

1973

## Taiwan - Land of the Forgotten Many

Roger H. Hull

---

### Recommended Citation

Roger H. Hull, *Taiwan - Land of the Forgotten Many*, 7 INT'L L. 788 (1973)  
<https://scholar.smu.edu/til/vol7/iss4/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## Taiwan—Land of the Forgotten Many

The admission of the People's Republic of China to the United Nations and the concomitant expulsion of the Republic of China unleashed a torrent of words. Some writers hailed the event as long overdue; others expressed the view that the admission—not the expulsion—was “an idea whose time had come”; and still others damned both the admission and expulsion as irresponsible acts, and opined that the United States should have nothing more to do with the United Nations.

Regardless of which view one ascribes to, however, he cannot help but conclude that the spectacle at the United Nations did little to enhance the prestige of that body. And regardless of which position one finds most compelling, he cannot help but be disappointed that the focus of the viewers and the pens of the writers were so misdirected. Despite the sound and the fury, the most interesting and important question—the question of what effect the admission and expulsion would have on the future of Taiwan—was rarely asked and never answered.

The starting point in a discussion of Taiwan's future must be a survey, however brief, of its past. As early as the seventeenth century, China had established contact with Taiwan. By the close of the seventeenth century it had full control over the island, control which it retained for approximately two hundred years. But with the signing of the Treaty of Shimonoseki terminating the Sino-Japanese War of 1894–1895, China ceded Taiwan to Japan, in whose hands it remained until the Japanese Peace Treaty (of World War II vintage) was signed in 1951. According to the terms of that treaty, Japan renounced “all right, title and claim to Formosa.”

Of cardinal significance in tracing the “lineage” of Taiwan are the events which occurred during World War II. At the Cairo Conference in 1943 Chiang Kai-shek secured from Messrs. Churchill and Roosevelt the promise—set forth in the Cairo Declaration—that all property, including Tai-

---

\*LL.M., Virginia (1972), LL.B., Yale (1968), B.A., Dartmouth (1964); member of the New York bar; co-author, with John Novogrod, of “Law and Vietnam.”

wan, which Japan had “stolen from the Chinese” would be returned to China (interestingly, as noted above, Taiwan had been ceded to Japan after the 1895 war, and had *not* been “stolen” during the Japanese expansion immediately prior to and during World War II). Shortly thereafter, at the Potsdam Conference—with Stalin in attendance and joining in the decision—the Cairo Declaration was affirmed in the Potsdam Proclamation.

In the years following Potsdam the Allies maintained that Taiwan was Chinese territory. Even after Chiang and his supporters fled to Taiwan in 1949, the United States did not retreat from its endorsement of the Cairo and Potsdam principles. But with the outbreak of the Korean War President Truman ordered the Seventh Fleet to patrol the waters off Taiwan, to prevent a Communist attack on the island, and announced that the future status of Taiwan must await the resolution of the Korean conflict and the restoration of peace to that part of the world.

Accordingly, the United States not only found itself on the opposite side of the fence from the Communists *and* Nationalists (both of whom felt that Taiwan was part of China), but also it found itself in a rather anomalous position. In effect, the United States seemed to be recognizing a “quasi government-in-exile,” for it recognized as the government of China a government whose base of operations that government, but not the United States, acknowledged to be part of China.

While the legal status of Taiwan appears unchanged, Taiwan’s position vis-à-vis the rest of the world has changed greatly since 1950. Although neither the Communists nor the Nationalists are willing to concede anything more than that the other side is a pretender to the Chinese “throne,” China and Taiwan have, in fact, become separate and distinct entities. History may show that Taiwan “belongs” to China; recent events prove, however, that the stalemated Chinese civil conflict has produced two states.

This conclusion may not at first appear to serve the interests of either the Communists or the Nationalists. In point of fact, though, Chiang Kai-shek and the Nationalists very clearly are the beneficiaries of the “transformation” of Taiwan into statehood.

Statehood is generally defined as a condition which exists when four qualifications are met—there is a permanent population; there is a defined territory; there is a government; and there is the capacity to enter into relations with other states. Each of these requirements is important, although the failure to fulfill one or more of the qualifications has not generally been viewed as stripping the “state” of its status in the international community.

In the case of governments-in-exile, for example, it is evident that a state

can be said to exist, notwithstanding the fact that it has neither people nor territory. Moreover, in the case of Israel in 1948 the existence of statehood was not questioned, despite the lack of defined borders.

Yet the fact that an entity may be labelled a state, even if one or more of the requisite criteria is missing, is moot with respect to the status of Taiwan. Since Taiwan has a permanent population, a defined territory, a government, and, as evidenced by its relations in general and treaties in particular with states other than the Sino-Soviet bloc, the capacity to deal with other states, it most assuredly fulfills the requirements of statehood.

Regardless of its status prior to 1949, Taiwan, under the pseudonym The Republic of China, became a state when Chiang Kai-shek "migrated" to the island and established his government. In the course of the twenty-three years since 1949, Taiwan has quietly strengthened its hold on statehood – with each day providing additional support for its claim.

Chiang Kai-shek, of course, does not think of Taiwan as a separate entity. Instead he continues to view Taiwan as the province of China that it once was and vows to return to the Mainland, to be able to liberate it and to unite it once again with Taiwan. But despite what the Generalissimo might say and think, Taiwan has become a state. Whether the Mainland remains in the hands of the Communists, or is returned to the Nationalists is immaterial. Taiwan is a state, for it has acquired the essential characteristics of a state.

In view of the fact that the Communists also do not accept Taiwan as a state, and in view of the statements by both the Communists and the Nationalists that force will be used to effectuate the "reunion" of the Mainland with Taiwan, a brief analysis of the permissibility of the use of force must be made.

To begin with, Article 2(4) of the United Nations Charter prohibits "the threat or use of force [by all Members] against the territorial integrity or political independence of any state." While it might be argued that the proscription of Article 2(4) is binding on the People's Republic of China, but not on the Republic of China since only the former state is a member of the United Nations, the better view is that both states are bound by that proscription.

Since Article 2(6) "ensure(s) that states which are not Members of the United Nations [shall] act in accordance with [the] Principles (of the United Nations) so far as may be necessary for the maintenance of international peace and security," the fact that the Republic of China is not a member of the United Nations, does not alleviate it of the responsibility to adhere to the proscription of Article 2(4).

If Taiwan is bound by the United Nations Charter, however, it is also

entitled to the protections of the Charter. Although it has been stated that non-members are to be denied the right of self-defense—Article 51 provides that nothing “shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations,” such an interpretation would be not only a deprivation of a right recognized under general international law, but also an undesirable restriction in light of the United Nations inability to maintain world public order.

Indeed, such a restrictive interpretation of Article 51—which, in effect, would prohibit Taiwan from defending itself in the event that the Communists launched an all-out attack on the island—makes absolutely no sense. Since the exercise of self-defense does not, by definition, constitute a “threat or use of force against the territorial integrity or political independence of any state,” it is not in any way inconsistent with the proscription of the use of force embodied in Article 2(4).

Moreover, the restriction of the right of self-defense to member states would concomitantly result in making non-member states easy prey for aggressor nations. Finally, it must be realized that logic compels the “extension” of the right of self-defense to non-members, for if Article 2(4) applies to non-members, it can only apply subject to the exception set forth in Article 51, since it is only with that exception that Article 2(4) applies to members.

It therefore follows that if a non-member state such as Taiwan must adhere to the tenets of Article 2, it must be permitted to avail itself of the right of individual self-defense, when another state engages in coercive actions across its frontiers. Accordingly, the fact that Taiwan is not a member of the United Nations would not negate its right to defend itself against Communist aggression—and, quite obviously, should the Nationalists attack the Mainland, the Communists would be permitted to employ force to protect themselves and repel the invasion.

If the right of individual self-defense in the case of both member states of the United Nations and non-member states of that body is accepted, the right of collective self-defense should also be embraced. Although there is no question of the rights of members to collective self-defense, it has been argued that since Taiwan is not a member of the United Nations—and since Article 51 speaks in terms of an armed attack against a member, Taiwan has no right of collective self-defense. But this interpretation is no more logical than, and does not differ at all from, the arguments concerning the individual right of self-defense.

Article 51 does not restrict the right of self-defense; it preserves that right. To prohibit or in any way to restrict the exercise of collective self-defense between members and non-members would therefore be an

unwarranted and overly broad limitation of the rights of both members and non-members. Furthermore, since collective self-defense is nothing more than permissible coercion and not force directed against the territorial integrity or political independence of any state, it inescapably follows that the right of collective self-defense between member and non-member states must be recognized.

And for that reason the Republic of China—United States Mutual Defense Treaty of 1954, is a valid treaty (although it should be realized that a special factor might be said to exist since the Republic of China, at the time of the signing of the Treaty, was a member of the United Nations).

It should be noted that these views of the use of force are not simply dreams made “real” by the pens of scholars or theories of the Occident. Although the Chinese Communists do not recognize Taiwan as a state, they accept the view that force between states is impermissible. Indeed, as Chinese Deputy Premier Li Hsien-Nien recently stated, the Communists “maintain that disputes between states should be settled by the two parties concerned through peaceful consultation and absolutely not by resorting to force.”

And, he added, “it is all the more impermissible for a country, under any pretext, to employ large numbers of armed troops to wilfully cross its own border and invade and occupy another country’s territory.” With the Communists’ acceptance of the view, therefore, that force may not be employed against the territorial integrity or political independence of another state, the sole question ostensibly revolves around whether Taiwan is a state.

All would agree that if Taiwan is a state—which it clearly is, the use of force against its territory or independence would be an impermissible and illegal act; some—including the Communists—would conclude that force may be employed against Taiwan because the island is not a state but a part of China. Not only is this position wrong in fact, but also it is erroneous in both law and policy.

At the very least, the past twenty-three years have transformed the island province into a *de facto* state—a transformation whose acceptance is necessitated by the demands of a minimum world public order. In our world grown small, coercion between two bodies, regardless of their origin or legal standing, must be prohibited. Therefore, it would be destructive of world order to characterize the Communist-Nationalist confrontation as a civil conflict and not a struggle between two states, for, under international law, the latter is impermissible while the former is not.

But even if it is conceded that Taiwan is today a part of China, it might well be impermissible for force to be used by the Mainland against the island, since it is clear that such force would be destructive of world order,

and might well produce a threat to, or breach of, international peace and security. And under the provisions of Chapter VII of the United Nations Charter, whenever there is “any threat to the peace, breach of the peace, or act of aggression,” the Security Council shall take the requisite action “to maintain or restore international peace and security,” despite the fact that the problem area may be within the domestic jurisdiction of a state.

In view of the fact that the use of force by the Communists against the Nationalists—or *vice versa*—would probably fall within the confines of Article 39 of the Charter, the mere fact that Taiwan may not be recognized as the international entity that it is, will not produce a different result with respect to the use of force than would be produced if Taiwan were recognized as a state.

Still, it is not enough to say that Taiwan is a state, and that force may not be used to effectuate a “reunion” with the Mainland. In addition, it must be recognized that a just solution to the Taiwan problem must take into account the aspirations of the inhabitants of the island. If, therefore, that fair solution is to be found, the principle of self-determination must be applied.

While there is some disagreement as to whether a right of self-determination exists, the better view appears to be that self-determination has developed into an international legal right. In light of the various United Nations resolutions—in particular the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and the 1967 Covenants on Human Rights—self-determination can no longer be viewed as a vague principle.

Even though the resolutions state that “all peoples have the right of self-determination,” their backers would, if pressed, refuse to interpret them quite so broadly. In point of fact, they would probably limit the application of the resolutions to those areas of the world where colonial peoples are still held in bondage, and they would, in view of the fact that in their collective opinion, a state’s territorial integrity is more important than a right of self-determination, be quick to conclude that there is no right to secede from the state in question.

At first blush the prohibition on the right of secession might appear to have some bearing on the Taiwan question. Even if Taiwan were viewed as an integral part of China, the limitation on secession would not necessarily apply to Taiwan, since an island—or, for that matter, any other geographically distinct territory—might constitute an exception to the flat prohibition on secession.

In any case, however, secession and Taiwan have, aside from “historical ties,” little connection. A discussion of secession might well have had some

import in 1949. With the secession already twenty-three years old and the state of Taiwan clearly formed, such a discussion would be somewhat out of date.

What is significant in 1972 is the question of self-determination for the nearly 14,000,000 native Taiwanese. During the years that Taiwan was under Japanese control, the Taiwanese fought to break the shackles of Japan; during the years following the defeat of Japan, they fought the Chinese. At first the Taiwanese welcomed the Chinese (the Nationalists) with open arms.

When the Chinese responded by treating the Taiwanese as a conquered people, the islanders took up arms against them. And when, during the 1947 rebellion, the Nationalist commander on the island tricked the Taiwanese into believing that reforms would soon occur, and then massacred nearly 10,000 unarmed islanders, the space between the island and the Mainland, although physically conquered, was mentally converted into an almost unbridgeable chasm.

The fact that the Nationalists have done little to give the Taiwanese a voice in the governing of their island has not narrowed the gap between the two peoples. If, therefore, the Taiwanese voice is to be heard—assuming, for the sake of argument, that revolution is ruled out, some means—such as a United Nations sponsored plebiscite—must be found to measure Taiwanese opinion.

Ironically, the concept of a plebiscite might well have been included in the Cairo Declaration which provided for the return of Taiwan to China, for in an earlier Rooseveltian document—the Atlantic Charter—the principle was enunciated that no change of sovereignty was to occur against the expressed will of the people concerned.

Such a plebiscite would, must assuredly, be in keeping with the principles of the United Nations. By the resolutions cited above and by Articles 1(2) and 55 of the Charter, the members of the United Nations have pledged themselves to permit the peoples of the world to determine their own destiny; and by promoting a plebiscite, the members of the United Nations would, at once, be fulfilling their pledge and enabling the long-silenced voice of the Taiwanese people to be heard once more.

Although the United Nations might be “somewhat hesitant” to take action in this matter, since it might be argued that the Taiwan question is a domestic concern, United Nations action would appear appropriate for several reasons. To begin with, the Taiwanese people may certainly be viewed as a colonial people—regardless of whether the Communists or the Nationalists are viewed as their conquerors, thereby bringing into play not just the principles of the Charter but also the more specific guidelines of the 1960 and 1967 resolutions.

Secondly, the threat to the peace resulting from a “blow-up” over the Taiwan question, might be said to trigger the mechanism of Article 39 and necessitate Security Council action. Thirdly, the fact that Taiwan—the Republic of China—is no longer a member of the United Nations might facilitate United Nations action, since some members might well conclude that the sanctity of domestic jurisdiction of non-members need not be maintained inviolate.

Fourthly, some members might also conclude that action against Taiwan would be quite effective, for the carrot of United Nations membership could be dangled before Chiang Kai-shek’s eyes, and the stick of United Nations intervention could be held over his head. Finally, the danger of Nationalist capitulation to the Communists following the Generalissimo’s death, and the concomitant sealing of 14,000,000 fates might force that much-needed and long-overdue United Nations action.

Realistically, however, there can be no self-determination during the remaining years of Chiang Kai-shek’s life, for, since it is unlikely that he would fare very well under a plebiscite, the Generalissimo would never consent to such a gauge of the public will. What must be done, therefore, is to pave the way for such a plebiscite after his death. And since the plebiscite—which would have as its options independence, maintenance of the status quo, union with the Mainland, and United Nations trusteeship—will probably produce a decision in favor of independence (a result not favorable to the Communists), that way will not be easy to pave.

In retrospect, it is obvious that the perfect solution would have been to provide for the simultaneous admission of the People’s Republic of China and, following a vote by the Taiwanese for independence, Taiwan. This solution was not accepted, and, hence, the future of Taiwan is unclear, for the People’s Republic of China, as a member of the Security Council, will play an important role in any Taiwan decision.

Suffice it to say, therefore, that a great deal of work will have to be done to insure that the 14,000,000 Taiwanese do not remain “forgotten.” And suffice it to say also, that until such time as a plebiscite is taken, the Taiwanese will remain captives in their own state, for although the world may well decry the use of force by the Communists to effectuate change, it will not, based on past experience, utter a word while the Nationalists stifle the Taiwanese voice.