

The Framework for Hartzell & Lin's Research

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The following facts form the basis of our legal analysis into Taiwan's international legal position:

- * Taiwan was ceded to Japan in the 1895 Treaty of Shimonoseki. Upon the coming into force of the 1895 Treaty, all previous claims of China regarding the ownership of Taiwan, whether due to history, culture, language, race, geography, geology, etc. became null and void.
- * The Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents do not have the force of law to transfer the sovereignty of Taiwan to China. In regard to the future status of Taiwan, these documents are merely statements of intent, for the possible reference of those parties who will draft the post-war peace treaty.
- * During the period of the Pacific War, all attacks against the four main Japanese islands and against Taiwan were conducted by US military forces, hence we can say that the United States liberated Taiwan. The ROC military forces did not participate.
- * Oct. 25, 1945, was not “Taiwan Retrocession Day,” but merely the beginning of the military occupation of Taiwan. There was no transfer of sovereignty on this date.
- * In Taiwan, the United States is “the occupying power.” It is often heard that that “the Japanese surrendered to the Allies, and hence the United States does not have any special position under such arrangements.” However, this type of analysis is incorrect. The laws of war (in particular as codified in the Hague and Geneva Conventions) do not discuss “who surrendered to whom,” or “which army defeated whom.” What they do discuss is “the occupying power.” If we review the contents of General Order No. 1 issued by Gen. Douglas MacArthur on Sept. 2, 1945, we are forced to conclude that “the occupying power” is the United States. (This is fully confirmed in Article 23 of the post-war San Francisco Peace Treaty, which designates the United States as “the principal occupying power.”)
- * Under such arrangements, CKS’s Republic of China can only be viewed as a subordinate occupying power. The ROC has “effective territorial control” over Taiwan, but not “sovereignty.” (These two concepts are not the same.)

- * In December of 1949, many high ranking officials of the ROC fled from mainland China to Taiwan, thus becoming a government in exile. Under international law, it is impossible for a government in exile to be recognized as “legitimate” by the international community unless it returns to its original location of governance.
- * The San Francisco Peace Treaty (SFPT) came into effect on April 28, 1952. While Japan renounced the sovereignty of Taiwan, no receiving country was specified. Hence, the ROC government in exile on Taiwan does not have “title” to Taiwan, and cannot be considered a country in the international community, since it lacks its own territory.
- * The statement by some researchers that the ROC holds the sovereignty of “Formosa and the Pescadores” based on the Sino-Japanese Peace Treaty (effective Aug. 5, 1952) is incorrect. The territorial cession of “Formosa and the Pescadores” was done in the SFPT, and the ROC was not a party to that treaty. The Sino-Japanese Peace Treaty is subsidiary to the SFPT.
- * The military government of the principal occupying power does not end with the coming into force of the peace treaty, but continues until legally supplanted. From 1952 to the present, we can find no other legal arrangements which have supplanted United States Military Government (USMG) authority in Taiwan.
- * The act of “territorial cession” is always done between governments. The assertion that when Japan renounced the territorial sovereignty of Taiwan, it reverted to the Taiwanese people is in error. The Taiwanese people have “popular sovereignty” (i.e. the right to vote), but territorial sovereignty is held by a government.
- * Territorial sovereignty cannot disappear, dry up, or become lost. In other words, “territorial sovereignty” always exists. If the ROC does not have it, then some other governmental entity, somewhere in the world, has it. Importantly, there are no international documents which prove that the territorial sovereignty of Taiwan has ever been transferred to the People’s Republic of China.
- * Beginning in 1898, the three fundamental criteria for the recognition of a type of US insular area are -- conquest by US military forces, the US as “the (principal) occupying power,” and territorial cession in the peace treaty. Historically, this has been the categorization for the initial four US insular areas of Philippines, Guam, Cuba, and Puerto Rico. All were initially under United States Military Government.

* The issue of whether there is a "recipient" for the territorial cession in the peace treaty is a separate consideration. Technically speaking, the designation of a "receiving country" in the peace treaty merely indicates that that country is authorized by the international community to establish a civil government in the territory.

Conclusion

After taking into account all of the above points, a full statement of Taiwan's current position under international law can be derived. Based on the SFPT, the US Constitution, and the Insular Cases of the US Supreme Court, Taiwan can be classified as "unincorporated territory under USMG." This means that Taiwan is an insular area of the United States.

Indeed, this conclusion was the subject of our Sept. 20, 2005, article in the Washington Post, entitled "What are you doing?" The full text of that article is here -- <http://www.taiwanbasic.com/notes/what2do.htm>

Challenges for the Future

In 2006 Taiwan faces many serious problems. Among the most important of these are: low efficiency and rampant corruption in the government bureaucracy, increasing collusion between the police and criminal elements, chaos and paralysis in the Legislative Yuan, unchecked investment in the PRC and erosion of Taiwan's economic base, widespread smuggling of people and goods from the PRC, much discontent with the educational system, continual struggle among the local people to determine the proper "direction" for the development of a unique "Taiwanese consciousness," etc.

Hence, we strongly recommend that pro-Taiwan advocacy groups in the USA cooperate with the promotion of our methodology to have Taiwan's true status under international law and US Constitutional law fully recognized. In this way, the ROC can be dismantled, and the Taiwanese people can immediately obtain the rights to implement "name rectification" and to draft a new Constitution under United States administrative authority.