in the following two decades: about 128 by the end of 1985, about 141 by the end of 1991, and 161 by 1999. Currently, about only twenty-nine States, mostly in Central America and Africa, are maintaining official relations with Taiwan).

⁶²⁸ See Wallace Wen-Yeu Wang & James Ting-Yeh Yang, FINANCIAL INSTITUTIONS IN TAIWAN: AN ANALYSIS OF THE REGULATORY SCHEME, 4 J. Chinese L. 3, 5-6(1990)(Noting that historically, the government pursued an economic policy of strict surveillance. This initial policy contributed to the reform of Taiwan's economy and laid the foundation for its early financial expansion and economic prosperity. In its transformation from an agrarian economy to a major economic power, Taiwan has managed to achieve an economic growth rate that very few other countries have matched). See also Tay-sheng Wang, THE LEGAL DEVELOPMENT OF TAIWAN IN THE 20TH CENTURY: TOWARD A LIBERAL AND DEMOCRATIC COUNTRY, 11 Pac. Rim L. & Pol'y J. 531, 537-8(2002)(Noting that in the 1960s and 1970s, the prosperous economy in Taiwan further promoted the prevalence of modern civil and commercial law based on the Western concept of capitalism. In the 1950s, the ROCOT government joined the Cold War camp of the Western democracies led by the United States, and, consistent with this, American legal institutions and ideas were to a certain extent "imported" into Taiwan).

⁶²⁹ See Michael E. Mangelson, TAIWAN RE-RECOGNIZED: A MODEL FOR TAIWAN'S FUTURE GLOBAL STATUS, 1992 B.Y.U.L. Rev. 231, 251(1992)(Noting that Taiwan's economic and political progress, coupled with the changing order of the Pacific region, necessitates a more active role for it in world affairs. Granting Taiwan increased international rights and allowing it to participate in world organizations would improve the peace and prosperity of the region. It would also foster change in the PRC and affirm Washington's support for democracy, a free market economy, human rights, and loyalty to its allies).

What the ROC seeks is only proper and effective protection for the twenty-three million people of Taiwan, and representation of their fundamental rights in the UN. It does not seek to represent the territory under the effective jurisdiction of the PRC. In the UN, there are precedents for parallel representation of divided countries. The former East Germany and West Germany, as well as North and South Korea were admitted into the UN,⁶³⁰ first as observers and later as full members. The former East and West Germanys have already achieved national unification since 1990, and the two Koreaes still aspire to national unification. This demonstrates that the divided status of nations does not impede equal and parallel participation by both sides in the international community. On the contrary, it may help to ease the tension between them, thereby helping to create more favorable conditions for either status quo or reunification.

Due to the possibility of the use of force by the PRC to enforce its claim of sovereignty over Taiwan, maintaining a peaceful Taiwan Strait should be regarded as a common desire of the international community.⁶³¹ In this respect, allowing the

⁶³⁰ Regarding the UN precedents on "divided nation" membership, see Parris Chang & Kok-Ui Lim, TAIWAN'S CASE FOR UNITED NATIONS MEMBERSHIP, 1 UCLA J. Int'l L. & Foreign Aff. 393, 425-6(1997)(Noting that admission to the UN as a divided country is contingent on (1) the competing governments' qualifications being relatively equal and (2) the rival government's mutual acquiescence. For example, in the Korea's case, dual admission for Seoul and Pyongyang occurred simultaneously in July 1991, only after the rival governments did not object each other's entry. Similarly, UN admission for a divided German state occurred only after a détente was reached between the two rivals in 1973.)

⁶³¹ See Charney & Prescott, *supra* note 81, at 477 ("Unfortunately, the serious differences of opinion across the Taiwan Strait stem from deep cultural, political, and historical foundations. These differences might make war inevitable."); see also Shen, *supra* note 72, at 1161 ("Independence for Taiwan is a dead-end. It is not only a legal impossibility, but also an actual impracticability, because the PRC Government will not allow that to happen or succeed.). See generally Charles R. Irish, THE

ROC on Taiwan to join the UN is not challenging the PRC's position in the United Nations. The world body can therefore provide necessary assistance to settle the existing disputes between the two sides of the Taiwan Strait before they degenerate into serious conflicts. After all, the UN's assistance is provided on the basis of commitments from the member states concerned to maintain a peaceful Taiwan Strait.

§ 4-27 Common Interest of Maintaining a Peaceful Taiwan Strait

If Taiwan were a UN member state, greater access to information about potential threats to the peace of the Taiwan Strait would enhance the UN's ability to launch any necessary measures to maintain a helpful role. Here the Korean model can be used for Taiwan's membership in the UN that would allow both the PRC on the mainland and the ROC on Taiwan to have UN membership. In this case, the major positive vision would be for the ROC to seek its peaceful coexistence and cooperation with the PRC in the UN and thus, they can settle any dispute between them through peaceful dialogue. Accordingly, the two sides of the Taiwan Strait will be able to forge good will and mutual trust to benefit the people of both sides that will be a boon to regional peace and prosperity.

Currently, the ROC and the PRC are full members in some international organizations (such as the Asian Bank, the APEC, and the WTO) showing that it is

"REPUBLIC OF TAIWAN": A LEGAL-HISTORICAL JUSTIFICATION FOR A TAIWANESE DECLARATION OF INDEPENDENCE, 75 N.Y.U. L. Rev. 429, 465(2000) (discussing tension

becoming possible to see both sides of the Taiwan Strait seated and represented in the international arena. It is in the best interest of both governments to create a stable framework in which the PRC and the ROC on Taiwan can negotiate toward reunification or some form of association over the long term.

§ 4-28 A Worthy Member of the UN

For the purposes of globalization, it is true that more progress has been made in the area of economic rights by the international community. The establishment of the WTO is a notable example that is easily visible. In view of the increasing integration of the global economy, it is important to emphasize again that Taiwan's responsibility for economic rights must be related to its actual participation in any international organization it deserves. As a matter of fact, the UN is the most significant one that Taiwan desires to join. This is because only the actual participation as a member state in the UN would ensure accountability for the protection of these people on Taiwan.

In today's world, the interdependent global community requires the positive contributions of many other actors in the international community. Accordingly, in order to fulfill the goal of membership universality and equal respect for state sovereignty, it is necessary for the United Nations to consider the exceptional situation of the ROC on Taiwan and accommodate Taiwan's accession to the world

body. As we all know that even before the UN was founded, the ROC has been already an established state. Until now, the ROC is a state as it was. Moreover, Taiwan embraces democratic values and has full respect for human rights; its economy is larger than ninety percent of the UN member states; and its population is bigger than two-thirds of the UN members.⁶³² The record of the ROC on Taiwan economically and politically is highly impressive. If a major contribution that the UN can make to world affairs is to aid in breaking down barriers that divide the people of the world, the question here arises as to what possibly could be the reason for the government of Taiwan not being admitted to membership in the United Nations.

In spite of the fact that Taiwan stands ready to join the UN, it could be that the time is not yet ripe enough for the ROC on Taiwan to gain a full membership in the United Nations in the near future due to the opposition from the PRC. It does not mean, however, that it will be impossible in the future. The end of the Cold War has raised expectation of people across Taiwan to look toward the world body to work its way into a wide humanitarian concern about this matter. Moreover, because Taiwan's UN membership would pose no barrier to the future peaceful and democratic unification of a divided China, therefore, Taiwan's UN bid may be structured on an

⁶³² See John J. Metzler, WHY CAN'T TAIWAN COME TO THE UN?, China Post, Taiwan, Sep. 29, 1999.(Noting that "if Taiwan should participate in the world body, its budget assessments and contributions to enhance economic development programs would be a boon for the cash-strapped organization.")

individual basis such as "one country two territorial entities," or "one country two adhering bodies."⁶³³ At the very least, to participate in a UN observer status, as is the case of Palestine, could be a positive precedent that could be first applied to the ROC particularly with respect to the humanitarian concerns as well as the inalienable right of the Taiwanese people. As a matter of fact, the international support⁶³⁴ for Taiwan to play a valuable role in the UN system is growing so that it will eventually look for ways for Taiwan to be heard. In this sense, the government of Taiwan should increase its efforts to join as many international organizations as possible that do not require statehood for membership. This would be a more flexible strategy to build stronger ties with other countries that eventually can actively benefit Taiwan's UN bid.

⁶³³ See Michael C. Davis, *THE CONCEPT OF STATEHOOD AND THE STATUS OF TAIWAN*, 4 J. Chinese L. 135, 142(1990)(Noting that membership may be structured on an individual basis, as an affiliation with full, or an observe status, or as "one country, two organization," "one country, two adhering bodies," or "one country, two territorial entities.")

⁶³⁴ On July 18, 1996, the European Parliament adopted a resolution on "Taiwan's Role in International Organizations," supporting Taiwan's bid to secure better representation in international forums and encouraging the UN to set up a working group to study the scope of Taiwan's participation in the United Nations. In September of the same year, the US Congress expressed its support for incorporating Taiwan into the global community by passing Resolution 212 to endorse the resolution adopted by the European Parliament. The Resolution 212 indicating that "the people of Taiwan ought to be better represented in international organizations than they are at present, which would benefit both Taiwan and the whole of the international community." (See H.R. Con. 212, 104th Cong., 1996). See also the US House of Representatives Resolution 390 (passed in 106th Congress, October 3, 2000), which emphasized that "(1) Taiwan and its 23,000,000 people deserve appropriate meaningful participation in the UN and other international organizations such as the World Health Organization; and (2) the United States should fulfill the commitment it made in the 1994 Taiwan Policy Review to

CHAPTER FIVE

**CONCLUSION: A VISION WITH HOPE FOR THE FUTURE OF
TAIWAN**

I. INTRODUCTION

Since it took power in 1949, the PRC has long embraced, as a basic policy, the position that it regards the integration of Taiwan into China as an essential goal. In this sense, the PRC repeatedly demands Taiwan to commit to reunion rather than independence by accepting its so-called “one China” principle,⁶³⁵ which downgrades Taiwan as part of the PRC and to accept so-called “one country, two systems,” which makes Taiwan another Hong Kong, or Macao. It is obviously a virtual rejection of the Taiwan people’s position that deems Taiwan a state equal in status with China. As the Government on Taiwan and the Government on the Chinese mainland have been separated into different political entities for decades, it is communism vs. capitalism or democracy vs. authoritarianism, and thus, the unification issue must not be decided unilaterally by the mainland side.

§ 5-1 Two Separate Chinese States

The assumption of the PRC’s declaration of its sovereignty over Taiwan implies that the PRC has succeeded the ROC as China’s representative since 1949. However, legally, the ROC has been a sovereign state since its foundation in 1912 and it has not disappeared because of its retreat from the Chinese mainland to Taiwan. Politically, the PRC has never ruled Taiwan for one single day since taking control of the Chinese

⁶³⁵ “One China” is repeatedly mentioned in China’s communiqués with over 160 countries that have formal diplomatic relations with China. Taiwan and China are both part of “one China,” this “one China” refers to the People’s Republic of China, instead of the Republic of China, and the PRC is the

mainland. Accordingly, in terms of institutional, legal, and political structure, there is no continuity of the PRC's sovereignty over Taiwan. This is certainly grounded in the legal aspects.

Such an assumption by the PRC is unfounded. The PRC's political proclamation of its one China principle may create international obligations for itself, but it will not impose legal obligations on the ROC. In the past, the ROC officially followed the political fiction of a "one-China" principle, but regarded its ties with the PRC on the basis that they were two equal political entities within a divided country. Despite the fact that the one-China principle is actually very much accepted internationally and the international reality is not in Taiwan's favor, this is not a matter of right or wrong for Taiwan to accept or reject the PRC's view of one-China, rather, the ROC's view of shaping the Taiwan-China ties as two divided Chinese states anchored in the undeniable fact of a historical, political, and legal reality that the whole world already knows.

In fact, one-China should be in the future tense. Since the reality of two Chinas was created with the birth of Communist China on the Chinese mainland and the relocation of Nationalist China to Taiwan since 1949, bilateral relations between the Taiwan Strait(the Strait) would be "one country on each side." Accordingly, Taiwan

has its own position on the “one-China” issue. If China composed of the ROC and the PRC is already a sovereign state at the present period of time, why does “one China” remain an issue? In this logic, how can unification be achieved without admitting division by both sides in the first place? Accordingly, cross-strait relations between the ROC and the PRC are not a unilateral problem, but a bilateral one. Whether unification between Taiwan and China can be realized to pursue a win-win situation only depends on how the two sides’ bilateral relations have developed.

§ 5-2 Dispute on One-China Issue

Identifying the current cross-strait relations as “special state-to-state relationship”(the two Chinese states have been separated by civil war) is one issue, promoting the scenario that the two sides of the Strait integrate into a political unit or union is another. Logically, there is no gap between the two issues because they are not subordinate to each other, rather they should be considered independently. However, despite the fact that Taiwan, together with China, are two divided and separate Chinese states, the PRC has always thrown people into confusion by stirring the two issues together under its political fiction of the “one-China” concept, instead of providing a satisfactory clarification. Should the PRC continue to maintain a hegemonic reunification policy toward Taiwan by its intransigent position on the sovereignty issue, it will only make the one China goal unattainable.

As mentioned above, there is no compelling reason why, after enjoying years of prosperity and democracy, the vast majority of Taiwanese people, as shown in public opinion polls, support the status quo of the current Taiwan position (neither a drive for independence, nor a push for reunification, but a careful management of the longstanding sovereignty dispute).⁶³⁶ Despite the fact that the lure of investment and markets has a strong pull for Taiwan's business community, Taiwan's people are averse to being absorbed by China. Although China offers Taiwan the Hong Kong model of autonomy to accommodate the difference, there are not many takers in Taiwan for this favor.⁶³⁷

So far, the one-China issue has been discussed, but no consensus has been reached.⁶³⁸ Any form of the one-China concept can only be served as a vision of the future because of the acceptance of the present status-quo that both sides of the Taiwan Strait have gone their own ways on the political, economic, social, and

⁶³⁶ See Kam Yiu-yu & Chris Wu, A DECLARATION OF INDEPENDENCE WOULD BE A FOOL'S ERRAND, Taipei Times, Feb. 22, 2002 (Noting that pro-independence forces are not in the majority. On the contrary, around 80 percent of all Taiwanese people insist on maintaining the status quo of the ROC). Also see information of public polls released by the ROC Mainland Affairs Council (Noting that on the question of unification or independence, the latest MAC-commissioned poll, conducted by the Survey and Opinion Research Group of National Chung-cheng University between July 6-9, 2001, showed that 80.5 percent of the respondents approved maintaining the status quo) (www.mac.gov.tw)

⁶³⁷ See Annette Lu, FOLLOWING THROUGH ON "TWO STATES," Taipei Times, July 23, 1999, Taiwan (Noting, in a recent poll regarding the relations between Taiwan and China, as many as 73 percent of the people in Taiwan support the two-states theory).

⁶³⁸ In October 1992, representatives from Taiwan and China met in Hong Kong, and both sides had substantive discussions on how to resolve the question of "one China." In spite of the fact that no conclusion was reached at the meeting, the PRC telephoned Taiwan's representative and expressed "respect and acceptance" of our suggestion. This means on the question of "one China," the two sides were willing to verbally handle this by "respective interpretation." This was the process that led to the two sides making their own interpretations respectively. "One China respectively interpreted by each side" has been a positive way of describing the whole process.

cultural fronts for more than half a century since a Chinese country(the ROC) was divided in 1949. Hence, a solution to the tension between Taiwan and China may lie in the establishment of a common interest in which each side would maintain considerable status quo of the Taiwan Strait situation and that provides a long-term solution satisfactory to the cross-strait relations. Before finding the genuine meaning of one China that is acceptable to both sides, it should be understood that each side could have its own interpretation of one China. The consolidation of a consensus over the interpretation of a future new China will be the starting point so as to make the cross-strait relations move forward on a basis that is mutually acceptable. That is to say, in terms of cross-strait relations, politics and economics must be kept as separate as possible and thus, difficult problems at present will be shelved for later handling and the promotion of cross-strait exchanges can be accelerated.

§ 5-3 Economic Exchanges

Although the two sides of the Taiwan Strait strongly disagree over political issues, they have developed fairly good people-to-people contacts, especially in the economic sphere.⁶³⁹ Obviously, economic interests have encouraged Taiwan and China to adopt a pragmatic approach to deals with each other. Despite the fact that the

⁶³⁹ See Taiwan Must Protect Its Economy, Taipei Times, September 29, 2002, Taiwan(Stating that according to the Chinese government's statistics, in the past 10 years, the total amount of contracted investments by Taiwan to China takes up about 2 percent of Taiwan's GNP.)

two sides share common interests economically,⁶⁴⁰ they still regard each other as longtime rivals politically. Economic exchanges across the Taiwan Strait are becoming increasingly involved and interdependent. As a result of closer economic interchange between China and Taiwan, China is now Taiwan's 4th biggest trading partner and Taiwan is now China's 5th biggest trading partner. By 2000, Taiwan had become the 4th largest source of foreign investment for mainland China.⁶⁴¹

Regardless of different motivations(some for profit, some for national identity objectives or some simply for political reasons), the cross-strait economic exchanges have been growing, necessitating both Taiwan and China, because of much that is at stake, should let their relations become more interdependent. This reality of broadening the economic interchange with China poses both risks as well as presents opportunities to Taiwan. Will the increasing interdependent economy across the Taiwan Strait be mutually beneficial to dialogue and lead to ultimately resolving the existing political differences between Taiwan and China? Will Taiwan eventually survive the impact of its economic interchanges with China? Apparently, it is not only the business risks but also the security risks that should be taken into account in the

⁶⁴⁰ Viewing that regionalization of economy has become an irreversible trend, economic exchanges between Taiwan and China would become more inevitable and attractive. Since 1980s, encouraged by open policies of the two countries, the relations between the two countries have changed rapidly. It makes Taiwan the China's second largest source of Foreign Direct Investment(FDI) and Taiwan has become China's major trading partner.

⁶⁴¹ See The ROC Yearbook: Taiwan 2002, information released by the ROC Government Information Office(www.gio.gov.tw).

cross-strait relations between Taiwan and China. With the future of the cross-strait relations uncertain, possibly having negative effects on the economy of both sides of the Taiwan Strait, the government of Taiwan must handle its China policy appropriately.

§ 5-4 Stabilize Taiwan Economy

After decades of rapid growth and participation in the international trading community, the global recession is a major factor affecting Taiwan's current economy.⁶⁴² The result should not come as a surprise that Taiwan's current economy is now facing a big challenge due to the global uncertainty risks despite the fact that Taiwan is one of the world's most competitive economies.⁶⁴³ This is because Taiwan is an export-oriented economic country that depends heavily on the world market and, more significantly, there is no doubt that China, the fastest growing economy on earth, is the most potential market in the world.

In this respect, if Taiwan, a major source of investment for China despite the conflict over sovereignty, wants to keep its economic competitiveness and also

⁶⁴² See PRESENTATION BY CHAIRPERSON ING-WEN TSAI CHAIRPERSON OF THE MAINLAND AFFAIRS COUNCIL AT THE 6TH TAIWAN ROUNDTABLE GOVERNMENT MEETS INDUSTRY POLICIES AND PROSPECTS FOR PROFITS THE WESTIN, November 20, 2001, Taipei Times, Taiwan (Noting that the world recession is, of course, a major factor affecting our (Taiwan) economy today, ... At the same time, we have found ourselves faced with structural changes which are much triggered by the rapid global changes, the technology changes, and the emergence of other economies as competitors in areas where Taiwan once excelled in.)

⁶⁴³ According to a recent survey released by the World Economic Forum (WEF), Taiwan is the world's most competitive economy after the US and Finland. The growth competitiveness index is made up of three variables (technology, the quality of public institutions and the macroeconomic environment) that drive medium and long-term growth. For detail, see a summary of the WEF's Global Competitiveness Report 2002-2003, quoted by Taipei Times, Taiwan, November 14, 2002.

maintain a stable cross-strait relation, the importance of continuing Taiwan's relations with China in economic terms would outweigh everything. Moreover, China's continuous economic growth and integration into the world economy provide enormous opportunities for developing a more pluralistic social and political system in China that would accelerate China's democratization. As was true in Taiwan, a rapidly modernizing economy in China is likely to generate effective pressure for political change toward democracy.

Given the rapid changes in the world market, the economic environment in Taiwan is much more dependent on external factors in the 21st century.⁶⁴⁴ To develop the sector into a competitive Chinese community in the world is to achieve the measure of the stability of Taiwan's economy and make the stability sustainable. By this logic, economic exchanges and cross-strait trade across the Taiwan Strait are not only the keys to pave a way for further improvement of cross-strait ties that benefit both of the two sides of the Strait, but also a good strategy to reinforce an ongoing effort by Taiwan to make its economy more open and more international, and thus, even more competitive than it already is.

§ 5-5 Triangular Relations Between Taiwan, China and the US

For decades, the US has not taken a position on the future of Taiwan other than

⁶⁴⁴ As of Dec. 2001, Taiwan is the world's 14th largest exporter, 16th largest importer and has the third largest foreign exchange reserves. See TAIWAN AT A GLANCE 2002, Ministry of Finance of the

to insist that the resolution of the Taiwan issue is a matter for the Chinese themselves to settle and that it should be settled peacefully. In fact, this position enables the US to easily adapt and adjust to practically any policy which may emerge with regard to this sensitive Taiwan question. In sum, the US regards peace in the Taiwan Strait as squarely in the US interest. Every US president since Richard Nixon has declared the American interest in a peaceful settlement of the Taiwan issue. Generally, the US policy toward the cross-strait relations is guided principally by the three US-China joint communiqués and the Taiwan Relations Act.

As China's threat to use force against Taiwan is the source of instability in the region of the Taiwan Strait, the prospect of American intervention in the Taiwan-China relations has long played a key role in deterring China's aggression against Taiwan.⁶⁴⁵

In this regard, to promote a new approach to the Taiwan status in the Strait and to maintain Taiwan's security are not only the business of the two sides of the Taiwan Strait, but are issues that deeply involve the US' vital interests as well.

II. ECONOMIC EXCHANGES IN CROSS-STRAIT RELATIONS

ROC(www.mof.gov.tw).

⁶⁴⁵ See Peter W. Rodman, US MUST REINFORCE PEACE IN ROC, the China Post, August 24, 1999, Taiwan (Noting American policy has two parallel concerns: first, to deter Beijing from a military attack on Taiwan, and second, to discourage Taipei from gratuitous unilateral moves that could generate a crisis).

Due to political confrontations across the Taiwan Strait after 1949, Taiwan's investment in China started much later than Hong Kong's. After 1987 when the tension between Taiwan and China began easing,⁶⁴⁶ the Taiwan government officially permitted its citizens to visit the mainland, and two measures were promulgated (one for regulating indirect exports to China; the other governing investing and technological cooperation with China) that are desirable to broaden the understanding between the two sides of the Taiwan Strait.⁶⁴⁷ From then on, many businessmen have used the chance to look for investment opportunities in China.⁶⁴⁸

As a result of common language and culture, China is one of most popular investment destinations for Taiwan's small-sized and medium-sized enterprises which were motivated to invest in China not by politics but by the prospect of cheap labor and a giant market.

⁶⁴⁶ See Ai Wei, THE DEVELOPMENT AND LIMITATIONS OF TAIWAN-MAINLAND ECONOMIC AND TRADE RELATIONS, Issues & Studies, May, 1991, Taiwan (Stating that in the year of 1987, the policy marked a major breakthrough by opening an indirect import of twenty-nine agricultural and industrial raw materials from the mainland in August, and permitting visits of relatives on the mainland in November.)

⁶⁴⁷ See Koo Hang Tse, THE EMERGING LEGAL FRAMEWORK FOR REGULATING ECONOMIC RELATIONS BETWEEN TAIWAN AND THE MAINLAND, 6 J. Chinese L. 137, 139-40 (Noting that despite this prohibition, Taiwanese business enterprises have, in the last decade, increasingly explored Mainland trade and investment opportunities presented by the opening up of the Mainland economy. Correspondingly, the R.O.C. government has come to realize that its insistence on absolute separation between the R.O.C. and the P.R.C. only prevents it from addressing the concrete issues that are emerging from the renewed contact. The R.O.C. authorities have thus gradually adopted liberalizing measures, from the legalization of visitations in 1987 to the establishment of special entities to deal with Mainland affairs in 1991).

⁶⁴⁸ Judging from economic need, Taiwan possesses capital, technology, and management know-how while China has the natural resources, inexpensive labor, and land. In addition to similar customs, a common language and kinship ties, Taiwanese found it easy to set up business in mainland China. Hence, China has become the largest destination for Taiwan's outbound investment. Fukien and Kwangtung Provinces are the most favored locations to Taiwanese investors. Currently, there are about 35,000 Taiwanese investors who have poured an estimated thirty billion US dollars into China for various projects, with or without approval of Taiwan government. It makes Taiwan China's second

§ 5-6 Indirect Trade

In order to achieve its economic goal, China has been very successful in attracting Taiwanese investors.⁶⁴⁹ Consequently, Taiwanese investors invest more in China than in the ASEAN⁶⁵⁰ countries. Taiwan's investment in China has resulted in a large need for trade across the Taiwan Strait. The more Taiwanese invest in China, the more the demand for Taiwan-made industrial material and machinery from China. This situation makes the two governments of the Strait become more and more important to each other as trading partners. Hence, imports from Taiwan to China grew rapidly along with other foreign products. Because no official commercial relations existed between China and Taiwan before the middle of 1980s,⁶⁵¹ the trade conducted between them takes the form of indirect trade through other countries and areas. That is to say, all exports must be processed through a third country or

largest source of FDI.

⁶⁴⁹ In 1983, China announced "Three Incentives for Taiwanese Investment in Special Economic Zone". In 1988, the China's State Council passed a draft law, "Regulations Encouraging Taiwan Compatriots to Invest in China", to regulate Taiwanese business in China. Both of these regulations allowed Taiwan investors to enjoy the same preferential treatment offered to foreign-funded enterprises. However, these regulations were too vague and difficult to enforce, and Taiwanese business people didn't really derive great benefit from them. Because of the limitations of the law to Taiwanese businessmen in practice, in 1994, China government issued a fifteen-article law, "Taiwanese Investment protection Law", to make it easier for Taiwanese business to transfer their property rights in China and to be compensated. The law also stipulates how Taiwanese investors can remit their net profits to Taiwan. See generally Cheng-Tian Kuo, *ECONOMIC STATECRAFT ACROSS THE TAIWAN STRAIT*, Issues & Studies, October 1993, Taiwan.

⁶⁵⁰ ASEAN, the Association of Southeast Asia Nations, includes Thailand, Malaysia, Singapore, the Philippines and Indonesia. ASEAN was established in 1967 by signing the Bangkok Declaration. The main purpose to set up this association is to accelerate the economic growth, social progress, cultural development, and promote active collaboration as well as mutual assistance on matter of common interest in the economic, social, cultural, technical, scientific and administrative fields.

⁶⁵¹ Before the middle of 1980s, Taiwan's government prohibited its businessmen to conduct any direct or indirect trade with China. For detail, see generally Charng Kao, *ECONOMIC INTERDEPENDENCE BETWEEN TAIWAN AND MAINLAND CHINA*, Issues & Studies, April, 1993, Taiwan.

area(such as Japan, Singapore, and Guam). By the late 1980s, longing to boost Taiwan's economy, the Taiwan government relaxed regulation on trade and commercial activities with China by formulating three principles to the two-way trade which are (1) indirect trade, (2) government approval, and (3) balancing national security and economic profit.⁶⁵² The principles marked the foundation of a more relaxed policy toward China's economic exchanges that resulted in rapid trade development between Taiwan and China.

The value of indirect trade between Taiwan and China(via Hong Kong) amounted to US\$31.25 billion in 2000, over eighty percent of this value was exports from Taiwan.⁶⁵³ Although political stand and consideration for national security may inevitably limit Taiwan in its trading activities with China and make Taiwan's imports from China present a slow growth, in long-term economic development, steady, continual, and cautious programming may establish a solid foundation for further development of the trade between Taiwan and China.

§ 5-7 Economic Interdependence

Even China has reiterated that the main purpose of strengthening its economic relations with Taiwan is to make Taiwan highly dependent on China economically,

⁶⁵² See information released by the ROC Ministry of Economic Affairs(www.moe.gov.tw).

⁶⁵³ See the ROC Yearbook: Taiwan 2002, released by the ROC Government Information Office(www.gio.gov.tw).

and, ultimately, politically. Considering China's potential economic power,⁶⁵⁴ like other countries in the world, Taiwan has little choice but to adopt a pragmatic approach to economic exchange with China. Consequently, this gradual economic integration makes China also dependent on Taiwan. Taiwan's economic exchanges with China can provide not only capital and technical expertise, but also its own economic development experience; but for Taiwan, it becomes much more complicated by fearing that too-large an economic stake there will make Taiwan overly dependent on China while considering national security and economic interests. Because of this concern, and in order to reduce the danger of becoming a political pawn, the Taiwanese government may give priority to encouraging its citizens, who need to invest abroad, to go to other Southeast Asian countries that offer similar investment incentives to China.

In reality, as China does not recognize Taiwan as an independent sovereign state, China does not extend the same guarantees of protection to Taiwanese investors as it does to other foreign citizens. This is regardless of the fact that Taiwan is a leading investor in China.⁶⁵⁵ Taking national security into consideration, the situation of

⁶⁵⁴ See Bonnie S. Glaser, BUSH'S CHINA POLICY SHOWS CHANGE, Taipei Times, March 18, 2002, Taiwan (Noting China's economy is projected to continue to grow at 6 percent to 7 percent during the next 20 years. Its per capita income will continue to lag behind many advanced industrialized economies, but in terms of GDP it is expected to surpass that of all individual European countries within two decades. According to some forecasts, by 2025 the size of China's economy may match that of the US)

⁶⁵⁵ See Taiwan Must Protect Its Economy, Taipei Times, September 29, 2002, Taiwan (Stating that despite frequent characterization by the media as having a China fever, the US and Japan invest only about 0.05 percent of their respective GNP in China each year. According to academics' statistics, the

Taiwan-China's economic interdependence has turned out to be the strangest one in the entire business world. The two sides of the Strait are now highly dependent on each other economically on one hand, but both have neither diplomatic relations nor any other mechanism for protecting the interests of Taiwan's investors on the other. In an effort to avoid unexpected risks and solve economic disputes via other channels, the businessmen who intend to invest in China are advised to register with Taiwan's Ministry of Economic Affairs⁶⁵⁶ and make their investment in China through subsidiaries set up in a third country so that they can place their investment under the protection of investment agreements between China and the third country.

The negative impact on Taiwan's investments directly flowing to China, will give China a political advantage over Taiwan by a further heightening of tensions between the two sides of the Strait. Too much investment by Taiwan's entrepreneurs could cause them to be held hostage by China, leading China to put Taiwan under political siege should the cross-strait conflict deepen. It is preferable therefore for Taiwan to maintain its appropriate handling of the normalizing cross-strait relations by improving its trade with China, through direct transportation links, rather than get too

amount of Taiwanese investments in China is 4 percent of Taiwan's GNP – a figure that is twice as larger than the one released by the government. The ratio between investments in China and GNP is about 80 times greater than those of the US and Japan).

⁶⁵⁶ See Charles H. C. Kao & Chu-chia Steve Lin, *THE ECONOMIC IMPACT OF TAIWAN'S INVESTMENT IN THE MAINLAND*, Issues & Studies, June, 1991, Taiwan (Stating that in an effort to control business investment and accurately gauge business activity across the Taiwan Strait, Taipei has insisted that all firms investing on the mainland register with the Ministry of Economic Affairs.)

involved in direct investment in China. In turn, direct investment involves many risks more than trade. In view of this, Taiwan's investment through international corporations registered in foreign countries would be a very useful way of minimizing risk when compared with direct investment in China. The opening of direct trade and transportation with China should be given Taiwan's priority in its implementation of normalizing the cross-strait relations.⁶⁵⁷

III. DIRECT TRANSPORTATION LINKS

Regardless of the political difficulties in the cross-strait relations, more than a decade of trade and investment has bound the fortunes of Taiwan's economy closely to China.⁶⁵⁸ As a result, China has replaced the US as the top destination for Taiwan's exports.⁶⁵⁹ Hence, establishing transportation links(including direct cross-strait trade, postal connections, as well as direct flights and shipping routes) between the two sides of the Strait to an extent as not to seriously jeopardize Taiwan's national security is inevitable and will also be accountable for the cross-strait trade

⁶⁵⁷ See Keith Bradsher, TAIWANESE SPLIT ON REPLY TO OVERTURES FROM CHINA, San Francisco Chronicle, Nov. 16, 2002, USA(Noting that Taiwan businesses have been the biggest foreign investors in China in the past decade, and they contend that the lack of direct transportation links and closer governmental relations have hurt their competitiveness.)

⁶⁵⁸ See H. Asher Bolande, NO END TO INDEPENDENCE STALEMATE?, the China Post, Oct. 1, 1999, Taiwan(Noting it is at the vanguard of mainland China's effort to woo Taiwan back into the fold through economic links. China has successfully pulled in large amounts of investment from Taiwan since 1987, when Taiwan began to tolerate cross-strait indirect trade and investment).

⁶⁵⁹ According to statistics from the Ministry of Economic Affairs of the ROC, 25.2 % of Taiwan exports went to China in the first half of 2002 that led to the PRC becoming the top destination for Taiwanese exports. See information released by the Government Information Office of the ROC(www.gio.gov.tw); see also EDITORIAL: CROSS-STRAIT POLICIES LACK COHERENCE, Taipei Times,

and economic exchanges between the two sides of the Strait.

The implementation of direct transportation would improve cross-strait relations through positive and constructive exchanges that would also bring the two sides closer in terms of economic, social, and cultural development. However, apart from serving to nurture mutual trust and cooperation between the two sides, to implement this policy of direct transportation links is a critical challenge to both sides of the Taiwan Strait. It is quite foreseeable that, regarding the issue of direct links, despite Taiwan's intention to handle such an issue by ways of a special status based on the reality of divided sovereignty of the two sides, China would rather handle the issue as its domestic affair. Therefore, the issue of direct links between the two sides is a simple concept with a not-so-easy solution that requires steadiness and collaboration with each other on the two sides of the Taiwan Strait. In spite of that, one thing that is more than clear here is that this challenge of implementing direct links will carry a positive meaning and does not aim to create problems for the bilateral ties of the Taiwan Strait.

§ 5-8 National Security

Accordingly, the direct transportation links will serve as an impetus in improving the relationship through meaningful exchanges. However, in the implementation of these direct links, the highest consideration and priority is given to the assurance of

national security due to the fact that China has refused to renounce the use of force against Taiwan.⁶⁶⁰ In other words, an on-going economic interaction of the two sides increasingly presents a dramatic divergence between economics and politics. In this context, the plan for the corresponding implementation of the direct transportation at the initial stage may be implemented with the necessity of bilateral negotiation. Regarding the direct links across the Taiwan Strait, the two sides must relate to the issues of ports, quarantine, and customs and the need for communication, consultation, and continuous cooperation. Hence, dialogue in bilateral negotiation of the two sides not only will enhance the normalization of meaningful exchanges between the Governments of the two sides, but will also enhance the well-being of the people on both sides of the Taiwan Strait.

In addition, the implementation of the direct transportation links is expected to increase commercial activities and tourism, which will in turn benefit local economic prosperity and contribute positively to improving the overall cross-strait relationship. By so doing, the economic and cultural exchanges across the Strait should continue to expand and the direct links for postal, air and shipping services and trade between the two sides are an objective requirement for speeding up this development. However,

⁶⁶⁰ See EXPLANATION OF PRESIDENT CHEN SHUI-BIAN'S REMARKS OF AUGUST 3, 2002, Government Information Office of the ROC(Taiwan)(www.gio.gov.tw)(Noting that China has continued to expand its military deployments across the Taiwan Strait. At present, China has deployed 400 missiles directly targeting Taiwan. Every year, it holds large-scale joint military exercise simulating attacks on Taiwan and its offshore islands.)

Taiwan needs to be extremely careful of how to handle such a direct links issue, because it is an issue that not only concerns meaningful exchanges across the Taiwan Strait, but also involves a risk of national security that needs to be weighed.

§ 5-9 Safe and Secure Direct Links

As discussed above, the complexity of developments between the two sides signals the fact to us that Taiwan is playing a strategic gamble between economic interest and political interest.⁶⁶¹ Putting national security issues into consideration regarding the normalization of the cross-strait relations through direct transportation links, the first steps to implement such direct links should be carried on in a narrower scope. In this respect, tactically, the so-called "Safe and Secure Links"(direct transportation, postal services, and trade between China and Taiwan's offshore islands of Kinmen and Matsu)(hereinafter "S&S Links") can be introduced as a preparation for the future direct transportation links. By so doing, Taiwan can expand the functions and scope of the existing offshore transshipment centers, set up a special cross-strait trade and economic exchange zone, as well as open Taiwan to tourism by PRC citizens in which people-to-people contacts and exchanges would be mutually beneficial; on the other hand, the increased cross-strait exchanges can be managed

⁶⁶¹ See generally Gary H. Jefferson, LIKE LIPS AND TEETH: ECONOMIC SCENARIOS FOR CROSS-STRAIT RELATIONS, Graduate School of Int'l Economic and Finance, Brandeis University, Sep., 1999. Regarding the issue that currently, mainland China and Taiwan appear to be engaged in a process of economic integration and political disintegration, the author argued that this divergence between economic and politics is not sustainable and is particularly threatening to Taiwan's economic

without a threat to Taiwan's security by practically establishing an effective mechanism, such as proportional and reciprocal principles, to monitor the so called "S&S Links." This is a very good way, in the interim, to enhance relations across the Taiwan Strait and enlarge people-to-people exchanges between the two sides of the Strait.

The implementation of Safe and Secure Links does not imply that there is no need to put priority concern on national security. Rather, Taiwan must make consistent efforts to improve its management experience as great attention to strengthen the paramount premise of maintaining national security. Apparently, to implement "Safe and Secure Direct Links" between Taiwan and China is the favorable balance of priorities between economy and security.

IV. US STANCE IN CROSS-STRAIT RELATIONS

More than two decades has passed since the United States switched its official recognition from the ROC, its long time faithful ally,⁶⁶² to the PRC in 1979.⁶⁶³ This de-recognition by the US did spur Taiwan's loss of status in the world because both

prosperity.

⁶⁶² See Mangelson, TAIWAN RE-RECOGNIZED: A MODEL FOR TAIWAN'S FUTURE GLOBAL STATUS, 1992 B.Y.U.L. Rev. 231, 234.(Noting that when Chiang Kai-shek and two million ROC Nationalists were forced to flee China in 1949, the allegiance of their wartime ally – the United States – crossed Taiwan Strait with them. Strong U.S. – ROC ties, solidified by the Cold War, continued for thirty years).

⁶⁶³ See Greg Mastel, US SHOULD SUPPORT TAIWAN DEMOCRACY, the China Post, Nov. 18, 1999, Taiwan(Noting that President Richard M. Nixon and Secretary of State Henry A. Kissinger engineered a switch, later completed by President Jimmy Carter, in which the US recognized the PRC

the ROC and the PRC insisted that they were the sole legitimate government of China. Regardless of the fact that the ROC no longer claims to represent all of China,⁶⁶⁴ most of Taiwan's other allies followed the US to recognize the PRC, instead of the ROC, to be China's legitimate government.⁶⁶⁵

After derecognition, the ROC was no longer China to the US and those countries who established official diplomatic relations with the PRC. In reality, the Taiwan issue is closely linked to the international power balance. Particularly, the US is the most deeply involved country in the world on the Taiwan issue with the exception of the ROC and the PRC.

§ 5-10 The US-PRC Joint Communiqués

Before normalizing its relations with the PRC, the US concluded the Shanghai Communiqué with the PRC in 1972 and acknowledged that "the US did not challenge the position of all Chinese on either side of the Taiwan Strait that there is but one China and that Taiwan is a part of China." The one-China acknowledged by the US is conceptually ambiguous.⁶⁶⁶ Later, in the 1978 Joint Communiqué Establishing

as the legitimate government of China and dropped formal recognition of Taiwan).

⁶⁶⁴ Actually, this policy died with Chiang Kai-shek, Taiwan is not attempting to compete with China regarding this issue. Instead, the ROC has made a pragmatic revision by no longer treating the PRC as a rebel regime. See Tzu-wen Lee, *THE INTERNATIONAL LEGAL STATUS OF THE REPUBLIC OF CHINA ON TAIWAN*, 1 *UCLA J. Int'l L. & Foreign Aff.* 351,391 (Noting that it is this increasing diplomatic isolation that forced the RCO to realize that it could not represent China nor afford to force other countries to choose between Taiwan and China).

⁶⁶⁵ The number of ROC's diplomatic allies dwindled quickly from well over 100 to today's 27.

⁶⁶⁶ See Lee Chang-kuei, "CHINESE CONFERATION" VERSES "ONE CHINA," *Taipei Times*, Feb. 23, 2001, Taiwan (Noting at the time of the Shanghai Communiqué, the one China the US government "recognized" was neither the ROC nor the PRC. Rather, it was "a China built by peaceful means," and "a future one China.")

Diplomatic Relations Between the US and the PRC(Normalization Communiqué), the US recognized “the Government of the People’s Republic of China as the sole legal Government of China.”⁶⁶⁷

The two mentioned Communiqués above are evidence that the United States has assumed that there is only one China in the world, and recognizes the PRC to represent China, but the US did not confirm the PRC’s sovereignty over Taiwan and was silent on the matter of American arms transfers to Taiwan. Particularly, American silence on the point of arms sales are due to the relevant facts and increased concerns for Taiwan’s security which were: (1) the notice of termination of the mutual defense treaty between the US and the ROC; (2) the decision to withdraw US military personnel from Taiwan.⁶⁶⁸

In the aftermath of its recognition of the PRC, the US concluded the third communiqué, the US-China Joint Communiqué, with the PRC in 1982 in which the US acknowledges that American arms transfers to Taiwan is of extreme importance to Taiwan. Despite the US’ commitment to reduce its arms sales to Taiwan gradually by understanding the Chinese policy of striving for a peaceful resolution of the Taiwan

⁶⁶⁷ See Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, Dec. 15, 1978, U.S.-P.R.C., reprinted in 18 I.L.M. 272, 274 (1979).

⁶⁶⁸ See Lori Fisler Damrosch, THE TAIWAN RELATIONS ACT AFTER TEN YEARS, 3 J. Chinese L. 157, 168.

question,⁶⁶⁹ this Communiqué focuses almost exclusively on the sales of defensive arms to Taiwan and it would reduce arms sales only as tensions diminished in the Taiwan Strait implying the US' long-standing commitment to supporting continued security assistance to Taiwan. In turn, the fact that the US continuously supplies Taiwan with defensive arms is a good source of legitimacy showing Taiwan's existence as a separate sovereign political entity independent of China.

As a matter of fact, this 1982 US-China Joint Communiqué is consistent with the principle of the Taiwan Relations Act(TRA), enacted by the US Congress since 1979 when relations between the US and the ROC were restricted to unofficial relations, which is to maintain the US close and friendly commercial, cultural, and other relations with Taiwan.

§ 5-11 Taiwan Relations Act

Accordingly, the language of the TRA no longer refers to Taiwan as "the Republic of China," but as "the people of Taiwan," "their institutions," and "the governing authorities on Taiwan recognized by the US as the Republic of China prior to January 1, 1979."⁶⁷⁰ Besides, the need of the US to protect its commercial interests

⁶⁶⁹ See Dennis Van Vranken Hickey, US-TAIWAN SECURITY TIES: TOWARD THE NEXT MILLENIUM, a paper prepared for delivery at the conference, entitled "Taiwan on the Threshold of 21st Century: A Paradigm Reexamined," National Chengchi University, Taiwan, Jan. 4-5, 1999 (Noting that, taken at face value, the 1982 U.S. China Joint Communiqué appear to pledge the U.S. to eschew long-term arms sales to Taiwan and to keep sales from exceeding either the quality or quantity of arms sold to Taiwan after the U.S. established relations with the PRC.

⁶⁷⁰ See Taiwan Relations Act, 22, U.S.C. § 3301 (a) (1), (1979).

in Taiwan in the wake of the US termination of official relations, in efforts to maintain the current status quo of peaceful cross-strait relations between the PRC and the ROC that absolutely is in the best interest of the United States, the TRA preconditions that “any non-peaceful actions against Taiwan, including boycotts or embargoes, will be considered a threat to the peace and security of the Western Pacific area and of grave concern to the United States.”⁶⁷¹ Obviously, this is an assumption that the TRA was also born of the need for the US to protect Taiwan’s significant security meaning that the US would find itself in conflict with China should the PRC attack Taiwan.⁶⁷² Any threats of force against Taiwan would be deemed a threat to US’ vital security interests. In this sense, the TRA, in part, provides necessary measures for the US to maintain a sufficient self-defense capability. This is because the maintenance of a military force by Taiwan as a deterrent to PRC’s forcible threats has been another major factor in the maintenance of peace in the Taiwan Strait.

In fact, the Taiwan Relations Act has played an indispensable role in shaping American policy toward Taiwan and is the only law governing nearly every aspect of US relations with a foreign government in the absence of diplomatic ties.⁶⁷³

⁶⁷¹ See Taiwan Relations Act, 22, U.S.C. § 3301 (b) (4), (1979).

⁶⁷² U.S. President George W. Bush is committed to defending Taiwan against a Chinese invasion with “whatever it takes.” Taiwan is increasingly being integrated into the US defense strategy including a nuclear response.

⁶⁷³ See Stephen J. Yates, THE TAIWAN RELATIONS ACT AFTER 20 YEARS: KEYS TO PAST AND FUTURE SUCCESS, the Heritage Foundation, Background, No. 1272, Apr. 16, 1999(www.taiwansecurity.org)(Noting that the TRA has allowed the United States to preserve peace, promote freedom, and maintain flexibility in balancing its relations and interests with governments on both sides of the Taiwan Strait).

Significantly, regardless of its unofficial relations with Taiwan, the US has practically treated Taiwan as if Taiwan were a sovereign state⁶⁷⁴ and assumed its responsibility for maintaining Taiwan 's security. Because the TRA has helped maintain peace and stability in the Taiwan Strait, in turn, under such a stable environment in the Taiwan Strait, the economic and political development in Taiwan can be achieved. As a result, following the substantive relations with governments and peoples between the US and Taiwan, by 2000, the increased trade relations between the two sides has made Taiwan the US' 7th largest trading partner.⁶⁷⁵

§ 5-12 Faithful Implementation of the Taiwan Relations Act

In the past two decades, the TRA has provided a security environment of cross-strait relations that has facilitated Taiwan's impressive economic expansion and democratization. Although the TRA is open to interpretation, it does seem to oblige the US to protect Taiwan from forcible attacks. Accordingly, in order to maintain the importance of continuing the policy of keeping the US commitment on the principal goals of the Taiwan Relations Act which are: (a) economic freedom(means to promote commercial and other similar relations); (b) security issues(means to deter aggression

⁶⁷⁴ See Stephen Lee, AMERICAN POLICY TOWARD TAIWAN: THE ISSUE OF THE DE FACTO AND DE JURE STATUS OF TAIWAN AND SOVEREIGNTY, 2 Buff. J. Int'l L. 323, 324(Noting that the U.S. maintains the "American Institution in Taiwan" in Taiwan and Taiwan maintains the "Taipei Economic and Culture Offices" in the United States. Even though the U.S. and Taiwan define these organizations as unofficial, the heads and staff of both these organizations are provided with official functions, diplomatic privileges, and immunities).

⁶⁷⁵ See THE WORLD ALMANAC AND BOOK OF FACTS, World Almanac Education Group, Inc. 2002, US, P.219.

by the PRC), and (c) human rights issues (means to protect the human rights of the Taiwan people), looking to the future, the US should continue faithfully to implement the TRA.

Even though the TRA does not attempt to plan for any possible contingencies that might eventually lead to any form of political integration of both sides of the Taiwan Strait, it endorses the achievement of Taiwan's ultimate status through peaceful means. Hence, with regard to the growing interactions between the US and the two sides of the Taiwan Strait at stake, as Dr. Stephen J. Yates noted,⁶⁷⁶ the US might amply interpret the TRA in such a way so that "*it can*:"

(1) Urge China to renounce the use of force against Taiwan. This is consistent with the longstanding US insistence that Taiwan's future be determined by peaceful means.

(2) Sell Taiwan missile defense system and technology. Considering China's provocative military exercises and tests of nuclear-capable missiles near Taiwan in 1995 and 1996, and China's increased deployment of missiles near Taiwan, providing assistance for Taiwan's missile defense is both appropriate and consistent with the TRA.

(3) Actively support Taiwan's membership in international organizations. With a

⁶⁷⁶ See Stephen J. Yates, THE TAIWAN RELATIONS ACT AFTER 20 YEARS: KEYS TO PAST AND FUTURE SUCCESS, the Heritage Foundation, Background, No. 1272, Apr. 16,

strong economy and vibrant democracy, Taiwan is clearly prepared to make significant contributions to the international community through institutions involved in trade, economic development, and humanitarian assistance.

(4) Promote Taiwan's democracy in China and abroad. Consistent with its interests in human rights on Taiwan, the US must properly recognize and reward the Taiwan people for their success in establishing a democracy. One way to do this is to treat Taiwan's leader officially with the respect appropriate to duly elected representative of a thriving democracy."

§ 5-13 Settling the Taiwan Question by Peaceful Means

Regarding a realistic understanding of the issues at stake in the Taiwan question, the US may play a more active role in cross-strait relations, but should not intervene in this relationship by taking specific actions. In this respect, the US has made clear that it would not tolerate a use of force from China against Taiwan. Instead, as the TRA provides in part, the US' decision to establish diplomatic relations with the PRC rests upon the expectation that the future of Taiwan will be determined by peaceful means.⁶⁷⁷ Indeed, the US approach applies to the Taiwan question the principle of Article 2(4) of the UN Charter that states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

1999(www.taiwansecurity.org)

⁶⁷⁷ See Taiwan Relations Act, 22, U.S.C. § 3301(b) (4) (1979).

political independence of any state, or in any other manner inconsistent with the United Nations." By applying this logic, in an effort to reach a peaceful settlement of such a sovereignty dispute between Taiwan and China, both sides of the Taiwan Strait can address matters through negotiation, mediation, or even conciliation.⁶⁷⁸

That is to say, although the US would not mediate between Taiwan and China, the two sides of the Taiwan Strait resolving their problems peacefully is in the interest of the US in safeguarding the security and stability of the Asia-Pacific region.⁶⁷⁹ This is not a favor either to China or Taiwan, rather, it is the US' core interest that has been the consistent basis of its policy since the 1972 Shanghai joint communiqué. Hence, as long as the Communist regime still rules China, the democratic future of Taiwan and the maintenance of peace in the Taiwan Strait require the US to play a more active role in the issue of the Taiwan question as it did in 1996 in the Taiwan Strait Missile Crisis.⁶⁸⁰ As Taiwan is indeed as full-fledged a democracy as the United

⁶⁷⁸ See C. M. Chinkin, *THIRD PARTY INTERVENTION BEFORE THE INTERNATIONAL COURT OF JUSTICE*, 80 *Am. J. Int'l L.* 495, 501(1986) (recognizing the international judicial arena as a fundamental norm in the settlement of disputes); Richard E. Rupp, *COOPERATION, INTERNATIONAL ORGANIZATIONS, AND MULTILATERAL INTERVENTION IN THE POST-COLD WAR ERA: LESSONS LEARNED FROM THE BALKANS, SOMALIA, AND CAMBODIA*, 3 *UCLA J. Int'l L. & Foreign Aff.* 183, 191 (1998) ("[A]n effectively functioning international organization or regime can promote cooperation and peaceful relations by serving as a forum where member states exchange information."). But see Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *TRAGEDIES IN SOMALIA, YUGOSLAVIA, HAITI, RWANDA AND LIBERIA-REVISITING THE VALIDITY OF HUMANITARIAN INTERVENTION UNDER INTERNATIONAL LAW-PART II*, 26 *Denv. J. Int'l L. & Pol'y* 827, 854(1998) (discussing the failed attempts to resolve the conflict in West Africa).

⁶⁷⁹ See Nicholas Rostow, *TAIWAN: PLAYING FOR TIME*, 32 *New Eng. L. Rev.* 707, 712(Noting that with respect to the Taiwan Strait, the U.S. interest in Asia's stability and security, deterrence seems clear. Achieving these goals would help secure US humanitarian and economic interests in the entire region.)

⁶⁸⁰ During the Missile Crisis in 1996, two carrier battle groups that the United States dispatched around the Taiwan Strait, in a bid to maintain stability in the region, constituted the largest task force

States, if the US is to have any credibility in advocating democracy to the PRC, it must properly recognize and support the people of Taiwan for their success in the democratization process.

Given this background, it is not difficult to understand the reaction by the US to deploy its two aircraft carrier groups near Taiwan in the 1996 Missile Crisis, which did evidence that the US was the only outside power that could back Taiwan with military might against any aggression from China. As such, the Taiwan issue is indeed a very central topic in relations between the US and the PRC.

§ 5-14 From Strategic Partnership to Strategic Competition

Although the US' normalization of its relations with the PRC was consistent with its interest in the need for allies to confront the aggressive Soviet Union, Asia is different from what it was then. The Soviet Union is no longer in existence as the region's expansionist enemy to the US.⁶⁸¹ Moreover, the PRC has not timely democratized its political system unlike the ROC that has achieved profound self-governance through the process of democratization and Taiwanization.⁶⁸² China

by the U.S. in East Asia since the Vietnam War. The U.S. clearly presented its policy as one of keeping a peaceful Taiwan Strait which is necessary for protecting its national interests.

⁶⁸¹ See Mangelson, TAIWAN RE-RECOGNIZED: A MODEL FOR TAIWAN'S FUTURE GLOBAL STATUS, 1992 B.Y.U.L. Rev. 231, 238 (Noting that in 1979, U.S. policy makers renounced any official recognition of the ROC after determining that US interests would be better served by strong ties with Beijing. Washington felt that strong ties with Beijing could be used as its "China card" to be played against the Soviet threat).

⁶⁸² See Eric, Ting-lun Huang, THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION, 14 N.Y. Int'l L. Rev. 167, 211-3. (Noting this continuing process of Taiwanization and democratization created a new milestone in 1996 when the people of Taiwan directly elected their President for the first time in history).

remains an authoritarian regime.

Generally, the US has experimented with various policies toward the PRC, such as emphasizing human rights, economic relations, rather, a strategic partnership. In sum, the US deemed China as a strategic partner by realizing that lasting security in the Asia-Pacific region was not possible without a constructive role played by China, a growing regional power. However, following China's 1996 military exercise when China fired missiles close to Taiwan shores to cow the people of Taiwan as they voted in their first-ever direct presidential election, the US has in fact begun adjusting its strategic planning toward the PRC. This is because the security of Taiwan is of international strategic concern.

Despite the intention of the US to build a strategic partnership with China, China's 1996 military exercise brought the US to complete a major overhaul of its strategy in East Asia that led to a new Security Treaty ratified between the US and Japan⁶⁸³ under the key consideration of taking the PRC as a hypothetical enemy and placing Taiwan in the inclusion of "peripheral areas." Indeed, it is very evident that this development provides a clear new strategic order in which the US no longer deems the PRC a partner⁶⁸⁴ and each party state to this agreement had a well-defined

⁶⁸³ See Kam Yiu & Chris Wu, UNIFICATION IS NOT AN EASY PROPOSITION, Taipei Times, Feb. 21, 2002 (Noting that after two rounds of Chinese missile tests targeting Taiwan in 1995 and 1996, the U.S. expanded the scope of the US-Japan security treaty to include Taiwan).

⁶⁸⁴ See Paul Lin, TAIWAN MUST WORK TO BETTER U.S. TIES, Taipei Times, March 12, 2002, Taiwan (Noting that in an interview with CNN dated Feb. 17, 2002, during a visit to Japan, U.S.

role to play.⁶⁸⁵ Another notable example of this is that in 1998, the US Congress “authorized the Pentagon to study architectural requirements for the establishment and operation of a Theater Missile Defense(hereinafter “TMD”) system(an anti-ballistic missile defense system) in the Asia-Pacific region in order to protect the country’s key allies: Japan, South Korea, and Taiwan.⁶⁸⁶

These examples above also make clear that the Taiwan issue cannot be solved simply by the PRC unilaterally. Instead, the PRC needs to adjust its strategies in maintaining the cross-strait relations peacefully as part of the improved relations between the US and the PRC, the improved trilateral relationship(China, Taiwan and the US) in particular. The further threats and military actions by the PRC will result in the progressive reduction of US vague pledges of maintaining a peaceful Taiwan Strait. On the contrary, it would lead the US to trigger an American military response(as in 1996) and strengthen its commitment to Taiwan.

Secretary of State Colin Powell said that China is neither a strategic partner nor a competitor. Powell is one of the doves in the U.S. government and yet he does not recognize China as a partner), see also Chang Yan-ting, WHAT THE PENTAGON’S CHINA REPORT TELL US, Taipei Times, July 30, 2002, Taiwan(Noting that the U.S. President George W. Bush regards China as a strategic competitor).

⁶⁸⁵ See Lin Cho-shui, LOOKING FOR CLUES TO CHINA’S ACTIONS, Taipei Times, August 28, 2002, Taiwan.(Noting that the new security agreements cleared up the ambiguous state of affairs that had temporarily prevailed in post-Cold War East Asia and revealed a clear new strategic order in which each country had a well-defined role to play.)

⁶⁸⁶ See Dennis Van Vranken Hickey, US-TAIWAN SECURITY TIES: TOWARD THE NEXT MILLENIUM, a paper prepared for delivery at the conference, entitled “Taiwan on the Threshold of 21st Century: A Paradigm Reexamined,” National Chengchi University, Taiwan, Jan. 4-5, 1999 (Noting that the study was authorized in the U.S. 1999 National Defense Authorization Act). See also Lee Chang-kuei, “CHINESE CONFEDERATION” VERSES “ONE CHINA,” Taipei Times, Feb. 23, 2001, Taiwan(Noting the US establishment of a theater missile defense system for Japan and Taiwan highlights the Bush administration’s policy of skewing toward Taiwan’s safety and stability in the triangular relationship, and US concerns about the proliferation of PRC nuclear offensive technology and missiles. The US also remains concerned about the PRC’s human rights conditions. These two concerns remain unresolved.)

§ 5-15 Strategic Ambiguity

As Taiwan's growth and security rely so heavily on its relationship with the US, the US Taiwan policy must be considered in any assessment of Taiwan's future. However, the US wants to create a degree of ambiguity relating to Taiwan's future.⁶⁸⁷ At the very least, notwithstanding that the evolution of the independence-reunification dichotomy would directly influence the consequence of Taiwan's future, the US avoids having to show its stance for publicly determining whether or not the US is pro-independence regarding the Taiwan question too early.⁶⁸⁸

That is to say, in the event of a formal and explicit declaration of independence by Taiwan, the US would not like Taiwan to declare formal independence,⁶⁸⁹ but its relatively low-key response to Taiwan's independent movement suggests that Taiwan has some leeway in the matter. As Armitage, US Deputy Secretary of State, said, regarding Taiwan's independence, that: *"the US neither supports nor opposes it. [S]aying we do not support it is one thing. It's different from saying we oppose it,"*...

⁶⁸⁷ See Greg Mastel, US SHOULD SUPPORT TAIWAN DEMOCRACY, the China Post, Nov. 18, 1999, Taiwan (Noting the United States has an ambiguous security commitment to the fledgling democracy (Taiwan), carefully limiting arms sales to it to avoid offending the totalitarian power (China). It cautions the democracy not to assert its right to independence and self-determination too loudly and supports the totalitarian power's effort to deny the democracy international recognition).

⁶⁸⁸ See Paul Lin, REFERENDA, US POLICY AND TAIWAN, Taipei Times, Sep. 8, 2002, Taiwan. (Stating that Armitage's detailed explanations tell us that "not supporting" is a policy the U.S. administration actively put forward, while "not opposing" requires an objective condition, which is what Armitage said: "If people on both sides of the Strait came to an agreeable solution, then the United States obviously wouldn't inject ourselves.")

⁶⁸⁹ See Kam Yiu & Chris Wu, UNIFICATION IS NOT AN EASY PROPOSITION, Taipei Times, Feb. 21, 2002 (Noting that the U.S. will use Taiwan's democratic society as an incentive to push Chinese society toward democratization. The U.S. will not hastily let Taiwan declare independence, which could incite a war in the Taiwan Strait and drag the U.S. into the fray).

“not supporting” is passive but “opposing” is active.”

Judged by the US emphasis on a peaceful resolution of the cross-strait issue, there is a different distinction between “peaceful resolution” and “peaceful reunification.” The latter assumes unification is a given, while the former does not. Despite the fact that the US stance toward the Taiwan status is more politically ambiguous, “to maintain the status quo of the ROC and wait for change in the PRC” is a positive vision of what kind of cross-strait relations the US wants to see. If we consider the advocacy of freedom as the most fundamental US value, as a result of Taiwan’s democratization which attaches to the US a considerable degree of responsibility, it is logical and true that the US should deem the decision of Taiwan whether or not to unify with the PRC as being in Taiwanese people’s hands exclusively. However, any support by the US to the exclusive entitlement of the Taiwan people to decide Taiwan’s future would contradict the PRC’s “one China” policy that lead to a dilemma accounting for the complicated triangular relations between the US and the two sides of the Taiwan Strait.

In this regard, if the two sides of the Taiwan Strait cannot remain perpetually divided, the US should endorse neither China’s vision of reunification nor Taiwan’s independence for establishment of the Republic of Taiwan. Instead, it should take a public stand on the matter that any eventual resolution of the Taiwan question should

come through peaceful negotiations and more importantly, with the consent of the people of Taiwan by means of a public referendum. In doing so, to maintain a stabilization of US-China relations is in Taiwan's interests.

V. CONCEPT OF A FUTURE ONE-CHINA

Since China was divided into two nations, the Republic of China on Taiwan and the People's Republic of China on the Chinese mainland in 1949, the two sides of the Taiwan Strait have not stopped debating the issue of one-China,⁶⁹⁰ despite the fact that both are independent sovereign states under international law. Regarding the definition of what "one-China" means, the two Governments of the Taiwan Strait have never reached a consensus on the "one-China" principle. The two sides still hold different definitions of one-China. In fact, this has a negative impact on the development of cross-strait relations.

Based on the thinking that China can attack and annex Taiwan, China believes that Taiwan's fate is already determined as a part of China. The PRC has hence interpreted the "one-China" principle to refer to the PRC as the sole legitimate

⁶⁹⁰ See Ruan Ming, IMPOSSIBLE DREAM: THE LIE THAT IS "ONE CHINA." The Taipei Times, July 23, 1999, Taiwan (Noting that the originators of the "one China" policy were Chiang Kai-shek's government in Taiwan and its main ally, the US. From 1949 to 1971, the "one China" policy got China barred from the UN for 22 years, the US government recognized the existence of the "little China" (the ROC) as the only legitimate government by simply ignoring the existence of the "big China" (the PRC). Since 1979, however, the US has recognized the "big China" as the only legitimate government, thus ignoring the existence of the "little China." The so called "one China" principle, as shared by Taiwan, the US and China, is fundamentally based on these lies and dreams that have persisted through the years).

government of China and has continued to insist that Taiwan's future is under this premise of the one-China principle. It is just a unilateral proposition imposed by the PRC on the ROC that is quite unsettling for Taiwan's future, easily giving rise to conflicts between the two sides of the Taiwan Strait. As mentioned above, the sovereignty dispute is likely a dead end issue to the cross-strait relations. If China only places emphasis on such a dead-end issue of the sovereignty dispute by sticking to its own view of the one-China concept, rather than renounce this stance and open the way for each side to accept each other's sovereignty and legitimacy, apparently, the cross-strait issues will be difficult to be resolved. In turn, this will also confuse the international community's understanding of Taiwan's status.

To understand the impact of the independence-reunification dichotomy, it would be necessary to examine the different parts of the scenarios that influence the cross-strait relations. When compared to the distinctive characters between the two sides of the Taiwan Strait, in fact, they share something unique in common: (1) both governments once belonged to a unified country, and while divided now; (2) both authorities claim to be the legitimate representative of their country; and (3) both sides meet the four-part test for statehood as a state under international law. The former West and East Germany is a very similar case of the above that can provide such an experience to both sides of the Taiwan Strait. Because of their linguistic,

geographical, and economic affinities, both Taiwan and China are conducive to the goal of future unification of a new, democratic China.⁶⁹¹ However, this is just one of the conditions that Taiwan might take but would not therefore block the possibility that the people of Taiwan are free to determine their own future.

§ 5-16 Enacting a Referendum Law and Taiwan Moves Toward Its Own Future

Any initiating action to seek Taiwan independence would pose a serious consequence in the Taiwan Strait because it might provoke China into using force and trigger a war in the Taiwan Strait. However, the Taiwanese government should keep opening the option of someday publicly declaring its political independence from China by abandoning the so-called one-China principle. At the same time, it should keep the possible option of unification with China before necessarily actualizing its independence, because it is the best tactical move that Taiwan can employ to prevent China from using force as an excuse.

By this logic, the question of Taiwan's future status lies not in whether Taiwan is an independent state (by any standards of customary international law, Taiwan has long qualified as a sovereign state), but rather whether or not to unite with China.

⁶⁹¹ See Mangelson, TAIWAN RE-RECOGNIZED: A MODEL FOR TAIWAN'S FUTURE GLOBAL STATUS, 1992 B.Y.U.L. Rev. 231, 249-50 (Noting that under Germany's former dual-system government, the Federal Republic of Germany (FRG) and German Democratic Republic (GDR) were able to develop closer ties and work out their differences. Both the GDR and the FRG have been members of the United Nations since 1973. The day after both were admitted to the United Nations, the foreign ministers of each side, speaking before the UN General Assembly, renounced, on behalf of their countries, the use of force in solving their differences. In the same year, the two sides also entered into an agreement to work toward peaceful reunification. In 1974, the two opened formal relations with each other. All of these exchanges helped lead to the eventual reunification of the two Germanies.)

Judging by the reality that the PRC is becoming stronger and its international position is rising, all of this makes Taiwan incompatible with the role of the PRC in deciding which way to deal with Taiwan's future and the cross-strait relations.

As a matter of legal concern, there exists relatively no procedure in Taiwan to implement the right of self-determination. In order to democratically decipher the political will of the people of Taiwan to resolve the longstanding dispute across the Taiwan Strait, the issue of enacting a referendum law to forge national consensus on Taiwan's political identity should be deemed a mature political mechanism. This is because to commence a direct, secret, and universal ballot is a comprehensive way to assess the will of the Taiwanese people.⁶⁹² As it is a major issue regarding Taiwan's future status, it is rising to become an important topic in Taiwan's domestic society and polity, much to China's great annoyance.⁶⁹³

Instead of a formal political proclamation of independence by Taiwan, to legalize the referendum procedure at the highest possible level in Taiwan is not just to signal an intention to settle the domestic dispute between pro-unification and pro-independence because it helps to present a real outcome of the will of the

⁶⁹² The UN Resolution 2625, known as "the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations," has firmly legalized the effect of people's domestic political collective rights. For UN Res. 2625, see G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 124, UN Doc. A/8028(1970).

⁶⁹³ See TAIPEI TIMES, August 7, 2002, Taiwan (Noting that, in a speech to the World Federation of Taiwanese Associations, Taiwan President Chen proposed that there is "one country on each side" of Taiwan and called for Taiwan to seriously consider the importance and urgency of establishing a referendum law.)

Taiwanese people, but more significantly, it can serve as an imperative to conflict resolution between the two sides of the Taiwan Strait if China decides to use force to annex Taiwan.⁶⁹⁴ In other words, while perpetuating the claim that Taiwan's future reunification with China, the PRC could not force Taiwan to go for it, nor could the decision of reunification be done by the people on both sides of the Strait. Instead, only the respective residents of Taiwan should be eligible to determine the future of Taiwan(including the establishment of an independent sovereign state, a free association or integration with China).⁶⁹⁵ As mentioned above, this merely accords respect for fundamental human rights to which the people of Taiwan are entitled.

§ 5-17 Negotiate Taiwan's Future Within a One-China Framework

North and South Korea are both members of the United Nations, meaning each side maintains its status as an independent sovereign state internationally. Recently, the two Koreas met for their historic talk regarding the reunification of the Korean Peninsula on parity without setting preconditions.⁶⁹⁶ This witnesses the fact that even

⁶⁹⁴ To collect the free will of people by conducting referendum democratically is deemed the universal value that not only fulfill the modern principle of self-determination and should be respected and recognized by the whole international community. For details, see Eric, Ting-lun Huang, THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION AND THE RIGHT OF THE PEOPLE OF TAIWAN TO SELF-DETERMINATION, 14 N.Y. Int'l L. Rev. 167, 167-229.

⁶⁹⁵ See Charney, J.R.V. Prescott, RESOLVING CROSS-STRAIT RELATIONS BETWEEN CHINA AND TAIWAN, 94, Am. J. Int'l L. 453, 471(Noting that the PRC's authoritarian character could make it difficult to ensure a free and fair plebiscite on independence after a period of PRC interim control over Taiwan. A reasonable alternative might be to hold a plebiscite within Taiwan prior to any change in the status quo, giving its population the option whether or not to choose some form of association with China).

⁶⁹⁶ See TAIWAN PRESIDENT CHEN SHUI-BIAN PRESS CONFERENCE DATED JUNE 20, 2000, Government Information Office of the ROC(www.gio.org.tw)(President Chen indicating that both North and South Korea still have fairly diverse interpretations of the unification policy of the Korean Peninsula. At the present stage, the two sides have inconsistent positions on this topic; and South Korea

if Taiwan were to act as an independent sovereign state in its relations with China, the two sides of the Taiwan Strait can look forward to future cross-strait reconciliation just as the day has already arrived for North and South Korea. This is because reconciliation is a new ideal in this world and has become a global mainstream trend that creates the environment and timing for the two Koreas to take this great step forward.⁶⁹⁷

In fact, Taiwan and China have a similar condition as the two Koreas. In turn, it is also understandable and manageable for the two sides to contribute a more constructive, cooperative relationship as long as the goodwill and sincerity on each side are mature enough. While the two sides of the Strait have deep differences on a range of important issues, i.e., sovereignty dispute, they still have some national interests in common. At this point, the “one-China” framework is apparently the most important issue among them. Therefore, reiterating mutual agreement on the “one-China” principle with respective interpretation with each side and the peaceful resolution of the Taiwan issue would be a good place for both Taiwan and China to start.

still considers it too early even for proposals regarding the establishment of a federal system or setting up a confederation, let alone discussing reunification. Still, even in the absence of any pre-established premises, the two Koreas have been inspired to sit down together for talk.)

⁶⁹⁷ See TAIWAN PRESIDENT CHEN SHUI-BIAN PRESS CONFERENCE DATED JUNE 20, 2000, Government Information Office of the ROC(www.gio.org.tw)(President Chen analyzed the requisite condition for North and South Korea to meet face to face in a dialogue on the basis of parity with any present condition are (1) South Korea has a new leader, President Kim Dae-jung; (2) North Korea must be politically stable; (3) the international environment and the timing are mature.)

§ 5-18 A New Integrated China

As noted earlier, Taiwan's future is inextricably tied to its relations with the PRC. However, the possible legal and political relationships that could develop between the two sides of the Taiwan Strait are numerous. Mainly, the most likely relationships to develop can be grouped into four categories: (1) forced reunification under communist rule; (2) reunification under the Hong Kong model; (3) Taiwan's independence or maintenance of the status quo; (4) peaceful reunification by democratic means. Despite the fact that the vast majority of the Taiwanese people are satisfied with the status quo (maintaining an ambiguous political relationship with the PRC while continuing to maintain economic exchanges in the Chinese mainland), an increasingly vocal number of Taiwanese people have expressed a desire to take the Number (4) model regarding Taiwan's future relations with the PRC if the current status quo of cross strait relations drags on too long.⁶⁹⁸ As a result of realizing the Taiwanese people's increasing concern about Taiwan's peaceful reunification with China, the government of Taiwan adopted the Guidelines for National Unification,⁶⁹⁹ which outlines the principles for the gradual and sequential steps toward the eventual

⁶⁹⁸ The PRC issued a provocative warning to Taiwan regarding reunification in a white paper released by the PRC's Taiwan Affairs Office on February 21, 2000. The paper, entitled "The One-China Principle and the Taiwan Issue," states that further delays by Taiwan on the question of reunification could lead to war. This is a signal that China is getting impatient with the delays in the process of reunification.

⁶⁹⁹ The Guidelines for National Unification was adopted by Taiwan's National Unification Council on February 23, 1991. For the Guidelines, see Government Information Office of the ROC. (www.gio.gov.tw)

unification of Taiwan and the Chinese mainland under the principles of freedom, democracy, and equitable distribution of wealth for all Chinese. Under this logic, the ROC and the PRC both belong to a new integrated China.

§ 5-19 Agreement to Disagree

If an integral political unit of China were the future of hope by the people of Taiwan, both sides of the Strait can deal with the question of a future integrated China by setting aside this controversy. That is to say, each side can define the cross-strait status at its own discretion so as to by-pass the differences regarding sovereignty issues. The concept of a future one-China is developing which refers to neither the ROC, nor the PRC. Such a definition of one-China cannot be unilaterally decided and manipulated by any single nation or political party. Accordingly, how to unify the two sides is an issue of the future that needs to respect the free will of the people on both sides of the Taiwan Strait. No outsider can make a decision for the twenty-three million people of Taiwan without their consent.

In other words, the position is crystal clear that the definition of a future "one-China" should be established on a basis that is acceptable to both sides of the Taiwan Strait. More important, the process must include all possibilities for all of the Taiwan people to decide in the future. In such a case, under the circumstances, US President Bill Clinton was right to return to the reality of the present status quo of

Taiwan-China relations by clearly saying that whether Taiwan's status quo continues or is changed is something to be collectively decided by the people of Taiwan.⁷⁰⁰

Before seeking a mutually acceptable definition of a political unit, the two sides must jointly deal with the question of a future one-China. The outcome is true and final only when it is acceptable to both sides. Otherwise, in the interim, to return to the 1992 tacit "one-China" agreement⁷⁰¹ in which both acknowledge that there is only one China, but that each side would be allowed to have its own interpretation of one-China is a best way to keep the Taiwan-China relations going. Tactically the "agreement to disagree" of respective interpretations is a good description that starts a process of the entire evolution of reaching an acceptable consensus with economics and culture as the basis of cross-strait exchanges. As a matter of fact, this intention of allowing each side to have its own way to say what it prefers provides both sides more opportunities for dialogues, exchanges, and shelving disputes relating to the issue of political integration between the two sides of the Strait before both sides consider whether or not to accept the concept of a future one-China.

⁷⁰⁰US President Bill Clinton criticized a threat by China forcibly to reunify Taiwan with the Chinese mainland if there are any further delays by Taiwan on the reunification negotiation by stating that the Taiwan issue must be resolved peacefully and with the assent of the people of Taiwan. For details, see CAN, Washington, Feb 25, 2000. "any final resolution to the cross-strait situation must be made with the consent of the people on Taiwan."

⁷⁰¹ See Lee Chang-kuei, "CHINESE CONFEDERATION" VERSES "ONE CHINA," the Taipei Times, Feb. 23, 2001, Taiwan (Noting in 1992, a conference between Mr. Koo-Chen-fu of the ROC Straits Exchange Foundation and Mr. Wang Doa-han of the PRC Association for Relations Across the Taiwan Strait took place in Singapore. During the conference, the issue of one China remained a subject of major dispute. With absolutely no consensus between the two sides, China expressed the view that "one China is the PRC, of which Taiwan is a part," while the ROC claimed "one China is the ROC, of which the mainland is a part.")

§ 5-20 Peaceful Coexistence and Cooperation Across the Taiwan Strait

As discussed above, the gap between the two sides of the Strait is caused not so much by the economic differences as by the political differences. Indeed, the key to the success of either the “one country two systems” model or the one country two governments” under the concept of future one China lies in economics, not politics because it is the common interest of the people of the two sides. The development of both sides’ continuing economic prosperity is an auspicious factor for the cross-strait relations, as well as for the Asian-Pacific region as a whole. In the meantime, modernization of China’s economy is planting the seeds for the broader aim of developing China into a regional power and bringing Taiwan to benefit from it.

If the common interest can really create a new environment of preventing unexpected cross-strait conflict, cross-strait relations should therefore be conducted based on reality to put economic matters first in the establishment of an economic Chinese community. Leaving political disputes aside in favor of dealing with less sensitive but more practical issues until a more opportune time to normalize the relationship between Taiwan and China,⁷⁰² and then, to seek common grounds on the

⁷⁰² See ROC(TAIWAN) VS. PRC(CHINA): A COMPARISION, Government Information Office of the ROC(www.gio.gov.tw)(Noting that in the realm of political development, Taiwan has grown into a free and vibrant democracy. In 1996, the people of Taiwan completed their first direct presidential election. The presidential election of 2000 ended five decades of government under the KMT and peacefully transferred power to the victorious Democratic Progressive Party(DPP). In contrast, the advancement of democracy in China has stagnated, and the PRC remains a one-party Communist dictatorship.)

basis of the existing foundations would be the major aspiration of the people on both sides of the Taiwan Strait.⁷⁰³ Each side of the Strait may therefore undertake to facilitate the further development of such a new environment to reach consensus on the controversial matters.

Accordingly, both sides can make their greatest contributions by proposing a project of joint cooperation such as the case of the joint cooperation between Britain and Argentina. For example, in 1996, the foreign ministers of Britain and Argentina signed a joint declaration concerning cooperation with regard to offshore activities in the south-west Atlantic. This contained a formula on sovereignty over the Falkland Island, South Georgia, the South Sandwich Islands and the surrounding maritime areas to the effect that nothing in the declaration or any action carried out in consequence of it would constitute a basis for affirming, supporting or changing the position of each of the countries in relation to those areas.⁷⁰⁴ As exemplified in the case of joint cooperation between Britain and Argentina, we sense the critical role that joint cooperation has played in the political and security agendas between Britain and Argentina.

⁷⁰³ Regarding the existing foundation meaning any result and consensus reached in past contacts, dialogue, or negotiations conducted between Taiwan's Straits Exchange Foundation(SEF) and the Association for Relations Across the Taiwan Strait in China(ARAT).

⁷⁰⁴ See Eli Lauterpacht, SOVEREIGNTY: MYTH OR REALITY, 73 INTAFS 139 (1997). In this case, sovereignty is a concept with a specific meaning, it is possible to separate the nominal part of sovereignty, the formal title, from the actual exercise of power in the area. By agreeing upon the manner in which the latter will be exercised without prejudice to the former, the significance of the dispute over title is reduced.

Likewise, without the risk of a war, the future development of the cross-strait relations should follow this direction of shared values by joint cooperation that would provide a good mechanism for economic integration between the two sides of the Strait. Under such a mechanism, both sides can establish mutual trust, understanding and assistance. As Dr. Mangelson has noted: "Increased contacts between Taiwan and China are propelled by the potential economic benefits of increased business contacts, the common heritage of Taiwan and China's people, incentives from Beijing, and the possibility that Taiwan's wealth could help change the PRC's social system."⁷⁰⁵

The growing economic and trade interaction between Taiwan and China allow more room for both sides to engage together in constructive ways so that the workable parallel approach to simultaneous cooperation with Taiwan and China can serve the interests of the whole regional economy. For instance, China and Taiwan have suffered much less from the economic crisis in East Asia. On the contrary, both have indeed become global major economic players: thus, the two sides of the Strait can make joint efforts in solving the regional economic crisis⁷⁰⁶ that would be desirable and beneficial to the region in particular.

⁷⁰⁵ See Mangelson, TAIWAN RE-RECOGNIZED: A MODEL FOR TAIWAN'S FUTURE GLOBAL STATUS, 1992 B.Y.U.L. Rev. 231, 244.

⁷⁰⁶ See Murray Weidenbaum & Harvey Sicherman, THE CHINESE ECONOMY: A NEW SCENARIO, Jan. 1999(www. taiwansecurity.org)(Noting that the problem-Asian financial crisis-arose first in Thailand and then quickly spread to other East Asian nations, especially Korea, Indonesia, and Malaysia. The key manifestations of financial distress were plummeting currencies, failing banks, massive layoffs, and a wholesale flight of foreign capital.)

VI. THE EVOLUTION OF GLOBAL POLITICAL ECONOMY AND THE
ECONOMIC INTEGRATION OF THE CROSS-STRAIT RELATIONS

With the demise of communism in Eastern Europe and the Collapse of the Soviet Union that led to the emergence of a new global society, globalization brings universal properties of human conditions with the international political economy. The mainstream trend in international political economy is a process of integration and arrangements for global cooperation between national political and international economies in the foreseeable future. Under such an evolution, national identity seems to be a conceptual ambiguity to nationhood.⁷⁰⁷ In an increasingly interdependent world, this might make boundaries become less significant as it is the case of the European Union(EU). In this respect, there is a crucial need for the PRC to accelerate and broaden its thinking to achieve a holistic view of the Chinese community that refers to the national identity of Chinese states, such as Taiwan and Singapore.

Although the PRC is still one of a minority of remaining authoritarian regimes today, the complexity of patterns of development in the economic and political realms underlies the fact that the PRC is now necessary for an understanding of the change

⁷⁰⁷ See LOOKING TO THE FUTURE, Asiaweek, May 21, 1999, p.34. In an interview regarding the question as to "what is the future of the Asian nation state?" the former Singapore President Lee Kuan Yew responds that "[I]f Asia stabilizes and grows and there's more economic integration, then, while it may not become like Europe, boundaries will become less significant."

and development in the global political economy. More importantly, China's future growth depends on reform of its financial and economic systems. In this respect, China should actively conduct dialogue with Taiwan to promote financial stability and economic cooperation in the Asia-Pacific region.

Applying the economic interdependence factors of cross-strait relations into the evolution of the global political economy, it is a simple but essential foundation to sense what may be difficult but not impossible to generate a qualitative "parallel engagement" with both parts of divided China under the inter-governmental arrangement for both the ROC and the PRC by an interim de facto confederative system. Under this system, the two sides may arrange for an agreement among high-ranking government officials of both sides to define their relations with each other and thus, the arrangement may facilitate a regularized ad hoc committee, composed of the leaders of economic and financial affairs from both sides, to coordinate economic issues of economic reform and transition in efforts to develop a Chinese community market between the two sides of the Strait(including the Hong Kong SAR).

§ 5-21 Establishment of the Chinese Community Market

As mechanisms for implementing and enforcing the related policies of the economic community would face the obstacles of sovereignty issues, as long as both

sides agree to respect the political reality of the two sides across the Taiwan Strait, a flexible approach allowing each side to retain full political sovereignty is also advocated such as the EU member states for example. Although the transition of both sides of the Strait to a common economic community may raise many political disputes, the case of the EU has already provided such a very good experience that the common economic community's main goals of legalizing foundations for a market economy would require both sides to refrain from exercising their full sovereignty in economic matters such as free movement of goods, services, and labor; a common monetary and banking system; a unified tax system and a common price policy. If analyzed from the evolutionary manner of the EU model that renders boundaries less significant and nationalism more blurred, such a procedure of integrating the Taiwan-China economies is quite available for settling nationality disputes between the Taiwanese and the Chinese.

The breakthrough of both sides(Taiwan and China) to enter the WTO simultaneously can be expected to lead to an acceleration of the establishment process for the Chinese Community Market. At least, there is no way either side can avoid some form of official contact. By joining the WTO, based on the premise for creating an equal status with China(independent customs territory vs. independent customs territory), each side of the Strait has committed itself to complying with the rule of

free trade, which includes requirements for market opening and removal of tariff and non-tariff trade barriers. As with other WTO members, Taiwan and China are surely to benefit from each other in their simultaneous WTO accession. At this point, it is a crucial step to start using the systemic mechanism provided by the WTO so as to build up a process of finding a consensus on a joint economic framework by democratic participation. This will lead the two sides of the Strait to overcome the barriers and reach a favorable balance regarding the integrating issues by democratic manners. Following both sides' WTO accession, the timing provides a good opportunity for the two longtime political rivals to adopt the successful model of the European Community to propose the creation of the Chinese community market. More importantly, such a creation of common community across the Taiwan Strait will enable the two independent sovereign ethnic Chinese nations, with their own political, social, and cultural identities, to find enough common ground and then to pave a positive way for the efficient integration of economies, trade and culture. This integration under the form of the common market can be the basis for a new framework of permanent peace and political integration between them. Absolutely, it will be one of the region's great success stories: a prosperous, stable and modern community that capitalizes on its human resource to become a global financial and commercial hub.

VII. CONCLUSION: PLAYING FOR TIME

Taiwan's current economic prosperity coupled with its relations with the PRC and the US make peaceful reunification under democratic rule more likely to occur than other formulas in the future for the reason that it could stabilize the status quo of peaceful cross-strait relations, especially, from the viewpoint of Chinese nationalism. More importantly, as Taiwan has a very central and valuable role to play in cross-strait historic development, both as a model and a resource for China's development, it is noted that Taiwan can therefore become China's very example for economic modernization and rapid democratization through increased trade, cultural exchanges, and other meaningful contacts. As it is the case of North and South Korea, after half a century's confrontation, the leaders of North and South Korea made history with a handshake that seemingly serves as a model for the two sides of the Taiwan Straits to follow. If North and South Korea could do it, why cannot the two sides?

§ 5-22 The Importance of Continuing the Policy of Institutionalized Communication

Observing that a quasi-official institutionalized system -- the Taipei-based Strait Exchange Foundation(SEF) and the Beijing-based Association for Relations Across the Taiwan Strait(ARATS) -- for cross-strait consultations was set up by the two sides in 1992 and 1993 respectively, coupled with the increasing cross-strait trade and

economic exchange⁷⁰⁸ between both sides of the Taiwan Straits has turned Taiwan into China's second largest source of investment capital,⁷⁰⁹ it is noted that both sides do have common interests with each other. Although Taiwan's future status vis-à-vis the PRC is uncertain since the institutionalized communication channels between the two sides do not function well,⁷¹⁰ its superior economic and democratic development vis-à-vis the PRC is apparent.

The discussion above outlines that both sides of the Strait may first cooperate economically, and then, move on to political dialogue to build mutual understanding. Political differences should not interfere with economic and trade relations between the two sides of the Strait. By so doing, Taiwan's successful economic and democratic development may offer the PRC a powerful incentive to fundamentally reform its communist system. This, in turn, will improve the cross-strait relations and help the two sides of the Strait to promote an acceptable integration politically. To improve the functioning of an already existing institutionalized communication arrangement would certainly fall within such a scope. In this regards, as being consultative

⁷⁰⁸ In order to achieve its economic and political goal, China has been successful in attracting investors from Taiwan by regulating a series of policies to provide some preferential treatments. Due to the similar customs and common language as well as kinship ties, those investors found it easy to set up business there. Gradually Chinese mainland became the most favorite place for Taiwan's outbound investment.

⁷⁰⁹ According the survey released in 1998, Taiwan was China's second largest source of investment capital, after Hong Kong. China is also one of Taiwan's biggest export markets. See John F. Copper, *TAIWAN: NATIONS-STATE OR PROVINCE*, SMC Publishing Inc., 1994, p.167.

⁷¹⁰ See STATEMENT ON MAINLAND CHINA'S WHITE PAPER, Mainland Affairs Council of the ROC, Feb. 25, 2000(www.mac.gov.tw)(Noting that until today, Beijing has not followed the terms of agreements to meet with each other once every season, to proceed with the second Koo-Wang Talks, and to fulfill the promise of sending Mr. Wang Dao-han, the ARATS chairman and Chain's top

agencies to both governments of the Strait currently, the Taiwan-based SEF and the China-based ARATS can serve as the best channels for conducting dialogue between the two sides of the Strait.

§ 5-23 Peaceful Treaty and Zone of Peace

Although the PRC's "one China" policy has been accepted by the majority of the world community, it is based on the precondition that China not use force to settle the Taiwan issue in order not to endanger regional stability.⁷¹¹ This is not to mention the fact that the military capacity would make it very costly for the PRC were China to mount an invasion of Taiwan. Even though China's repeated vow to end its separation from Taiwan by force if necessary is nothing new and it is gradually becoming the dominant regional power, the mission of China's being a great power requires the capability and intention of playing a constructive and stabilizing role in the regional order. Hence, the meaningful mission for China to play its role as a dominant regional power is to maintain non-hostile ties with Taiwan by working out a peaceful settlement of the decades long cross-strait conflict through negotiation with Taiwan. This is also a key to Asian stability and prosperity that would benefit both Taiwan and China.

negotiator in handling ties with Taiwan, to visit Taiwan for a constructive dialogue).

⁷¹¹ See David Shambaugh, TWO CHINAS, BUT ONLY ONE ANSWER, the China Post, July, 21, 1999, Taiwan (Noting that despite the profound difference between Beijing and Taipei and complexities of the situation, the "one China" framework has served for more than two decades as the principal basis for stability in an inherently volatile environment).

To maintain peace is a fundamental purpose of international law and is specifically a common interest of the international community, especially considering that the institutionalized systems for cross-strait consultations were suspended years ago.⁷¹² In efforts to stabilize such a common interest in the Taiwan Strait, the international community should help facilitate cross-strait dialogue between China and Taiwan by returning to their institutional track on the basis of previous contacts, so that the two sides can sign a bilateral treaty of non-aggression to formally end hostility⁷¹³ and create a zone of peace in sensitive areas of the Taiwan Strait by gradually demilitarizing the region of the Strait. This is a short-term goal in the long-term process of the cross-strait reconciliation, which would serve the people and interest of Taiwan better than any further consensus on defining the ultimate status of Taiwan.

§ 5-24 China's Progress Towards Democratization

To reunify the two sides of the Taiwan Strait into a political unit(a new free China) is a historical process, meaning that it is not something the two sides can achieve overnight. Following its continuous modernization economically, China is

⁷¹² See Marta Weidenhiller, PRC TAKES LONG-TERM VIEW ON ROC, the China Post, Oct. 23, 1999, Taiwan(Noting that what Taiwan wants is a resumption of the dialogue which began with great difficulty in 1993 but came to an immediate halt when Taiwan President Lee traveled to the United States in 1995).

⁷¹³ See Chang Yan-ting, WHAT THE PENTAGON'S CHINA REPORT TELL US, Taipei Times, July 30, 2002, Taiwan(Noting that, according to the U.S. Pentagon's recent annual report, the PRC has at least 300 medium-range ballistic missiles deployed on China's southeast coast, aimed at major Taiwanese cities and landmarks, and the number of missiles increases every year).

gaining opportunities for political reform as economic freedom creates habits of liberty, and habits of liberty create expectations of democracy.⁷¹⁴ In this respect, Taiwan is in a good position as a very good example to prove this point.

To date, as a result of avoiding unexpected threats of political instability, democracies have replaced autocratic regimes in virtually every region of the world. Apparently, with popular demands for more transparency and freedom, the political and economic evolution in China will sustain a favorable balance in such a new scenario that does not allow the arbitrary decisions of officials to override national interests. Instead, democratization is of great importance to China to retain its long-term national interests. As the China becomes more democratized, sooner or later, it is inevitable that the Chinese people can turn the Government of China from an authoritarian dictatorship into a full-fledged democracy along with a steady high growth Chinese economy. In turn, the cross-strait issues would be smoothly resolved by a democratic consensus under the best formula which is not "one country, two systems" but "one country, one system of democracy." Following a better understanding of the general political and social situation with each other during such an evolutionary and cooperative process, then, not surprisingly, both sides can reach a

⁷¹⁴ For example, see Jane Rickards, ACROSS THE STRAIT: WHAT IS THE FUTURE?, the China Post, Dec. 27, 1999, Taiwan (Noting that Beijing's WTO entry would lead to more imports of foreign information, technology and culture that would change the people's thinking through exposure to new ideas).

peaceful settlement on the sovereignty dispute regarding the issue of Taiwan's status in a democratic fashion. In the meantime, the goal of unification, namely a future one-China remains possible in the process, which is still available as a free option to each side of the Strait.

§ 5-25 An Association of Chinese Nations

As a compromise due to Taiwan's aspiration for full sovereignty and the increased need to preserve the benefits from the cross-strait economic interdependence, and following the successful creation of the Chinese Community Market, both sides of the Strait can further map out an association of Chinese nations(which is similar to a confederal system), namely, for example, a "Chinese Union," so as to contribute to political stability across the Taiwan Strait. Actually, a confederal system rather than the federal system⁷¹⁵ would be more qualified to apply for the present political reality of the Taiwan-China ties because, through such an association of the two Chinese nations based on international agreements concluded to institutionalize cooperation and coordination in various areas of common concern,

⁷¹⁵ The distinction between federations and confederations is crucial, since the world community and international law treat the two legal entities differently. See Urs W. Saxer, THE TRANSFORMATION OF THE SOVIET UNION: FROM A SOCIALIST FEDERATION TO A COMMONWEALTH OF INDEPENDENT STATES, 14 Loy. L. A. Int'l & Comp. L. J. 581, 605(Noting that, in theory, the major distinction between a federation and a confederation is sovereignty, as sovereignty is the decisive criterion for determining a state's existence in the world community. In a confederation, the members retain their capacity to act as sovereign entities. Thus, according to international law they continue to be states, while in a federation they merge to form a new state. As a legal entity, a confederation lacks genuine sovereignty – independent power – aspect, due to its complete dependence on the will of its sovereign member states, which are free in all other aspects, including that of determining the future of the confederation).

each side can retain its own political system independently but at the same time continuously strengthen their economic interdependence with each other.

In such an association case, both the ROC and the PRC can be continuously identified as two separate sovereignties that have already been such for decades. In turn, by acting together through the democratic framework, each side would hold similar sovereign authority without damaging the evolution of external policies and the legal framework of the association of Chinese nations and interfering with each side's domestic normative framework.

The most fundamental purposes of creating the association of Chinese nations, with the existence of divided state sovereignty and territory by the two sides of the Strait, would be to develop the best possible political integration for both the ROC and the PRC. As the evolution of economic integration and political integration would be compatible with the process of a great integrated China, once both member states of the association of Chinese nations simultaneously benefit from such an association system, striving toward peaceful reunification through transformation from "two separate Chinese nations" to "a China Union" would be a simple goal with a simple solution to the longtime existence of the two Chinese governments without the need to clamor for the US to broker a grand settlement of the Taiwan issue. It is rather extraordinary, but also predictable.

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APPENDIX: MAP OF CHINA & TAIWAN

