

# The Legal Basis for Taiwan's Qualification as "Unincorporated Territory" of the United States

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

After the publication of our two-part essay in the *Taiwan Daily News* on November 16 & 17, 2005, describing Taiwan's qualifying criteria as an Insular Area of the United States, many researchers in the field of Taiwan studies expressed a high degree of interest. Based on the formulation given therein, it is now clear that Taiwan will soon be able to establish a strong position in the international community, and free itself from the influence of the bellicose PRC rhetoric that "Taiwan is an integral part of China." In the near future, it is to be expected that Taiwan can emerge from the shadow of the foreign regime of the "Republic of China" imposed on it in 1945, and move forward to accomplish the great goals of calling a convention to draft a "new constitution" along with the implementation of "name rectification." In order to more fully explain the truth regarding Taiwan's international legal position, this essay will provide further details on the nature of "unincorporated territory" under the territorial clause of the US Constitution, (Article IV, Section 3, Clause 2).

## *Territorial Cessions after the Spanish American War*

During the Spanish American War of 1898, the United States undertook direct military attacks on Puerto Rico, Cuba, Guam, and the Philippines – four island groups under Spanish sovereignty. When Spanish troops on these island groups surrendered, the United States became the "conquerer," and these areas came under "military occupation," with the United States as the (principal) occupying power. It is important to recognize that the military actions of the United States against Spain could not be construed as **annexing** these island groups to the United States, as would have been the case in a pre-Napoleonic world.

Military occupation is administered under military government, and the United States had four separate military governments in these island groups of Puerto Rico, Cuba, Guam, and the Philippines, each conducting its own affairs under the authority of the US Commander in Chief. The "Treaty of Paris" (Spanish American Peace Treaty) was signed on December 10, 1898, and came into effect on April 11, 1899. The peace treaty clearly specified that Spain ceded Puerto Rico, Guam, and the Philippines to the United States, however Cuba was ceded without specifying a recipient. Under

the laws of war, this may be called a “limbo cession,” and indeed this is a remarkably similar situation to what happened in the San Francisco Peace Treaty of April 28, 1952, when Japan ceded “Formosa and the Pescadores” without specifying a recipient.

### *The US Supreme Court’s Insular Cases*

By studying the military history of the Spanish American War, it is easy to see that Puerto Rico, Cuba, Guam, and the Philippines were all overseas territories under the administration of United States Military Government, and were all extremely similar in their relationship to the continental United States. But what exactly was this relationship? Many US government officials and court judges had differing opinions at the time. As a result, a number of controversies reached the US Supreme Court, and a series of cases collectively known as the “Insular Cases” were decided. In these decisions, the terminology of “unincorporated territory” was used to describe these island groups which had come under the administration of United States Military Government and then were ceded by their “original owners.”

In other words, the Insular Cases clarified the fact that after the coming into force of the peace treaty on April 11, 1899, under US law these four areas had all become “unincorporated territory under USMG,” and technically speaking no verification by the US Congress was necessary. However, as per the peace treaty, the US Congress was given the task of determining the civil rights and political status of the native inhabitants of these areas. Later US Supreme Court cases determined that “fundamental rights” under the US Constitution apply in all unincorporated territories.

Additional US Supreme Court cases over the years have clarified the existence of five types of US Insular Areas, all with different qualifying criteria. Importantly, the qualifications for a TYPE 1 Insular Area include three items: the United States as the “conquerer,” the United States as the “principal occupying power,” and actual cession in the peace treaty.

### *Taiwan qualifies as a TYPE 1 Insular Area of the United States*

Based on the Insular Cases, after the coming into force of the Spanish American Peace Treaty on April 11, 1899, Puerto Rico, Cuba, Guam, and the Philippines

immediately became “unincorporated territory under USMG,” and qualify as TYPE 1 Insular Areas of the United States. Comparing their situations with that of Taiwan as a result of WWII, we see a complete similarity, and recognize that Taiwan fully qualifies as a TYPE 1 Insular Area of the United States.

Since the United States is a democratic country with a high regard for legal principles, we know that the US President will not violate the Constitution, and will never “sell out” Taiwan to a foreign power such as the PRC. The Taiwanese people should really not worry about this too much. Of course, it would be most fitting and proper for the US Congress launch an investigation on the true facts of the Taiwan status at an early date.

After analyzing the course of events in the Spanish American War in some detail, we see that Puerto Rico, Cuba, Guam, and the Philippines were four separate areas under military occupation, each with its own United States Military Government. Over fifty years ago, we saw the same situation in regard to Taiwan and metropolitan Japan, when the United States had military government jurisdiction, and was handling the military occupation of Taiwan and metropolitan Japan separately.

In the post-war peace treaties, Cuba and Taiwan were both “limbo cessions.” In any situation of territorial cession after war, the military government of the (principal) occupying power continues past the point in time when the peace treaty comes into effect. Hence, there must be official paperwork at some later date to fully document the ending of military government and the beginning of “civil government.” For example, the end of United States Military Government in the Spanish American War cessions was as follows: Puerto Rico on May 1, 1900; Guam on July 1, 1950; Cuba on May 20, 1902; and the Philippines on July 4, 1901.

The four main islands of Japan were not involved in any aspects of territorial cession in the San Francisco Peace Treaty, and so the military occupation of Japan ended upon the coming into force of the peace treaty on April 28, 1952. In other words, Japan regained its sovereignty on that date. But did the military occupation of Taiwan end at that time? The answer is “No”. Indeed, up to the present day, there is no official US government paperwork which can document the end of United States Military Government (USMG) in Taiwan.

It is clear that the military occupation of Taiwan was delegated to the Chinese Nationalists under Chiang Kai-shek, however in the post-war peace treaty, the

international community did not agree to give the “territorial title” of Taiwan to the Republic of China or to the People’s Republic of China. Hence, this “territorial title” is currently still being held by the “principal occupying power” (the United States) as an interim status condition. Of course, as everyone knows, the “Taiwan Relations Act” is a domestic law of the United States.

### *A Government in Exile does not have “Territorial Title”*

In 2005, some Legislators in Taiwan have expressed puzzlement over United States’ policies toward Taiwan. On the one hand, the US is strongly urging the “Republic of China” to pass a huge arms procurement bill to bolster its defenses. Naturally, the Taiwanese people feel that the main reason they would need to bolster their defenses is to protect their “sovereignty.” However, the US government position is that “Taiwan does not enjoy sovereignty as a nation.” This entire situation seems quite contradictory.

Additionally, the PRC’s policies toward Taiwan are also puzzling. The PRC does not recognize the nomenclature of the “Republic of China,” and ROC passports cannot be used in the PRC. However, whenever the news media in Taiwan has reports about large numbers of people urging the Taiwan government to do away with the nomenclature of the “Republic of China,” the PRC government officials immediately issue loud protests.

In reality, the key problem revolves around the meaning of the events of October 25, 1945. Although the Japanese surrender ceremonies were held on this date, there is no legal basis for interpreting it as “Taiwan Retrocession Day” – in fact it merely marks the beginning of the military occupation of Taiwan. At that time, Taiwan was still part of the Japanese Empire, and it was on the “losing side” in the war. Considering the laws of war, there could not possibly be a transfer of “territorial sovereignty” to the Chinese Nationalists on October 25, 1945.

In December of 1949, high ranking officials of the Republic of China fled to Taiwan from the China mainland, thus becoming a “government in exile.” To date, the ROC continues to exercise “effective territorial control” over Taiwan, but it does not have “territorial sovereignty.” Regardless of how long this “effective territorial control” is exercised, the ROC on Taiwan will never be recognized by the international community as an independent sovereign nation.

In many respects, the situation in Taiwan today is similar to the Israeli occupation of the Gaza Strip, which ended in September 2005. Israel had exercised “effective territorial control” over the Gaza Strip for thirty eight years, but its “territorial sovereignty” over this area was not recognized by the world community.

### *The Truth of the “Strategic Ambiguity” in US Policy toward Taiwan*

So, the truth of the “strategic ambiguity” in US policy toward Taiwan is that the US government wants to sell military hardware to the “Republic of China government in exile,” which is continuing to administer Taiwan under military occupation on behalf of USMG. Yet when the PRC threatens to attack Taiwan, of course the United States issues loud protests because it needs to protect its own territory. The PRC officials clearly know that if Taiwan’s true international legal position is discovered, the “successor government theory” which it uses to justify its claims of territorial sovereignty over Taiwan will evaporate into thin air, and Taiwan will develop its own identity separate from China.

As would be expected, the PRC officials are very frustrated by all of this, and so they recently suggested to the US President that the administration of the Taiwan Strait should be a joint USA-PRC effort. The US President immediately refused, however, so it is clear that he wants to maintain US control of the Taiwan Strait for the foreseeable future.