

COMMENTS

SELF-DETERMINATION FOR THE PEOPLE OF TAIWAN

On January 1, 1979, the United States established diplomatic relations with the People's Republic of China (PRC)¹. The terms of their agreement required the United States to recognize only one government for China.² This objective was accomplished by virtue of the Taiwan Relations Act on April 10, 1979.³

1. 79 DEP'T ST. BULL. 2022 (1979); *see also* 21 PEKING REVIEW No. 51 (Dec. 22, 1978), at 8-9; HARRY HSIN-I HSIAO, POLITICAL DEVELOPMENT IN TAIWAN SINCE THE NORMALIZATION OF THE SINO-U.S. RELATIONSHIP 162 (1983).

2. 79 DEP'T ST. BULL., *supra* note 1, at 2022. Prior to the 1979 enactment of the Taiwan Relations Act, the United States recognized the Kuomintang government of the Republic of China as the sole governing body of all of China. *See generally*, Simon, *Legal Developments in U.S.-ROC Trade Since Derecognition*, 7 INT'L TRADE L.J. 203, 204 (1983).

3. Taiwan Relations Act, 22 U.S.C.A. § 3301 (1979) [hereinafter cited as Taiwan Relations Act]. The specific language of the Act provides as follows:

(a) The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary—

(1) to help maintain peace, security, and stability in the Western Pacific; and

(2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

(b) It is the policy of the United States—

(1) to preserve and promote extensive, close, and friendly commercial, cultural and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;

(2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States and are matters of international concern;

(3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;

(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;

(5) to provide Taiwan with arms of a defensive character; and

(6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.

(c) Nothing contained in this Act shall contravene the interest of the United States in human rights, especially with respect to the human rights of all of the approximately eighteen million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the United States.

In this agreement, the Nationalist government⁴ of the Republic of China (ROC), better known as Taiwan, was derecognized. As a result, the United States no longer views the Nationalist government as a viable government for Taiwan.⁵ This sequence of events has served to further enhance a growing attitude in the international community recognizing the need for Taiwan to be governed by a more representative body.⁶

For over four centuries, the island of Taiwan and mainland China have generally existed as separate entities.⁷ The people on both sides of the Taiwan Straits which separate Taiwan from mainland China are of Chinese lineage. Periods of separation, however, have made the political and economic situations of each group diverse.⁸ One of the few points on which both sides agree is that China is “one” and that Taiwan is a province of China.⁹

The PRC insists that foreign governments recognize it as the sole government of China. Furthermore, the PRC refuses diplomatic relations to any government that maintains diplomatic relations with Taiwan.¹⁰ The PRC’s view is that one day Taiwan will be reunited with China even if force is required to accomplish that goal.¹¹ On the other hand, the Nationalist government of the ROC also rejects the “two China” or “one Taiwan, one China” policy.¹² The Nationalist government maintains that it represents the whole of China.¹³ Recognizing the conflict of the objectives sought by the PRC and the ROC, the United States has traditionally sought a

4. The Nationalist government is also referred to as the Kuomintang. These terms will be used interchangeably throughout the remainder of this Comment.

5. Oakes, *Identity Crisis*, N.Y. Times, Aug. 7, 1980, at A19, col. 2.

6. *Taiwan: Hearings on Taiwan Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 550-51 (1979), [hereinafter cited as *Hearings*]; see also N.Y. Times, Nov. 14, 1971, at 15, col. 1; July 1, 1976, at 28, col. 3; Sep. 3, 1976, at A18, col. 5; Li, *A Perspective on Taiwan*, 14 INT’L LAW. 73, 75 (1980).

7. See *infra* text accompanying notes 34-60. See also Wall Street Journal, Apr. 24, 1984, at 22, col. 1.

8. See S. REP. NO. 7, 96th Cong., 1st Sess. 1,7 (testimony of Dr. Richard C. Kagan, Assistant Professor of History, Hamline University, St. Paul, Minn.), reprinted in 1979 U.S. CODE CONG. AND AD. NEWS 650, 654.

9. Clough, *Taiwan’s International Status*, 1 CHINESE Y.B. OF INT’L AFF. 17, 18 (H. Chiu ed. 1981).

10. See *Hearings*, *supra* note 6, at 598; see also N.Y. Times, Feb. 28, 1972, at 16, col. 3.

11. See, Clough *supra* note 9, at 18; see also N.Y. Times, Aug. 2, 1971, at 1, col. 5.

12. Clough, *supra* note 9, at 18. The Nationalist government bases this claim on the fact that their government was established on the mainland in 1948. They claim that the Communist takeover of the mainland is only a temporary “militant” occupation of their country. As a result, the Kuomintang is the sole government for all of China. *Id.*

13. *Id.*

policy of non-intervention to the extent that peace would be promoted in the Asian Pacific.¹⁴

Of the 17 million people that inhabit the island of Taiwan,¹⁵ eighty-five percent have descendants who qualify as natives of the island.¹⁶ The remaining 15 percent are considered mainland Chinese.¹⁷ The majority of the Nationalist government's power rests with this fifteen percent of Taiwan's population.¹⁸

In 1947, the mainland Chinese (or Chinese Nationals, as they are also referred to in the ROC), came to power in Taiwan.¹⁹ These Chinese Nationals from the mainland founded the new Nationalist government on the premise that the ROC was the sole governing body for all of China.²⁰ When the Chinese Nationals established their new government on Taiwan,²¹ the officials they had elected to office on the mainland were transplanted to govern the new Republic of China.²² The Nationalist government claimed that they represented the whole of China's 500 million people,²³ and that the 8 million native Taiwanese comprised only 3 percent of that body.²⁴ As a result, the Nationalist government apportioned representation accordingly and allowed native Taiwanese to hold only three percent of the governmental positions on Taiwan.²⁵ Many of the same officials who were relocated to Taiwan in 1949 continue to hold office in the Republic of China's government today. Their average

14. See *Hearings*, *supra* note 6, at 15 (testimony of the Honorable Warren Christopher, Deputy Secretary, United States Department of State).

15. *Id.* at 579. Taiwan's population as of the 1979 census was approximately 17.8 million people. Estimates today range between 17.8 to 18 million people.

16. "Native" as used here refers to those people who occupied Taiwan prior to 1947. These people were primarily of Chinese descent, from the mainland province of Fukien. This also includes the "aborigines" that are credited as the original inhabitants of the island. It is speculated that these "aborigines" were of Malay descent. Li, *supra* note 6, at 75; see also N.Y. Times, Jan. 4, 1975, at 22, col. 2.

17. 5 U.N. SCOR (527th mtg.) at 6 (1950), as cited in Jwain, *The Legal Status of Formosa*, 57 AM. J. INT'L L. 25, 33 (1963).

18. See *infra* notes 23-25.

19. AMNESTY INTERNATIONAL BRIEFING, as cited in *Hearings*, *supra* note 6, at 555.

20. *Id.* L. CHEN & H. LASSWELL, FORMOSA, CHINA AND THE UNITED NATIONS 83 (1967); see also *Hearings*, *supra* note 6, at 599 (statement of A. Doak Barnett).

21. L. CHEN & H. LASSWELL, *supra* note 20, at 83.

22. *Hearings*, *supra* note 6, at 879 (Bulletin of the Peace Studies Institute, Manchester College, Aug. 1976).

23. See *Hearings*, *supra* note 6, at 598.

24. At the time of the establishment of the PRC and the ROC, Taiwan's population was 8 million as compared to the 500 million people in mainland China.

25. L. CHEN & H. LASSWELL, *supra* note 20, at 134.

age is now 78 years; this factor will necessitate their replacement in the near future.

Moreover, subsequent to their occupation of Taiwan, the Nationalists imposed martial law on the island in order to suppress any Communist or native Taiwanese movement which might seek to overthrow their new government.²⁶ This state of martial law has continued since 1949,²⁷ depriving the native Taiwanese majority of the constitutional rights that were conferred to them by the Nationalist government at the time of its inception on the mainland.²⁸

Currently, there exists a strong movement, both on Taiwan and abroad, to recognize the wishes of the vast numbers of under-represented people who reside there.²⁹ The Taiwanese people want the right to determine their own government on the basis of the international legal principle of self-determination,³⁰ and seek to establish an independent and sovereign State on Taiwan.³¹ This Comment explores how the enactment of the Taiwan Relations Act of 1979³² provides an indication that the United States government approves of a native Taiwanese movement toward independence through self-determination. The historical background of the island is first discussed, with emphasis on the long-time separate existence of Taiwan and mainland China. The differences resulting from the divergent political and economic backgrounds are stressed. The principle of self-determination in international law is then reviewed relative to the Taiwan issue. This discussion is followed by an examination of the events which have brought about a conscious awareness of the principle of self-determination and the demand for independence among the native Taiwanese. The barriers which have thwarted advancements of the Taiwanese indepen-

26. See *Political Repression in "Free China,"* 116 CONG. REC. E7953-56 (1970) (speech of Donald M. Fraser).

27. *Hearings, supra* note 6, at 389, 546, 874; see also Wash. Post, Feb. 3, 1979, at A8, col. 1.

28. Wash. Post, Feb. 3, 1979, at A8, col. 1.

29. There is extensive documentation on the Taiwan Independence Movement in material published by the World United Formosan's for Independence (WUFI). *Hearings on the United States Relations with the People's Republic of China Before the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. 347-61, 463-70 (1971) [hereinafter cited as *Hearings on United States Relations with the PRC*]; *The Question of Self-Determination for Formosa-Taiwan*, 116 CONG. REC. E9345-46 (1970); *Hearings, supra* note 6 at 546; L. CHEN & H. LASSWELL, *supra* note 20, at 185-200.

30. N.Y. Times, Jan. 16, 1975, at 7, col. 5; Wash. Post, Apr. 21, 1970, at 3, col. 1.

31. See *Hearings, supra* note 6, at 551-2 (testimony of Wilbur Chen, Representative of the Overseas Alliance for Democratic Rule in Taiwan).

32. See Taiwan Relations Act, *supra* note 3.

dence movement to date are then analyzed. Finally, this Comment discusses how the Taiwan Relations Act³³ has afforded a positive means for the people of Taiwan to establish an independent State through the international legal principle of self-determination, and a proposal is presented as a means by which this objective might be accomplished.

I. TAIWAN AND CHINA AS TWO SEPARATE ENTITIES

A. *Historical Background*

Taiwan is an island which lies 110 miles to the southeast of mainland China. It is separated from the mainland by the Taiwan or Formosa Straits.³⁴ It is unknown when the first inhabitants came to Taiwan, but it is known that its first natives were aborigines of Malay descent.³⁵ In the late 1600's, dissident mainland Chinese began to cross the Formosa Straits and settle in Taiwan in substantial numbers.³⁶ Shortly thereafter, the Portuguese, Dutch and Spanish began to establish settlements on the island.³⁷ At that time, the mainland Chinese government was neither concerned with, nor able to prevent such migration.³⁸

In 1683, the Ching Dynasty of mainland China annexed Taiwan and thereafter maintained very loose control over the nation for two centuries.³⁹ Even though Taiwan was a Chinese province at that time, China often declined responsibility for the island. For example, in 1871 a Japanese vessel was shipwrecked off the shore of Taiwan and all of its inhabitants were murdered by Taiwanese aborigines. When Japan asked for a remedy, the answer of the Chinese government was that "it could not be responsible for outrages committed outside its jurisdiction."⁴⁰

The Chinese occupation ended in 1895 when China ceded Taiwan to Japan by the Treaty of Shimonoseki.⁴¹ The Treaty pro-

33. *Id.*

34. L. CHEN & H. LASSWELL, *supra* note 20, at 82.

35. *Id.*

36. *Id.*

37. G. KERR, FORMOSA: LICENSED REVOLUTION AND THE HOME RULE MOVEMENT 1895-1945 1-10 (1974).

38. *Id.*

39. L. CHEN & H. LASWELL, *supra* note 20, at 82.

40. *Id.*

41. Treaty of Shimonoseki, Apr. 17, 1895, 181 Parry's T.S. 217, *as cited in* 1 AM. J. INT'L L. 378 (Supp. 1907). Article II reads: "China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications thereon: . . . (b) The Island

vided the Taiwanese people a two-year period in which they could choose to remain in Taiwan or return to mainland China. Almost all of the population chose to remain in Taiwan;⁴² in fact, only 0.16 percent of the population opted for Chinese nationality.⁴³ This action, however, was by no means a reflection of the Taiwanese people's allegiance to Japan. Soon after the cession to Japan, the Taiwanese revolted and established the Republic of Taiwan. Within a year, however, their Republic was crushed by Japanese forces.⁴⁴

During the half-century that Japan controlled Taiwan, the social and economic development of Taiwan changed dramatically from that of mainland China. By 1939, Taiwan's per capita foreign trade value was thirty-nine times that of mainland China.⁴⁵ After the end of World War II, Japan surrendered Taiwan to the Allied Forces in the Pacific which were under the direction of General Chiang Kai-Shek.⁴⁶ In October, 1945, as the Administrator General and Supreme Commander in the Taiwan area, Chiang established the Nationalist government on Taiwan.⁴⁷

The native Taiwanese at first welcomed the Nationalist regime. Shortly thereafter, however, they became disillusioned when the Nationalists proved more oppressive than the Japanese.⁴⁸ Historians point out that "the corruption and graft of the Nationalist officials was unprecedented in the history of the island."⁴⁹ Taiwanese rage at the Nationalist government oppression climaxed on February 28, 1947, when the Nationalist police killed a Taiwanese woman for selling untaxed cigarettes. The incident led to a nationwide uprising.⁵⁰ As a result, an estimated 12,000 to

of Formosa [Taiwan], together with all the islands appertaining or belonging to said island of Formosa."

42. YUZIN CHIAOTAONG NG, *HISTORICAL AND LEGAL ASPECTS OF THE INTERNATIONAL STATUS OF TAIWAN* (1971), as cited in Chen, *Who Owns Taiwan: A Search for International Title*, 81 *YALE L.J.* 599, 610 (1972).

43. *Id.*

44. Lamley, *The 1895 Taiwan Republic: A Significant Episode in Modern Chinese History*, 27 *J. ASIAN STUDIES* 739 (1968).

45. G. BARCLAY, *COLONIAL DEVELOPMENT AND POPULATION IN TAIWAN* 33 (1954), quoted in R. N. CLOUGH, *ISLAND CHINA* 72 (1978).

46. Japan surrendered their sovereignty over Taiwan in the peace treaty signed at San Francisco on Sep. 8, 1951. See *infra* note 61.

47. See L. CHEN & H. LASSWELL, *supra* note 20, at 83.

48. See *Hearings*, *supra* note 6, at 867 (testimony of Dr. Richard Kagan, Assistant Professor of History, Hamline University, St. Paul, Minn.).

49. See L. CHEN & H. LASSWELL, *supra* note 20, at 83.

50. *Id.* at 612. An excellent documentation of the incident may be found in G. KERR,

20,000 native Taiwanese leaders were seized, tortured, and brutally killed in March, 1947, by the occupational forces of Chiang Kai-Shek.⁵¹

On January 21, 1949, General Chiang Kai-Shek resigned his post as the President of the ROC to return to the mainland conflict between the Communist and remaining Nationalists. At that time, he was succeeded by Vice-President Li Tsung-Jai.⁵² On October 1, 1949, the Chinese Communists led by Mao Tse-Tung defeated the Nationalist forces on the mainland, and established the PRC.⁵³ Chiang Kai-Shek fled to Taiwan with the remaining military and civilian personnel of the ROC's Nationalist or "Kuomintang" government.⁵⁴

On March 1, 1950, Chiang reappointed himself "President" of the "Republic of China." He then commenced the organization of the new government on Taiwan by installing the majority of the transported mainland Nationalist officials in leadership positions.⁵⁵ In addition, Chiang declared a permanent state of martial law on Taiwan. Despite the non-involvement of the people of the island in the Chinese civil war, he sought to justify his rule as a safeguard against a Chinese Communist Rebellion.⁵⁶

The new Nationalist government immediately pronounced that its rule over the 500 million people of mainland China was only being temporarily interrupted by the Communist take-over. The Kuomintang also asserted that it was still the legitimate government of both the 500 million Chinese on the mainland and the 8 million inhabitants of Taiwan. As a result, the Nationalists claimed that the size of the native population required only a three percent proportionate representation.⁵⁷ The Nationalists countered any objection to their systematic suppression of Taiwanese liberties with the use of military force under the declared state of martial law.⁵⁸

Although Chiang asserted dominion over the island of Taiwan

FORMOSA BETRAYED 254-59 (1965). Mr. Kert was a United States consular officer in Taipei at the time and witnessed the uprising.

51. See *Hearings*, *supra* note 6, at 867.

52. See L. CHEN & H. LASSWELL, *supra* note 20, at 613.

53. See *Hearings*, *supra* note 6, at 866.

54. See *id.* at 38 (statement of Congressman Donald M. Fraser).

55. See *id.* at 598 (testimony of A. Doak Barnett, Senior Fellow, The Brookings Institution, Washington, D.C.); see also *supra* text accompanying note 22.

56. See *supra* text accompanying note 19.

57. See *supra* text accompanying notes 22-25.

58. See *supra* text accompanying notes 26-28.

by virtue of the Nationalist government, the United States and other nations did not readily acknowledge the government's legal status. President Truman declared the "neutralization of Formosa"⁵⁹ and dispatched the United States Seventh Fleet to the Taiwan Straits to thwart conflicts arising from either side. He stated that "the determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations."⁶⁰

B. Taiwan's Unsettled International Status

In 1951, Japan signed a peace treaty which removed all of its right, title, and claim to Taiwan.⁶¹ However, the treaty did not specify to whom Taiwan would be delivered.⁶² When the United States Senate ratified the Mutual Defense Treaty of 1954, insuring military protection to the people of Taiwan,⁶³ it was mindful of the unsettled status of Taiwan. In order to avoid misinterpretation, Congress included the language, "that nothing in the present treaty shall be construed as effecting or modifying the legal status or the sovereignty [of Taiwan]".⁶⁴

The language of both treaties unquestionably terminated Japan's sovereignty over Taiwan, but neither one indicated to whom sovereignty passed.⁶⁵ The question thus arose as to what effect this failure to name a successor would have on the people of Taiwan. Representatives of several countries began to assert that the omission by the United Nations was intended to afford Taiwan a basis for self-determination under the United Nations Charter. For example, the Egyptian representative stated: "My government trusts that the reason behind this omission is to afford the opportunity to deal with this question in accordance with the United Nations Charter, taking into consideration the principle of self-determination and the expressed desire of the inhabitants of these

59. 23 DEP'T ST. BULL. 5 (1950). Taiwan was previously known as Formosa.

60. *Id.*

61. U.S.-Japan Treaty, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45, reprinted in 25 DEP'T ST. BULL. 349 (1951).

62. See 25 DEP'T ST. BULL., *supra* note 61, at 349.

63. Mutual Defense Treaty with Republic of China, Dec. 2, 10, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178, 248 UNT.S. 213.

64. *Id.*; see also *Taiwan: Hearings Before Senate Comm. on Foreign Relations, Mutual Defense Treaty with Republic of China*, 84th Cong., 1st Sess. 6 (1965).

65. U.S. DEP'T OF STATE, PUB. NO. 4392, CONFERENCE FOR THE CONCLUSION AND SIGNATURE OF THE TREATY OF PEACE WITH JAPAN: RECORD OF PROCEEDINGS 93 (1951).

territories.”⁶⁶

In addition, the United Kingdom interpreted the omission as follows:

The treaty also provides for Japan to renounce its sovereignty over Formosa and the Pescadores Islands. The treaty itself does not determine the future of these islands Until China shows by her action that she accepts those provisions and principles, it will be difficult to reach a final settlement of the problem of Formosa. In due course a solution must be found, in accord with the purposes and principles of the Charter of the United Nations.⁶⁷

Taiwan’s uncertain legal status was reiterated by Secretary of State John Foster Dulles, when he declared: “It is the understanding of the Senate that nothing in the present treaty shall be construed as affecting or modifying the legal status or the sovereignty of the territories referred to in Article VI (that is, Formosa and the Pescadores).”⁶⁸

Shortly after France recognized the PRC in 1964,⁶⁹ President Georges Pompidou also made clear that through the peace treaty with Japan, “Formosa (Taiwan) was detached from Japan, but it was not attached to anyone.”⁷⁰ It would appear from the above discussion that Taiwan’s legal status as an independent State is undecided. This unsettled status suggests that the native Taiwanese are in a position to pursue national independence.

II. THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW

A. Sources of the Principle of Self-Determination

The right of national independence, which has come to be called the principle of self-determination, is the belief that each “nation”⁷¹ has a right to independently determine its own form of government.⁷² The concept of self-determination is enshrined in

66. *Id.* at 144.

67. *Id.* at 93.

68. See 31 DEP’T ST. BULL., *supra* note 61, at 896 (testimony of John Foster Dulles, United States Secretary of State).

69. The actual date of recognition was January 27, 1964.

70. N.Y. Times, Apr. 24, 1964, at 4, col. 4. See also *Self-Determination for Taiwan*, N.Y. Times, May 19, 1964, at 36, col. 2.

71. The term “nation” has been defined as a common relationship as to birth or origin and implies a common race, usually characterized by community of language and customs. 1 G. HACKWORTH, DIGEST OF INT’L LAW 47 (1940);

72. A. COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION 39 (1969).

the United Nations Charter in Articles 1 and 55.⁷³ It has been frequently and vigorously invoked since World War II as a principle allowing various factions to seek independence in international law.⁷⁴ In light of its wide acceptance and successful application by entities seeking independence, the principle of self-determination is now a well-established rule in international law.⁷⁵

At the Sixth Session of the United Nations General Assembly, a decision was made to include the right to self-determination in the Covenants on Human Rights.⁷⁶ This was deemed necessary because experience had shown that violations of the right of self-determination had led to several wars, and the denial of such a right was viewed as a constant threat to peace.⁷⁷ Therefore, the UN

73. Articles 1 and 55 of the U.N. CHARTER specifically refer to self-determination as an international legal principle. U.N. CHARTER arts. 1 and 55. Article 1 reads as follows:

The Purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations that might lead to a breach of the peace;

(2) 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;

(3) To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

(4) To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 55 reads as follows:

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

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

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

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

74. See generally W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 129-47 (1977).

75. *Id.* at 147. Ofuatey-Kodjoe states that: "[T]oday there is no doubt that self-determination, as defined in UN and general international practice, is a principle in international law which yields a right to self-government that can be claimed legitimately by bona fide dependent peoples." *Id.*

76. 5 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 69 (1965). The resolution which was adopted by the General Assembly stated that an article was to be placed in the Covenants to the effect that: "All persons shall have the right of Self-determination." G.A. Res. 545, 7 U.N. GAOR Supp. (No. 20) at 36, U.N. Doc. A/2119 (1952).

77. G.A. Res. 545, *supra* note 76.

Covenant on Economic, Social and Cultural Rights, which was adopted in final form in 1966, provided that "all peoples have the right to self-determination."⁷⁸ In addition, the Universal Declaration of Human Rights included the language that for self-determination claims, "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non self-governing, or under any limitation of sovereignty."⁷⁹

The preliminary text of the UN Covenant on Civil and Political Rights supporting the right to self-determination was drafted and discussed by the Tenth Session of the General Assembly.⁸⁰ Paragraph 1 of that draft states that: "all peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social, and cultural status."⁸¹ The Twenty-First Session of the UN General Assembly moderately changed the wording of the Covenant and adopted it in its final form on December 16, 1966.⁸² Presently, it reads: "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."⁸³

The UN Charter discusses the principle of self-determination as being "of peoples and nations."⁸⁴ By contrast, both of the UN Covenants⁸⁵ add a higher degree of definition when they speak of an actual "right to self-determination for *all* peoples."⁸⁶ The term "nations," as used in the UN Charter, is clearly avoided by the UN Covenants, due to the fact that misunderstandings were likely to result.⁸⁷

Since its initial exposure under the UN Charter, the concept of

78. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

79. G.A. Res. 217, U.N. Doc. A/810, at art. 2 (1948); *see also* UMORURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 48 (1972).

80. M. WHITEMAN, *supra* note 76, at 71.

81. *Id.* The original draft implied that a "nation" of peoples seeking independence must exist before the resolution would be applied to them.

82. Cited in final form as: U.N. Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

83. *Id.* at art. 1. Here the term "nation" is deleted from the resolution making it applicable to "all peoples" regardless of whether they are a part of a recognized nation.

84. *See* U.N. CHARTER art. 2, para. 2.

85. *Referring to* U.N. CHARTER arts. 1 and 55; *see supra* note 73.

86. U.N. CHARTER art. 76; *see also* Taiwan Relations Act, *supra* note 3 (emphasis added).

87. M. WHITEMAN, *supra* note 76, at 69.

self-determination continues to be confirmed as an international legal principle. The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations⁸⁸ includes the right to self-determination among its seven enunciated principles. The right to self-determination is apparent in the final version of the sixth principle which states:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to 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. Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle⁸⁹

Obviously, the UN Covenants and the subsequent Declaration suggest a viable basis for the international legal principle of self-determination. Furthermore, it is clear that this principle provides a universal "right" to self-determination for all peoples, regardless of the type of political system under which they live.⁹⁰ Yet even in light of the explicit wording of these instruments, some scholars contend that such provisions have no legal effect.⁹¹ Accordingly, they argue that the language used by the Charter ". . . does not allow the interpretation that the members are under legal obligations regarding the rights and freedoms mentioned in the preamble or text of the Charter."⁹² It is also argued that "[t]he United Nations can only take action in areas of human rights and self-determination when a breach of these rights are of such enormity as to constitute a danger to the world peace. In essence, the provision of

88. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, G.A. Res 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration on Principles of International Law].

89. This is the language that appears in the Declaration as adopted by the UN General Assembly on Oct. 24, 1970. *Id.*

90. H. Kelsen, *THE LAW OF THE UNITED NATIONS* 29 (1950).

91. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 317-318 (1949).

92. *Id.*

the Charter is merely exhortatory rather than legally mandatory."⁹³

The more persuasive view however, maintains that the provisions of the Charter do indeed have legal effect.⁹⁴ It is pointed out that the mere absence of a sufficient means of implementation and lack of precise definition does not detract from the principle's legality.⁹⁵ There is a mandatory obligation implied in the provisions of Article 55 that the United Nations shall promote respect for, and observance of, human rights and fundamental freedom.⁹⁶ There is a distinct element of a legal duty in the understanding as expressed in Article 56.⁹⁷ The minimum duty then, according to this view, is that the members of the United Nations refrain from obstructing the promotion of human rights, including the right to self-determination.⁹⁸

Generally, the principle of self-determination is given prominence by the United Nations Charter and the General Assembly's string of resolutions that have followed.⁹⁹ Writers and commentators on the principle of self-determination have repeatedly recognized its legal significance in international law.¹⁰⁰ In addition, the nations represented in the UN adhere to the intent of that organization "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."¹⁰¹

93. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 148 (1973).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS*, 119 (1963).

99. The Principle has been reaffirmed almost annually by the General Assembly. *See, e.g.*, G.A. Res. 1654, 16 U.N. GAOR Supp. (No. 17) at 65, U.N. Doc. A/5100 (1961); G.A. Res. 1810, 17 U.N. GAOR Supp. (No. 17) at 72, U.N. Doc. A/5217 (1962); G.A. Res. 1956, 18 U.N. GAOR Supp. (No. 15) at 8, U.N. Doc. A/5515 (1963); G.A. Res. 2105, 20 U.N. GAOR Supp. (No. 14) at 3, U.N. Doc. A/6014 (1965); G.A. Res. 2189, 21 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/6316 (1966); G.A. Res. 2326, 22 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/6716 (1967); G.A. Res. 2465, 23 U.N. GAOR Supp. (No. 18) at 4, U.N. Doc. A/7218 (1968); G.A. Res. 2548, 24 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/7630 (1969); G.A. Res. 2621, 25 U.N. GAOR Supp. (No. 28) at 1, U.N. Doc. A/8028 (1970).

100. R. EMERSON, *SELF-DETERMINATION REVISITED IN AN ERA OF DECOLONIZATION*, 12 (1964); D. O'CONNELL, *INTERNATIONAL LAW* 337-8 (1965); *see also* U. UMUZURIKE, *supra* note 79, at 623; A. COBBAN, *supra* note 72, at 39; W. OFUATEY-KODJOE, *supra* note 74, at 129.

101. U.N. CHARTER art. 55.

B. *Assertion of the Principle of Self-Determination*

The United Nations affords all peoples the right to self-determination.¹⁰² The General Assembly has declared that it is within its sole discretion to determine when a people may claim self-rule.¹⁰³ It is well established that the United Nations will only recognize a country's movement toward self-determination where that movement has met the criteria of at least one of two tests.¹⁰⁴ Once the criteria of either test have been met, then the people seeking independence have the standing to invoke the right of self-determination.

One test is set out in the first paragraph of the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁰⁵ This paragraph sets forth three specific criteria required of a people seeking to assert the right of self-determination. These criteria are that: (1) the people are subjugated, (2) the people are territorily based, and (3) the movement is made up of a colonial people.¹⁰⁶

The people on Taiwan have satisfied the criteria under this test. The first criteria requires that the people must be subjugated, and defines¹⁰⁷ a subjugated people are those who have been denied basic human rights.¹⁰⁸ In retrospect, the situation on Taiwan concerning (1) representation in government,¹⁰⁹ (2) the cancellation of the 1978 general election,¹¹⁰ and (3) the overwhelming denial of numerous individual rights and freedoms¹¹¹ have all served to evi-

102. *See supra* text accompanying notes 30, 74 and 85.

103. G.A. Res. 637, 7 U.N. GAOR Supp. (No. 20) at 26, U.N. Doc. A/2361 (1952); G.A. Res. 648, 7 U.N. GAOR Supp. (No. 20) at 33, U.N. Doc. A/2361 (1952).

104. L. BUCHHEIT, SUCCESSION 11 (1978).

105. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). The second test that is articulated is essentially a more general version of the first. Under this test, two general requirements must be met: (1) the group seeking independence must share a common group identity, and (2) group members must exercise the right of self-determination in a collective manner. MUSTAFA, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 479, 481 (1971).

106. G.A. Res. 1514, *supra* note 105.

107. *Id.*

108. Subjugate is defined by Webster's Dictionary as "to bring under the yoke or power of dominion; conquer by force and compel to submit as a subject to the government of another (colonial powers subjugating native peoples). WEBSTERS NEW COLLEGIATE DICTIONARY, (1977 ed.). *See* A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION 51-52 (1973).

109. *See infra* text accompanying notes 128-144.

110. *See infra* text accompanying notes 145-150.

111. *See infra* text accompanying notes 151-163.

dence the subjugation of the people on Taiwan by the existing powers there.

The requirement that a people be territorily based is also met by the people of Taiwan. This requirement may be satisfied by showing that the group asserting the right has an affinity with the land which they seek to claim through self-determination.¹¹² The Taiwanese people have established such an affinity through their continuous inhabitation of Taiwan for over five centuries.¹¹³ In contrast, the Chinese of the Communist mainland and the mainlanders who make up the Nationalist government have few, if any, ties to the land of Taiwan.¹¹⁴ Thus, the native Taiwanese who inhabit the island are the ones who hold the right to assert self-determination.

The "colonial people" requirement is fulfilled when the group of people seeking self-determination express their desires to gain independence.¹¹⁵ The Taiwanese, both in Taiwan and abroad, have brought their desires for independence to the forefront of world affairs.¹¹⁶ This can be seen in the numerous independence groups that have sprung up as well as in the voluminous literature that has been distributed relative to this issue.¹¹⁷ Accordingly the facts show that the Taiwanese have met the requirements for a recognizable self-determination movement.

III. INDEPENDENCE MOVEMENT WITHIN TAIWAN AND ABROAD CALLING FOR SELF-DETERMINATION

The present situation in Taiwan highlights the Taiwanese peoples' desire to achieve independence through self-determination. In effect, Taiwan's international legal status was never determined after the Japanese surrendered occupation of it at the close of World War II.¹¹⁸ The native Taiwanese are a group of people who seek independence, not from a colonial ruler, but from the Nationalist

112. MUSTAFA, *supra* note 105, at 481.

113. *See supra* text accompanying notes 7-8.

114. *See supra* text accompanying notes 34-40.

115. *See* W. OFUATEY-KODJOE, *supra* note 74.

116. *See supra* notes 29 and 31; *see infra* text accompanying notes 118-163, 208-10. In addition to the extensive documentation of a movement for Taiwan's independence, there have also been several uprisings in Taiwan in which the main purpose was to voice the people's desire for independence. *See, e.g.*, N.Y. Times, Jan. 3, 1980, at A6, col. 3; Jan. 23, 1970, at 6, col. 4; Apr. 25, 1970, at 1, col. 5; Apr. 19, 1980, at 3, col. 1.

117. *See supra* notes 29 and 31; *see infra* text accompanying notes 208-10.

118. *See* L. CHEN & H. LASSWELL, *supra* note 20, at 95. *See also supra* text accompanying notes 61-70.

government, which, as an occupation authority has sought to impose its rule over them.¹¹⁹ The Taiwanese are invoking the principle against “the existing authority of unauthorized occupation, for the purposes of establishing an independent state.”¹²⁰ Although the Nationalists still claim to be the legitimate government of all of China,¹²¹ international legal principles do not support such an assertion.¹²² Moreover, the goal that they will one day return to the mainland has lost credibility among the international community and the majority of people on Taiwan.¹²³ Currently, there exists a strong movement by a majority of the Taiwanese people to replace the Nationalist government and establish an independent nation in Taiwan through self-determination.¹²⁴ This movement is based on several factors.

A. *Tension Between Native Taiwanese and Mainlanders*

One factor responsible for the movement to replace the Nationalist government is the persistent tension in relations between native Taiwanese and mainlanders living on the island.¹²⁵ This tension is evidenced by the large numbers of the Taiwanese population who continue to openly express their discontent and desire to achieve independence from the Nationalist government.¹²⁶ It has been stated that the continued oppression by the “security forces” of the Nationalist government has made the government an object of hatred to virtually all Taiwanese and even to many mainlanders residing on Taiwan.”¹²⁷

B. *Denial of Adequate Representation*

Another factor which has brought about the movement toward self-determination on the island is that the local Taiwanese population has been denied an adequate share of their representation in the political affairs of the country.¹²⁸ The population now consists of approximately 17.4 million people.¹²⁹ Apart from a very small

119. L. CHEN & H. LASSWELL, *supra* note 20, at 95.

120. *Id.*

121. *Id.* at 599.

122. *Id.*

123. *See Hearings, supra* note 6, at 598 (testimony of A. Doak Barnett).

124. *See generally Hearings on United States Relations With the PRC, supra* note 29.

125. *See Hearings, supra* note 6, at 602.

126. *Id.* at 604.

127. N.Y. Times, Jan. 24, 1979, at A23, col. 4.

128. *See Hearings, supra* note 6, at 556 (reprinted from *Amnesty International Briefing*).

129. *Id.*

minority of non-Chinese,¹³⁰ Taiwan is primarily populated by people of ethnic Chinese origin. This Chinese population, however, is divided into several groups which have cultural and linguistic differences.¹³¹ Approximately 13.6 percent of the population are Chinese mainlanders, while the remaining 86.4 percent are Taiwanese.¹³²

The government of Taiwan consists of a National Assembly which meets once every six years to elect a President. The law-making body is called the Legislative Yuan.¹³³ The current representatives for both bodies were elected on the mainland in 1948.¹³⁴ The officials of these bodies are almost entirely comprised of members of Taiwan's *mainland* population. No general elections have been held since 1948, because the government claims that elections cannot be held until the mainland is recovered.¹³⁵ The average age of the existing Nationalist leadership is now 78 years, which will necessitate their replacement in the near future.¹³⁶

The native Taiwanese assert that their population of 14.5 million people is disproportionately and inadequately represented in the Nationalist government.¹³⁷ The statistics show that of the 1,288 representatives who hold positions in the National Assembly, only 88 are native Taiwanese.¹³⁸ Of the 436 members in the Legislative Yuan, only forty-nine are native Taiwanese.¹³⁹ In a statement made to the Senate Committee on Foreign Relations, Senator Pell summed up the dilemma regarding representation of the Taiwanese people when he said that these figures are "not a very good record as far as respecting the will of the majority of the country; especially when one bears in mind that more than eighty percent of the people are [to be] represented in those ratios."¹⁴⁰

It is clear that the central political problem in Taiwan is that

130. This part of the population consists of approximately 200,000 of the 174 million people. *Id.* at 555.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* It is important to note that this election did not include the representation of any of the inhabitants of Taiwan.

135. *Id.*

136. Li, *A Perspective on Taiwan*, 14 INT'L LAW. 73, 75 (1980).

137. See *Hearings*, *supra* note 6, at 46, 651 (testimony of Senator Claiborne Pell).

138. *Id.* at 651. These figures represent the organization of Premier Y.S. Sun's cabinet, presided over by President Chiang Ching-kuo, as established in May, 1980.

139. *Id.*

140. *Id.* at 141, 651.

the Taiwanese are restrained from obtaining adequate representation in the national government.¹⁴¹ The Nationalist rationale for depriving such representation is based on the continuing claim that the government must be representative of all of China and not just Taiwan.¹⁴² Presently, seventy percent of the Nationalist government are not native Taiwanese.¹⁴³ This reality has caused an increasing number of Taiwanese to revolt and demand proportionate representation. Because ROC Nationalists have continually ignored their pleas, many Taiwanese consider self-determination of an independent Taiwan as their only remedy.¹⁴⁴

C. Cancellation of the 1978 General Election

A third factor which has strengthened the internal movement for self-determination is the cancellation of the scheduled elections of 1978.¹⁴⁵ One week after President Carter formally recognized the PRC, elections were cancelled throughout Taiwan.¹⁴⁶ The reason given by the Nationalist government was to "avoid unrest."¹⁴⁷

For thirty-three years the majority of Taiwanese people have lived under martial law. This has prohibited their participation in any significant political activity.¹⁴⁸ Cancellation of the 1978 election appears only to have "whetted the demand for a democratic government."¹⁴⁹ A well-known specialist on Taiwan politics and a prominent resident of Taiwan commented that "had the elections taken place, the Kuomintang (Nationalist) would have taken a beating. They were frightened. They panicked."¹⁵⁰

D. Denial of Individual Rights and Freedoms

A fourth factor which has caused a high level of consciousness toward self-determination in Taiwan is the persistent denial of indi-

141. *Id.* at 437 (testimony of Ralph N. Clough, Fellow, Woodrow Wilson International Center for Scholars).

142. *Id.*

143. *Id.*

144. *Id.* at 438, 555.

145. *Id.* at 146 (testimony of Victor Li, Stanford University School of Law, Palo Alto, California); *see also* Wash. Post, Feb. 3, 1979, at A8, col. 1, wherein a complete listing of the cabinet positions and the names of the individuals occupying them may be found.

146. *Id.* at 146 (testimony of Victor Li).

147. *Id.*

148. *See supra* text accompanying notes 26-28.

149. Wash. Post, Feb. 3, 1979, at A8, col. 1; *see also Hearings, supra* 6, at 388-9.

150. *See Hearings, supra* note 6, at 388-9.

vidual rights and freedoms by the Nationalist government.¹⁵¹ The ROC Constitution, which was adopted in Nanking on mainland China in December, 1946, guarantees certain fundamental rights.¹⁵² Among these rights are freedom of speech, writing, teaching, and publication;¹⁵³ personal freedom;¹⁵⁴ freedom of residence and change of residence;¹⁵⁵ freedom of privacy of correspondence;¹⁵⁶ freedom of religious beliefs;¹⁵⁷ freedom of assembly and association;¹⁵⁸ and freedom to petition.¹⁵⁹ The Constitution is equally applicable to the rights of the Taiwanese under the Nationalist government.¹⁶⁰

The seizure of Taiwan by the Nationalist government in 1949,¹⁶¹ and its subsequent proclamation of martial law suspended all provisions of individual rights and freedoms guaranteed by the ROC Constitution.¹⁶² The Nationalists have declared that the suspension will last as long as the "Communist Rebellion" exists on the China mainland.¹⁶³ It is apparent that the deprivation of fundamental rights by the existing government is a major factor that has fueled the present movement toward self-determination. The Taiwan Relations Act, however, has effectively provided a channel whereby native Taiwanese may gain relief from Nationalist oppression.

IV. THE TAIWAN RELATIONS ACT HAS LAID THE FOUNDATION FOR THE TAIWANESE TO PROCEED TO INDEPENDENCE THROUGH SELF-DETERMINATION

Prior to the Taiwan Relations Act,¹⁶⁴ the United States recognized the Nationalist or Kuomintang authority as at least the *de facto*¹⁶⁵ government of China.¹⁶⁶ The United States, however, like

151. *Id.* at 552, 553, 557, 817.

152. *Id.* at 557.

153. *Id.*; see also REPUBLIC OF CHINA CONSTITUTION art. 113 (1946) [hereinafter cited as ROC CONST.].

154. *Hearings, supra* note 6 at 557; see also ROC CONST., *supra* note 153, at art. 8.

155. ROC CONST. art. 10.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* art. 113.

161. See *supra* text accompanying notes 47-56.

162. See *Hearings, supra* note 6, at 557.

163. *Id.*

164. Taiwan Relations Act, *supra* note 3.

165. "Defacto" is used to describe a government which is exercising power as if it is

many other nations of the world,¹⁶⁷ maintained relations with the Chinese as though “two Chinas” existed.¹⁶⁸ The PRC feared that this might lead to Taiwan’s *de jure*¹⁶⁹ legal independence.¹⁷⁰ The PRC consistently asserted that there was only one China, and that Taiwan was a part of that nation.¹⁷¹ The PRC acted against *de jure* recognition of Taiwan by the United States by conditioning any normalization of relations between the PRC and United States on the coincidental termination of relations between the United States and the ROC.¹⁷²

On the other hand, if the United States had encouraged the ROC to pursue independence prior to the Taiwan Relations Act, such a move would have been in direct opposition to the desires of the Nationalist government.¹⁷³ This is attributable to the fact that the Nationalist government of the ROC was as adamantly opposed to a “two-China” policy as its mainland counterpart.¹⁷⁴ Both sides held fast to the idea that the other side was in possession of an “unliberated territory of their Chinese brothers.”¹⁷⁵

The 1979 passage of the Taiwan relations Act¹⁷⁶ has considerably altered the political and economic situation of Taiwan and the PRC.¹⁷⁷ As part of the normalization process with the PRC, the United States has adopted a new policy of non-recognition¹⁷⁸ towards the ROC pursuant to the Taiwan Relations Act.¹⁷⁹ Prior to the Taiwan Relations Act, the United States had an obligation to

legally constituted to do so, but in fact is not. J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 818-820 (2d ed. 1980).

166. Gable, *Taiwan Relations Act: Legislative Re-Recognition*, 12 *VAND. J. TRANSNAT'L L.* 511, 512 (1979).

167. *Id.*

168. *Id.*

169. “*De Jure*” is defined as recognition extended to a new government by right. WEBSTER, *supra* note 108, at 299.

170. *See Hearings, supra* note 6, at 599 (exerpt from BROOKINGS INSTITUTE, *CHINA AND THE MAJOR POWERS IN EAST ASIA*, (1977)).

171. *Id.* at 551.

172. *N.Y. Times*, Feb. 28, 1972, at 16, col. 3.

173. *See Hearings, supra* note 6, at 599.

174. *Id.* The Republic of China continues to maintain that reunification of China is the only solution to the China situation.

175. *Id.*

176. *See Taiwan Relations Act, supra* note 3.

177. *Hearings, supra* note 6, at 437 (testimony of Ralph N. Clough, Fellow, Woodrow Wilson International Center for Scholars).

178. *N.Y. Times*, Feb. 28, 1972, at 16, col. 3.

179. *See generally Taiwan Relations Act, supra* note 3.

help defend Taiwan from outside aggression.¹⁸⁰ In addition, there were treaties between the two countries which were important to Taiwan's survival. Moreover, there were many trade agreements which Taiwan and the United States depended on.¹⁸¹ Thus, some form of arrangement was essential to permit relations to continue between the two countries on an unofficial basis.¹⁸²

The Taiwan Relations Act dealt with these important considerations.¹⁸³ The Act allows agencies of the United States government to conduct relations with Taiwan through the American Institute in Taiwan.¹⁸⁴ This non-profit corporation continues to carry out diplomatic and consular business in Taiwan as though there existed a recognized diplomatic mission or consulate.¹⁸⁵ Correspondingly, Taiwan established a counterpart organization called the Coordination Council for North American Affairs to serve a similar function.¹⁸⁶ The officials of these newly created entities were granted the same privileges and immunities as officials of diplomatic missions.¹⁸⁷

The Taiwan Relations Act also reinforced the United States' determination to prevent outside interference with Taiwan's inter-

180. See MUTUAL DEFENSE TREATY, *supra* note 63.

181. Clough, *Taiwan's International Status*, 1 CHINESE Y.B. OF INT'L AFF. 17, 26 (1981).

182. *Id.* This is primarily attributable to the fact that the United States wanted to continue its economic ties with Taiwan. In addition, the United States had made a strong commitment to aid in the defense of Taiwan from outside aggression. There had to be some type of arrangement to prevent a breach of that promise. *Id.*

183. See Taiwan Relations Act, *supra* note 3.

184. Clough, *supra* note 181, at 27. The specific language of the Act is as follows:

THE AMERICAN INSTITUTE OF TAIWAN

Sec. 6. (a) Programs, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through—

(1) The American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia, or

(2) such comparable successor nongovernmental entity as the President may designate, (hereinafter in this Act referred to as the "Institute").

(b) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

(c) To the extent that any law, rule, regulation, or ordinance of the District of Columbia, or of any State or political subdivision thereof which the Institute is incorporated or doing business, impedes or otherwise interferes with the performance of the functions of the Institute pursuant to this Act, such law, rule, regulation, or ordinance shall be deemed to be preempted by this Act.

185. Clough, *supra* note 181, at 27.

186. *Id.*

187. *Id.*

national status.¹⁸⁸ The United States declared that any effort by another country to determine the future of Taiwan by other than peaceful means would be considered a threat to peace and security in the Western Pacific and a matter of grave concern to the United States.¹⁸⁹ In order to be certain that aggression did not result from derecognition, the Act states that the United States would provide Taiwan with defensive arms and seek to resist any form of coercion that would jeopardize the economic or social system of the people of that country.¹⁹⁰ The Act specified that all treaties or agreements between the United States and the ROC that existed prior to January 1, 1979 would continue in force unless expressly terminated.¹⁹¹ In addition, the laws of the United States would continue to be applied to Taiwan identically as they had been prior to the Act.¹⁹²

In response to the PRC's demand that the United States denounce its recognition of Taiwan, the United States "acknowledged" that there was only "one China."¹⁹³ In an attempt to avoid harmful effects between the United States and the PRC, the United States, by way of the Act, also left the question of Taiwan's status to be

188. *Id.* The Taiwan Relations Act, *supra* note 3, at 22 U.S.C. § 3302 states:

IMPLEMENTATION OF UNITED STATES POLICY
WITH REGARD TO TAIWAN

Sec. 3. (a) In furtherance of the policy set forth in section 2 of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.

(b) The President and the Congress shall determine the nature and the quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan's defense needs shall include review by United States military authorities in connection with recommendations to the President and the Congress.

(c) The President is directed to inform the Congress promptly of any threat to the security or the social or the economic system of the people on Taiwan and any danger to the interests of the United States arising therefrom. The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the United States in response to any such danger.

189. *Id.*

190. *Id.*

191. 22 U.S.C. § 3303 states:

APPLICATION OF LAWS; INTERNATIONAL AGREEMENTS

Sec. 4. (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

192. *Id.* More specifically, 22 U.S.C. § 3303, sec. 4, states:

(b) (1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

193. The translation of "acknowledged" was used differently depending on whether the Chinese or English version was used. For definition of such translation, see *Hearings, supra* note 6, at 29, 146.

resolved in the future by the Chinese people themselves. Meanwhile, the United States still maintains that it has never declared Taiwan to be a part of China,¹⁹⁴ and the Taiwan Relations Act supports the assertion that the United States takes no position with regard to Taiwan's current legal status.¹⁹⁵

The United States derecognition of the Nationalist government, in conjunction with its position of non-intervention, has opened the door to those Taiwanese who seek to establish an independent nation on Taiwan.¹⁹⁶ In effect, the Taiwan Relations Act has created a new and separate entity, at least in the eyes of the United States.¹⁹⁷ This new entity possesses all of the attributes of an independent sovereign nation, even though it lacks a clearly defined legal status in regard to international recognition.¹⁹⁸

The derecognition as accomplished by the Act has brought about the feasibility of a new and independent Taiwanese government. Moreover, obstacles such as the claim posed by both the PRC and ROC Nationalists that there is one China no longer exist. Such claims have lost credibility, and such a plan is not only rejected as unrealistic by the Chinese,¹⁹⁹ but is also viewed by the international community as an implausible alternative.²⁰⁰ One historian has commented that "The fact is that they (the ROC and PRC) are evading reality . . . there are two Chinese states, and two Chinese governments, and this has been the dilemma and the situation for nearly 30 years."²⁰¹ In light of the changed circumstances brought on by the Taiwan Relations Act, the major barriers to a self-determined and independent state on Taiwan are now diminished.²⁰²

There exists a strong sentiment in the United States and abroad which advocates that the time has come for Taiwanese self-

194. *Id.* at 611.

195. *See Hearings, supra* note 6, at 611 (statement by A. Doake Barnett).

196. *Id.* at 551.

197. *See Oakes, supra* note 5.

198. *Id.*

199. Initially, the Chinese Communist Party under Mao Tse-tung acknowledged that Taiwan was a "weak and small nation" which would have to have its own independent course of revolution and its own authentic sovereignty. This statement was made in the 1930's. Obviously, the political position of the Chinese Communist's has since changed. The PRC would seem to prefer to maintain the "status quo" over any action by Taiwan to seek independence at this time. *See Hearings, supra* note 6, at 866.

200. *Id.* at 146, 389 and 598.

201. *Id.* at 577.

202. *See supra* text accompanying notes 176-198.

determination and independence.²⁰³ The general consensus may be summed up in the statement that “Taiwan is going through a transition from being the Republic of China representing all of China to some new and still undefined status. What that new status should be must ultimately be decided by the people of Taiwan.”²⁰⁴ Moreover, the United States has declared that the “Taiwan question should be determined by the Chinese themselves.”²⁰⁵ United States Senator Claiborne Pell of Rhode Island has stated that “I have always believed that the United States made a mistake in supporting Chiang Kai-shek’s contention that his regime was the government of all China. We would be much better off and truer to our professed principle of self-determination if we . . . pressed for an independent Taiwan.”²⁰⁶

In addition, the French government has made clear that Taiwan’s undetermined status “must be decided” by “taking the wishes of the Formosan (Taiwanese) population into consideration.”²⁰⁷ Moreover, there reportedly exists a large majority of people on Taiwan, of both Taiwanese and mainland descent, who favor independence for Taiwan.²⁰⁸ Their voice, however, has often been muffled by the Nationalist government through its martial law authority.²⁰⁹

There are also numerous groups outside Taiwan who continue to promote the wishes of that country’s majority.²¹⁰ Such groups state that the United States supported the ROC as the “free China” in their movement against Communism for many years.²¹¹ During those years, the United States ignored the plight of the majority of the 17 million people on the island.²¹² These groups contend that because the United States and the PRC have established relations,

203. See *supra* note 29.

204. See *Hearings, supra* note 6, at 147 (statement of Victor Li’s testimony before the Senate Committee).

205. N.Y. Times, Feb. 28, 1972, at 16, col. 3.

206. *Hearings, supra* note 6, at 549.

207. See N.Y. Times, April 24, 1964, at 4, col. 4.

208. N.Y. Times, May 19, 1964, at 36, col. 6.

209. *Hearings, supra* note 6, at 552.

210. See, e.g., *Hearings, supra* note 6, at 546 (Overseas Alliance for Democratic Rule); *id.* at 574 (Taiwanese Association of America); N.Y. Times, Jan. 16, 1975, at 40, col. 5 (Formosan Christians for Independence); N.Y. Times, Oct. 19, 1971, at 37, col. 1 (Formosan Peoples Conference; Asian Center); N.Y. Times, Apr. 21, 1970, at 3, col. 1 (World United Formosans for Independence).

211. See *Hearings, supra* note 6, at 551.

212. *Id.*

the ROC is no longer recognized.²¹³ Thus, they declare that “the time for self-determination and the well-being of those 17 million people has finally arrived.”²¹⁴

It is important that the decision of Taiwan’s future status be determined by the majority of the people on Taiwan.²¹⁵ The Taiwanese are the ones who have a direct stake in their “nation’s” future. The Taiwan Relations Act effectively provides the foundation upon which the Taiwanese can build a means to achieve the desires of the majority of its peoples.

The enactment of the 1979 Taiwan Relations Act²¹⁶ virtually eliminates the existence of the ROC and the Nationalist government in the eyes of the United States.²¹⁷ In its place, the United States has created the American Institute on Taiwan.²¹⁸ That body has been given the legal status providing that “whenever any law, regulation, or order of the United States refers or relates to a foreign country, nation, state, government, or similar entity, such terms shall include . . . and apply with respect to Taiwan.”²¹⁹ Since the government of the ROC is no longer recognized by the United States, the term “Taiwan,” as used in the statute, applies specifically to the people on that island.²²⁰ As a result, all diplomatic and legal relations that the United States carries out with the nations of the world shall be equally applicable to the people of Taiwan. Thus, the Act designates the Taiwan Institute as the functional body through which implementation of future intercourse between the United States and the people of Taiwan shall be accomplished.²²¹

Although the United States maintains that notwithstanding the creation of the Taiwan Institute there exists only an unofficial relationship with Taiwan,²²² this unofficial relationship does not provide for recognition of the Nationalist government as the “legitimate government” of the people of Taiwan.²²³ The agree-

213. *Id.*

214. *Id.*

215. N.Y. Times, Jan. 4, 1975, at 22, col. 2.

216. See Taiwan Relations Act, *supra* note 3.

217. See Oakes, *supra* note 5.

218. See *supra* note 184 and accompanying text.

219. See *supra* note 192.

220. Title I, § 102 provides that such terms as “foreign country,” “nation,” “state,” as used in United States’ legislation, will include the people of Taiwan. *Id.*

221. See Taiwan Relations Act, 22 U.S.C. § 3302.

222. See *Hearings, supra* note 6, at 18.

223. See generally Taiwan Relations Act, 22 U.S.C. §§ 3301-16.

ment promulgated by the Act *derecognized* any claim to government that the Nationalist may have over Taiwan.²²⁴ In addition, the United States continues to maintain that it also does not recognize the PRC as the legitimate government of Taiwan.²²⁵

The legitimacy of the Nationalist government in Taiwan rests on the contention that it is the successor of the government that ruled the mainland before 1949.²²⁶ The justification for the dominant role held by the people from the mainland in the Nationalist government is that it represents all of China.²²⁷ That justification is now non-existent. In light of the non-recognized status of the ROC and the Nationalist government, the United States has opened the door and laid a foundation for the Taiwanese people to establish a new government.²²⁸ The Taiwanese people could propose a referendum setting forth the desires of the majority of the island's population, and therein align the status of their island and its government with those desires. The United Nation's Trusteeship system could be utilized to ensure that the interests of the Taiwanese majority are best served.

V. A PROPOSAL FOR THE IMPLEMENTATION OF A UNITED NATIONS TRUSTEESHIP TO ESTABLISH A NEW GOVERNMENT ON TAIWAN

The necessity for the creation of a trusteeship in Taiwan is largely attributable to the adamant opposition against an independent Taiwan by both the PRC and the present Nationalist government of Taiwan. This opposition seems to evidence the need for such a "moderator" to determine the will of the majority of people on Taiwan. By trust agreement, Taiwan would be placed under the trusteeship system for the purpose of holding neutral elections. This arrangement would allow the inhabitants of Taiwan to determine their own leadership and sovereignty. Upon establishment of a new government, the trusteeship would terminate. In light of the strong movement for independence among the Taiwanese and the advancing ages of the members of the present ROC government, the United States is in a good position to propose such a trusteeship at this time.

224. *Id.*

225. *See Hearings, supra* note 6, at 600.

226. Clough, *supra* note 9, at 17, 19.

227. *Id.*

228. *See supra* text accompanying notes 200-02.

Chaper XII, Article 75 of the United Nations Charter provides “that the United Nations shall establish, under its authority, an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.”²²⁹ In addition, Article 76 of the UN Charter lends itself well to the creation of a trust territory on Taiwan.²³⁰ Among other things,²³¹ Article 76 seeks to “promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence, as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.”²³²

The trusteeship system was intended to cover three categories of territories: (1) former mandates, (2) former enemy territories, and (3) territories voluntarily placed under the system by states responsible for their administration.²³³ The trusteeship system could be made applicable to Taiwan by virtue of the third category.

The effect of placing a territory such as Taiwan under the trusteeship system is merely to recognize the principle of international accountability for the welfare of the territory’s native inhabitants.²³⁴ Accountability is promoted through the United Nation’s supervision, which involves periodic visits, examination of annual reports submitted by the administering authority, and other actions in conformity with the trusteeship agreement.²³⁵ The objective of the trust is to further the “progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned . . .”²³⁶ Once this objective is accomplished in Taiwan, the trusteeship would dissolve.

In determining how such a trusteeship would be supervised, it appears feasible for the United Nations to appoint a Trust Committee. This Trust Committee would be composed of not only representatives from Taiwan’s native population, but also of Chinese

229. U.N. CHARTER art. 75, chap. 12.

230. *Id.* art. 76.

231. Article 76 also sets forth the administration of such trusteeships. *Id.*

232. *Id.*

233. *Id.*

234. C. TOUSSIAINT, *THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS* 11 (1956).

235. *See* U.N. CHARTER art. 87; *see also* TOUSSIAINT, *supra* note 234, at 11, 179-99.

236. U.N. CHARTER art. 76(b).

mainlanders in Taiwan. In recognition of the great impact that an independent Taiwan would have on other countries of the world, a combination of UN member countries, especially those in Asia, should also be represented by the committee. The Trust Committee would in turn supervise the organization and creation of a viable and representative government on the island of Taiwan.

Obviously, the existing Nationalist government and the government of the PRC will strongly object to such a trusteeship. The trusteeship system, however, was devised by the United Nations to overcome the very obstacles posed by the Taiwan situation. The primary objective of the the UN Charter is to further the advancement and progressive development of self-government or independence, as freely expressed by the peoples concerned. The Trust Committee would ascertain the wishes of the majority of Taiwan's people, and accordingly make the appropriate recommendations to the UN General Assembly. Assuming that the general consensus of the people of Taiwan would be to establish a new and independent government, the Trust Committee would then supervise the elections conducted on the island for its establishment. Upon completion of its duties, and at a time when the new government was operating at a level satisfactory to the UN General Assembly, the Trust Committee would be dissolved. The critical issue here is not the degree of opposition that the creation of a trusteeship would generate, but the plausibility and mechanics of effectively supervising the establishment of the new government. The Taiwan Relations Act paves the way for such a reform, and the UN trusteeship provides the necessary vehicle to accomplish that end.

VI. CONCLUSION

As a result of enactment of the Taiwan Relations Act, the legitimacy of the ROC and the Nationalist government are no longer a reality in international law.²³⁷ The people of Taiwan, who have been subject to that government for over 30 years, are in perhaps the best position in their history to seek independence.²³⁸

The entities of Taiwan and mainland China have been divided for almost four centuries.²³⁹ Each has developed a unique identity and culture which further evidences their differences. At the end of

237. See Oakes, *supra* note 5.

238. See *Hearings*, *supra* note 6, at 436-37 (testimony of Professor Parris H. Chang, Pennsylvania State University Political Science Department).

239. See *supra* text accompanying notes 34-45.

World War II, the Supreme Commander of the Allied Command in the Pacific required the surrender of Taiwan by Japan to the Allied forces.²⁴⁰ General Chiang Kai-Shek founded the Nationalist government on Taiwan in October of 1945. Subsequently, the Nationalist forces fighting the Civil War on the mainland were defeated and the PRC was established on the mainland in October, 1949.²⁴¹ The remaining mainland Nationalist fled to Taiwan and assumed positions of authority within the ROC.²⁴²

Martial law has been imposed by the Chinese Nationalist government since 1949.²⁴³ The Taiwanese population has since been deprived of proportionate representation in the political system of Taiwan.²⁴⁴ Although the Taiwanese comprise 85 percent of the population,²⁴⁵ they occupy a mere 5 percent of the ranking political offices. Martial law has also been a source of the Nationalists' denial of fundamental rights as set forth in the country's constitution. These conditions have spurred both the current plea for self-determination and the Taiwan independence movement at home and abroad.²⁴⁶

The cession of Taiwan by Japan renounced all Japan's claims to Taiwan,²⁴⁷ but did not provide for a beneficiary.²⁴⁸ The sovereignty of Taiwan is therefore, "undetermined," and should be decided by the People of Taiwan.²⁴⁹ The American Institute on Taiwan, the entity created by the Taiwan Relations Act,²⁵⁰ effectively provides the Taiwanese people with the necessary qualifications to invoke statehood through the principle of self-determination.²⁵¹ At this time, Taiwan possesses the requisite elements of: (a) a subjected people, (b) a territorily based people, and (c) a movement made up of a colonial people.²⁵² With these elements present, Taiwan is now "ripe" to pursue a course of independence via the principle of self-determination. The Taiwan

240. See *supra* note 46 and accompanying text.

241. See *Hearings, supra* note 6, at 867.

242. *Id.* at 38.

243. See *supra* text accompanying notes 26-28.

244. See *supra* text accompanying notes 21-25, 57 and 137-39.

245. See *supra* text accompanying notes 16 and 132.

246. See *supra* text accompanying notes 29, 31, 117 and 208-210.

247. See *supra* text accompanying notes 61-62.

248. *Id.*

249. See *Hearings, supra* note 6, at 600.

250. See generally Taiwan Relations Act, *supra* note 3, at §§ 3301-16. See also *supra* note 184 and accompanying text.

251. See *supra* notes 200-02.

252. See *supra* text accompanying notes 102-117.

Relations Act has in effect provided a vehicle through which other nations recognizing the PRC could establish an entity similar to the Taiwan Institute on Taiwan. The purpose of such action would be twofold: (1) to maintain economic ties with Taiwan while recognizing the PRC, and (2) to ease the PRC toward the ultimate reality of Taiwan's independence.

The suggested medium for gaining sovereign independence for the people of Taiwan is through the application of the international legal principle of self-determination. This could be accomplished by the establishment of a UN trusteeship. The trusteeship would take into account the respective interests of the United States, Taiwan, China, and "affected Asian countries" to ensure a satisfactory result. The major purpose of the trusteeship is recognized as providing a systematic means to ascertain the wishes of the majority of Taiwan's 17.8 million people. Once a representative government is established, the trusteeship would dissolve.

It is recognized that opposition by the PRC is a likely result of such a proposal. However, in light of the current stalemate between Taiwan and the PRC and the potential threat that the two entities pose to each other, it is possible that the Chinese will balance the interests and eventually agree to Taiwan's independence. Nonetheless, it is important that the international community recognize and properly accord the Taiwanese people the rights to which they have a legal claim.

Kent L. Christiansen