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# Is china's claim of title over Taiwan Justified

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**To cite this article:**

Churchill Otieno Saoke. Is China's Claim of Title Over Taiwan Justified. *Social Sciences*. Vol. 4, No. 1, 2015, pp. 1-4.

doi: 10.11648/j.ss.20150401.11

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**Abstract:** From history Taiwan has had very close relations with China, with several Chinese regimes having control of the Taiwan. Moreover, the region has also been ruled by other countries among them Japan and the Dutch. In the recent years there have been trends to recognize Taiwan as a state but Chinese government has often claimed it owns the title over Taiwan and that the government of Taiwan is just like any other regional government of other parts of china. The question has been is china a government in exile for Taiwan? Can Taiwan claim to be an independent state? This paper looks at these questions by dissecting the Taiwan dilemma on the basis of the Montevideo convention on the rights and duties of states 1933.

**Keywords:** State, Population, Government, Territory, Title, Montevideo Convention

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## 1. History of Taiwan-China Relations

Historically, Taiwan has been part of China since ancient times. Ancient Chinese called this island *Daiyuan* in the primitive era. In the Warring States period (475-221 B.C.), the island was renamed *Daoyi* and *Yizhou*. In 1624, the Dutch invaded Taiwan and occupied the island for 38 years but were later expelled by General Zheng who established *Chengtian* Prefecture on the island under the jurisdiction of Fujian Province and subsequently, the Zheng government expanded the administrative structure in Taiwan, thereby strengthening its rule over the territory<sup>1</sup>. From that time, different Chinese dynasties reigned in Taiwan until 1894 when Japan launched a war of aggression against China and coerced Qing government to sign the humiliating Treaty of Shimonoseki (Treaty of Maguan) in 1895; under which Taiwan and Penghu were ceded to Japan. This began a history of fifty years of Japanese colonial reign of Taiwan against the will of the Chinese people, including the inhabitants on Taiwan. During the Second World War, the Chinese Government in its declaration of War against Japan proclaimed to abrogate all treaties, conventions, agreements and contracts regarding relations between China and Japan including the Treaty of Shimonoseki. The proclamation declared China's resumption of sovereignty over Taiwan, Penghu and four northeastern provinces. After China won the war against Japanese aggression in 1945, the Chinese

government reinstated its administrative authority in Taiwan Province, thereby formally resuming sovereignty of China over the territory<sup>2</sup>.

The presence and settlement of Chinese people on the island in addition to China's actual exercise of authority throughout history supports the character of Taiwan as part of China. The Chinese Government effectively established and exercised jurisdiction over Taiwan in all the various dynasties. Therefore sovereignty of China over Taiwan and its territorial rights over Taiwan is inseparable from the historical facts relating to China's actual exercise of jurisdiction over Taiwan<sup>3</sup>. Despite the allegation that in certain periods in history the Chinese government's control over Taiwan was weak and fragile, such control was particularly strong and continuous in comparison with other Chinese frontiers<sup>4</sup>. China's long-time display of effective authority over the island exceeds all the requirements of international law for the acquisition and maintenance of territorial title either by way of occupation or prescription. The *de jure territorial* attributes of Taiwan to China remained uninterrupted by the Qing Government's cession in perpetuity. Although the island ceded to Japan by an unequal treaty, the validity of the cession was in itself questionable because the Qing Government signed it under extreme duress which under contemporary international law such a treaty is void and invalid because it was entered into

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1 (White Paper, supra note 7, at 1.)

2 (Prescon, Jan. 14,2000)

3 (D.I. HARRIS, 1998)

4 (Prescon, Jan. 14,2000)

under coercion or fraud<sup>1</sup>.

## 2. The Status of Taiwan Based on the Montevideo Convention

One of the arguments supporting Taiwan's independence is that the territory satisfies all the requirements of statehood and therefore is already a sovereign nation. Let us reexamine the criteria for statehood in customary international law and determine whether Taiwan really meets these criteria. According to the Montevideo Convention on the Rights and Duties of States, a state must meet at least four criteria: (1) A permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other nations. Although this Convention itself binds upon only States Parties, it is commonly accepted as reflecting in general terms the requirements of statehood at customary international law.

### 2.1. Permanent Population

Oppenheim defines a population as an aggregate of individuals who live together as a community; though they may belong to different races, creeds or cultures or be of different color. Under this construction, for the purpose of statehood, an entity's population must first live together as one people, and secondly must form a national community. Under another construction, the permanent population requirement suggests that there must be people identifying themselves with the territory no matter how small or large the population might be<sup>5</sup>. The population in Taiwan may meet the permanent population criterion under either construction. There are about 21 million permanent residents in the province of Taiwan. They live together as part of the Chinese population and form a special local Chinese community in the same way as in any other province on the Chinese mainland. To the extent of habitual inhabitation, this local Chinese population also identifies with Taiwan. They, therefore, constitute the permanent population of the province. Nevertheless, since ninety-seven percent of the "people" of Taiwan are ethnic *han* Chinese, they are no different from the permanent population of any other province or political subdivision in the mainland. They are all citizens of China covering the same geographical sphere, *i.e.*, the Chinese mainland and the Taiwan Island. The permanent population in Taiwan is simply part of the permanent population of the entire State of China regardless of the name used to designate it.

### 2.2. Defined Territory

In general, a State without a defined territory is impossible for a territory is the necessary space in which the putative State exercises its sovereign power. Although a *defined* territory is general requirement for statehood, there need not necessarily be a perfect demarcation of the

territorial boundaries of the State. As was stated in the from a decision of 1929, "*the requirement of a defined territory does not require precise delimitation of every corner and every portion of a putative State's boundaries*"

China's territorial and boundary disputes with some of its neighboring States do not make China a non-State. Essentially the putative State must have a territory of its own over which it exercises sovereign and independent authority. If the entire territory under the custody of an entity is owned or claimed by another entity, then whether the former entity can claim statehood becomes highly questionable because it is doubtful whether it indeed owns a territory. In other words, a self-owned and necessary territory is inseparable from the sovereign and independent operation of a putative State. Using the words of Crawford of Cambridge, the State must consist of a certain coherent territory effectively governed<sup>6</sup>.

In the case of Taiwan, it is true that there does exist a defined land territory consisting of the Taiwan Island *per se* and a number of smaller islands, including some just off the shore of the Chinese mainland. Yet, to claim statehood, an entity must own territory essentially free from claims by any other entity<sup>6</sup>. The territory of Taiwan is not owned and therefore not disposable by any entity other than the State of China. Although the Taiwanese authorities are in actual possession, custody, and control of the territory in question; they do not have legal title to the territory and therefore do not possess the capacity and authority to legally sever such territory from that of the Chinese mainland. The Chinese territory in Taiwan may not become Taiwan's own unless and until the Chinese Government in Beijing abandons its sovereignty over Taiwan; a scenario which is unlikely to happen. Taiwan's situation is no different from that of any other province of China. While the Taiwanese authorities hold significant municipal authority over areas under its control, they do not possess sovereignty over them in any legal or even practical sense<sup>7</sup>. Accordingly, Taiwan does not have a territory of its own and fails to meet the "defined territory" requirement. Therefore, the Taiwanese authorities do not exercise sovereign and independent authority over any territory of their own at all. Rather, they are merely administering a part of China's territory on behalf of the State of China or the Chinese central Government.

### 2.3. A Government

A government is an indispensable requirement for statehood. The question arises as to what kind of government is required. For the purpose of statehood, the government criterion does not require that an entity conform to a particular form of government<sup>8</sup>. The family of nations comprises States with various forms of government with different degrees and forms of democracy ranging from

5 (D.I. HARRIS, 1998)

6 (CRAWFORD, 1979)

7 (CRAWFORD, 1979)

8 (CRAWFORD, 1979)

republics to monarchies and to theocracies. A government constituted by way of popular election does not make it more a government. Similarly, a government constituted not by general election, or a government lacking any element of democracy does not make it less a government as long as it exercises effective public authority and sovereignty. Further, when we discuss government in the context of criteria for statehood, we do not mean any type or any level of organizations of public authorities. A local government, for example, does not meet the criterion of a government for the purpose of statehood because it does not have the necessary legal credentials and capacity to claim statehood for the community it administers. The two factors that matter for a government are effectiveness and legitimacy. The degree of actual authority exercised measures effectiveness while legal title to exercise that authority measures legitimacy<sup>9</sup>. In other words, what is essential for statehood in this connection is a stable central political organization that exercises effective public power within a defined territory and over a permanent population. A government's actual exercise of authority, or its effectiveness, refers to its structural coherence and its general capacity to maintain law and order within an area it controls or purports to control. There is little development, however, regarding the degree and standards of effectiveness. It is possible that this territory came into acquisition by way of occupation, prescription, succession or cession by the former sovereign of the territory. However, where applicable, one can obtain territory in accordance with the principle of self-determination.

Judging the situation in Taiwan against the above criterion, one may fail to see the Taiwanese authorities as a government for the purpose of claiming statehood. It is true that the Taiwanese authorities function as a *de facto* public administration in Taiwan and in that sense a "government" but it is no more than a special local government since it is not a central political organ that satisfies both the elements of effectiveness and legal title. Although the administration of Taiwan has been generally effective and stable, it does not have the required legal title to pose itself as a government for statehood. Instead, the Chinese Government in Beijing is the sole legitimate Government with legal title to represent and govern the entire Chinese territory, including Taiwan. The Taiwanese authorities do not even possess the weakest and most fragile legal title to the territory of Taiwan. Thus no matter how strong and how effective their *de facto* exercise of authority over the territory may be, their total lack of legitimacy determines that they do not meet the government criterion for statehood.

#### 2.4. Capacity to Enter into Foreign Relations

The fourth requirement for statehood, the capacity to enter into foreign relations, refers to the legal capacity or legal competence of an entity to participate in public

international relations including the legal competence to discharge its international obligations. This legal capacity relates very little with economic or monetary ability or political or military power. Some developing States lack the economic capacity to engage in active relations with other nations yet they are States and are recognized as such. California on the other hand possesses more than abundant economic power to fully participate in the international system yet it is not and cannot be recognized as a State in the sense of international law because it does not possess the legal competence to act as a State on the international plane.<sup>10</sup>

Indeed, the capacity to enter into foreign relations necessarily embodies the element of sovereignty or independence which determines whether an entity has or has not the legal competence to participate in international relations and to affect the undertakings into which it enters on behalf of the population and territory it governs. Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe with the right to exercise therein, to the exclusion of any other state, the functions of a

In the case of Taiwan, the assertion that the regime in Taiwan acted responsibly in external relations is nowhere near the sovereignty requirement. A local government is to some degree considered able to act responsibly in external relations. Yet, these relations are not State-to-State relations for a simple reason: A political subdivision or a local government, no matter how special it may be, does not have the sovereignty and independence to act as a State. In other words, a non-sovereign and non-independent entity does not have the necessary legal competence and qualifications to enter into relations with other nations on a State-to-State basis. Although politically separated from the Chinese mainland for slightly more than fifty years, Taiwan remains under the sovereignty of China. Even though Taiwan may arguably satisfy the requirement of separateness in the sense that it is maintaining a separate legal order different from that of the mainland, it clearly does not fulfil the requirement of sovereignty. The persistent position of China throughout history is that Taiwan is an inalienable part of China. It was also the official position of the Taiwanese authorities since 1949 and at least until the 1990s. The international community recognizes this fact, in addition to the fact that the Government of the People's Republic of China is the sole legitimate Government of China in its entirety.

Thus, it is only the PRC Government that holds sovereignty over Taiwan and therefore the legal competence to enter into relations with other nations on behalf of the entire State of China, including Taiwan. Just as the Hong Kong Government is governing Hong Kong on behalf of China, the Taiwanese authorities are at most exercising *de facto* administrative control over Taiwan as a special local government on behalf of China, not on behalf of themselves.

9 (CRAWFORD, supra note 83, at 77)

10 (CRAWFORD, 1979)

Again, the reason is quite simple: the sovereignty over these territories is vested in China as a whole, not in the respective territory or local government itself. Moreover, the general international community has overwhelmingly recognized the sovereignty of China over Taiwan. Since the founding of the People's Republic of China, more than 160 countries have established diplomatic relations with China. As a result of such diplomatic relations, all these countries recognize three inseparable things: (1) that there is only but one China in the world; (2) that the Government of the People's Republic of China is the sole legitimate government of China, and; (3) that Taiwan is an inalienable territorial part of China. China has made recognition of these three factors a precondition for all cases of mutual recognition and establishment of diplomatic relations.

### 3. Conclusion

In view of the above, it would be impossible to characterize Taiwan as an independent and sovereign entity. Even though Taiwan under the Kuomintang or DPP authorities is leading a somewhat distinct life separate from the rest of China, it does not possess the legal authority over

the province in international relations and therefore the government of the People's Republic of China has sovereign rights over Taiwan. That being so and on the basis of this argument it can be said that China is a government in exile over Taiwan.

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