

Does Taiwan Meet the Criteria to Qualify as an “Overseas Territory of the United States”?

by Richard W. Hartzell & Dr. Roger C.S. Lin

Introduction

Many legal experts would be surprised at the contention that Taiwan might meet the criteria necessary to qualify as an “Overseas Territory of the United States.” If such a contention is true, then the Taiwanese people should be enjoying “fundamental rights” under the US Constitution, similar to the native persons in other US overseas territories (also called “unincorporated territories”).

Peace Treaty Specifications

In the April 28, 1952, San Francisco Peace Treaty (SFPT), Japan renounced sovereignty over “Formosa and the Pescadores” (i.e. Taiwan) but no “recipient” for this territorial cession was specified.

The State Department informed the Senate in 1970 that “As Taiwan and the Pescadores are not covered by any existing international disposition, sovereignty over the area is an unsettled question subject to future international resolution.” Taiwan is not currently included on the US State Department’s listing of Independent States in the World.

Although there is the general impression among politicians that Taiwan is somehow a part of Chinese territory, in fact there are no US government documents which conclusively say that Taiwan belongs to either the People’s Republic of China (PRC), nor to the Republic of China (ROC). This fact has been repeatedly confirmed by researchers in many prominent think-tanks in the United States.

Moreover, a close reading of the Senate-ratified SFPT of April 28, 1952, and its subsidiary “Sino-Japanese Peace Treaty” of August 5, 1952, with reference to the Truman Statement of June 27, 1950, the Taiwan Relations Act, and other US policy statements clearly shows that the United States government has never recognized the forcible incorporation of Taiwan into Chinese territory.

That “all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China” is something that the United States only “acknowledges.” This acknowledgement is clearly stated in the Shanghai

Communiqué of 1972. (Unfortunately, the international news media often restate this wording as “recognizes” or “accepts.” Clearly, this is a misstatement of the United States government’s position.)

Although many government officials in Beijing currently regard Taiwan as a “renegade province,” in fact since the founding of the People’s Republic of China on October 1, 1949, that country has never ruled Taiwan for even twenty minutes.

Under United States law, overseas territories are also called “unincorporated territories” or “insular areas.” Let us examine the different types of United States insular areas and see how Taiwan might qualify.

Background to US Insular Area Studies

The larger insular areas originally came under the sovereignty of the United States in various ways. The following is a brief introduction to Major US Insular Areas, which are also called “unincorporated territories.”

TYPE 1: Insular Areas Acquired by Conquest -- In a treaty signed at the end of the Spanish-American War in 1898, Spain ceded Puerto Rico, Guam, and the Philippines to the United States. In the same treaty, Spain’s sovereignty over Cuba was relinquished, but no recipient was designated.

TYPE 2: Insular Areas Acquired by Purchase -- The United States purchased the Virgin Islands from Denmark in 1917.

TYPE 3: Insular Areas Acquired by Agreement -- Great Britain and Germany renounced their claims over Samoa in February 1900. The island group was then formally ceded to the United States by the Samoan chiefs, with ratification by the US Congress in 1929.

TYPE 4: Insular Areas Acquired after United Nations Trusteeship, as a Commonwealth of the United States -- The United States was responsible for administering the Northern Mariana Islands after World War II as a United Nations trusteeship. In 1976 Congress approved the mutually negotiated "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States." The commonwealth government adopted its own constitution in 1977, and the constitutional government took office in Jan. 1978. The Covenant was

fully implemented on Nov. 3, 1986, pursuant to Presidential Proclamation No. 5564.

(TYPE 5: An additional type of Insular Area would be those countries which have achieved independence but are now in “Free Association with the United States.” However, these are not an “unincorporated territories” and hence are not considered here.)

Post-1941 Military History of Taiwan

During the WWII period, all military attacks against Japanese installations in Taiwan were conducted by United States military forces. The historical record shows that bombing raids against targets in Taiwan began in earnest on October 12, 1944. At no time did the military forces of the Republic of China participate in attacks against Taiwan.

After the dropping of two atomic bombs on Japan, the Japanese Emperor agreed to an unconditional surrender on August 15, 1945. On September 2, General Douglas MacArthur issued General Order No. 1, which described procedures for the surrender ceremonies and military occupation of over twenty areas. After a thorough reading of General Order No. 1, we need to answer an important question: “Who is *the occupying power?*”

The only possible answer is: “It is the United States.” (This assertion is also fully confirmed by Article 23 of the post-war San Francisco Peace Treaty, where the terminology of “the principal occupying power” is used.) The Hague Conventions of 1907 state that “Territory is considered occupied when it is actually placed under the authority of the hostile army.”

Important legal relationships for the disposition of Taiwan do indeed arise from all these facts.

Dissection of a TYPE 1 US Insular Area

As seen from the above, the earliest delineation of US insular areas (TYPE 1) was by the Supreme Court after the Spanish American War, for Puerto Rico, Guam, the Philippines, and Cuba. The United States was the “conqueror,” hence (in the post-Napoleonic era) the United States is “the occupying power.” Obviously,

“military occupation” is not equivalent to “annexation.”

From this information we can see that beginning in 1898, the three fundamental criteria for the recognition of a type of US insular area are -- conquest by US military forces, the United States as "the (principal) occupying power," and territorial cession in the peace treaty. This is a “default status” for these areas, and does not require any immediate confirmation by the US Congress. Significantly, Taiwan fits these TYPE 1 criteria exactly.

Puerto Rico, Guam, the Philippines , and Cuba were all under United States Military Government upon the coming into force of the Spanish-American Peace Treaty on April 11, 1899. In fact, for most of these territories, “civil government” authorized or recognized by the United States government was only implemented many years later.

To re-emphasize this: Upon the coming into force of Spanish-American Peace Treaty, the four areas of Puerto Rico, Guam, the Philippines , and Cuba were all under United States Military Government. This is an important similarity that many legal researchers miss.

To Whom was Taiwan ceded?

However, in reviewing the above explanations, some persons would say: “But Taiwan was not ceded to the United States in the SFPT.” This is true. Nevertheless, the issue of whether there is a "recipient" for the territorial cession in the peace treaty is a separate consideration. Its significance is this: 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.

Without the designation of a “receiving country” in the peace treaty, the ceded territory remains under the authority of the “principal occupying power” as an interim status condition. This is because military occupation is, at the most basic level, a transitional period, or a period of “interim (political) status.”

To clarify this, the form of administration by which an occupying power exercises government authority over occupied territory is called **military government**. 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.

With no announcement of the end of United States Military Government in Taiwan, and no superseding “civil government” legislation passed by the US Congress, Taiwan remains in a period of “interim (political) status.” In other words, in the present day, Taiwan has still not reached a final political status.

United States Military Government authority over Taiwan

The above dissection of a TYPE 1 US insular area clearly shows that Taiwan remains under the authority of the United States Military Government (USMG) at the present time.

At the head of the military chain-of-command in the USA is of course none other than the Commander-in-Chief. According to current US government pronouncements, the Commander in Chief does not support Taiwan independence. That Taiwan (or “the Republic of China on Taiwan”) is not now a sovereign nation is easily seen by reading the post-war San Francisco Peace Treaty. The territorial sovereignty of “Formosa and the Pescadores” (i.e. Taiwan) was not awarded to the Republic of China. As an occupying power, the ROC on Taiwan is simply fulfilling the role of “agent” for the United States, in addition to being a government-in-exile.

The ROC’s status as being a government-in-exile has been noted by many researchers. However, none have grasped the reality that the territory of Taiwan actually meets the criteria to qualify as an insular area of the United States! They have failed to see that the three fundamental criteria for the recognition of a TYPE 1 US insular area are -- conquest by US military forces, the US as “the (principal) occupying power,” and territorial cession in the peace treaty. Taiwan does indeed meet these criteria.

Might the authors suggest that the Committee on Resources of the House of Representatives launch an in-depth investigation into this entire topic? According to Congressional documents, in the late 1990’s the Chairman of the Committee on Resources requisitioned a full report on the “Application of the US Constitution in US Insular Areas” from the General Accounting Office.

See <http://www.gao.gov/archive/1998/og98005.pdf>

Clearly, a similar report should be prepared on the “Application of the US Constitution to Taiwan.”