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## East Goes West

The Chinese view on state sovereignty;  
in line with the West or a notion of their own?

Master thesis  
20 points

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# Preface

When researched and discussed as a legal notion, sovereignty is difficult to define; as a strict definition will in all probability be built on subjective state values, and will also change due to adoption or denunciation of treaties, and changes in the overall international political climate. Therefore, as an effect, scholars have declared sovereignty as dead and, thus, of no value to the interdependence of states. These scholars could not be more wrong. When writing this paper I have discovered that sovereignty of states is very much alive and, by some states, guarded as a national treasure.

One of the reasons that I have found, that makes sovereignty so hard to define and categorize is that it is not, strictly speaking, a legal concept. Sovereignty is more of a philosophical approach towards the powers of states, than a legal approach. Therefore, one cannot point towards a specific Article or law and definitely claim that this is sovereignty. Instead, sovereignty lives within the state, in symbiosis. This is also a reason for sovereignty being alive and well. With sovereignty dead, so would also the state and international law, as we know them, be dead. Without the one there cannot be the other. And a statement that I find perfectly emphasise my point is made by Rousseau when stating that;

over ‘If the state or city is nothing but a moral person, the life of which consists in the union of its members, and if the most important of its cares is that of self-preservation, it needs a universal and compulsive force to move and dispose of every part in the manner most expedient for the whole. As nature gives every man an absolute power over all his limbs, the social pact gives the body politic an absolute power all its members; and it is this same power which, when directed by the general will, bears, as I said, the name of sovereignty.’<sup>1</sup>

Earlier, I claimed that sovereignty, or rather its definition, depends on subjectively defined criteria; and with regard to China, it could not be more close to the truth. China is a perfect example of an entity that allows its past experiences to colour and influence its present actions and claims. Due to China’s history and psychological experiences, China has developed a narrow and classical notion of sovereignty. Nevertheless, the foundation for Chinese sovereignty is not without fractures. The Communist Party is struggling with legitimizing insufficiencies that threatens its very power-structure and existence, as the still growing dependence of states and between states undermines Party control and legitimacy. As an indicator of the weaknesses in the Chinese communist power-structure, one might mention that Chairman Mao himself did not believe that the ‘one-party’ communism leadership was the only true answer to the re-founding of a powerful China;

‘It is essential to resolutely uphold the ‘three-thirds system,’ under which Communists have only one-third of the places in organs of

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<sup>1</sup> Rousseau, Book II, Chapter IV.

political power, so as to attract non-Communists to participate in political power. In areas like the northern part of Jiangsu province, where anti-Japanese democratic political power is just beginning to take form, the proportion of Communists may be even less than one-third. Both governmental offices and the people's representative bodies must draw the petty bourgeoisie, the national bourgeoisie, and the enlightened gentry who are not actively opposed to the Communist Party into participation, and those members of the GMD [Kuomintang or KMT] who are not anti-Communists must also be allowed to participate. Even a small number of Rightists may be allowed to join the people's representative bodies. On no account should our Party monopolize everything. We aim only to destroy the dictatorship of the big compradore bourgeoisie and the big landlord classes, not to replace it with a one-party dictatorship of the CCP [China's Communist Party]... It should be laid down that all landlords and capitalists not opposed to the War of Resistance shall enjoy the same human rights, property rights, and right to vote, and the same freedoms of speech, assembly, association, thought, and belief, as the workers and peasants. The government shall take action only against saboteurs and those who organize riots in our base areas, and shall protect all others and not interfere with them.<sup>2</sup>

In the end of the preface, I would like to make it perfectly clear that differences between Western states and China concerning sovereignty, does not constitute a dissimilarity *per se*. Statements, actions and policy-choices made in the West and in China, is merely due to a development in time. Where the West is today, China will probably be tomorrow. I would also like to make it clear that my definition of sovereignty and my conclusions of China's policies, is merely interpretations and analytic answers due to *my* research; as stated before, it is all subjective, and my research constitutes an attempt of interpreting and explaining something so indistinct and vague as sovereignty.

Finally, I feel that a word of gratitude to my supervisor Olof Beckman (LL.M), and also Ulf Linderfalk (LL.D), Daniel Petersson, and Lotten Paulsson, is much needed. This for them taking time of to, listen to my ideas, helping me when stuck, answering my, sometimes, hazy questions and actually reading my thesis. Thanks!

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<sup>2</sup> 'On Policy,' originally written in 1940, reprinted in 'Selected Works of Mao Zedong, Beijing, Renmin Chubanshe, 1991, Vol. 2, pp. 762-770, cited from Angle and Svensson, pp. 190-191.

# 1 Introduction

## 1.1 Purpose and Limitations

task 'Most introductions begin by emphasizing the impossibility of the ahead, presumably seeking to excuse failure or magnify success. Sadly, this introduction will be no different.'<sup>3</sup>

Sovereignty started out as a Monarch with absolute and uncontested power being the sovereign. He stood above all except God and nothing could bind him if he did not want to. Sovereignty evolved through time and it became more connected with the state<sup>4</sup> itself instead of the individual. Today, as before, sovereignty is claimed by states as a limiting factor<sup>5</sup> when it comes to acts by other states or international organizations, and in international instruments one may find articles expressing a limitation of possible actions against a state.<sup>6</sup> So it is prudent to conclude from the very beginning that states and their governments have used its sovereignty as a guarding post against actions taken by other states and international organisations as sovereignty has long been seen as the 'Holy Cow' when it comes to international law and more specifically treaty based law. But what exactly is sovereignty and how might it be defined? In international law, and especially when discussing state sovereignty, it is hard to formulate rules of sufficient generality while at the same time being of sufficient precision to allow for a constructive discourse. A problem that I discovered almost immediately is how to explain the *connecting factor*?<sup>7</sup> To whom or what is sovereignty connected? Is it the territory of the state itself, the government of the state or perhaps the citizens<sup>8</sup> of the state?

To fully understand why states regard the concept of sovereignty as such an important factor of international law one has to look beyond treaties and customary international law to find the only pure and original international principal rule, that of the totally sovereign state. Assuming that

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<sup>3</sup> Boyle, p. xiii.

<sup>4</sup> For this paper I define 'State' by using *Convention on Rights and Duties of States*, signed at Montevideo on 26 December 1933, article 1. UNTS registration number: 3802, volume number: 165. See also Raič, pp. 58-74.

<sup>5</sup> 'Sovereignty is for many states their best - and sometimes seemingly their only - line of defence.' *The Responsibility to Protect*, p. 7.

<sup>6</sup> See Article 2(7) of the Charter of the United Nations, 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...' and *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly resolution 2625 (XXV), 24 October 1970, UN Doc. A/8082.

<sup>7</sup> A term I use to describe who or what actually wields sovereignty.

<sup>8</sup> See Chapter 2.3.3 'People's Sovereignty.'

no treaties existed,<sup>9</sup> there was no customary international law, then, the only rule that constitute a genuine limiting factor of a state's sovereignty is the sovereignty of other states.<sup>10</sup>

When I started working on this paper I had some questions that I wanted answered.

1. What is state sovereignty from a Western notion, and how may it be defined in terms of law?
2. Is the view on sovereignty universal or are there any regional discrepancies in the concept of sovereignty or its definition?
3. Claims made by states, are those within or outside the defined limits of state sovereignty, and which relevance does competing claims on the notion of sovereignty have?

The first question must be answered to be able to formulate a working definition of state sovereignty. Without this definition one can not answer the two other questions, namely are states aware of the limits of sovereignty as defined and how does states act in relation to these limits and are there any regional discrepancies towards the concept of sovereignty?

I have chosen to concentrate on one single state and its view on sovereignty namely the People's Republic of China (China and the PRC). The reasons for this choice are plentiful. First of all, during the last two hundred years China has been forced to adapt to a staggering international pressure from other states. During the *Battle of the Concessions*<sup>11</sup> China was forced to lease out some of its territory and thereby limiting its own ability to rule these areas. Some writers<sup>12</sup> claim that such leases fall within the concept of divisible territorial sovereignty.<sup>13</sup> During the twentieth century China saw a colossal change in politics both internal and external. During the Sino-Soviet Alliance 1945 - 1963 the external politics and claims made by the PRC was coloured by the ongoing Cold War and China thereby became a enemy of the Western States. In the seventies the PRC was made a permanent member of the United Nations Security Council and thereby ousted the Taiwan-based Chiang Kai-shek regime claimed to be a wrongful

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<sup>9</sup> '[i]n the absence of prior agreement by treaty, international law as at present constituted knows of no legislative process in the proper sense of the term,' Jennings and Watts, p. 341.

<sup>8</sup> Lauterpacht, p. 288, §125, and, Shaw, p. 333, where the notion of a negative aspect of territorial sovereignty is debated. See also Article 8, *Montevideo Convention* and Article 2(7) of the Charter of the United Nations, where *the principle of non-intervention* is described and as I see it is the effect of the sovereign state.

<sup>11</sup> Those countries that obtained territory in China was: Russia, France, Germany and Great Britain. See Shearer, p. 145, and, Wesley-Smith, pp. 21-28.

<sup>12</sup> Lauterpacht, Jennings and Watts uses the same example as Shearer and more closely defines the areas that were leased out by the owner-state China. According to Lauterpacht, Jennings and Watts, these areas where: the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang-Chou to France and Port Arthur to Russia. Lauterpacht, p. 456 § 171, and, Jennings and Watts, p. 568 – 9.

<sup>13</sup> The divisibility of sovereignty implies 'that the powers connected with sovereignty need not necessarily be united in one hand.' Jennings and Watts, p. 124. Jennings and Watts also state that '[i]t accordingly seems preferable to maintain the practical, though abnormal and possibly illogical, view that sovereignty is divisible.' p. 124.

representative of China.<sup>14</sup> All this taken together with the fact that China during the last twenty five years has shifted its politics from a hard core and isolated socialist state to a more progressive and western friendly part of the global community makes China even more interesting.

## 1.2 Method and Material

To be able to clearly define and explain state sovereignty, I have chosen to apply a timeframe. The reason for is to be given the chance of comparing Chinese claims and actions with the rest of the world during a precise and limited part of time. By applying the Western notion of state sovereignty as the underlying rule, I am also able to clearly define and differentiate between the Chinese notion of state sovereignty and the Western notion.

When defining sovereignty, it might turn out difficult to try to define it in an entirely positive sense i.e. what a state is allowed to do because of its sovereignty. When describing sovereignty one must also look upon what a state is limited and forbidden from doing, i.e. in a negative sense. And to be able to do this, I have employed both, domestic Chinese documents and statements, together with treaties, United Nations Documentation, and books and articles from international scholars, this to be able to give an as clearly defined definition of sovereignty and the Chinese notion as possible.

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<sup>14</sup> *Restoration of the lawful rights of the People's Republic of China in the United Nations*, General Assembly resolution 2758 (XXVI), 25 October 1971.



## 2 Sovereignty

in ‘The Organization and its Members, in pursuit of the Purpose stated Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the *sovereign equality* of all its Members.’<sup>15</sup> (emphasis added)

The effect of state sovereignty in its strict sense is international law, and when discussing sovereignty, and more specifically, state sovereignty a division has to be made between the territorial demarcation of sovereignty and the contents of sovereignty. For this purpose, I have divided the chapter into three subdivisions; the history of sovereignty, territorial sovereignty and legal and political sovereignty where territorial sovereignty represents the boundaries proper of state sovereignty and where legal and political sovereignty represents the normative contents of sovereignty and its limitations.

### 2.1 The History of Sovereignty

The word ‘sovereign’ has evolved from the French word *souverain* which in term is derived from the Latin *superanus*. According to Lauterpacht it was used at the end of the Middle Ages in France to describe an authority which had no other authority above itself.<sup>16</sup> During the sixteenth century the concept of sovereignty grew to a philosophical and political fiction. Both Niccolò Machiavelli (*Il Principe*) and Bodin (*De la République*) described the Monarch, or the Sovereign, as the absolute and perpetual power, within a state, without any restrictions except the Commandments of God and the Law of Nature.<sup>17</sup> Bodin’s *De la République* is based on the concept of the Law of Nature<sup>18</sup> and he worked from the standpoint that ‘a contract is only binding upon the Sovereign because the Law of Nature commands that a contract shall be binding.’<sup>19</sup>

Many writers have tried to define sovereignty and they have also tried to mark the time of birth of the Sovereign whether it be a monarch or, as shown later on in history, the state. I fully concur with Camillieri and Falk when they state that ‘[i]ts history [sovereignty] parallels the evolution of the modern state’<sup>20</sup> but I do not find it to important to pinpoint the historic

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<sup>15</sup> Article 2(1) Charter of the United Nations. ‘The principle that all states are equally sovereign under international law was established as a cornerstone of the UN Charter.’ *The Responsibility to Protect*, p. 7

<sup>16</sup> Lauterpacht, p. 120, see also Jennings and Watts, p. 124.

<sup>17</sup> Williams, p. 517, where he also discusses Hobbe’s theory of sovereignty. Malanczuk, pp. 17-18, and, Meron, pp. 1-20.

<sup>18</sup> See Shearer, p. 90.

<sup>19</sup> Shearer, p 120-121. Since this is more of a philosophical approach of sovereignty I do not use Bodin as a source for my later arguments.

<sup>20</sup> Camillieri and Falk, p. 11.

source of the Sovereign, as I believe it is more important to focus on the various notions of sovereignty that exists today.

## 2.2 Territorial Sovereignty

The legally and politically constructed geographical boundaries that delimit states can be defined both via different treaties<sup>21</sup> and customary international law.<sup>22</sup> The most lucid definition of ‘territory’ as applied in international law is found in Article 2 of the *Convention on International Civil Aviation*, signed at Chicago, 7 December 1944,<sup>23</sup> asserting that ‘...the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.’ The Convention states also in Article 1 that ‘[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.’ This is strengthened by the *United Nations Convention on the Law of the Sea*, concluded at Montego Bay, 10 December 1982.<sup>24</sup> According to its Article 2, the territorial sea and its seabed and subsoil together with the airspace above the territorial sea and the land territory falls under the sovereignty of the coastal State thereby defining the state territory proper and the boundaries of territorial sovereignty.<sup>25</sup>

The notion of territorial sovereignty<sup>26</sup> is closely linked to both internal and external sovereignty. Without a defined territory there can be no state proper<sup>27</sup> and without a state there can be no sovereignty.<sup>28</sup> Just as sovereignty may be described as equality of states it can also be described as independence; that a state is independent towards other states and international organizations if not otherwise agreed via treaty or international customary law. Jennings and Watts uses a division comprising of internal and external independence<sup>29</sup> that ought to have the likelihood of effectively be translated into internal and external sovereignty. Shearer, just as Lauterpacht, places great emphasis in the territory of the state when defining

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<sup>21</sup> Advisory Opinion regarding the delimitation of the Polish-Czechoslovakian Frontier (1923), PCIJ, Ser. B, no. 8, p. 41, Advisory Opinion regarding frontier between Turkey and Iraq (1925), PCIJ, Ser. B, no. 12, p.19. See also, Kasikili/Sedudu Island Case, Merits, ICJ, 13 December 1999.

<sup>22</sup> Brownlie, Ian, p. 291. See also, Minquiers and Ecrehos Case, Merits, ICJ, 17 November 1953, Individual Opinion, Levi Carneiro, p. 85.

<sup>23</sup> UNTS registration number: 102, volume number: 15.

<sup>24</sup> UNTS registration number: 31363, volume number: 1834.

<sup>25</sup> See Jennings and Watts, pp. 572 – 575. The same Article in its para. 3 define the limits of state territorial sovereignty when stating that the sovereignty of the coastal state is limited by the Convention itself and other rules of international law.

<sup>26</sup> ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations.’ Corfu Channel Case, Merits, ICJ, 9 April 1949, p. 35.

<sup>27</sup> See for instance the *Montevideo Convention* Article 1.

<sup>28</sup> See Chapter 2.3.3 ‘*People’s Sovereignty*’ for a plausible exception.

<sup>29</sup> Jennings and Watts, p. 382 § 117, ‘It is external independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys’ and ‘it is internal independence with regard to the liberty of action of a State within its borders.’

territorial sovereignty when he states that ‘[o]ne of the essential elements of statehood is the occupation of a territorial area, within which state law operates. Over this area, supreme authority is vested in the state.’<sup>30</sup> And from this statement Shearer deduces the notion that territorial sovereignty arises as a concept from the occupation of a territory and the supreme authority wielded within.<sup>31</sup> Max Huber (sole arbitrator) describes territorial sovereignty in the Island of Palmas Arbitration (1928) being ‘Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.’<sup>32</sup>

The territory and all sovereign rights that follows with it belonging to a state has and will be protected by the use of force, international adjudication, and political struggle between states. Seemingly insignificant islands located in the Celebes Sea<sup>33</sup> instigates states to appeal to the International Court of Justice (ICJ) asking it to declare sovereign rights over these islands to one of the parties of the conflict.<sup>34</sup> But one of the most widely debated cases during the twentieth century is the Lotus Case, where the Permanent Court of International Justice (PCIJ), in its dicta, states that ‘[i]t does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.’ This together with ‘[a]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.’<sup>35</sup> makes it clear that what the PCIJ means is that a state is free to do as it likes so long as customary international law and treaties binding upon the state does not explicitly restrict its actions.<sup>36</sup> This principle from the Lotus Case, has lingered on in arguments made by states until these days. It was one of the most used arguments made by states in the Nuclear Weapons Advisory Opinion<sup>37</sup> as it was stated that the word “permitted” would otherwise only authorize the use of the threat of using nuclear weapons if authorized by a treaty provision or

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<sup>30</sup> Shearer, p.144.

<sup>31</sup> Shearer, p. 144.

<sup>32</sup> Reports of International Arbitral Awards (RIAA), Vol. II, p. 838.

<sup>33</sup> Off the north-east of the island of Borneo

<sup>34</sup> Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan, Indonesia/Malaysia, Merits, ICJ, 17 December, 2002. The islands which the biggest is approximately 0.13 sq.km should be of no real economic value by them selves but when considering that both of the islands is permanently above sea level and one is permanently inhabited and sustains a tourist community (Sipidan) it becomes much more interesting. According to Article 121 UNCLOS an island can hold a territorial zone an exclusive economic zone and a continental shelf and thereby representing a vast economic interest to the Indonesian and Malaysian States. The Court (ICJ) concluded that Malaysia had title to both islands on the basis of the *effectivités* namely a form of quasi-judicial and administrative acts concerning for example a turtle reserve.

<sup>35</sup> The case of the S.S. “Lotus” (1927), PCIJ, Ser. A, no. 10, pp. 18-19.

<sup>36</sup> Spiermann, p. 119, citing Martti Koskenniemi, *From Apology to Utopia* (1989), p. 221 ‘To avoid a *non liquet* the Court [PCIJ] relied on the assumption that unless specific prohibiting rules exist, State sovereignty - the sphere of its legitimate action - is unlimited.’

<sup>37</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, 8 July 1996.

via customary international law. It was claimed that ‘States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law.’<sup>38</sup> The principle, however, created by the PCIJ has also been contested both by scholars, in verdicts<sup>39</sup> and by customary international law; so today it is possible to claim that the Lotus Case has lost its legal relevance and that the view on state sovereignty in this field has changed to a obligation upon states not to act externally if not international law explicitly approves.<sup>40</sup> Therefore I fully concur with Shearer when he states that sovereignty of a state means the *residuum* of power which it possesses within the confines laid down by international law.<sup>41</sup>

## 2.2.1 Internal Sovereignty

In its Article 1, the Montevideo Convention lists certain qualifications that a state should possess. Those qualifications mentioned are; a permanent population, a defined territory and a government.<sup>42</sup> Within this defined territory the government wields a monopoly of power over those present within the territory and over its resources.<sup>43</sup> The authority that the government of a state possesses must by its very definition be total,<sup>44</sup> as the government must have the authority to legislate, adjudicate and enforce laws within the territory of that state.<sup>45</sup> This exclusive, but not absolute right, of the state is coupled with the corresponding duty of other states not to intervene in a sovereign state’s internal affairs.<sup>46</sup> This right and duty is the foundation of the Right to Self Defence stated in Article 51 of the Charter of the United Nations, that ‘if that duty [not to intervene] is

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<sup>38</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, p. 16, para. 21, with reference to Military and Paramilitary Activities Case, Merits, ICJ, 27 June 1986, p. 135, para. 269. See also, Spierrmann, pp. 133-7.

<sup>39</sup> Fisheries Case, Merits, ICJ, 18 December 1951, Individual Opinion, judge Alvarez, p. 152.

<sup>40</sup> Shearer, p 91 ‘At the present time there is hardly a state which, in the interests of the international community, has not accepted restrictions on its liberty of action.’

<sup>41</sup> As early as 1923 the PCIJ observed that the sovereignty of states would be proportionately diminished and restricted as international law developed. Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, (1923), ser. B, No. 4, pp. 121-5, 127, and, 130. See also, Shearer, p. 91.

<sup>42</sup> Lastly, Article 1 also lists a capacity to enter into relations with the other states. See more of this under Chapter 2.2.2 ‘*External Sovereignty*’.

<sup>43</sup> Brownlie, Ian, p. 29, Jennings and Watts, p. 382, § 117. See also, Article 3 of the *Convention on Biological Diversity*, concluded at Rio de Janeiro, on 5 June 1992, UNTS registration number: 30619, volume number: 1760.

<sup>44</sup> ‘Internally, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state.’ *The Responsibility to Protect*, p. 12.

<sup>45</sup> Spierrmann, p. 211.

<sup>46</sup> ‘All states are under an international legal obligation not to commit any violation of the independence, or territorial or personal authority [see *imperium*], of any other state.’ Jennings and Watts, p 382 § 118. However; it must be remembered that ‘not all acts performed by one state in the territory of another involve a violation of sovereignty.’ Jennings and Watts, p 385 § 119.

violated, the victim state has the further right to defend its territorial integrity and political independence.<sup>47</sup>

Lauterpacht stated that 'a State proper is in existence when the people are settled in a country under its own sovereign government.'<sup>48</sup> By this statement Lauterpacht links the concept of sovereignty to the government. That it is the government that is truly sovereign. But he also states that 'the importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority.'<sup>49</sup> Thereby saying that without a territory there can not be a sovereign government or a state proper.<sup>50</sup>

As a consequence of internal sovereignty, states are free to adopt any constitution it prefers and may arrange its economy and administration in any way it thinks fit<sup>51</sup> - subject, of course, to restrictions imposed by rules of customary international law or by treaties binding upon it. And according to General Assembly resolution 2625 (XXV),<sup>52</sup> states have 'the duty not to intervene in matters within the domestic jurisdiction [territorial sovereignty] of any State, in accordance with the [UN] Charter.'

## 2.2.2 External Sovereignty

The Montevideo convention listed in Article 1 as the fourth criteria of statehood, the capacity to enter into relations with other states.<sup>53</sup> This capacity is based on the notion that every state is equally sovereign and thereby able to interact with other states. According to the principle of *par in parem non habet imperium*,<sup>54</sup> no state can be forced to act against its will by other states.<sup>55</sup> Therefore, sovereignty holds a correlative duty of respect

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<sup>47</sup> *The Responsibility to Protect*, p.12.

<sup>48</sup> Lauterpacht, p. 118 § 64.

<sup>49</sup> Lauterpacht, p. 452 § 170.

<sup>50</sup> See also Jennings and Watts, p 563 § 168, stating that: '[a] state without a territory is not possible.'

<sup>51</sup> 'A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems,' Military and Paramilitary Activities Case, Merits, ICJ, 27 June 1986, p 131 and Jennings and Watts, p. 383 § 118.

<sup>52</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, adopted 24 October 1970.

<sup>53</sup> This capacity has been named *sovereign government* by Jennings and Watts stating that 'sovereignty is supreme authority, which on the international plane means not legal authority over all states but rather legal authority which is not in law dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country.' p. 122 § 34.

<sup>54</sup> 'No State can claim jurisdiction over another', Lauterpacht, p. 264 §115a and Jennings and Watts, p. 341 § 109.

<sup>55</sup> 'A condition of any one state's sovereignty is a corresponding obligation to respect every other state's sovereignty: the norm of non-intervention is enshrined in Article 2.7 of the UN Charter.' *The Responsibility to Protect*, p. 12.

for the territorial sovereignty of other states,<sup>56</sup> and, thus limiting the external sovereignty of the activities of states.<sup>57</sup> Or as Jennings and Watts puts it ‘no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states.’<sup>58</sup>

When states interact on the international arena they make full use of their external sovereignty. As members of the international community states are able to initiate, ratify, and, adhere to treaties,<sup>59</sup> create and adhere to customary international law when interacting with the rest of the international community. I have already concluded that all states enjoy an equal sovereign right and independence but the proper term to be applied when it comes to international relations and the usage of external sovereignty ought to be interdependence.<sup>60</sup>

## 2.3 The Normative Content of Sovereignty

### 2.3.1 Legal Sovereignty

According to the International Committee on Intervention and State Sovereignty (ICISS), ‘sovereignty has come to signify, in the Westphalian<sup>61</sup> concept, the legal identity of a state in international law.’<sup>62</sup> Due to the fact that states are equally internally and externally sovereign, there must also subsist a legal equality between states.<sup>63</sup> As stated by Jennings and Watts; ‘[w]henver a question arises which has to be settled by, consent, every State has a right to a vote, but, unless it has been agreed otherwise, to one vote only.’<sup>64</sup> The only logical conclusion of this is that even the weakest

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<sup>56</sup> ‘Much of the purpose of a doctrine of abuse of rights is directed to securing a balance between the right of the state to do freely all those things it is entitled to do, and the right of other states to enjoy a similar freedom of action without harmful interference originating outside their borders.’ Jennings and Watts, p 408 § 124

<sup>57</sup> *The principle of Non-Intervention*, See Article 2(7) of the Charter of the United Nations, and, Brownlie, Ian, p. 293. See also *Military and Paramilitary Activities Case, Merits*, ICJ, 27 June 1986, p 106, where the principle of non-intervention was described as ‘a corollary of the principle of the sovereign equality of States.’

<sup>58</sup> Jennings and Watts, p 125 § 37.

<sup>59</sup> *The S. S. “Wimbledon”* (1923), PCIJ, Ser. A, No 1, p. 25, and, *Exchange of Greek and Turkish Populations* (1925), PCIJ, Ser. B, No. 10, p. 21. Both stating that the right of entering into international engagements is an attribute of state sovereignty. What is interesting is that both cases declare that ‘it is therefore impossible to admit that a convention which creates obligations (of this kind), construed according to its natural meaning, infringes the sovereign rights of the High Contracting Parties.’ *Greek and Turkish population*, p. 21.

<sup>60</sup> Jennings and Watts, p. 125, § 37.

<sup>61</sup> See also Camilleri and Falk, p. 14.

<sup>62</sup> *The Responsibility to Protect*, p. 12.

<sup>63</sup> Jennings and Watts, pp. 330, and, 339, and, Shearer, p. 99.

<sup>64</sup> Jennings and Watts, p. 341 § 108, see, for instance, article 18(1) and article 27(1) Charter of the United Nations.

state exercises the same amount of weight in an international organization as a powerful state unless otherwise agreed.<sup>65</sup>

But not only in international organizations does legal sovereignty become important. National laws applied by states must be respected as long as these laws do not encroach upon other states without their consent.<sup>66</sup> The PCIJ stated in the Lotus Case that ‘the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State.’<sup>67</sup> The question whether or not a court has jurisdiction over a foreign subject is an essentially relative question. It depends mostly if and to what degree the forum state has adhered to any treaty or customary international law concerning jurisdiction.<sup>68</sup> If no such undertaking exists the question will fall under the forum state’s own *reserved domain*<sup>69</sup> which is best described as ‘the domain of state activities where the jurisdiction of the state is not bound by international law.’<sup>70</sup>

### 2.3.2 Political Sovereignty

Political sovereignty must not be confused with legal sovereignty. By definition all states are legally equals but they are in no manner political equals.<sup>71</sup> As an example one might take the Charter of the United Nations where it is in Article 2(1) stated that ‘[t]he Organization [the UN] is based on the principle of the sovereign equality of all its Members.’ But, when comparing this Article with the representation in the Security Council one is struck by the total lack of equality. In the Council, the five great powers<sup>72</sup> are given permanent representation, while the ten remaining seats on the Council are filled by periodic elections.<sup>73</sup> This point to a difference in political sovereignty. The permanent members of the Security Council have by their veto<sup>74</sup> and permanent membership more power than the other members of the Council and are, thereby, more sovereign. A thesis proven by the total lack of Security Council resolutions adopted against any of the permanent members.

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<sup>65</sup> *The Responsibility to Protect*, p. 12.

<sup>66</sup> ‘[i]t might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law.’ Nationality Decrees in Tunis and Morocco (1923), PCIJ, Ser. B, no. 4, p. 23.

<sup>67</sup> The case of the S.S. “Lotus” (1927), PCIJ, Ser. A, no. 10, p. 18.

<sup>68</sup> ‘In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.’ The case of the S.S. “Lotus” (1927), PCIJ, Ser. A, no. 10, p. 18.

<sup>69</sup> Nationality Decrees in Tunis and Morocco (1923), PCIJ, Ser. B, No. 4, p. 24.

<sup>70</sup> Brownlie, Ian, p. 293.

<sup>71</sup> Lauterpacht, p 275, § 116 and Jennings and Watts, p. 339, § 107, ‘States are by their nature certainly not equal as regards power, territory and the like.’

<sup>72</sup> The People’s Republic of China, France, Great Britain, Russia and United States of America.

<sup>73</sup> Article 23 of the Charter of the United Nations.

<sup>74</sup> Article 27(3) of the Charter of the United Nations.

As stated above,<sup>75</sup> states are free to adopt any constitution it prefers, enact such laws as it pleases and can arrange its economy and administration as it see fit, and other states must abstain from coercive measures and intervention ‘in the management of the internal or international affairs of [other] states.’<sup>76</sup> This freedom of the state is of course limited by restrictions imposed by customary international law and treaties binding upon the state.<sup>77</sup> The principle *quidquid est in territorio est etiam de territorio* makes it clear that ‘all individuals and all property within the territory of a state are under its dominion and sway,’<sup>78</sup> This territorial authority also includes a state’s natural resources, meaning that a state is free to exploit its natural resources as it see fit. But this freedom of the state is coupled with the responsibility not to harm in any way another state’s territory or ‘areas beyond the limits of natural jurisdiction.’<sup>79</sup> So therefore it is possible to conclude that a state can act, in its own territory, as it desire, as long as it does not harm other states or violate any customary international law or treaty binding upon it.

In resolution 2625 (XXV),<sup>80</sup> the General Assembly stated in paragraph (c) that states have an obligation not to intervene in matters ‘within the domestic jurisdiction [political and territorial sovereignty] of any state, in accordance with the [UN] Charter.’ Of course, Assembly resolutions carries no binding force upon member states but via this statement the General Assembly effectively codifies a principle and discussion that started with the Lotus Case, namely are states truly free to act.

### 2.3.3 People’s Sovereignty

In his speech before the General Assembly Secretary-General Kofi Annan made a division between the concept of the sovereign state and people’s sovereignty being a sovereignty connected to individuals, by which he meant ‘the fundamental freedom of each individual... has been enhanced by a renewed and spreading consciousness of individual rights.’<sup>81</sup>

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<sup>75</sup> See Chapter 2.2.1 ‘*Internal Sovereignty*.’

<sup>76</sup> Jennings and Watts, p. 386 § 119. For instance; People’s Republic of China was 1953 and 1954, condemned by the General Assembly for giving assistance to hostile forces in Burma, General Assembly resolutions 707 (VII), 23 April 1953, and, 815 (IX), 29 October 1954. See also Shearer, pp. 91, and, 94-5.

<sup>77</sup> See Chapter 2.4 ‘*Limitations*.’

<sup>78</sup> Jennings and Watts, p. 384 § 118, also stating that a foreign individual and property fall at once under the territorial authority of a state when they cross its frontiers.

<sup>79</sup> *Permanent Sovereignty over Natural Resources*, General Assembly resolution 1803 (XVII), 14 December 1962, and, Article 3, *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, UNTS registration number: 30619, volume number: 1760.

<sup>80</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly resolution 2625 (XXV), 24 October 1970.

<sup>81</sup> ‘Two Concepts of Sovereignty,’ Annan, <[http://www.economist.com/displaystory.cfm?story\\_id=S%26%29%28%24%28Q%21%5F%26%0A](http://www.economist.com/displaystory.cfm?story_id=S%26%29%28%24%28Q%21%5F%26%0A)> last visited 17 July 2004.



The Ugandan Constitution,<sup>82</sup> for instance, has dedicated an entire chapter to people's sovereignty stating, in its first Article, that '[a]ll power belongs to the people who shall exercise their sovereignty in accordance with this constitution.'<sup>83</sup> And it also states that 'all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.'<sup>84</sup>

Personally, I fail to see the link between an independent state proper, and a devised notion of a sovereign people. An individual or a group cannot be sovereign *per se* because they are not independent with exclusive authoritative power. As the government of a state has the authority to act as, for instance, judiciary and wields the power to enforce this authority over the individual; the individual or the people cannot be sovereign. Additionally, the individual can not choose if whether to be bound by national laws or not such as states can choose if to be bound by a treaty or not.

I assume that the notion of 'people's sovereignty' is an term related to right to self-determination as enshrined in International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the General Assembly's Friendly Relations Declaration,<sup>85</sup> but it is not *sovereignty*, because that would be axiomatic since there can not exist a individual who is totally independent and who can only be bound by laws by explicit or implicit consent. And, also, because there cannot be more then one sovereign within a state, otherwise none of them would truly be sovereign. The most logical explanation must be the one of parliamentary democracy. That the governmental power has its source in the people of the state and that they are able to participate as such. I believe that Mr Annan should have used the phrase 'parliamentary democracy,' not 'people's sovereignty.' It seems to me that Mr Annan tried to make something important and legitimate even more important and legitimate by changing its name. Environmental law does not become more important if named environmental sovereignty; nor does parliamentary democracy.

## 2.4 Limitations

The first and foremost limitation of a state's sovereignty is the sovereignty of other states and their right not to be harmed or encroached upon. It might prove difficult to strictly claim that sovereignty is curbed by international law because the sovereign state created international law not the other way

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<sup>82</sup> The Constitution of the Republic of Uganda. <<http://www.government.go.ug/constitution/detail.php?myId=1>> last visited 30 August 2004.

<sup>83</sup> Chapter 1, Article 1(1), the Ugandan Constitution.

<sup>84</sup> Chapter 1, Article 1(3), the Ugandan Constitution. See also the Constitution of the United States, Articles I-III, <<http://www.house.gov/Constitution/Constitution.html>> last visited 22 September 2004.

<sup>85</sup> Article 1 ICCPR, UNTS registration number: 14668, volume number: 999, Article 1 ICESCR, UNTS registration number: 14531, volume number: 993, and General Assembly resolution 2625 (XXV), 24 December 1970.

around.<sup>86</sup> Therefore it might seem odd that the creator is limited by her own creation but this is a fact clearly exemplified in treaty law, customary international law and jurisprudence.<sup>87</sup> When ratifying a treaty the state uses its external sovereign right to be bound, because there seems to exist a customary rule that dictates that when ratified, a treaty becomes binding upon the ratifying state.<sup>88</sup> The question when it comes to treaties and sovereign rights is if sovereignty is handed over as a direct effect of the ratification? As I see it, sovereignty cannot be handed over, this because ratification is a sovereign act and so is also amending, the act of reservation, and a denunciation of a treaty. The most plausible explanation ought to be that states, via the ratification of a treaty, not accept to be bound by it but instead they accept not to use their sovereignty in this particular field of international law, until felt necessary to act otherwise. Their reserved domain may therefore change and expand by denouncing a treaty. The possible sovereignty-limiting effects of treaty ratification will further be discussed in Chapter 5.3 ‘Treaties versus Sovereignty.’

## 2.5 Working Definition and Conclusion

As stated in the preface, sovereignty, as legal notion, will be, due to its subjectivity, difficult to define. However, without a clear definition, questions number 2 and 3 cannot be answered. So, from a Western point of view, what is state sovereignty? During the twentieth century, the Western notion of state sovereignty changed drastically. In the Lotus Case (1927), the Permanent Court of International Justice concluded that a state has an un-restricted freedom to act, both internally and externally, so long as international law, explicitly, did not forbid this. Today, the notion is quite the opposite, meaning that a state can act internally with full freedom as long as the state in question has not agreed via, for instance, treaty-provisions, to limit its own sovereign powers, and a state can act externally only if, and to the extent that, international law, i.e. treaties, Security Council resolutions and customary international law, mandates or ‘approves’ of these actions, thus via specific provisions granting freedom of state conduct.<sup>89</sup>

Therefore, a cautious definition of state sovereignty would be; that a state has full freedom to act domestically if not, and to the extent that it is, hindered due to treaty-provisions where no reservation is made or recognized by other treaty parties, and customary law. The same state is also unhindered to act internationally if, and to the extent that, international law and customary law, approves of these actions and that no other state’s sovereign sphere is encroached upon. Of course, not all state actions that, in some way, encroach upon or damage other state’s sovereignty will be

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<sup>86</sup> See discussion in Spiermann, pp. 18-23, Brownlie, 287, and, Jennings, p. 35.

<sup>87</sup> When it comes to jurisprudence and state behaviour precaution is necessary because it would hardly be conceivable to assume that states voluntarily curbs its sovereign rights via an international judgement.

<sup>88</sup> See also, Article 2(1b) VCLT.

<sup>89</sup> See, for instance, Jennings and Watts, p. 382, § 118.

regarded as a violation of state sovereignty. Within the Western notion of sovereignty exist the view that only intentional violations are forbidden, not unintentional, i.e. accidents. The intentional and unintentional violation of sovereign spheres will be further discussed when considering the Chinese notion of Westphalian sovereignty.

As far as limitations of sovereignty is concerned, the Western notion ought to be regarded as approving of the principle of 'limited state sovereignty.' Nevertheless, the question still remain unanswered if, and to what extent, sovereignty is actually 'given away,' or states merely give their consent not to use their sovereignty in specific areas of law or politics, but still keeping their *de facto* sovereignty for themselves. This question is hard to answer since sovereignty, *per se* means that no other entity, save the specific entity in question, have authority to act within the specific area of concern. For instance, all states have a police force with the mandate to uphold the law; this is the specific entities – the state and its national police with its mandate to act as authority - and area; being the territory of the state. No state have the right to send their police force into the territory of another state with the objective of, for instance, apprehending a criminal, without treaty based or *ad hoc* state consent. Nevertheless, it seems that, as a result of the possibilities of amending a treaty, denouncing a treaty and/or make reservations to a treaty; that states willingly, via treaties, approve of certain provisions being binding upon treaty parties as long as state sovereignty can be activated and safeguarded once again. And it must also be kept in mind that when states, seen as treaty parties, limit their sovereignty, one might argue that they, as a result, enhance their international sovereignty as member of, for instance, an intergovernmental organisation.

Already stated differences between, and notions of, legal sovereignty and political sovereignty ought not create the conclusion that they are forming two parts of territorial state sovereignty and its internal and external implications. Thus, political and legal sovereignty should not be regarded as separated but merely as 'labels' given by theorists to segments of the implications of sovereignty, where legal sovereignty concerns the legal equality and independence between states, and political sovereignty forms the part of state sovereignty that the specific state uses, for instance, within international organisations. They are, however, *de facto* differentiated; see, for instance, voting procedures within the United Nations General Assembly *vis-à-vis* the Security Council and its permanent members. Where the 'one vote' rules ought to be seen as depicting the equality of states, despite size, strength and military power, and, the veto-function ought to be considered as depicting the political sovereignty and the differentiated value of states that becomes the effect of the said veto-function.

Therefore, it is prudent to conclude that the Western notion of state sovereignty comprises of an unmitigated internal freedom of state conduct unless limited by treaties and/or customary international law, and, treaty or customary law consented international performance; for instance, as members of the United Nations, and when given the mandate to intervene with military force in a armed conflict, the acting state's sovereignty is 'enlarged' as to mandate an action that, otherwise, would run counter, both

the intervened state's territorial sovereignty and, most probably, Article 2(4) of the Charter and customary international law seen as *ius cogens*.

# 3 The Chinese View – The Key Case of Taiwan

## 3.1 Introduction

One cannot blame China for not being consistent in its argumentation concerning Taiwan and the question of sovereign rights over the island.<sup>90</sup> One important part of this question that deserves mentioning is that the dispute of Taiwan and sovereign rights did not start with the Kuomintang (KMT) and Chiang Kai-shek fleeing mainland China for Taiwan. During the period between the sixteenth and nineteenth centuries the island of Formosa (Taiwan) changed sovereign on a multitude of occasions.<sup>91</sup> For logic and consistency I have chosen to start with the Treaty of Shimonoseki<sup>92</sup> and move forwards in time via the Cairo and Potsdam Declarations.

It is important to realise that the island of Taiwan is only a small part of a greater and harder to crack nut. The size of the island's territory is but a fraction of the mainland's and the economy of both parties is more or less flourishing,<sup>93</sup> so the answer must lie somewhere else. To fully comprehend the 'Taiwan nut' one has to look upon the entire region through a geopolitical Cold War lens. The reason for this statement is that the real problem transpired via the end of World War Two and the start of the Cold War.

During the nineteenth century the emperor of China was forced, via treaties, to surrender sovereignty over certain areas of China to western colonial powers.<sup>94</sup> The effect of this 'humiliation' would transpire into the notion of 'unequal treaties' and a vigorously defended view of Chinese territorial- and governmental control.<sup>95</sup> Even in the Chinese 1982 Constitution it is exclaimed that sovereign rights over Taiwan belongs to the People's Republic of China:

'Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our

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<sup>90</sup> See, for instance, Article 2(2) of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, depicting Taiwan as belonging to the land territory of mainland China. *Zhonghua Renmin Gonghuo falü/Laws of the People's Republic of China*, pp. 794-795.

<sup>91</sup> Chen and Reisman, pp. 603-605

<sup>92</sup> Signed at Shimonoseki 17 April 1895 and entered into force 8 May 1895 between [mainland] China and Japan. <<http://www.taiwandocuments.org/shimonoseki01.htm>> last visited 27 August 2004. See also, Hsü, pp. 342-343, 367.

<sup>93</sup> See, for instance, China's financial situation in 2002 at the World Bank website: <<http://devdata.worldbank.org/external/CPProfile.asp?SelectedCountry=CHN&CCODE=CH&CNAME=China&PTYPE=CP>> last visited 27 August 2004.

<sup>94</sup> See *Battle of Concessions* mentioned above, and, 'Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties', Chiu, pp. 241-242 and 260.

<sup>95</sup> 'Chinas relations with Hong Kong and Taiwan' Chang, p. 145, *China as a Great Power*; Kim, p. 457, and, Charney and Prescott, p. 461.

compatriots in Taiwan, to accomplish the great task of reunifying the motherland.<sup>96</sup>

The Chinese government claims ancient territorial sovereignty over Taiwan constituting some form of historic title and that China's sovereignty and territorial integrity are indivisible.<sup>97</sup> The claim of indivisibility is not a new phenomenon linked only to PRC, even the Nationalist Chinese (Chiang Kai-shek) stated the 'self-evident fact that Taiwan has always been part of China.'<sup>98</sup>

The doctrine of unequal treaties is probably the biggest divergent<sup>99</sup> from Western practice of treaty law as the Western notion of a treaty builds on the intention of the parties to create legal obligations binding upon themselves, despite power and size of the parties.<sup>100</sup> However, due to the founding of the League of Nations and Article 19 in the Covenant of the League, some states, among others, China, were encouraged to make efforts to free themselves from certain treaty obligations that they felt had been forced upon them.<sup>101</sup> The implication of unequal treaties as used referred to those treaties that had been forced upon China by the colonial powers during the nineteenth and early twentieth centuries<sup>102</sup> and shortly after the end of the Second World War the Nationalist Chinese attempts to invalidate those treaties - claimed to be unequal - bore fruit.<sup>103</sup> Even the PRC was, and is, of the opinion that unequal treaties can be unilaterally denounced at any time and that this is not contrary to the principles of international law.<sup>104</sup>

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<sup>96</sup> Constitution of the People's Republic of China, preamble, p. 3, *Zhonghua Renmin Gonghuo Falü/Laws of the People's Republic of China*.

<sup>97</sup> Statements by H. E. Mr. Tang Jiaxuan (Minister of Foreign Affairs and Head of Delegation of the People's Republic of China), at the 56th Session of the UN General Assembly, 11 November 2001 and 57th Session of the UN General Assembly, 13 September 2002. *Hsinhua, Renmin Ribao/People's Daily*, 23 October 1971, cited from Barnouin and Yu, p. 181. See also <[www.china.org.cn/english/taiwan/7891.htm](http://www.china.org.cn/english/taiwan/7891.htm)> last visited 20 April 2004.

<sup>98</sup> Chen and Reisman, p. 621.

<sup>99</sup> Scott, p. 60, Nozari, p. 107, Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties; Chiu, pp. 241-242, and 260, and, Aust, p. 257. Aust states that the notion of 'unequal treaties' has never been accepted in international law since no two states are ever equal. However, what Aust overlooks is the fact that all states are equals in terms of legality, but states are very seldom equals in terms of political sovereignty; a distinction which is important to make.

<sup>100</sup> Schwarzenberger, p. 122.

<sup>101</sup> Article 19 of the League of Nations state: '[t]he Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.' Cited from Howard-Ellis, Annex A, p. 493. See also, Nozari, p. 109, and, UN Doc. A/CONF.39/20, 17 May 1969.

<sup>102</sup> Scott, p. 87, Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties; Chiu, p. 260, and, Wesley-Smith, pp. 21-28.

<sup>103</sup> See below, Cairo Declaration, Potsdam Declaration and the 1952 Japan-ROC Peace Treaty. See also, Nozari, pp. 112-113, and, Chen and Reisman, p. 632. According to Nationalist China the Chinese emperor was forced to sign the treaty of Shimonoseki and in 1937 - during a period of renewed armed conflict with Japan - the Chinese government unilaterally proclaimed that the treaty of Shimonoseki had been terminated.

<sup>104</sup> The People's Republic of China and the Law of Treaties; Chiu, p. 92 and Scott, p. 90. The PRC considers that the principles contained in the VCLT - e.g. article 52 VCLT - are

The doctrine refers, in principle, to all cases in which there were inequalities in the positions of the negotiating parties.<sup>105</sup>

## 3.2 Treaty Based Claims

### 3.2.1 Chinese Statements

Statements made by the People's Republic of China consist of certain specifics that always are mentioned in some form or another. *Firstly*; the island of Taiwan has always been part of Chinese sovereignty. *Secondly*; the treaty of Shimonoseki is illegal and, as such, not binding upon China.<sup>106</sup> It is important for China to make this statement because in Article 2 of the treaty it is stated that 'China cedes to Japan in perpetuity and full sovereignty the following territories, - - - [t]he island of Formosa'. *Thirdly*; the Cairo Declaration<sup>107</sup> states that territories - such as Formosa - stolen by Japan shall be returned to the Republic of China. *Fourthly*; the Potsdam Proclamation affirms, in paragraph 8, that the Cairo Declaration shall be carried out. *Fifthly*; China states that General Assembly resolution 2758 (XXVI), 25 October 1971, recognises that there exist only one China and that the island of Taiwan belongs to China.<sup>108</sup>

### 3.2.2 Treaty of Shimonoseki

When discussing Taiwan and sovereignty, there are two Articles in the 1895 Shimonoseki treaty that becomes important; namely Articles 2 and 10, as cited below. As a result of the Shimonoseki treaty the island of Taiwan became a colony of Japan and its formal status as such continued until the ending of the Second World War.<sup>109</sup>

2. 'China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon --- [t]he island of Formosa, together with all islands appertaining or belonging to the said island of Formosa.'

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based on accepted standards of international law and, as such, are therefore applicable to all treaties past, present and future despite of article 4 VCLT. See also, 'China's White Paper on Human Rights, published 1991, <<http://chinesehumanrightsreader.org/governments/91wp/91hr-wp.html>> last visited 2 August 2004.

<sup>105</sup> 'Whether a treaty is equal does not depend upon the form and words of various treaty provisions, but depends upon the state character, economic strength, and the substance of correlation of the contracting states.' Scott, p. 90-92.

<sup>106</sup> See, for instance, <[www.china.org.cn/english/taiwan/7891.htm](http://www.china.org.cn/english/taiwan/7891.htm)> last visited 20 April 2004.

<sup>107</sup> 22 - 26 November 1943. <<http://www.taiwandocuments.org/cairo.htm>> last visited 28 August 2004.

<sup>108</sup> See for instance, Chinese statements in, UN Docs. A/52/69, 3 February 1997, A/55/256, 4 August 2000, and, A/57/298, 12 August 2002.

<sup>109</sup> Chen and Reisman, p. 611.

10. 'Each of the two governments [China and Japan] shall ... send one or more Commissioners to Formosa to effect a final transfer of that province, and within the space of two months after the exchange of ratifications of this Act such transfer shall be completed.'

Clearly these articles speak of *cession* in combination with a peace treaty as a written agreement between the parties.<sup>110</sup> The Treaty of Shimonoseki, therefore, has the effect of replacing one sovereign by another over Taiwan.<sup>111</sup> The basic foundation of cession lies in the intention of the relevant parties to transfer sovereignty over the territory in question<sup>112</sup> which means that China by the peace treaty loses sovereignty over Taiwan; which implies that before the Shimonoseki treaty Taiwan was accepted as belonging to China.<sup>113</sup>

As the treaty was adopted in 1895, the prohibition of use of force and threat of force as enshrined in Article 2(4) of the Charter of the United Nations, and also international customary law accepted as *ius cogens*; was not applicable.<sup>114</sup> Nor were there any rules - such as enshrined in Article 52 of the VCLT<sup>115</sup> - stating that the treaty was null and void because of the force or coercion used. By applying *the principle of intertemporal law*,<sup>116</sup> that is to say that a legal title or dispute has to be examined according to the conditions and rules in existence at the time title and dispute was claimed; it is possible to state that at the time the treaty was adopted; treaties, such as the Shimonoseki treaty, was legitimate. This since war itself was not illegal and treaties were valid even if they were concluded under duress.<sup>117</sup>

### 3.2.3 The Cairo and Potsdam Declarations

During the Second World War the allied powers gathered in Cairo to determine the future of Japan, and, in the Cairo Declaration it is stated that;

'It is their [the Three Great Allies; China, USA and UK] purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa [Taiwan], and the Pescadores, shall be restored to the Republic of China.'

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<sup>110</sup> Jennings and Watts, p. 680 § 245.

<sup>111</sup> Shaw, p. 339, Jennings and Watts, p. 679 § 244, and, Verzijl, p.366.

<sup>112</sup> Jennings and Watts, p. 680 § 244.

<sup>113</sup> Charney and Prescott, pp. 455 and 457.

<sup>114</sup> Article 28 *Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969. UNTS registration number: 18232, volume number: 1155. The first restriction concerning the resorting to force was primarily emphasized via the League of Nations Covenant, Articles 12-15. See also, Nozari, pp. 108-109.

<sup>115</sup> Korman, p. 231

<sup>116</sup> Jennings and Watts, p. 681 § 245 and p. 702 § 268. See also, *Island of Palmas Case* (1928), RIAA, Vol. II, p. 845.

<sup>117</sup> Jennings and Watts, p. 698-699 § 263, Korman, p.123, and, Chen and Reisman, p. 631, and, 632, footnote 125. See also, *General Assembly Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, UN Doc. A/CONF.39/20, 17 May 1969.



This part of the Cairo Declaration confirms the Chinese view evidenced even today that Japan had - via the treaty of Shimonoseki - stolen Taiwan (Formosa) from China and was - at least politically - obligated to return the island to its rightful sovereign.<sup>118</sup> But a few questions remain to be answered. *Firstly*; as the Cairo Declaration was adopted by President Chiang Kai-shek; what happened with the treaty in force when the Chinese Communist Party (CCP) and Chairman Mao took over? *Secondly*; is the Cairo Declaration truly a treaty binding upon its parties or a political statement coloured by the Allies desire of winning the war?<sup>119</sup>

Keeping in mind that no state can denounce treaty obligations merely because the treaty was concluded by the state but under a previous government<sup>120</sup> the most prudent way of answering the first question is to look upon the actions taken by the PRC after 1949. One has to conclude to what extent the PRC are willing to adopt the privileges and obligations undertaken by the Nationalist China. According to Chiu,<sup>121</sup> the PRC has recognized the validity of both the Cairo Declaration and the Potsdam Proclamation and Chiu also denotes the most logical answer to this acceptance; that both declarations consists of given rights of territorial sovereignty towards PRC.

A unilateral act of a state member to an international instrument can sometimes be inconsistent with the instrument's object and purpose and as such the other member states can claim that the acting state has violated the instrument and thereby they – the other members states - may suspend or terminate the treaty in whole or only with regard to the violating party.<sup>122</sup> But several Western states have, in fact, recognised that treaties ratified between Nationalist China and themselves are still in force.<sup>123</sup>

The question concerning the status of the Cairo Declaration as international instrument is very important and as such must be answered. The reason for this is that the parties, through the Declaration, create obligations for a third state, namely Japan.<sup>124</sup> Nevertheless, according to Chen and Reisman, the Declaration is not to be looked upon as an instrument binding its parties.<sup>125</sup> The reason for this statement is that the Cairo Declaration was not ratified and constitutes therefore 'merely' a political instrument determining the goals of the Allied parties.<sup>126</sup>

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<sup>118</sup> See, for instance, speech by Chaio Kuan-Hua, Chairman of the delegation of the People's Republic of China, at the plenary meeting of the 26th session of the UN General Assembly, 15 November 1971, cited from Barnouin and Yu, p.165.

<sup>119</sup> Charney and Prescott, p. 457.

<sup>120</sup> Jennings and Watts, p. 1253 § 623.

<sup>121</sup> The People's Republic of China and the Law of Treaties; Chiu, p. 94.

<sup>122</sup> See, Article 60 VCLT.

<sup>123</sup> Scott, p. 81.

<sup>124</sup> See Article 34 VCLT; '[a] treaty does not create either obligations or rights for a third state without its consent.' The Article also reflects customary international law in force at the time of the Cairo Declaration. Clearly at the time of the Declaration, Japan had not given its consent to be bound.

<sup>125</sup> Chen and Reisman, pp. 635-636, and, Charney and Prescott, pp. 458-459.

<sup>126</sup> Chen and Reisman, pp. 635-636.

In my opinion the Declaration is nothing more than a basic foundation for future actions and instruments, showing the will of some states but not all states involved. Therefore the Declaration - in itself - cannot create a sovereign title to Taiwan.

The Potsdam Declaration simply repeats and confirms what is already stated in the Cairo Declaration, and claims further that the Cairo Declaration shall be carried out.<sup>127</sup> Most of the reservations stated above concerning the binding force of the Cairo Declaration would apply once again here.

### 3.2.4 Conclusions

China, as showed above, tries to create and uphold a legal title to Taiwan by referring to both the Cairo and Potsdam Declarations. But, when considering that these instruments do not - in themselves - create a legally binding title to sovereignty over Taiwan; Chinese statements with regard to these instruments carry no binding legal force. But one must remember that Taiwan was stripped from the Japanese empire and returned to China<sup>128</sup> and the reason for this re-cedation was not the Cairo and Potsdam Declarations, but because of the Japanese Surrender Treaty<sup>129</sup> where the Japanese Government accepted to abide by the provisions of the Potsdam declaration.<sup>130</sup> Therefore, it is possible to conclude that, after World War Two and, due to the Japanese Surrender Treaty, the re-cedation of Taiwan to China, the island fell under Chinese sovereignty.

## 3.3 Invasion of Taiwan and the Korean War

Not many realise that there exist an actual, both legal and political, link between the Korean War and the question concerning sovereign rights over Taiwan. The Korean War unfolded in the broader context of the Cold War under the US-USSR bloc system as a full blown international war involving troops from twenty different nations thereby implicitly qualifying as the Third World War.

During the period of 1951 and 1952 two of the most ambiguous treaties ever were created.<sup>131</sup> As a treaty concluded between sovereign and legally equal states, the Japanese Peace Treaty of 1951 creates both rights

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<sup>127</sup> Potsdam Proclamation of 26 July, 1945, section eight; 'The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited...' <<http://www.taiwandocuments.org/potsdam.htm>> last visited 28 August 2004. See also, Charney and Prescott, p. 457.

<sup>128</sup> Taiwan, Nation-State or Province? Copper, p. 33.

<sup>129</sup> Japanese Instrument of Surrender, September 2, 1945, cited in Chiang and Chiang, pp. 150-151. UNTS registration number: 465, volume number: 139. See also, Charney and Prescott, p. 457.

<sup>130</sup> Weng, p. 124.

<sup>131</sup> The Treaty of Peace with Japan, signed at San Francisco, 8 September 1951, UNTS registration number: 1832, volume number: 136, and, Treaty of Peace between the Republic of China and Japan, signed at Taipei, 28 April 1952, UNTS registration number: 1858, volume number: 138.

and obligations for these states; but it also contains three peculiarities. *Firstly*; neither the Republic of China - at that time situated in Taiwan - nor the People's Republic of China were invited to the Japanese Peace Conference and neither of them became parties to the Peace Treaty. *Secondly*; in Article 2(a), it is confirmed that Japan recognises the independence of Korea and renounces all sovereign rights over Korea. *Thirdly*; Article 2(b), confirms in part the above mentioned Declarations of Cairo and Potsdam, but not completely. What Article 2(b) declares is that 'Japan renounces all right, title and claim to Formosa [Taiwan]...' What makes this paragraph exceptional is that it does not state to whom Japan renounces its sovereignty over Taiwan, nor does any other Article in the Japanese 1951 Peace Treaty. Therefore three questions emanates, namely; (A), to which state does Japan give up its title over Taiwan?<sup>132</sup> (B), why is Article 2(b) of the 1951 Peace Treaty formulated the way it is? (C), what meaning does the formulation discrepancies between Articles 2(a) and 2(b) have, if any? These questions are important to answer because the treaty in itself does not determine the sovereignty and future of Taiwan.

To be able to answer the first question one has to look at the conduct of the Allied parties the years between 1945 and 1951. At the conclusion of the Second World War, the Japanese forces in Formosa and China surrendered to Chiang Kai-shek, authorized by General Douglas MacArthur to act as trustee of the Allied Forces.<sup>133</sup> The Nationalist Chinese authorities were also sanctioned by MacArthur to undertake temporarily military occupation of Formosa.<sup>134</sup> When, in 1949, the remnants of the KMT army fled across the Formosa Straits [Taiwan Straits] to Formosa they started a major international propaganda campaign in order to secure recognition of sovereignty from the Allied Powers.<sup>135</sup> Needless to say - despite that a number of Western states refused to recognize the finality of the Communist victory - none was forthcoming as they saw it as an internal conflict.<sup>136</sup>

With the outbreak of the Korean War the table suddenly turned and it became vital for Western states not to risk Chiang Kai-shek's position on Taiwan.<sup>137</sup> This is probably the main reason for the incomplete Article 2(b) of the Japanese 1951 Peace Treaty; the area situated between Japan (at that time in the hands of the United States), South Korea, and Taiwan forms a triangle, but it also forms a vital boundary zone between the Cold War blocs East and West. This is a theory well evidenced by certain events and responses undertaken at the same time, namely; (a) the Treaty of Peace between the Republic of China and Japan signed at Taipei, 28 April 1952, (b) the Mutual Defence Treaty between United States and the Republic of

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<sup>132</sup> Charney and Prescott, p. 459.

<sup>133</sup> The trusteeship was not intended to last in perpetuity, it was merely seen by the Allied as a temporary arrangement. Charney and Prescott, p. 460-461.

<sup>134</sup> However, '[i]t is important to remember that Japan surrendered to the Allies and not to China; Chiang Kai-shek occupied Taiwan only as their agent.' Chen and Reisman, pp. 611 and 639.

<sup>135</sup> Chen and Reisman, pp. 639-640.

<sup>136</sup> Chen and Reisman, p. 641.

<sup>137</sup> Chen and Reisman, p. 641. Not because Western leaders overly liked Chiang but because of the enormous geopolitical potential held by the island of Taiwan.

China, (c) President Truman ordering the American 7th fleet in to the Taiwan Straits, (d) Chinese claims concerning the illegal invasion of Formosa, (e) the Chinese intervention in the Korean War,<sup>138</sup> (f) the bombing by American air force inside Chinese territory,<sup>139</sup> and, (g) that Mao puts the Taiwan campaign on hold during the Korean intervention.<sup>140</sup>

With the outbreak of the Korean War, American and United Nations intervention in South Korea and the deployment of the U.S. 7th Fleet along the Taiwan Strait;<sup>141</sup> the Chinese government estimated that it was being threatened from America in, at least, two directions: Korea and Taiwan.<sup>142</sup> Due to the presence of the 7th Fleet; Taiwan started playing an important role in maintaining American supremacy over the Pacific Ocean.<sup>143</sup> This since U.S. leaders were committed to the strategy of *Containment*, according to which Communist China was to be encircled by a both political and military zone<sup>144</sup> with the intention of halting the PRC's efforts to extend Communism into the countries surrounding China.<sup>145</sup> From the American perspective, the Nationalists and Taiwan was a link in the system of containment<sup>146</sup> thereby the two parties concluded in December 1954 the Mutual Defence Treaty<sup>147</sup> that remained in force until 1980, when it was terminated by the U.S. The principal idea behind the Defence Treaty is well evidenced by its preamble where it is stated that;

‘[d]esiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the West Pacific Area’.

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<sup>138</sup> Yearbook of the United Nations, 1950, p. 244-249, and, for instance, General Assembly resolutions 498 (V), 1 February 1951, and, 500 (V), 18 May 1951.

<sup>139</sup> Yearbook of the United Nations, 1950, p. 283-285. and, UN Docs. S/1808 and S/1832.

<sup>140</sup> ‘The Korean War,’ Vol. II, pp. 19-25, and New War of Nerves: Mao’s Legacy in Beijing’s Policy toward Taiwan; Li, p. 368.

<sup>141</sup> Creating quite a debacle concerning the armed invasion of Taiwan by U.S. troops when PRC in a cablegram to the Security Council (S/1715) accused the U.S. for violating Chinese sovereignty by placing U.S. Navy and Air force on Chinese territory. Yearbook of the United Nations, 1950, pp. 287- 298, UN Doc. S/1836 and General Assembly resolution 384 (V), 14 December 1950. Lieberthal, p. 88, ‘The Korean War,’ Vol. II, pp. 19-23, and, President Truman’s statement on the Mission of the U.S. Seventh Fleet in the Formosa Area, June 27 1950, cited from Chai and Chai, pp. 164-165.

<sup>142</sup> Speech by Chiao Kuan-Hua, Chairman of the delegation of the People’s Republic of China, at the plenary meeting of the 26th session of the General Assembly (November 15 1971), Chairman Mao’s talk with a French delegation, July 13 1970 cited from Barnouin and Yu, p. 149. PRC Foreign Minister Zhou En-lai’s statement refuting Truman’s statement of June 27 1950, cited from Chai and Chai, pp. 168-169. All claiming that the U.S. illegally had invaded Taiwan being Chinese territory. The Chinese Communists regarded the liberation of Taiwan as the last battle of China’s civil war, Lieberthal, p. 88.

<sup>143</sup> Garver, pp. 35-36.

<sup>144</sup> Barnett, p. 12, Garver, chapter 12 and, Fitzgerald, p. 51.

<sup>145</sup> Garver, p. 73, Barnouin and Yu, p. 98, and, Lieberthal, p. 89. See for instance Mao’s telegram *re* the Decision to Send Troops to Korea, 2 October 1950; and calling them Chinese People’s Volunteers, cited from Goncharov, Lewis and Xue, p. 275.

<sup>146</sup> Friends and Enemies, the United States, China, and the Soviet Union, 1948-1972; Chang, pp. 18-19, 60-62 and 80. See U.S. Department of State’s Policy Information Paper, Formosa, December 12 1949, cited from Chai and Chai, pp. 155-159.

<sup>147</sup> UNTS registration number: 3496, volume number: 248.

The idea was that the alliance between the U.S. and the Republic of China would deter PRC invasion of Taiwan, being an ally of the United States.<sup>148</sup>

During the Korean War<sup>149</sup> - where PRC at that moment took part - Beijing insisted that the U.S. agreed to withdraw from Taiwan and the Taiwan Straits and recognition of the Cairo and Potsdam Declarations as a precondition for the beginning of talks about ending the Korean War.<sup>150</sup> However, as the U.S. strategy increasingly was directed toward a long-term confrontation with Communist China the notion grew that Beijing was not to be rewarded with Taiwan for its aggression in Korea and that Taiwan was to remain an important asset in countering Communist China to be abandoned.

The 1952 Peace Treaty concluded between Japan and the Republic of China<sup>151</sup> reiterates - in its Article 2 - Article 2(b) of the Japanese 1951 Peace Treaty; namely that Japan renounces all sovereign rights and claims to Taiwan. As in the 1951 Treaty no definition regarding the state which gains sovereignty over Taiwan is made. But this time other documents explain the underlying reason for this. In a meeting between U.S. Secretary of State Dulles and the ROC Ambassador Koo it was stated that '[t]he territories would be handled by the Allies themselves and it should not require Japan to confirm to whom each of the territories should be ceded.'<sup>152</sup>

What is more interesting is Article 4 of the 1952 Peace Treaty, stating that 'all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.' As a consequence of this statement the treaty of Shimonoseki is terminated as between the parties which strengthens the notion that the island of Taiwan was handed over to China; nevertheless, the question remains, to the government in Beijing or authorities in Taipei?

Needless to say the formulations of both the 1951 and the 1952 Peace Treaties enraged the PRC, and PRC's Foreign Affairs Minister Zhou En-lai called them a violation of international agreements and a flagrant violation of both the Cairo and Potsdam Declarations.<sup>153</sup> But the best evidence of the Chinese notion of the 1951 and 1952 Peace Treaties is;

'Now the Central People's Government of the People's Republic of China once again declares: if there is no participation of the People's Republic of China in the preparation, drafting and signing of a peace treaty with Japan, whatever the contents and result of such a treaty,

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<sup>148</sup> Garver, p. 54. In March 8, 1999 the U.S. Attorney General submitted a secret memorandum that stated: '...I hereby designate the following countries as country threats under the NSL for 1999/2000; Russian Federation, People's Republic of China ... and Taiwan.' Cited from Gertz, p. 225. I feel that this memorandum nicely shows how politics change with time; the former ally became labelled as a threat.

<sup>149</sup> Mao's China and the Cold War; Chen, pp. 99-107, C. P. Fitzgerald, p. 56, and, Gittings, pp. 181-189.

<sup>150</sup> Garver, pp. 48-49, and, Gittings, pp 196-197.

<sup>151</sup> See treaty text in, Chai and Chai, pp.178-180.

<sup>152</sup> December 19, 1950, cited from, Chai and Chai, pp. 173-174.

<sup>153</sup> PRC Foreign Affairs Minister Zhou En-lai's Statement on the U.S. Proposal of the Japanese Peace Treaty, August 15, 1951, cited from, Chai and Chai, p. 177.

the Central People's Government considers it all illegal, and therefore null and void.<sup>154</sup>

Zhou awakens a very interesting question by this statement. As Japan, by the Japanese Instrument of Surrender signed 2 September 1945, adhered to the Potsdam Proclamation and thereby ceded Taiwan to China; can Japan then six years later ratify another treaty of cession concerning the same territory? The answer ought to be that Japan most certainly cannot.

### 3.4 Chinese Representation in the United Nations

At the beginning of this chapter several of PRC's arguments claiming sovereign rights over the island of Taiwan were listed. One of them is the General Assembly resolution 2758 (XXVI)<sup>155</sup> concerning 'Restoration of the lawful rights of the People's Republic of China in the United Nations.'<sup>156</sup>

'--- [r]ecognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

the Decides to restore all its rights to the People's Republic of China and to recognize the representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from place which they unlawfully occupy at the United Nations and in all the organizations related to it.'

The resolution speaks of transfer of representation within the United Nations, but does it really - even implicitly - mention the relationship between China and Taiwan and their possible sovereign rights? The situation is based on the fact that more than one authority is claiming to be the government entitled to represent a member state in the United Nations, and these entities resides on diametrical sides of the Cold War blocs; therefore the question ought to be considered in the light of the purposes and principles of the UN Charter and the specific circumstances of this case.

There might be two answers to the question mentioned above, *firstly*; a point made by the General Assembly representative of Equador in 1968 concerning discrepancies between the concepts of 'state' and of 'government'.<sup>157</sup> He claims that a state is characterized by an ownership over a territory which is permanent in time, while a government as exerciser of sovereign rights might change over time. In the light of this statement it is feasible to look upon China and Taiwan as one state and the transfer within the UN; from ROC representation to PRC representation as being a

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<sup>154</sup> PRC Foreign Affairs Minister Zhou En-lai's Statement on the U.S. Proposal of the Japanese Peace Treaty, August 15, 1951, cited from, Chai and Chai, p. 177.

<sup>155</sup> Adopted at the General Assembly 1976th plenary meeting, October 25, 1971.

<sup>156</sup> See also, Foot, chapter 2, and, Schindlmayr, p. 220.

<sup>157</sup> Yearbook of the United Nations, 1968, p. 168, and, 1969, p. 154-155, where the Cambodian representative makes the same statement.

logical passing of governmental representatives. It has nothing to do with excluding a member of the UN but merely changing this member's representative. A notion also adhered to by other UN members, for instance, France and Iraq.<sup>158</sup> *Secondly*; among the arguments raised during the 1968 General Assembly session was that the PRC 'had for some time met all the conditions required for membership in the United Nations and was being arbitrarily excluded primarily because the régime which governed it was not to the liking of certain powers.'<sup>159</sup> This statement opens up possibilities to argue that since ROC is recognised as legal representative of China within the UN, and as China under the PRC fulfils the requirements for membership but is excluded from this membership; there might be two states after all, one China and one Taiwan.<sup>160</sup> Otherwise the statement above would not be logic since if there were only one China and Taiwan was to be seen as a province of China,<sup>161</sup> then China is already represented within the UN and there would be no need for launching any claims regarding Chinas qualifications as a future member of the UN.

During the discussions concerning representation of China within the UN, arguments were raised airing the notion of 'two Chinas' and similar concepts.<sup>162</sup> And, in June 1953 U.S. Secretary of State Dulles started composing a new China policy where he tried to devise a way for both China and Taiwan to be allowed within the UN General Assembly.<sup>163</sup> Not only would both Beijing and Taiwan oppose the idea, but most countries that at that time recognized the Chinese Communist regime would also do so, since to do otherwise could create problems for them in their relations with Beijing. The thought was that if the proposal was formulated carefully enough, a majority of UN member states might accept a seating comprising of both Beijing and Taiwan.<sup>164</sup> However, this vision was counteracted by statements made by PRC when declaring that they would not accept any plan of forming two Chinas within the United Nations and that there existed only one China and Taiwan was part of that China as a province returned to China after the second World War and that the question concerning Taiwan is strictly an internal Chinese affairs.<sup>165</sup> It was also stated that;

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<sup>158</sup> Yearbook of the United Nations, 1968, p. 168.

<sup>159</sup> Yearbook of the United Nations, 1968, p. 162, Barnett, p. 57, and, *Friends and Enemies, the United States, China, and the Soviet Union, 1948-1972*; Chang, p. 102. The PRC accused the U.S. and their containment policy - discussed above - directed at the PRC as being the greatest hindrance towards PRC representation within the UN. See also, *Legitimacy in the International System*; Franck, pp. 738-739.

<sup>160</sup> Barnett, p. 87-88.

<sup>161</sup> See for instance *Statements of the Foreign Affairs of the PRC*, cited from Yearbook of the United Nations, 1971, p. 127.

<sup>162</sup> U.S. Secretary of State Dulles told ROC Foreign Minister Yeh and ROC Ambassador Koo that two Chinas existed, 'just as there were two Germanies, two Koreas and two Viet-Nams.' cited from *Friends and Enemies, the United States, China, and the Soviet Union, 1948-1972*; Chang, p. 147.

<sup>163</sup> *Friends and Enemies, the United States, China, and the Soviet Union, 1948-1972*; Chang, p. 146.

<sup>164</sup> Barnett, p. 91.

<sup>165</sup> Yearbook of the United Nations, 1971, p. 162, where the claims made are based on the terms of the Cairo Declaration of 1943 and the Japanese Peace Treaty of 1951. Compare with Article 2(7) of the Charter of the United Nations.

‘The Chinese Government declared that the Chinese people and Government firmly opposed “two Chinas,” “one China, one Taiwan” or any similar absurdities, as well as the fallacy that “the status of Taiwan remains to be determined” and the scheme of creating “an independent Taiwan.” Should any such situation or any other similar situation occur in the United Nations, the Government of the People’s Republic of China would have absolutely nothing to do with the United Nations.’<sup>166</sup>

The PRC strict unwillingness to adhere to any UN conduct concerning the ‘two Chinas’ concept - and PRC’s threat of not joining UN if any such situation occurs - illustrates also the reluctance shown by Zhou En-lai concerning the overall PRC representation in the UN seen as a bourgeois institution. Zhou was concerned that a PRC membership, within the UN, might give the impression that the PRC and the CCP were eager to become a part of this organisation thereby miss-crediting the Chinese Communist Party’s struggle.<sup>167</sup>

### 3.4.1 One or Two Chinas

Even Chairman Mao stressed, in 1949, the importance of unification with Taiwan under the principle of ‘one China,’ which would be the foundation for the Chinese government’s policy on Taiwan for the next 55 years. As a well suited evidence of PRC’s willingness to reunite with Taiwan; the PRC adopted a communiqué with its former enemy the United States<sup>168</sup> where the PRC reaffirmed its position with regard to Taiwan and the U.S. representative stated that ‘there is but one China and that Taiwan is a part of China.’ It was also exclaimed - by the U.S. - that the question concerning the reunification is exclusively a Chinese internal affair.<sup>169</sup>

During the period from the United Nations replacement from Taipei to Beijing as the representative of China; more and more PRC statements concerning the reunification of Taiwan builds on the same foundations namely; (A) there is only one China in the world and Taiwan is a Chinese province which ought to be returned to the motherland;<sup>170</sup> (B) force can be

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<sup>166</sup> Yearbook of the United Nations, 1971, p. 127.

<sup>167</sup> Barnouin and Yu, p. 64-65.

<sup>168</sup> The Shanghai Communiqué, February 28, 1972, Chai and Chai, pp. 241-246. <<http://www.taiwandocuments.org/communique01.htm>> last visited 27 August 2004. See also US Docs. concerning the Shanghai Communiqué; <<http://foia.state.gov/documents/foiadocs/4f91.PDF>>, <<http://foia.state.gov/documents/foiadocs/4f93.PDF>>, and, <<http://foia.state.gov/documents/foiadocs/4f92.PDF>> all last visited 2 September 2004.

<sup>169</sup> Chai and Chai, p. 245.

<sup>170</sup> ‘An idea for the peaceful reunification of the Chinese mainland and Taiwan,’ June 26, 1983, cited from Selected Works of Deng Xiaoping, Vol. III (1982-1992). The Taiwan Question and the Reunification of China, Taiwan Affairs Office & Information Office, State Council, The People’s Republic of China, August 1993, Beijing, China, cited from Taiwan, Nation-State or Province; Copper, pp. 74, and, 83, the Shanghai Communiqué from 1972. NPC Chairman Ye Jianying’s Nine Points on Reunification, September 30,



used by the PRC to prevent any independence movements in Taiwan;<sup>171</sup> (C) no external interference will be tolerated;<sup>172</sup> (D) certain freedoms are still to be given Taiwan;<sup>173</sup> and, (E) self-determination is not an option.<sup>174</sup>

When analyzing the Taiwan question one is struck by the total confusion concerning the sovereignty issue. There is a plethora of treaties contradicting one another and third party interventions, both political and military, with the aim of protecting their own geopolitical interests.

When trying to deduce some form of hard fact I have chosen to disregard from the 1951 and the 1952 treaties because of their inaccuracy and third party intervention. Therefore I will use three treaties to start from when looking upon Chinese statements to see if they are legally stable with regard to Chinese claims of sovereignty over Taiwan. And these are the Cairo Declaration, the Potsdam Proclamation and the Japanese Surrender Treaty. Both the Cairo and the Potsdam Declarations state that sovereignty over the island of Taiwan is to be ceded to China and the Japanese Surrender Treaty confirms the Japanese acceptance of this cession. Therefore, at the end of the 1940s, Taiwan is under Chinese sovereignty. The question then appears - that after the flight of KMT and Chiang Kai-shek to Taiwan - if China has lost sovereignty over Taiwan?

#### **3.4.1.1 Conquest and the use of force**

After the final establishment of the prohibition of use of force and threat of force via Article 2(4) of the Charter of the United Nations, this method of gaining territorial sovereignty must be looked upon as obsolete and most probably illegal.<sup>175</sup> However, when considering that Chiang and the KMT fled to a part of their own country; is it then really conquest as the definition of conquest is 'the act of defeating an opponent and occupying all or part of

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1991, cited from Chiang and Chiang, pp. 254-256, and, Taipei-Peking Relations: The Sovereignty Issue; Wu, p. 188.

<sup>171</sup> Taipei-Peking Relations: The Sovereignty Issue; Wu, p. 188. The Taiwan Question and the Reunification of China, Taiwan Affairs Office & Information Office, State Council, The People's Republic of China, August 1993, Beijing, China, cited from, Taiwan, Nation-State or Province; Copper, pp. 84-85.

<sup>172</sup> 'An idea for the peaceful reunification of the Chinese mainland and Taiwan,' June 26, 1983, cited from Selected Works of Deng Xiaoping, Vol. III (1982-1992). The Taiwan Question and the Reunification of China, Taiwan Affairs Office & Information Office, State Council, The People's Republic of China, August 1993, Beijing, China, cited from, Taiwan, Nation-State or Province; Copper, p. 85. The Shanghai 1972 Communiqué, and, Kubáková and Cruichshank, pp. 177-178.

<sup>173</sup> 'An idea for the peaceful reunification of the Chinese mainland and Taiwan,' June 26, 1983, cited from Selected Works of Deng Xiaoping, Vol. III (1982-1992), Taipei-Peking Relations: The Sovereignty Issue; Wu, pp. 187-188. The Taiwan Question and the Reunification of China, Taiwan Affairs Office & Information Office, State Council, The People's Republic of China, August 1993, Beijing, China, cited from, Taiwan, Nation-State or Province; Copper, p. 84. NPC Chairman Ye Jianying's Nine Points on Reunification, September 30, 1991, cited from Chiang and Chiang, pp. 254-256.

<sup>174</sup> The Taiwan Question and the Reunification of China, Taiwan Affairs Office & Information Office, State Council, The People's Republic of China, August 1993, Beijing, China, cited from, Taiwan, Nation-State or Province; Copper, p. 84, and, Lieberthal, pp. 333-334.

<sup>175</sup> Shaw, pp. 340-342.

its territory...<sup>176</sup> Conquest alone does not itself constitute a basis of title to land. The reason for being since a treaty of cession by the former sovereign or international recognition is a condition for a conqueror to gain sovereignty over the conquered territory and its inhabitants.

#### **3.4.1.2 Occupation of terra nullius**

Occupation consists of acquiring sovereignty over territory which is not under the sovereignty of any other state.<sup>177</sup> Occupation can only be accomplished by a state, not private persons, and it must be effective. Therefore, the flight to Taiwan by the KMT can not be seen as occupation of terra nullius. This since Taiwan at that moment was - due to the Japanese Surrender Treaty - under Chinese sovereignty.

#### **3.4.1.3 Prescription**

As a method of establishing sovereignty over a territory not seen as terra nullius; prescription<sup>178</sup> must be evidenced by a peaceful exercise of *de facto* sovereignty for a long period of time and the presumed acquiescence of the former sovereign.<sup>179</sup> But as the People's Republic of China from the period of KMT flight in 1949 consistently has protested against KMT presence in Taiwan and claiming the island as a province belonging to China; it is prudent to conclude that the former sovereign has not acquiescent to another entity's sovereign rights over Taiwan.

Since neither occupation of terra nullius nor prescription is, in this case, valid the only logical answer is that Taiwan does belong to China being sovereign. A fact that has been diverted and prolonged because of foreign interference.

### **3.4.2 An Independent Taiwan**

According to Article 1 of the Montevideo Convention, a state should possess the following qualifications; (a), a permanent population; which Taiwan has, (b), a defined territory; the island and its archipelago, (c), a authority; which Taiwan have had since 1949, and (d), a capacity to enter into relations with other states, i.e. a sovereign authority. The authorities of Taiwan has under several years been able to adopt financial transactions and treaties with other states, but, political treaties and arms deals have been strongly protested against by the PRC. Is it therefore possible to claim that the government of Taiwan is *de facto* sovereign and *de jure* semi-sovereign? For further argumentation I assume that by adopting the Montevideo Convention that the Republic of China is an entity with certain qualifications making it *de facto* a sovereign state.

But has the authorities of Taiwan ever made claims of statehood? An entity fulfilling the qualifications mentioned above does not become a state

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<sup>176</sup> Shaw, p. 340.

<sup>177</sup> Shaw, pp. 342-343, and, Shearer, p. 147.

<sup>178</sup> Shearer, pp. 153-154, and, Shaw, pp. 343-344.

<sup>179</sup> Shaw, p. 350.

merely by possessing these qualifications. There must be something more; namely a claim of being recognized as a state.<sup>180</sup> In July 1999 Taiwan President Lee says, in a German radio interview, that China and Taiwan should deal with each other on a "state-to-state" basis, thereby implying that Taiwan is moving towards a formal declaration of independence.<sup>181</sup> PRC officials, however, responded by exclaiming that Lee's statement was a monumental disaster. This state-to-state argument is the strongest statement ever made by an ROC official publicly. But if it is to be considered as a claim of statehood remains dubious. Even if this statement was to be recognized as a claim of independence it would probably fall flat on the ground and receive no further recognition by third party states<sup>182</sup> due to PRC policy.<sup>183</sup>

#### **3.4.2.1 Right of Self-determination**

So far Chinese claims of sovereignty over Taiwan seems logical and carries legal weight. But statements made by PRC officials concerning the Taiwanese right of self-determination<sup>184</sup> seems peculiar since all other statement from the PRC is somewhat obscured and vague. Have the PRC discovered that a Taiwanese claim for self-determination would be recognized by the international community?<sup>185</sup> Or is the PRC concerned about how other states might react if the Chinese People's Liberation Army (PLA) were to invade Taiwan days after the ROC made a claim of independence?<sup>186</sup>

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<sup>180</sup> There is two theories concerning the implications of recognition; firstly that 'it is only through recognition that a state comes into being under international law, secondly 'whereas the latter approach maintains that once the factual criteria of statehood have been satisfied, a new state exists as an international person, recognition becoming merely a political and not a legal act in this context.' Shaw, p. 146.

<sup>181</sup> The origins of conflict across the Taiwan Strait; Copper, p. 41.

<sup>182</sup> By 12 November 2004 only twenty six states recognized Taiwan as an independent state, namely; Belize, Burkina Faso, Costa Rica, Dominican Republic, El Salvador, Gambia, Grenada, Guatemala, Haiti, Honduras, Kiribati, Malawi, Marshall islands, Nicaragua, Palau, Panama, Paraguay, Saint Kitts & Nevis, Saint Vincent & Grenadine, São Tomé & Príncipe, Senegal, Solomon islands, Swaziland, Chad, Tuvalu and the Vatican state. Information received from Ingemar Ottosson; see also, <[www.wordiq.com/definition/Foreign\\_relations\\_of\\_the\\_Republic\\_of\\_China](http://www.wordiq.com/definition/Foreign_relations_of_the_Republic_of_China)> last visited 17 July 2004.

<sup>183</sup> Hsiung, p. 46.

<sup>184</sup> The Taiwan Question and the Reunification of China, Taiwan Affairs Office & Information Office, State Council, The People's Republic of China, August 1993, Beijing, China, cited from, Taiwan, Nation-State or Province? Copper, p. 84, Lieberthal, pp. 333-334, Shearer, p. 111, Shaw, pp. 144-146, 177-182, 337, 354-357, and, Jiang, in full.

<sup>185</sup> Chinas relations with Hong Kong and Taiwan; Chang, p. 127 and 136-137, and, Chan, p. 77.

<sup>186</sup> 'A second unsettling possibility is a declaration of independence by Taiwan. If Taiwan should make such a declaration, Beijing would likely feel obligated to respond. It could impose a military blockade... which may, in turn, elicit a diplomatic or military response from the U.S.' Lieberthal, pp. 333-334, and, 'New War of Nerves: Mao's Legacy in Beijing's Policy toward Taiwan', Li, pp. 366, and, 399.

When examining international instruments<sup>187</sup> concerning the right of self-determination a question appears, namely; who are peoples? The definition of peoples ought to be the population of a territory within international recognized borders.<sup>188</sup> This is a territorial criterion and does not depend upon the ethnicity, language or religion, etcetera, of the population. As these instruments, mentioned above, does not approve of secession there has to be some form of an overseas criterion by which is meant that there must be some distance between the mainland and the territory to allow the people to break free by claiming self-determination. When it comes to the Taiwan question concerning the authorities possibilities of claiming self-determination, a problem occur; the United Nations and several governments have recognized the island as a part of Chinese sovereignty.<sup>189</sup> As a consequence of this the island of Taiwan does not have the right of self-determination and can only become an independent state with the express, or possibly the implicit, approval of the PRC.<sup>190</sup>

#### **3.4.2.2 The use of force**

Several statements from PRC officials confirm the Chinese view that if Taiwan tries to break free, force will be used to prevent secession.<sup>191</sup> These statements are made despite of the, according to Professor Carlson's, notion of a declining aggressiveness in Chinese territorial claims.<sup>192</sup> According to the wording of Article 2(4) of the Charter of the United Nations, the force used during a struggle for self-determination was not covered by the prohibition of use of force; strictly focusing on force from an international perspective. Thereby, if force was used by PRC to counteract a struggle for self-determination, force might be used by ROC in order to counter the force used by the mainland; this to achieve self-determination.<sup>193</sup> But, as declared above, Taiwan does not have the right of self-determination. So if force were to be used by either side; what implications would that have?

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<sup>187</sup> The United Nations Charter, Articles 1(2) and 55, ICCPR, Article 1(1), ICESCR, Article 1(1), General Assembly Friendly Relations Declaration, resolution 2625 (XXV); '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.'

<sup>188</sup> Legitimacy in the International System; Franck, pp. 745-746, and, Kiwanuka, pp. 86-91.

<sup>189</sup> General Assembly resolution 2758 (XXVI) speaks of shifting representatives within the same country. Because of the policy of the two governments, the UN was in the lucky position to be able to label the whole issue one of mere representation, which had the effect that, via Assembly resolution 2758, Taiwan was seen as a part of mainland China. See also, Keesing's Record of World Events, 1996, p. 45286, depicting the European Union's notion of 'one China.' Duursma, p. 352, and, Luard, pp. 729-744.

<sup>190</sup> For further references concerning self-determination, see Duursma, in full.

<sup>191</sup> Even if the situation would be regarded as one between states, the mere threat of using force has never been argued under Article 2(4) of the Charter. UN Charter, a Commentary, 2002, p. 124, para. 38. See also, 'National Unity, Sovereignty and Territorial Integration,' Chu, pp. 98-102.

<sup>192</sup> Carlson, pp. 677-698.

<sup>193</sup> Shaw, pp. 795-797, and General Assembly resolution, 2625 (XXV), 24 October 1970.

According to the Friendly Relations Declaration<sup>194</sup> nothing in the Declaration shall be construed as authorizing any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states. Since article 2(4) of the Charter of the United Nations only relates to international usage of force, a purely internal armed conflict is not prohibited.

Since a internal rebellion falls within the domestic sphere of each sovereign state and states are free to use force to counteract such a rebellion to 'defend the national unity and territorial integrity of the state'<sup>195</sup> everything points to that if Taiwan were to rebel against Chinese sovereignty by claims of independence, and the PRC did not agree of this claim, then force might be used legally to strike down on such a rebellion.

Therefore, Chinese statements concerning the use of force if claims of independence is made, turns out to be legitimate. As such also the claims made by the PRC concerning the Taiwan question being one of internal affairs must be acknowledged since international law looks upon civil wars and internal armed conflicts as being purely within the domestic jurisdiction of a state.<sup>196</sup>

#### **3.4.2.3 Non-external interference**

According to Article 2(7) of the Charter of the United Nations, no state may intervene in affairs being of an essentially domestic matter, and according to the Friendly Relations Declaration shall '[e]very state [shall] refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.'<sup>197</sup> Nevertheless, sometimes states are allowed to support freedom movements in other countries though it depends on the classifications of that particular movement.<sup>198</sup>

However, international law and regulations put aside, with regard to PRC's position regarding Taiwan, seen by PRC purely as a domestic question, not tolerating any international intervention – as shall be made obvious below – and the majority of states' policies with regard to the Taiwan question, everything points to the answer that no state willingly will interfere in Chinese internal affairs.<sup>199</sup> And since China is a permanent

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<sup>194</sup> General Assembly resolution 2625 (XXV), 24 October 1970. Adopted by consensus thereby showing the opinio juris of all United Nations member states.

<sup>195</sup> Additional Protocol II of the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Article 3(1). UNTS registration number: 17513, volume number: 1289.

<sup>196</sup> Shaw, pp. 798, and, 815.

<sup>197</sup> See also, '*Declaration on the Granting of Independence to Colonial Countries and Peoples*,' General Assembly resolution 1514 (XV), 14 December 1960, para. 6; 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

<sup>198</sup> Shaw, p. 798-802.

<sup>199</sup> See for instance, as examples of Chinese vigilance, 'China opposes US congress resolution on Taiwan,' *People's Daily*, 19 July 2004. 'China slams US selling radar system to Taiwan,' *People's Daily*, 1 April 2004. 'US should reconsider its Taiwan policies: Expert,' *People's Daily*, 14 July 2004.

member of the Security Council, the Council would be hindered to intervene due to Chinese veto-power.

### 3.5 Conclusion Regarding Taiwan

The question concerning sovereignty over Taiwan carries not only legal, but also, political implications. Since one government - the PRC - is making a claim of sovereignty over a particular piece of territory and another administration is actually wielding governmental control over the same territory. However, it must be pointed out that Taiwan has not formally proclaimed independence. Thus, so far, Taiwan is a *de facto* but not formally *de jure* independent entity.<sup>200</sup>

Due to normative factors, such as the Cairo and Potsdam Declarations and the Japanese Surrender Treaty, whereby Japanese governmental officials accepted the terms enshrined in the Potsdam Declaration as legally binding upon Japan, it is possible to conclude that PRC *de jure* holds sovereignty over Taiwan. Nevertheless, a multitude of political factors and repeated external interventions has made the question tainted with East-West bloc politics and the both internal and external political agendas of other states, thereby suggesting a *de facto* sovereignty over Taiwan held by the Taiwanese authorities. A sovereignty, displayed by total governmental control, that has lasted for over fifty years and, certainly, Taiwan satisfies the generally accepted criterion's for statehood, as the island has a population, a territory under authority control, and a government with the ability to enter into international relations, more or less, independently of any other state and government. That ability, however, has been hindered by PRC's strategy, while calling for unification, aims to isolate Taiwan economically and politically, thus, creating a *quid pro quo* containment-policy of its own as a method of serving PRC's own goals.<sup>201</sup>

Since Taiwan - during the twentieth century - has not been subjected to the actual sovereignty or governance of the PRC, and because of the widespread international assumption that Taiwan belongs to China, assertions that the PRC has violated human rights - as enshrined in treaties binding upon China or via international customary law - in general and the exercise of the right of self-determination in specific, cannot be made with regard to the residents of Taiwan. Thus, the precondition for Taiwan's independence on a *de jure* basis apparently does not exist. However, if the claim to self-determination was made by the Taiwanese government, it might awaken - if not legal at least political - awareness and a more widespread international recognition.<sup>202</sup> This since a claim of independence

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<sup>200</sup> Raič, p. 76.

<sup>201</sup> Words across the Taiwan Strait, a Critique of Beijing's 'White Paper' on China's Reunification, Copper, p. 119, 'New War of Nerves: Mao's Legacy in Beijing's Policy toward Taiwan', Li, pp. 379-380, and, Saich, p. 277.

<sup>202</sup> By 12 November 2004 only twenty six states recognizes Taiwan as an independent state, namely; Belize, Burkina Faso, Costa Rica, Dominican Republic, El Salvador, Gambia, Grenada, Guatemala, Haiti, Honduras, Kiribati, Malawi, Marshall islands, Nicaragua, Palau, Panama, Paraguay, Saint Kitts & Nevis, Saint Vincent & Grenadine, São

could compel states to actively recognise or deny such a claim of independence.

The ongoing dispute between the PRC and the Taiwanese government could be addressed through a number of different processes such as the use of force, adjudication, total inactivity, external intervention or negotiations. These methods are nevertheless not without conceivable negative effects. As far as external intervention is concerned the PRC has rigidly stated that no external intervention in any way will be tolerated, therefore, this method is probably the second to least effective when trying to solve the dispute. The least plausible method of solving the dispute ought to be adjudication.<sup>203</sup> Even if this procedure of conflict-solving was, in theory, possible, the parties would never accept a verdict not in line with their individual policy. And the PRC's exclamation concerning external interference would most likely also fall under this heading. Therefore, both adjudication and any other method of external influence would most likely fail to solve the dispute due to the unwillingness shown by the parties.

During the twentieth century, total inactivity was the preferred method of not aggravating the situation and, thereby, preserving both, the status quo and regional peace, and, it might turn out that the best method when handling the Taiwan question is to just ignore it.<sup>204</sup> But, acquiescence due to PRC governmental silence will most likely harm the PRC's position on sovereign rights over Taiwan. In his 'Law of Nations' Brierly put forward the question concerning how far a protesting state must go as to prevent another party from acquiring title to a specific part of territory<sup>205</sup> and, as far as the PRC are concerned it has not acquiesced to any claims of title put forward by the Taiwanese government. This since actions and threats made by the PRC with the aim of thwarting international recognition of Taiwan as an independent state cannot be seen as reflecting passivity. As typical non-acquiescence actions one might mention the fact that the PRC managed to oust the ROC from China's seat in the UN in 1971, and that PRC has through diplomacy and military actions made internationally known its positions concerning the island of Taiwan and its sovereignty status. The fact that China has not militarily intervened to incorporate Taiwan must be viewed in light of the United Nations Charter in general and the plausible violations of Articles 2(3), 33, and, 2(4) of the Charter in particular, namely, that international conflicts should be settled by peaceful means and that the, strictly domestic, threat of force and use of force, possibly, is forbidden.

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Tomé & Príncipe, Senegal, Solomon islands, Swaziland, Chad, Tuvalu and the Vatican state.

<sup>203</sup> The People's Republic of China has not accepted the ICJ's compulsory jurisdiction. See Chapter 5 '*Treaties - Suppressor of Sovereignty?*'

<sup>204</sup> During a conversation with Secretary of State Henry Kissinger, Chairman Mao stated that the PRC could do without Taiwan for the time being, and that the PRC could wait for a hundred years before solving the question. At the same time Mao also said that he did not believe in a peaceful solving of the question. <<http://foia.state.gov/documents/foiadocs/4f96.PDF>> 'Memorandum of conversation,' 12 November 1973. Last visited 2 September 2004.

<sup>205</sup> Brierly, pp. 170-171.

As for the last two methods, use of force and negotiations, I strongly believe that they are linked together. A requirement that Taiwan and the People's Republic of China engage in good faith negotiations to seek a solution would certainly be reasonable and may be necessary to solve the question, as this duty to conduct in good faith negotiations finds substantial support in the Charter of the United Nations and more generally in international law.<sup>206</sup> However, as PRC leadership has created a Chinese nationalism built on the notion of Chinese victimization it may turn out difficult for the PRC Government to recommend compromises.<sup>207</sup> Negotiations are important because, not only is the use of force, by either side, undesirable, but its initiation might violate international law. However, the supposed violation of international law – as a result of PRC/Taiwanese use of force - might turn out to be a minute problem when compared to the likelihood that the dispute would escalate into a major military conflict between two large and powerful states - the United States and China. The reason being that the long-held position of the PRC, that Taiwan is a renegade province of China, contains the seed of an armed conflict and the U.S. still has strong connections with Taiwan. As an example of this question being a veritable powder keg one might relate to one of the latest disputes between Taiwan and Beijing, when, in the 1995-1996 crisis, the PRC fired missiles over the Taiwan Strait and the U.S. sent warships to protect Taiwan.<sup>208</sup> A crisis that began with the Taiwanese President Lee's U.S. visa approval and the 1996 Taiwanese presidential election with the victory by President Lee,<sup>209</sup> and it resembles the geopolitical pattern from the 1950s and 1960s especially with the U.S. sending the 7th Fleet into the Taiwan Strait during the Korean War. This is a national development in Taiwan that spells danger for the Chinese Communist Party; therefore, the Communist leadership has forcefully demonstrated their determination to use force if Taiwan declares independence. Another strong incentive for Taiwan to start negotiations is that logically the Taiwanese authorities have to try to seek a peaceful solution before Taiwan could legally launch a claim of independence.

In the absence of good faith negotiations between the PRC and Taiwan, there will only be two realistic alternative solutions, namely, the total independence of Taiwan or the total absorption of Taiwan into China, this with the conceivable use of military force. Therefore, the question of unification or independence is, most preferably, a matter between the PRC and Taiwan as an entirely internal affair. However, third party intervention may turn out to be the only way of salvation. Nevertheless, so far, the island of Taiwan is *de jure* under the sovereignty of mainland China and *de facto* under the sovereignty of the Taiwanese authorities.

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<sup>206</sup> Duursma, p. 360.

<sup>207</sup> Sutter, p. 81.

<sup>208</sup> New War of Nerves: Mao's Legacy in Beijing's Policy toward Taiwan; Li, p. 367, Sutter, pp. 80-82 and 90-91, and, Keesing's Record of World Events, 1996, p. 40997.

<sup>209</sup> The Origins of Conflict across the Taiwan Strait; Copper, pp. 41-44, Keesing's Record of World Events, 1995, pp. 40551, 40644, 40680, 40826 and 1996, pp. 40996-40997, and, Saich, pp. 277-278, and, 282-283.



## 4 The Almighty Super-Sovereigns

As mentioned above in Chapter 2.3.2 ‘*Political Sovereignty*,’ when studying the both normative and geopolitical implications of state sovereignty one has to make a distinction between legal sovereignty as enshrined in Article 2(1) of the Charter of the United Nations and political sovereignty as enshrined in Article 27(3) of the Charter.<sup>210</sup> According to Article 2(1), all states are regarded as equals when at the same time the Charter, in Article 27(3), exclaims that some states shall have the possibility of vetoing non-procedural decisions, which means that the proposed resolution or amendment fails to be adopted.<sup>211</sup> Thus, the Charter has, thereby, created a group of ‘super-sovereigns’<sup>212</sup> that - as the expression suggests - are more sovereign and equal than other UN members in a way that permanent members of the Security Council have a mandate to prevent a motion becoming an adopted Security Council resolution.<sup>213</sup> Permanent members even holds the power to hinder a motion being put to a vote, simply by, explicitly or implicitly, threatening to use their negative vote, this as a form of clandestine or silent veto.<sup>214</sup> The mandated super-sovereigns wields, therefore, a right that ought to be considered as running counter to the principles of state sovereignty and state equality, as they, thereby, has a normative power that might be defined as the position and ability to define and control global politics and ‘to legitimate a new international order.’<sup>215</sup> However, one must understand that the veto is the price that the ‘United Nations’ had to pay in order to create an organ with mandate and ability to decide and act internationally and, in 1945, none of the Allied parties would become a UN member if the mere possibility existed that they could be forced to adhere to a resolution regarding peace and security they did not accept or had voted against.<sup>216</sup>

Nevertheless, at the same time, it became vital to the Allied powers of the Second World War to safe-guard their power structure and geostrategical place in the international pecking-order, thereby, compelling

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<sup>210</sup> Schwarzenberger, p. 259, and, Steiner and Alston, p. 565.

<sup>211</sup> Legitimacy in the International System; Franck, p. 749, Brierly, p. 110-111, Bross, pp. 246-247, Shearer, pp. 577-578, Schwarzenberger, pp. 237-238, and, UN Doc. S/PV. 4753, 13 May 2003, p. 8, where Judge Elaraby from the ICJ exclaims that ‘[t]he scope of the veto has never been defined.’

<sup>212</sup> Legitimacy in the International System; Franck, p. 711, and, Bross, p. 247.

<sup>213</sup> ‘Blessed Little Security,’ Editorial from *London Free Press*, <<http://www.globalpolicy.org/security/reform/1fp-0100.htm>>, and, Sid-Ahmed, <<http://www.globalpolicy.org/security/reform/ahmed.htm>>. Both last visited 12 July 2004. With regard to voting power and structure within the United Nations, see also, O’Neill, pp. 219-237.

<sup>214</sup> UN Charter, a Commentary, 1994, pp. 443 and 466, and, Brierly, p. 111. See also statement made by the Cuban Security Council representative with regard to U.S. position towards Israel, UN Doc. S/PV. 3654, 18 April 1996, p. 17.

<sup>215</sup> China as the Great Power; Kim, p. 456, and, Schindlmayr, p. 220.

<sup>216</sup> Schwarzenberger, p. 259, and, Schindlmayr, p. 223.

them to become members of the United Nations.<sup>217</sup> It is also important to realise that the underlying notion of permanent membership and the mandated negative vote was to halt repetition of the two World Wars, by collectively guaranteeing international peace and security, i.e. the current world order.

It is vital to mention that by saying that some states are ‘super-sovereigns’ it is not implied that they misuse their veto-power; in fact, permanent members are entirely free to use their negative vote as they see fit.<sup>218</sup> When exclaiming that the negative vote of the permanent members of the Security Council has been misused, the exclaimer uses a subjective perception instead of objective fact, thus, only seeing one side of the coin, when in fact, the unjust use by one permanent member is another nations rightful use of the negative vote; just as an organisation is deemed as terrorists by one country and freedom-fighters by another.<sup>219</sup> The mere detail that the permanent members were influenced by the Cold War bloc creation, when casting their votes does not automatically imply that the veto-function was misused, rather, misguided.<sup>220</sup>

When examining the use of the negative vote it is equally important to examine the non-use of the negative vote. There are a number of reasons why permanent members does not use their negative vote; *firstly*; the state agrees with the proposed resolution,<sup>221</sup> *secondly*; the proposed resolution has already won the required nine votes and the permanent member does not regard the question being of direct importance, and, *thirdly*; the permanent member does not necessarily have to agree with the proposed resolution, but due to geopolitical considerations, the state finds it unnecessary to hinder the adoption because of the state not wanting to be labelled as a international pariah.

## 4.1 Chinese Ambiguity

The State of ‘China’ has been seated in the United Nations and its Security Council as a permanent member since the founding of the United Nations, thereby making it one of these ‘super-sovereigns.’<sup>222</sup> At this point it is important to remember that the concept of a state, being a super-sovereign and a state wielding true great power, points not always to the same state.<sup>223</sup>

As a state, China has experienced, both, social and economic national transformation, thereby making it difficult to assess whether the PRC truly

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<sup>217</sup> Schindlmayr, p. 218.

<sup>218</sup> Law and the Indo-China War; Moore, pp. 229-230, Schwarzenberger, pp. 237-238, and, Schindlmayr, p. 220. See also Article 27(3) of the Charter and its wording.

<sup>219</sup> See, for instance, statements from specially invited Israeli representative in the Security Council, UN Doc. S/PV. 4438, 14 December 2001, p. 22.

<sup>220</sup> Law and the Indo-China war; Moore, pp 303-304 and 306, Schwarzenberger, p. 240, and, Schindlmayr, pp. 230-232.

<sup>221</sup> Vining, p. 228.

<sup>222</sup> The PRC, however, does not maintain the opinion that each state’s vote must carry the same weight. The United Nations; Chiu, pp. 198-199.

<sup>223</sup> China as a Great Power; Kim, p. 449.

is a great power or not.<sup>224</sup> By stating that China truly is a great international power, is thereby to say that not only does China have special rights and privileges, but it also means that China has corresponding obligations and duties to act as a responsible great power.<sup>225</sup>

To fully comprehend the reasons for cast Chinese vetoes, which will be accounted for below, one must understand the PRC's view on both the United Nations and the PRC's notion with regard to itself in international relations. During the Korean War, with the participation of Chinese 'Volunteers,' China viewed the enemies not as being the United Nations as an subject, but as the U.S. with allies, this to avoid a situation where China and the UN became international, political and military foes.<sup>226</sup> As being an intergovernmental organization with global reach, China looks upon the UN in general, and the Security Council in particular, as a suitable platform for spreading its own political agenda and the PRC's notion of the world,<sup>227</sup> and, because of the exclusion of Communist China from the UN during almost thirty years, the PRC are anxious to receive international recognition as a great power and, thus, even today, holds international recognition as a fundamental goal of its foreign policy.<sup>228</sup>

#### 4.1.1 A Third World State

From its founding in 1949, the PRC has constantly considered itself especially well qualified to promote and protect the cause of socialism in developing countries and upon the ending of the Korean War by the Armistice Agreement, in July 1953, the Chinese Communist Party soon took upon itself to act as the leader of the Third World.<sup>229</sup> The underlying motive was, among others, that the PRC wanted a neutral belt of socialist states acting as a buffer zone between Western states and the PRC; as can be seen by the PRC delegation visiting Burma and India in 1953.<sup>230</sup> The result of these visits, between PRC Foreign Minister Zhou En-lai and India's and Burma's Prime Ministers Nehru and U Nu, were joint communiqués that emphasized the relations between the PRC and these two countries. It was also stated that the relations should be built upon mutual respect for the territorial sovereignty of these states, mutual non-aggression and non-

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<sup>224</sup> Words across the Taiwan Strait, a Critique of Beijing's 'White Paper' on China's reunification; Copper, p. 117.

<sup>225</sup> China as a Great Power; Kim, p. 454, and, *The Responsibility to Protect*, p. 13, para. 2.14.

<sup>226</sup> Foot, p. 26, and, Brierly, pp. 114-115, where he discusses the link between Soviet absence in the Security Council and the ability for the Council to adopt resolutions. For a further discussion concerning absence and voting procedures within the Security Council, see Schindlmayr, pp. 221-222.

<sup>227</sup> China's International Organizational Behaviour; Kim, pp. 408, 411-412, International Organizations in Chinese Foreign Policy; Kim, p. 141, and, Kubálková and Cruichshank, p. 175.

<sup>228</sup> International Organizations in Chinese Foreign Policy; Kim, p. 142.

<sup>229</sup> Dittmer, p. 121.

<sup>230</sup> Dittmer, pp. 122-123. See Chan, pp. 79-80, with regard to strategic sovereignty and neutral buffer zones.

intervention in internal affairs and peaceful co-existence; something that would come to be tested between the PRC and India later on.<sup>231</sup> It was also stated by Zhou that the U.S. and the Soviet Union ought to be excluded from the affairs of the South Asian subcontinent.<sup>232</sup>

However, although the PRC may, henceforth, be recognised as having originated the first Communist bloc campaign to win the fidelity of the Third World, the campaign did not survive Chairman Mao's impatient radicalisation during the period of 1955-1957. During this period only four nations had established diplomatic relations with the PRC and the Korean War embargo issued by the United Nations against the PRC, remained intact. Therefore, instead of creating alliances with leaders such as Nehru, the PRC began a policy of promoting violent national liberation movements as a mean of achieving international reorganisation and probable recognition by the new leaders of these states.<sup>233</sup> But, during the late 1960s and early 1970s, China began to reaffirm its position as a state belonging to the Third World,<sup>234</sup> instead of being its supreme leader and benefactor, since the PRC was committed to the notion that the Third World were the gateway to UN membership. Therefore, after the goal of UN membership had been achieved, the PRC had no alternative but to support Third World states and their claims for equal representation via PRC's newly won seat as a permanent member within the Security Council.<sup>235</sup>

Another reason for the PRC identifying with the Third World mirrors PRC's sense of being unjustly suppressed and exploited by those more powerful, thereby, being unjustly denied its rightful place within the international community. In the case of the PRC, the denial exclaimed has its foundation in the question concerning representation of China within the UN and the status of Taiwan as well as the Western colonialism and 'gun-boat diplomacy' experienced during the nineteenth and early twentieth centuries.<sup>236</sup> Thus, the PRC identifies itself as being the only Third World country endowed with permanent membership within the Security Council, thereby voting with the Third World and challenging other permanent member's actions as encroaching or neglecting Third World hot zones.<sup>237</sup> As such, this victim identification might be a useful tool; thereby keeping

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<sup>231</sup> See, for instance, discussion in UN Doc. S/PV.1660, 25 August 1972, concerning the membership application of Bangladesh.

<sup>232</sup> Dittmer, pp. 123-124, and, Gittings, pp. 210-211.

<sup>233</sup> Dittmer, pp. 126-127 and Memorandum of Conversation between Prime Minister Zhou En-lai and Secretary of State Henry Kissinger, 13 November 1973. <<http://foia.state.gov/documents/foiadocs/4f97.PDF>> last visited 2 September 2004.

<sup>234</sup> 'Like the overwhelming majority of the Asian, African and Latin American countries, China belongs to the Third World,' Qiao Guanhua, head of the Chinese delegation to the twenty-sixth session of the General Assembly, 15 November 1971, cited from Dittmer, p. 130. See also US Intelligence's Weekly Review of the People's Republic of China, November 1973, p. 8. <<http://foia.state.gov/documents/foiadocs/4f94.PDF>> last visited 4 September 2004.

<sup>235</sup> Kubáľková and Cruichshank, p. 185, Dittmer, pp. 132, and 194, and, The People's Republic of China and the Charter-Based International Legal Order; Kim, p. 326. See also Chapter 3.4 '*United Nations Representation.*'

<sup>236</sup> Chan, pp. 5 and 75.

<sup>237</sup> International Organizations in Chinese Foreign Policy; Kim, p. 143.

the Chinese people's moral resentment, nationalism and hurt feelings ablaze and, as such, giving the Chinese Government citizens which are more easy to handle and direct.<sup>238</sup>

As a consequence of its Janus-like, two-faced policy, the PRC government is trapped in a somewhat schizophrenic position where they try to legitimise itself as a great international power and at the same time exclaims to be part of the victims of the Third World. According to, for instance, Kim, China's ambiguous acting might stem from an excessive demand placed on its foreign policy to achieve international recognition in order to compensate for expanding domestic legitimating insufficiencies.<sup>239</sup>

#### 4.1.2 A Mighty Permanent Member

Not only cast negative votes, i.e. vetoes, will tell the reader something about a permanent member's notion about international law and international relations. Even abstentions from voting will say a lot about the abstaining member's policy with regard to the specific subject.<sup>240</sup> For example, in Security Council Resolution 678,<sup>241</sup> China abstained from voting with the explanation that China cannot support the use of force in the name of the UN,<sup>242</sup> and in the 'Question concerning Haiti,' the Chinese representative abstained from voting with the motivation that China did not believe that a mandatory authorisation of the use of force under Chapter VII of the Charter would solve Haiti's problems and that the proposed actions was most likely not in line with, both, the principles contained in the Charter of the United Nations and Chinese policies of peaceful negotiations, thereby, the proposed resolution might set a dangerous precedent, going against the post-Cold War practise of solving disputes via peaceful means.<sup>243</sup>

These motivations denotes the PRC view that Western [imperialistic] states of the United Nations has frequently and unjustifiably intervened in

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<sup>238</sup> Dittmer, p. 136, Saich, p. 275, and, Chan, p. 78-79, citing Chen Jie, 'China's Spratly policy,' *Asian Survey*, Vol. 34, No. 10, October 1994, p. 894.

<sup>239</sup> International Organizations in Chinese Foreign Policy; Kim, p. 143, Legitimacy Crisis, Political Economy, and the Fifteenth Party Congress; Wu, pp. 13-14, Between Freedom and Subsistence, China and Human Rights, Kent; pp. 212-213, and, Otto and Li, p. 1.

<sup>240</sup> Fravel, <<http://www.stanford.edu/~fravel/pubs/chinapko.htm>> last visited 17 August 2004. For an further development concerning abstentions within the Security Council, see, Thirlway, pp. 24-25 and 71, and, Amerasinghe, p. 199.

<sup>241</sup> Security Council resolution 678 (1990), adopted at its 2963<sup>rd</sup> meeting, 29 November 1990.

<sup>242</sup> '[T]he Chinese people still clearly remember that the Korean War was launched in the name of the UN.' PRC Foreign Minister Qian, Renmin Ribao, 17 December 1999, p. 7, cited from, International Organizations in Chinese Foreign Policy; Kim, p. 150. See also Saich, p. 277, and, Friedman, p. 19, and, UN Doc. S/PV. 2963, 29 November 1990, pp. 62-65.

<sup>243</sup> UN Doc. S/PV. 3413, 31 July 1994, p. 10. See also, Security Council resolution 1556 (2004), 30 July 2004, concerning the situation in Sudan, where China abstained from voting with the explanation that a respect for Sudan's sovereignty and territorial integrity must be upheld. UN Doc. S/PV. 5015, 30 July 2004, pp. 2-3.

domestic affairs of states and thereby indicating the strong affection the PRC has of state sovereignty.<sup>244</sup>

According to Chinese scholars Yang Hsin and Chen Chien, sovereignty is one of the top most vital principles, and the core of all other principles in international relations and international law. As examples of sovereignty being the core of other international principles Yang and Chen mentions, among others, the principles of non-intervention in internal affairs, mutual non-aggression and equality of states.<sup>245</sup> The principles mentioned perfectly emphasises the PRC position in world politics in general and within the Security Council in specific. Namely that states and intergovernmental organisations shall not, in any way, intervene in a state's domestic affairs. This might seem to be an old, pre-Nuremberg state centric and Westphalian<sup>246</sup> notion of state sovereignty, but one must understand that, during the nineteenth and twentieth centuries, China has been threatened by, and has seen its sovereignty annexed by, Western states on a multitude of occasions, thereby, creating a protectionistic Chinese foreign policy.

For obvious reasons, veto statistics are not very informative since the only thing statistics will tell the reader is when the negative vote was cast and the amount of vetoes that have been cast by different permanent members; hence, by only looking at these facts, statistics cannot tell the reader the underlying reasons for the casting of a negative vote. Therefore, I have chosen a different approach, namely, a geopolitical analysis concerning a number of vetoes, some cast by China and some negative votes cast by other states as presumed 'proxy vetoes.'

Despite that the PRC views the Security Council as a launching point for Communist Chinese, both, national and foreign policy; the PRC has not used its veto-power that much during its UN membership, and the possible reasons for this doing will be explained further below. In the listing of negative votes cast by 'China' in the Security Council as enumerated below, I have chosen to group them into; Sino-Soviet related vetoes; vetoes directly affecting Chinese interests; and, 'proxy vetoes', as a mean of more clearly being able to reiterate and explain the underlying reasons for Chinese actions and the political atmosphere existing at a specific moment.

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<sup>244</sup> The United Nations; Chiu, pp. 196-197, and 211.

<sup>245</sup> Yang Hsin and Chen Chien, 'Expose and Censure the Imperialist's Fallacy Concerning the Question of state Sovereignty', CFYC, No. 4, November 1964, p. 6, cited from 'The United Nations,' Chiu, p. 197. See also, Chiu, p. 199 citing Chou Keng-sheng '...they [the imperialists] utilize the provisions concerning the promotion of basic human rights and liberties and maintenance of peace and security to intervene in the internal affairs of other states, even to the point of undertaking collective armed intervention to suppress the national liberation movement and the revolution in each country. However, this behaviour totally undermines the principles of national sovereignty and non-intervention in internal affairs which are laid down in the United Nations Charter.' Chou Keng-sheng, 'Trends in the thought of modern English and American International Law', Beijing, 1963, p. 68. See also, Broms, pp. 247-248.

<sup>246</sup> China as a Great Power; Kim, p. 457, and 145, and, Chan, p. 75. See also, Chapter 5.2.3 'A Westphalian Notion.'

## 4.2 Sino-Soviet Vetos

The Sino-Soviet relationship has, far from being trouble-free and straightforward, always created speed-bumps on the international geopolitical highway. Not surprisingly, the rift between these two communist giants does not merely have its foundation in Soviet Union not wanting communist China to have the atom-bomb, but it also depicts the struggle of leadership and power-dominance via allied countries and thus, the setting of the international communist agenda. Therefore, as a method of showing this battle of Titans, I have selected the membership-applications into the United Nations of Bangladesh and Outer Mongolia to visualise the Sino-Soviet struggle over, and, attempts to gain or regain the communist leadership.

### 4.2.1 The Case of East-Pakistan/Bangladesh

This veto<sup>247</sup> together with the Outer Mongolia veto, concerns the Sino-Soviet relationship, nevertheless, a discrepancy between the two negative votes cast exist. In the veto concerning Outer Mongolia, the Kuomintang held the China-seat in the Security Council and, thus, makes the negative vote against the membership of a Communist ‘protectorate’ more logic. The membership of the People’s Republic of Bangladesh, on the other hand, was vetoed by the PRC, thus, explicitly emphasising that there is truly ‘something rotten’ in the communist camp. This negative vote, cast by the PRC, also shows the growing rift between India and the PRC, when, as a part of its Third World policy, the PRC adopted communiqués between themselves and India,<sup>248</sup> thereby creating a non-Western safe-zone, but, due to Chinese alliance with Pakistan, and the Soviet Union becoming India’s newest and best friend, tables turned.

As explained earlier, the negative vote, of a permanent member of the Security Council is very seldom interesting in itself if one wants to find out about states international policies; without examining the underlying reasons and policies of those states beforehand trying to explain the veto. Therefore, a short historic review of the Asian subcontinent is needed.

#### 4.2.1.1 Historical background

In early 1948, the political climate in India changed from a pro-Soviet Union communist leadership to a pro-Chinese, led by B. T. Ranadive, this probably by the covert help of Communist China. Ranadive was however forced to resign in 1949 due to the Soviet Union not accepting the leadership change of 1948 and Soviet loss of influence.<sup>249</sup> Although India was one of the first states to support PRC’s entry in the United Nations and a part of PRC’s safe-zone against Western pressure, India leaning towards

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<sup>247</sup> UN Doc. S/PV.1660, 25 August 1972.

<sup>248</sup> Dittmer, pp. 123-124, and, Gittings, pp. 210-211.

<sup>249</sup> Dittmer, p. 122.

the Soviet Union instead of the People's Republic of China, made India emerge as China's main rival in Asia and a Sino-Indian rivalry appeared. A rivalry that became apparent by Indian support - and also via incidents at the China-Indian border thereby provoking China<sup>250</sup> - for Tibet during the 1959 Tibetan rebellion against China, and the granting of refuge to the Tibetan Dalai Lama.<sup>251</sup> The Tibetan rebellion did not only aggravate the positions between China and India, but also between China and the Soviet Union, due to Khrushchev refusing to recognise, when asked to do so by Chairman Mao, that the Indian subcontinent fell within the Chinese sphere of influence and asserting Chinese territorial claims against India. Khrushchev also refused to support the PRC in the border conflicts - mentioned above - between China and India, which, even more aggravated the Sino-Soviet relationship.<sup>252</sup>

As Sino-Soviet and Sino-Indian relations deteriorated,<sup>253</sup> relations between Soviet and India improved to the point where Soviet military aid was offered India in the form of, for instance, a dozen MiG-21s that was delivered to the Indian Air Force.<sup>254</sup> However, this alliance build up was not to reach its peak until August 1971, when India and the Soviet Union sealed a non-aggression pact, thereby giving India a free rein to support the independence of Bangladesh by military action and, thus, at the same time attacking the new Chinese ally, Pakistan.<sup>255</sup> The territorial disputes and border clashes between the PRC and India escalated when PRC claimed some treaties, delimitating the Sino-Indian boundary, as null and void, due to them being unequal. Both the Soviet Union and India denied this and exclaimed that the People's Republic of China was guilty of an expansionistic foreign policy that could not be tolerated.<sup>256</sup> A notion that may explain Khrushchev's denial of support as mentioned earlier.

As tensions between the former allies, the PRC and the Soviet Union, grew, communist China gained, not a new friend but at least a country sympathetic of PRC needs as a tacit ally, in the United States.<sup>257</sup> American assurances held that if China wanted to assist Pakistan as a result of Indian aggression, thereby, presumably, making the Soviet Union attack China, the U.S. would not stand silent.<sup>258</sup> But, as Mao did not fully trust the Americans

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<sup>250</sup> Gittings, p. 215, *China's Boundary Treaties and Frontier Disputes*; Chang, pp. 77-87, and, Carlson, pp. 684-685, and, 690-694.

<sup>251</sup> Dittmer, pp. 127-128.

<sup>252</sup> Dittmer, p. 171.

<sup>253</sup> Barnouin and Yu, p. 73.

<sup>254</sup> Dittmer, p. 172, and, *China's Boundary Treaties and Frontier Disputes*; Chang, p. 84.

<sup>255</sup> *China's Boundary Treaties and Frontier Disputes*; Chang, pp. 92, and 174, Dittmer, pp. 192, and 198, *The U.S. Action in Grenada; Grenada and the International Double Standard*; Moore, p. 170, and, *Of Gnats and Camels: is there a Double Standard at the United Nations?*; Franck, p. 815.

<sup>256</sup> *China's Boundary Treaties and Frontier Disputes*; Chang, p. 174.

<sup>257</sup> Dittmer, p. 198, Memorandum for the President, 19 November 1973. <<http://foia.state.gov/documents/foiadocs/4f99.PDF>> ,and, Memorandum of Conversation between Prime Minister Zhou En-lai and Secretary of State Henry Kissinger, 13 November 1973. <<http://foia.state.gov/documents/foiadocs/4f97.PDF>> both last visited 3 September 2004.

<sup>258</sup> Dittmer, p. 201.



and their intentions, he warned them ‘not to stand on the shoulders of China to reach the USSR.’<sup>259</sup>

As the Soviet Union supported India with arms and military equipment, so did China support Pakistan – plausibly as a mean to serve national interests of the PRC - when China transferred medium-range M-11 missiles and nuclear knowledge to the Pakistani Government. As China’s strategic regional ally, Pakistan was assisted with arms and knowledge as this, most likely, would deter an Indian attack against Pakistan.<sup>260</sup> The thought was that instead of being forced to help Pakistan in a war with India and deploy troops in such a conflict, Chinese weaponry and knowledge would strengthen Pakistan so as to being able to fight their own war against India over East-Pakistan (modern Bangladesh), thus, in the long run, help China control the unresolved territorial dispute with India.<sup>261</sup>

#### **4.2.1.2 Conditions of Admission of a state to Membership in the UN**

An Advisory Opinion<sup>262</sup> by the International Court of Justice (ICJ) is referred to in the Security Council debate on membership for Bangladesh. It is first of all vital to have a deep knowledge of the contents of this Advisory Opinion. The International Court of Justice was, by the General Assembly, asked if a UN member state were entitled to make other demands or conditions dependent upon its vote in the admission procedure within the United Nations or if the conditions, stated in Article 4 of the Charter, were to be seen as exhaustive? The answer given by the ICJ was in the negative by nine votes to six, thereby, stating that Article 4 of the Charter is exhaustive. However, the dissenting judges made a statement that may shed some light over the question at hand. Perhaps not in a legal sense, but as a statement with political significance, this, as the question the ICJ were asked to answer did not concern the actual membership vote, which is not subject to control, but the reasons and attitudes which a member state may give before voting as the question was, not entirely legal, but also political. The opinion made by the dissenting judges, thus, seems to represent an open door to those states claiming that other conditions may be asserted during a membership debate, this as the judges exclaimed that despite Article 4 of the Charter being exhaustive, it might be vital to recognize other factors as

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<sup>259</sup> Dittmer, p. 201. Chairman Mao’s concern with regard to U.S. support is affirmed by the Memorandum for the President, 19 November 1973, p. 3 and 6, where Secretary of State Kissinger states that ‘[the] meticulous care and feeding of the Chinese on our Soviet policy has paid off... And even if we don’t make mistakes, events beyond our control could turn one or the other against us or propel them toward each other ... once they [China] become convinced that we cannot or will not act as a major force on a global scale, we will lose our principal value to them.’ <<http://foia.state.gov/documents/foiadocs/4f99.PDF>> last visited 3 September 2004.

<sup>260</sup> According to Moore, the arming of one’s ally might also be seen as an implicit form of military intervention, Law and the Indo-China War; Moore, p. 151.

<sup>261</sup> Ross, pp. 17 and 91.

<sup>262</sup> Conditions for Admission of a State to Membership in the United Nations, Article 4 of the Charter, Advisory Opinion, ICJ, 28 May 1948. See also Shearer, p. 570, and, Janev, pp. 156-157.

to be able to verify if the conditions in Article 4 truly is existing, thereby, saying that no relevant political factor connected with the conditions of admission is excluded.

#### **4.2.1.3 United Nations Document S/PV.1660**

The application for membership of the People's Republic of Bangladesh was, by the Chinese representative linked with two UN resolutions, namely: General Assembly resolution 2793 (XXVI),<sup>263</sup> and Security Council resolution 307 (1971);<sup>264</sup> where, the contents of these two resolutions is precisely articulated in objective paragraphs 1 and 2 of Security Council resolution 307 (1971). According to these paragraphs, both India and Pakistan shall withdraw their armed forces to their respective territories and a durable cease-fire must be observed. It is also stated that no UN member can intervene in the conflict in a way that might aggravate the situation. These two resolutions is the Chinese representative's main argument why Bangladesh, at this particular moment, should not become a member of the United Nations until after the provisions of Security Council resolution 307 (1971) had been fully implemented and as a result of the non-implementation of these resolutions, the Council should postpone further considerations of a Bangladesh membership.<sup>265</sup> As China contested the proposed membership, a plethora of objections were raised by other Security Council members. According to a number of representatives, China by its statement has violated the ICJ's Advisory Opinion, mentioned above, by adding further demands on a proposed member state, and thus, hindered the UN in an unjust and illegal way, since Bangladesh fulfils the conditions laid down in paragraph 1 of Article 4 of the Charter.<sup>266</sup>

When the Chinese proposal, S/10768 and Correndum. 1, concerning the postponing of Bangladesh membership until Security Council resolution 307 (1971) had been fully implemented, was put to the vote, it was voted against by India, the Soviet Union and Yugoslavia, thereby; due to the negative votes and the abstentions by other member states, failed to become adopted.<sup>267</sup> After the vote was taken, the Sino-Soviet and Sino-Indian antagonism became even more apparent, as the Chinese representative held them, i.e. the Soviet Union and India, responsible for trying to drag Bangladesh into the UN and impairing the work of the United Nations.<sup>268</sup>

Yet another reason claimed by the representative of China were that, as the Soviet Union had helped India in launching a war of aggression against Pakistan,<sup>269</sup> and, as the above mentioned resolutions had not been fully implemented, this as no withdrawal of Indian armed forces from the

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<sup>263</sup> 'Question considered by the Security Council of its 1606<sup>th</sup>, 1607<sup>th</sup> and 1608<sup>th</sup> meetings on 4,5,6 December 1971,' General Assembly resolution 2793 (XXVI), 7 December 1971. See also, Blum, p. 590.

<sup>264</sup> Security Council resolution 307 (1971), 21 December 1971.

<sup>265</sup> UN Doc. S/PV. 1660, 25 August 1972, pp. 2-3, paras. 20-21, p. 9, para. 81 and p. 15, para. 140.

<sup>266</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 2, para. 11 and p. 5, para. 46.

<sup>267</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 7, para. 70.

<sup>268</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 7, para. 72, pp. 8-9, paras. 79-80.

<sup>269</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 8, para. 78.

area of East-Pakistan had taken place,<sup>270</sup> none of the Parties, including Bangladesh had followed the biddings of the United Nations, and thereby, Bangladesh had violated the conditions laid down in Article 4 of the Charter, thus not qualifying as a member of the United Nations.<sup>271</sup>

As a result of the failed adoption of the Chinese proposal, China regarded itself forced to cast its negative vote against the membership proposal (S/10771) brought forward by India, the Soviet Union, the United Kingdom<sup>272</sup> and Yugoslavia, thereby, making sure that Bangladesh did not become a member of the United Nations; this time, due to the veto of China.<sup>273</sup> The Soviet response to the Chinese veto even further accentuated the Sino-Soviet rift as the Soviet representative stated that the veto itself was unjust<sup>274</sup> and the arguments brought forward by the Chinese representative was a repetition of words used by the enemies of the Soviet Union.<sup>275</sup> It was also stated, by the Soviet representative, that China, as a self-exclaimed Third World state, obviously would not fulfil its promises of protection to other Third World states and national liberation movements.<sup>276</sup>

#### **4.2.1.4 Conclusion**

There are two questions that need answering before the acts of China can be explained. *Firstly*; why did China try to amend the requirements of the two resolutions into Bangladesh's membership proposal, and, *secondly*; why did China cast its negative vote against Bangladesh's membership in the United Nations? As one thinks about it, the answer to both questions is quite simple, thus, China acted as it did because the PRC did not want to be geostrategically isolated, i.e. China did not want to be surrounded by enemies such as the Soviet Union, Outer Mongolia, India, Bangladesh, and, due to past time American support, Taiwan and South Korea.<sup>277</sup> By connecting the membership proposal to the Security Council resolution 307 (1971), I believe, that China intended to safe-guard its interests in the South Asian subcontinent by helping Pakistan fight off Indian attacks, thereby, at least, still having one ally in the South Asian subcontinent. And if India were to withdraw its troops from Bangladesh, communist China might have harboured the hope that China, probably with help from Pakistan, could turn the situation into Chinese advantage and perhaps a Chinese port in the Bay of Bengal, thereby avoiding the American Containment policy in the Pacific, as explained in the chapter concerning Taiwan.

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<sup>270</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 8, para. 77.

<sup>271</sup> UN Doc. S/PV. 1660, 25 August 1972, pp. 7-8, paras. 73 and 75-76.

<sup>272</sup> The most logical answer to the United Kingdom involvement would be ex-colonial protectionism.

<sup>273</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 9, paras. 82-83, p. 10, para. 85 and p. 15, para. 142.

<sup>274</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 16, para. 152.

<sup>275</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 12, para. 110.

<sup>276</sup> UN Doc. S/PV. 1660, 25 August 1972, p. 12, para. 114.

<sup>277</sup> Memorandum for the President, 19 November 1973, p. 2. <<http://foia.state.gov/documents/foiadocs/4f99.PDF>> last visited 3 September 2004.

## 4.2.2 The Case of Outer Mongolia

With regard to this non-adopted resolution, it is vital to point out that in 1955, the Kuomintang and Nationalist China held the China-seat within the United Nations and was internationally recognized as the legal representative of China and the debate and the negative vote cast in the Security Council had its basis in a General Assembly resolution concerning proposed membership of eighteen states and a proposed amendment made by the Chinese Security Council representative.<sup>278</sup> As the General Assembly, in resolution 918 (X), requested the Security Council to consider the pending applications for membership of these eighteen states, the Chinese representative, in an amendment (S/3506), tried to bring into the resolution two other states not mentioned; namely, the Republic of Korea (South Korea) and the Republic of Vietnam (South Vietnam).<sup>279</sup>

### 4.2.2.1 Historical Background

During the entire first half of the twentieth century, Outer Mongolia was regarded as an area of great concern and vigilance for both the Soviet Union (as well as tsarist Russia) and Nationalist China, which was, in 1949, to be replaced as Chinese mainland sovereign by the Chinese Communist Party. However, the events within Outer Mongolia and bordering states, is not to be seen as single and unique events, as would be evident considering the chapter above on Bangladesh. The Soviet invasion of Outer Mongolia in 1921 was the effect of Nationalist China regaining control of a part of China that already had been, by the Soviet, recognised as an autonomous, *de facto*, part of the Soviet Union - i.e. a communist state - as they promoted the Mongolian struggle for independence in the Republican Revolution of 1912.<sup>280</sup> The 1921 events also had the consequence of, in 1924, creating the Mongolian People's Republic.<sup>281</sup> Despite the Soviet annexation of Outer Mongolia, Nationalist China had always regarded the area as part of Chinese sovereignty and at the Yalta Conference it was decided that the *status quo* of the Mongolian People's Republic was to be preserved.<sup>282</sup> This was also included in the Sino-Soviet treaty of 14 August 1945, where Nationalist China agreed to allow for self-determination for Outer Mongolia.<sup>283</sup> As a result of this self-determination process and their promise, Nationalist China was implicitly forced to recognise the independence of the Mongolian People's Republic on 5 January 1946.<sup>284</sup>

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<sup>278</sup> UN Doc. S/PV.704, 13 December 1955, General Assembly resolution 918 (X), 552nd plenary meeting, 8 December 1955, and, UN Doc. S/3506.

<sup>279</sup> UN Doc. S/PV.704, 13 December 1955, p. 2, para. 5, and, Yearbook of the United Nations, 1955, pp. 22, and 26-27.

<sup>280</sup> Dittmer, p. 3, and, China's Boundary Treaties and Frontier Disputes; Chang, p. 26.

<sup>281</sup> Hsü, p. 682.

<sup>282</sup> See Yalta Protocol, <<http://www.fordham.edu/halsall/mod/1945YALTA.html>> last visited 16 July 2004.

<sup>283</sup> 'China and Union of Soviet Socialist Republics: Treaty of Friendship and Alliance and other Related Documents.' Signed at Moscow on 14 August 1945. UNTS registration number: 68, volume number: 10. See also, Hsü, p. 610.

<sup>284</sup> China's Boundary Treaties and Frontier Disputes; Chang, p. 26.

The 1945 treaty and Outer Mongolian independence, however, was not to be seen as a total loss for Nationalist China, due to the newly created security in Outer Mongolia and Soviet assurances of support against the Communist Chinese; the recognition of Outer Mongolia was therefore considered, by Chiang Kai-shek, as a good deal.<sup>285</sup> But, as Chiang considered the treaty concluded between Nationalist China and the Soviet Union as being a good deal, Mao Tse-tung held quite the opposite opinion as he maintained that the Mongolian People's Republic would willingly return to form a part of the new China, as the People's Revolution in China would be successful and, thereby, ousting Chiang as leader.<sup>286</sup> Nevertheless, after the 1949 shift of Chinese leadership, the PRC, in 1950, recognized Outer Mongolia as being an independent state.<sup>287</sup>

Other factors that further complicates the given situation in the Security Council, is the memory of the Korean War and the, then, ongoing East-West bloc antagonism. As will be depicted below, the Chinese representative suggests, as a reason for its negative vote concerning the membership of the People's Republic of Mongolia (PRM), that the PRM took part in the Korean War on the side of North Korea, thereby making it an aggressor and, thus, not suitable for UN membership.<sup>288</sup> However, there is another vital factor that needs focusing upon. During the early stages of the Korean War the Soviet Union were absent from the United Nations as a protest against the non-representations of Communist China in the Security Council, thereby allowing the rest of the Security Council to adopt a number of resolutions concerning the collective defence of South Korea. As a consequence of this, the Soviet Union returned and took up its seat in the Security Council and, thus, paralysed the Security Council during the remaining conflict, which, in turn, produced an antagonistic and bickering atmosphere within the Security Council.<sup>289</sup>

#### **4.2.2.2 United Nations Document S/PV. 704**

When General Assembly resolution 918 (X), of 8 December 1955, were sent to the Security Council for recommendation,<sup>290</sup> the Nationalist Chinese UN representative laid forward an amendment (S/3506), to the mentioned resolution, concerning the proposed membership of the Republic of Korea and the republic of Vietnam.<sup>291</sup> An amendment that was to be welcomed by the American representative with the explanation that the Republic of Korea

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<sup>285</sup> Hsü, p. 610, and, Dittmer, p. 159.

<sup>286</sup> Edgar Snow, *Red Star over China*, p. 96, cited from *China's Boundary Treaties and Frontier Disputes*; Chang, p. 25. See also, Hsü, p. 682.

<sup>287</sup> *The People's Republic of China and the Law of Treaties*; Chiu, pp. 12, and 69.

<sup>288</sup> UN Doc. S/PV. 704, 13 December 1955, p. 5, para. 24. See also *Advisory Opinion concerning Article 4 of the Charter of the United Nations and the debate in the Bangladesh-veto*.

<sup>289</sup> Schwarzenberger, p. 240, and, Chayes and Chayes, pp. 75-78.

<sup>290</sup> According to Article 4(2) of the Charter of the United Nations: '[t]he admission of any such state [ref. to Article 4(1) and 'peace-loving state'] to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

<sup>291</sup> UN Doc. S/PV. 704, 13 December 1955, p. 2, para. 5.

took great part in the Korean War and therefore was to be seen as a symbol of the free world's efforts in repelling aggression.<sup>292</sup> As a further argument concerning the proposed amendment, the ROC United Nations representative portrayed Outer Mongolia as an aggressor in Korea, i.e. that Outer Mongolia helped North Korea in the war against the international collective as they supported South Korea, and, thus, as victims of this aggression, both the Republic of Vietnam and the Republic of Korea deserved to become members of the United Nations.<sup>293</sup>

The suggested amendment instantly became a notion of annoyance to the Soviet representative that exclaimed that the purpose of the ROC amendment was to obstruct the work of the United Nations when introducing proposed new members into the United Nations. The Soviet representative also made an interesting remark concerning the ROC representative, that is to say, he depicted the ROC representative as being illegally occupying the Chinese seat in the Security Council<sup>294</sup> and that the Soviet Union would vote against the ROC amendment.<sup>295</sup> And, as the ROC amendment was put to the vote, the Soviet Union did cast its negative vote with regard to both ROC amended membership applications,<sup>296</sup> and, probably as a result of the Soviet veto, the ROC representative cast its negative vote with regard to the membership of the Mongolian People's Republic, and, also, the entire proposed resolution, then containing the suggested United Nations members Albania, Hungary, Romania and Bulgaria.<sup>297</sup> Naturally, this annoyed the Soviet representative even more as he exclaimed that the failure of welcoming the proposed states were because of the actions of one single individual who 'represent none but himself' and holds its place due to backing from another state which uses the ROC as a castor of implicit [U.S.] vetoes, a statement which, of course, was contested by the U.S. representative who depicted the ROC as a government in exile.<sup>298</sup> Even the British representative became 'upset' and claimed that both representatives of the Soviet Union and the ROC had used their negative votes in an unjust way and, thereby, abused their right to veto.<sup>299</sup> Thus, the result of the vetoes used was that none of the suggested states became, at that meeting, proposed members of the United Nations.

#### **4.2.2.3 Conclusion**

As explained earlier, the negative vote cast by China, differs from the one cast in the Bangladesh question because the Chinese representative in these

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<sup>292</sup> UN Doc. S/PV. 704, 13 December 1955, p. 4, para. 16. See also discussion above concerning Soviet absence allowing for the rest of the Security Council to adopt much needed resolutions concerning the defence of South Korea.

<sup>293</sup> UN Doc. S/PV. 704, 13 December 1955, p. 5, para. 24.

<sup>294</sup> As an example of Soviet-ROC antagonism, see UN Doc. S/PV. 480, 1 August 1950, pp. 1-2, where the Soviet representative, then the President of the Security Council, tries to oust the ROC representative from the Security Council.

<sup>295</sup> UN Doc. S/PV. 704, 13 December 1955, p. 6, paras. 29-32.

<sup>296</sup> UN Doc. S/PV. 704, 13 December 1955, p. 10, paras. 51-52.

<sup>297</sup> UN Doc. S/PV. 704, 13 December 1955, pp. 11 and 14, paras. 54 and 73.

<sup>298</sup> UN Doc. S/PV. 704, 13 December 1955, pp. 16, 18 and 21, paras. 84, 86, 95 and 121.

<sup>299</sup> UN Doc. S/PV. 704, 13 December 1955, p. 21, para. 117.

two cases came from two different Cold War camps; as can be evidenced by statements made by the Soviet representative mentioned above. And the answer to the question why the ‘Chinese’ representative used its negative vote in this case is more evident than in the Bangladesh case as the Western bloc could not allow another Communist state to enter the United Nations, thereby tilting the balance even more than before.

### 4.2.3 Proxy vetoes

Throughout the Cold War, the Security Council were on several occasions hindered to act due to permanent members not only using their right to cast a negative vote to protect their own vital interests, but also using it as a means of support or defence of their allies and as a method of challenging other permanent members voting intentions and policies.<sup>300</sup> As the term ‘proxy vetoes’<sup>301</sup> imply, the reasons for the negative vote cast by a permanent member is not because the permanent member itself felt a need for so doing, but, the interests of a allied state – itself without the option of casting a veto - was in some way threatened. Therefore, the mere fact that a state is not a permanent member of the Security Council, does not necessary imply that this state does not have a veto option; this as the exercise of the ‘proxy veto’ has proven valuable to non-permanent members involved in a number of disputes.

In the Outer Mongolian membership application question, where the Chinese ROC representative casts his negative vote, the Soviet Union representative accused the United States for using ROC as a caster of U.S. vetoes;<sup>302</sup> thereby implying that a ‘proxy veto’ was being used. In principle the Soviet representative was correct, nevertheless, he missed one of the most vital requirements for a ‘proxy veto;’ namely, that the U.S. also had the ability to cast a veto. Therefore, the cast negative vote in the Outer Mongolian case, was not to be seen as a true ‘proxy veto,’ but instead, the negative vote was, most likely, part of a U.S. policy not to openly work against the Soviet Union, thus, instead, using ‘their’ ROC veto.

Nevertheless, the most prudent case of ‘proxy vetoes’ ought to be the U.S.-Israel partnership and the U.S. principle<sup>303</sup> of casting negative votes whenever a proposed Security Council resolution emphasises either Israeli guilt or responsibilities, or, proposes a heightened degree of Security Council action in the conflict.<sup>304</sup> American statements, however, does not, as, for example Palestinian or Cuban statements does, explicitly portray US cast Security Council vetoes as being the result of an U.S.-Israel

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<sup>300</sup> Schindlmayr, p. 233.

<sup>301</sup> Schindlmayr, p. 225.

<sup>302</sup> UN Doc. S/PV. 704, 13 December 1955, pp. 16 and 21, paras. 84, 86 and 121.

<sup>303</sup> UN Doc. S/PV. 3538, 17 May 1995, pp. 6-7.

<sup>304</sup> UN Docs. S/PV. 4438, 14 December 2001, p. 11, S/PV. 4934, 25 March 2004, p. 2, S/PV. 3756, 21 March 1997, p. 5 and, S/PV. 3538, 17 May 1995, p. 6. See also, ‘*Advisory opinion by the International Court of Justice on the legal consequences of the construction of a Wall on the occupied Palestinian Territories,*’ UN Doc. A/ES-10/273, 13 July 2004, note by the Secretary-General, pp. 11-12 and 15, paras. 19-20 and 31.

partnership. But, according to the specially invited Palestinian representative, Mr. Al-Kidwa, the U.S. vetoes 'has been cast to shield Israel from the will of the international community and to exempt Israel from the provisions of international law and of the Charter of the United Nations.'<sup>305</sup>

## 4.3 Chinese National Interests

The negative votes mentioned above was most probably cast due to geopolitical implications that had an impact on a larger number of states, and 'China' was more or less sucked in to this vortex of politics. Those mentioned below has more of a bilateral impact as they directly affect and threatens Chinese national policies. The underlying answer to both vetoes, is presumably, the Taiwan question and China's strongly held notion of state sovereignty and non-external interference in domestic affairs.

### 4.3.1 The Case of Macedonia and UNPREDEP

At a first glance, China ought not to be interested in casting its negative vote, as the United Nations Preventive Deployment Force (UNPREDEP) operates in Macedonia not being a regional sphere of direct Chinese interest, but, the negative vote was cast and the plausible reasons are, as shall be evidenced later on, twofold.

At its 3982<sup>nd</sup> meeting the Security Council sat down to decide on the proposed extension of UNPREDEP's mandate. A mandate that had already once been extended due to Security Council resolution 1186 (1998), where the Minister of Foreign Affairs of the former Yugoslav Republic of Macedonia requested an extension of UNPREDEP's mandate, and the Security Council decided both to increase the forces troop strength and its mandate for a time period until 28 February 1999.<sup>306</sup> This was also to happen at the 3982<sup>nd</sup> Security Council meeting, at least in theory, where the proposed resolution, when adopted, would extend the forces mandate for another six month period, until 31 August 1999.<sup>307</sup> An extension much needed since the situation in Macedonia was definitely unpredictable and ought to be considered as threatening the peace and security of the Balkans.

What makes this negative vote interesting is that the Chinese representative did not once, before the actual vote being taken, signal that he would cast the Chinese negative vote and the rest of the Security Council was, to say the least, surprised, this as, usually, the casting of a negative vote is announced beforehand as a warning and display of displeasure. This time, all statements made by Security Council representatives, before the vote, was highly appreciative and supporting of an extension of the

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<sup>305</sup> UN Doc. S/PV. 3756, 21 March 1997, p. 8. See also statements made by the Cuban Security Council representative Mr Rodriguez Parilla, UN Docs. S/PV. 4824 (Resumption 1), 15 September 2003, p. 15, and, S/PV. 4836, 5 October 2003, p. 21.

<sup>306</sup> Security Council resolution, 1186 (1998), 21 July 1998.

<sup>307</sup> UN Doc. S/PV. 3982, 25 February 1999, p. 3, and, Yearbook of the United Nations, 1999, pp. 370-371.



mandate.<sup>308</sup> When the vote was taken, the result would turn out to be thirteen votes against one abstention, being the Russian Federation, and one negative vote being China, thus, the proposed resolution failed to be adopted due to the negative vote of China being a permanent member.<sup>309</sup>

The debate after the failed adoption would explain some of the reasons for the Chinese casting their negative vote, when the Chinese representative declared the Chinese policy concerning UN operations. According to the Chinese representative, it has always been a Chinese policy that UN operations should not be open-ended and that the situation in Macedonia had stabilized and relations with neighbouring states had been improved, thereby, not adversely affecting regional peace and stability and that the goals, set out by the Security Council, had been met. Thus, there would be no reason for extending the mandate of UNPREDEP.<sup>310</sup> It was also stated by the Chinese representative that every sovereign state was free to vote as it considered appropriate and that China had committed no faults.<sup>311</sup> As the other representatives expressed regret towards the Chinese negative vote, it was only the Canadian representative (which is also the Security Council's President at that moment) who indicated that China might have had an ulterior motive for casting its negative vote.<sup>312</sup> According to the Canadian representative, China was 'compelled by bilateral concerns unrelated to UNPREDEP,' and that the negative vote cast 'constitutes an unfortunate and inappropriate use of the veto.'<sup>313</sup> The Canadian representative, however, also pointed a finger towards the government of Macedonia, stating that actions by the Macedonian government produced the Sino-Macedonian dispute that lead to the present situation, i.e. China casting its negative vote.<sup>314</sup>

#### 4.3.1.1 Conclusion

As stated above, there are two alternative theories that may explain China's negative vote. *Firstly*; during its United Nations membership, China has always exclaimed the principle of state sovereignty and that a state's internal affairs should be protected and not interfered with by other states or intergovernmental organisations. However, since the Macedonian government asked the Security Council to extend UNPREDEP's mandate, it would be illogic to claim interference within a state's sphere of sovereignty, and, therefore, this theory seems to be the less convincing. *Secondly*; the representative of Canada pointed towards Chinese ulterior motives and that Macedonia had contributed to the situation. This ulterior motive is not as unobvious as one might think, as the dispute between China and Macedonia

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<sup>308</sup> See, for instance, speech made by the representative from the Russian Federation, UN Doc. S/PV. 3982, 25 February 1999, p. 4.

<sup>309</sup> UN Doc. S/PV. 3982, 25 February 1999, pp. 4-5 and Keesing's Record of World Events, 1999, p. 42807.

<sup>310</sup> UN Doc. S/PV. 3982, 25 February 1999, pp. 6-7 and Yearbook of the United Nations, 1999, p. 371.

<sup>311</sup> UN Doc. S/PV. 3982, 25 February 1999, p. 9.

<sup>312</sup> UN Doc. S/PV. 3982, 25 February 1999, pp. 5-6.

<sup>313</sup> UN Doc. S/PV. 3982, 25 February 1999, p. 7.

<sup>314</sup> UN Doc. S/PV. 3982, 25 February 1999, p. 7.

builds on the diplomatic recognition, via a joint communiqué signed in Taipei on 27 January 1999, of Taiwan made by Macedonia.<sup>315</sup> As explained in the chapter concerning Taiwan, China tries to isolate Taiwan and will not allow any external interference. So by recognizing Taiwan as a state, Macedonia created the conflict as they went head on with China on a topic where the PRC is very sensitive. Therefore, it is possible to state that the negative vote cast by China is a form of retaliation and China making a point of showing other states that China will not tolerate recognition of Taiwan, seen by China as a Chinese province.<sup>316</sup>

### 4.3.2 The Case of Guatemala and MINAGUA

In its efforts towards peace, the Guatemalan government signed a Peace Agreement on 29 December 1996 with the Unidad Revolucionaria Nacional Guatemalteca (URNG),<sup>317</sup> thereby ending an internal conflict that had ravaged Guatemala and its citizens for 36 years. The United Nations Secretary-General, however, concluded in his Report (S/1996/1045 and Addendums 1 and 2) that a successful peace process and its implementation needed verification by means of a military peacekeeping force supplementing the *United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala* (MINAGUA), a UN observer unit already located in Guatemala.<sup>318</sup> Therefore, a draft resolution contained in UN Document S/1997/18 was submitted to the Security Council with the intention of authorizing a United Nations military mission to Guatemala.<sup>319</sup>

Unlike the negative vote cast by the Chinese representative in the proposed Macedonian/UNPREDEP resolution, this negative vote was expected by many representatives, and a ‘problem of bilateral nature’ raised by a permanent member, that could not be allowed to halt an adoption due to the problem not being related to the question at hand, was referred to on several occasions.<sup>320</sup> And, as expected by some representatives, the Chinese representative did cast its negative vote, and thereby, blocked the adoption of proposed resolution S/1997/18,<sup>321</sup> this, despite urgent assertions from

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<sup>315</sup> Keesing’s Record of World Events, 1999, p. 42730, Casella, in full, <<http://www.atimes.com/china/CG11Ad02.html>>, Winfield, in full, <<http://www.globalpolicy.org/globalpolicy/security/issues/chinav99.htm>>, Both last visited 18 June 2004.

<sup>316</sup> Saich, p. 276.

<sup>317</sup> As confirmed by Secretary-General Addendum 2, para. 1 to Secretary-General Report S/1996/1045, 17 December 1996.

<sup>318</sup> UN Doc. Secretary-General Report S/1996/1045, 17 December 1996, chapter E, paras. 1, 11-12, and Addendum 2, para. 2, and, Yearbook of the United Nations, 1997, p. 166.

<sup>319</sup> UN Docs. S/PV. 3730, 10 January 1997, p. 3, and, S/1997/18, 9 January 1997, operative para. 1.

<sup>320</sup> See for instance, UN Docs. S/PV. 3730, 10 January 1997, p. 3, A/50/145, 19 July 1995, A/49/144, 19 July 1994 and Addendum 3, 19 September 1994, and, A/48/191, 9 August 1993.

<sup>321</sup> UN Doc. S/PV. 3730, 10 January 1997, p. 17, and, Keesing’s Record of World Events, 1997, p. 41441.

the Guatemalan representative that Guatemala never intended to interfere in the internal affairs of any other state and always acted as to not affect the territorial integrity or political independence of other states.<sup>322</sup> The Chinese negative vote was also deeply ‘regretted’ and criticised by the representatives of United States of America and Costa Rica, saying that China ‘was not able to give the larger interest of regional peace and security the priority it deserves.’<sup>323</sup>

The critique directed against China was firmly contested by the Chinese representative saying that the casting of its negative vote was forced upon China by the erroneous acts of the Guatemalan government setting obstacles in the way of Chinese support, and that this was something China actually did not want to do, but, Guatemala could not be expecting Chinese support while, at the same time, taking actions aimed at harming Chinese interests.<sup>324</sup> Therefore, due to the Guatemalan government’s support with the aim of splitting China in the United Nations; thereby violating General Assembly resolution 2758 (XXVI), and the invitation of Taiwanese authorities to the 29 December Peace Treaty signing, Guatemala had violated Chinese sovereignty and territorial integrity, thus, interfering in China’s internal affairs and ‘hurt the feelings of the Chinese people.’<sup>325</sup> The Chinese representative, probably as a method of advocating China’s position with regard to Taiwan, reaffirmed Chinese principles regarding the Taiwan question by stating that there is but one China and that ‘the Government of the People’s Republic of China is the sole legal Government representing the entire Chinese people.’<sup>326</sup> And, most likely as a part of its containment-policy towards Taiwan, the Chinese representative exclaimed that if the Guatemalan government moved to remove the obstacles, i.e. cancelled all future contacts with Taiwan and its authorities, the Chinese delegation might reconsider its negative vote at a future Council meeting.<sup>327</sup>

#### **4.3.2.1 Conclusion**

In a meeting between Prime Minister Zhou En-lai and Secretary of State Kissinger, Zhou exclaimed that the PRC would not cause trouble in Latin America,<sup>328</sup> nevertheless, if the veto cast by the Chinese Security Council representative did not cause any troubles in Latin America; it unquestionably did not improve the Guatemalan situation.

This negative vote once again depicts the strong and uncompromising view the Government of China holds of state sovereignty as it was stated by the Chinese Security Council representative that the Guatemalan peace process should not outweigh China’s sovereignty and territorial integrity,<sup>329</sup>

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<sup>322</sup> UN Doc. S/PV. 3730, 10 January 1997, p. 3.

<sup>323</sup> UN Doc. S/PV. 3730, 10 January 1997, pp. 17 and 19.

<sup>324</sup> UN Doc. S/PV. 3730, 10 January 1997, p. 20.

<sup>325</sup> UN Doc. S/PV. 3730, 10 January 1997, p. 20.

<sup>326</sup> UN Doc. S/PV. 3730, 10 January 1997, p. 20.

<sup>327</sup> UN Doc. S/PV. 3730, 10 January 1997, p. 20.

<sup>328</sup> Memorandum for the President, 19 November 1973, p. 9. <<http://foia.state.gov/documents/foiadocs/4f99.PDF>> last visited 3 September 2004.

<sup>329</sup> See also, letter from permanent representative of China to the President of the Security Council, S/1997/53, 20 January 1997, and, Haq, in full, <<http://www.globalpolicy.org/>

and that what makes this failed adoption actually interesting, is not that the proposed resolution failed to be adopted *per se*, but, instead, the listings of Chinese arguments concerning the Taiwan question exclaimed by the Chinese representative also illustrates the Chinese notion of their own sovereignty as the Chinese representative refers to acts made by Guatemalan government with the intention of splitting China in the United Nations. These acts made by the Guatemalan government that the Chinese representative refers to are, among others, letters sent to the General Assembly with the request of including the question of Republic of China and of parallel representation of divided countries at the United Nations into the provisional agenda of the General Assembly.<sup>330</sup> Something that the government of China cannot adhere to due to their ‘one China’ policy and its cause of national reunification. The Guatemalan government also tramples on the Chinese political containment-policy with regard to Taiwan as the Guatemalan government invite Taiwanese representatives to the December Peace Treaty signing.

Like Macedonia, Guatemala did, according to Chinese policy, almost everything wrong as they both ‘interfered’ in something that the PRC guards utmost rigidly, hence the casting of negative votes as a mean of making a strong point and retaliate.

## 4.4 Conclusion Regarding Veto

As shown earlier, the usage of the negative vote, has been the source of a number of political disputes within the Security Council, but, the exercise of the veto reflects, in itself, the underlying reason for the veto cast, namely; the geopolitical climate throughout the period’s during and *post* the Cold War. Therefore, it will be most prudent to separate negative votes cast for the duration of and after the end of the Cold War; this as a method of separating negative votes cast due to bloc antagonism and negative votes cast due to national policies and a permanent member’s notion of international law.<sup>331</sup>

Those vetoes cast during the period depicted as the Cold War, was, most likely, merely used as a method of hindering the ‘other side’ from gaining advantages, and, in principle, must be seen as strictly principle-vetoes. When, as negative votes cast during the period from 1990s until today, on the other side, suggests the substance of the casting state’s domestic policy with regard to certain international questions, for instance the Israel-Palestine conflict and Taiwan.<sup>332</sup>

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security/membership/chinavet.htm> last visited 12 July 2004.

<sup>330</sup> For instance, UN Docs. S/PV. 3730, 10 January 1997, p. 3, A/50/145, 19 July 1995, A/49/144, 19 July 1994 and Addendum 3, 19 September 1994, and, A/48/191, 9 August 1993. Also mentioned in Chapter 4.3.2 ‘*The Case of Guatemala and MINAGUA.*’

<sup>331</sup> Law and the Indo-China War; Moore, pp. 303-304 and 306, and, Schwarzenberger, pp. 237-238.

<sup>332</sup> Compare, as an example of PRC leadership’s ambivalence, China’s Security Council’s representatives’ statements and action with regard to Taiwan, in UN Docs. S/PV. 3982, 25 February 1999, pp. 6-7 and 9, with regard to Guatemala, S/PV. 3730, 10 January 1997, p.

Within international relations, China has, probably due to governmental reluctance and schizophrenic policy towards its own, both national and international status, not showed a straightforward policy in general. Plausibly because of the desire for independence and unification has remained deep in the Chinese mind. However, due to cast negative votes and statements within the Security Council, the Chinese government's strong view on state sovereignty, as a mean of protecting the country from further foreign intervention; thus, explaining the narrow and classical sense of state sovereignty adopted by Communist China, and the usefulness of turning the United Nations into its own account, is well portrayed.<sup>333</sup> This is especially evident in the Chinese reluctance of voting in favour of resolutions that mandate United Nations military interventions under Chapter VII of the Charter, seen by the Chinese, as a way of interfering in states domestic affairs. Nevertheless, it also sheds some light over China not wanting the right of self-determination being introduced into the Taiwan question, as the implications of self-determination would run against, and most likely, have repercussions for, Chinas domestic policy and the Chinese notion of a strong centralized state sovereignty.<sup>334</sup> Therefore, it is possible to argue that during the period known as the Cold War, the negative vote cast by 'China' was coloured and guided by outside interests, whereas, Chinese vetoes cast during the Guatemala and Macedonia cases until today, most prudently explains the Chinese view of external sovereignty; namely, that no state, nor international organisation should intervene in questions of Chinese domestic interest; *ergo* emphasizing the Chinese notion of its political sovereignty.

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20, with regard to Macedonia, and, Chinese statements with regard to the Israel-Palestinian conflict; S/PV. 3538, 17 May 1995, p. 8, and, S/PV. 3756, 21 March 1997, pp. 4-5.

<sup>333</sup> Kubálková and Cruichshank, pp. 159, 162, 175, and 177-178, and, Chan, p. 75.

<sup>334</sup> Chan, pp. 76-77.

# 5 Treaties - Suppressor of Sovereignty?

Treaties, when seen as the carrier of the will of states, is probably one of the best indicators of the weight each state places on its own sovereignty. But, to fully comprehend the entire normative picture painted by states when signing, ratifying, or, otherwise adhering to a treaty, one must also consider reservations that states, as future treaty parties, exclaims. Plausible objections to a reservation, however, is in this part of no importance since an objection depicts the objecting state's legal position and the reservation the reserving state's legal position, which in fact, is the one of interest. When linking this to China it is, therefore, also prudent to consider what implications exclamations of Asian values, Cultural relativism, and Subsistence have on a state's view of treaties and their implications.

## 5.1 Approaches and Implications

A treaty and its normative implications ought to be considered as to represent a vital and more intentional source of international law and co-operation between states; as treaties are express and written agreements whereby participating states agree to legally adhere to, and act in a certain manner.<sup>335</sup>

In Chapter 2.4 '*Limitations*,' treaties are depicted as a potential limitation to state sovereignty, thus, states via their external sovereignty might restrict their internal sovereignty, i.e. their sphere of free conduct with no external disturbances from states and/or international organisations. Nevertheless, according to the Vienna Convention on the Law of Treaties<sup>336</sup> (VCLT), Article 2(1a), 'treaty;'

'means an international agreement concluded between States [two or more] in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'<sup>337</sup>

A clear formulation in itself, but, it does not affirm, even implicitly, that the sphere of a state's sovereignty, when the state ratifies a treaty, thereby

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<sup>335</sup> Treaties can, of course, be concluded between states and international organisations, but it is outside the scope of this paper. Schwarzenberger, pp. 23, and 36, Jennings and Watts, pp. 1197, and 1217, Shearer, p. 37, and 398, The People's Republic of China and the Law of Treaties; Chiu, p. 1, Aust, pp. 14 and 16-17, Shaw, pp. 73-74 and 632, and, The People's Republic of China and the Charter-Based International Legal Order; Kim, pp. 328-330. Something that is made evident by Article 38 of the Statute of the International Court of Justice. Nevertheless, according to Scott, 'the PRC is not in full agreement with this particular list of the sources of international law.' Scott, p. 50.

<sup>336</sup> 23 May 1969, UNTS registration number: 18232, volume number: 1155.

<sup>337</sup> For definition, see also, Jennings and Watts, p. 1199, and, Shearer, p. 397.

giving formal declaration of consent to be bound, automatically will decrease. To clarify and further elaborate, one must turn to Article 26 of the VCLT and the legal implications of *pacta sunt servanda*;<sup>338</sup>

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

The normal procedure for a treaty becoming binding on a future party is ratification.<sup>339</sup> So, principally, a treaty is an international agreement, containing specific normative provisions, between a number of sovereign states that, due to ratification, is binding upon them; thereby, *prima facie* limiting state sovereignty.<sup>340</sup>

With regard to treaties it is important to realise that just because a state has ratified a treaty, thereby allowing the treaty to enter into force for the state in question, that the treaty is in force in the state, i.e. that the treaty in it self and its normative implications has become part of the ratifying state’s domestic law. To fully comprehend the difference between a treaty being in force for a state and a treaty being in force in a state, one might think upon international law and domestic law as constituting two different levels of norms.<sup>341</sup> With regard to the differentiation of treaties and domestic laws, two legal schools of thought, the monistic and the dualistic, has different answers with regard to the two different normative planes constituted by international and domestic laws, and how treaties interact with domestic law as founded by states different constitutions. It is, however, important to realise that this separation is strictly theoretical and constitutions worldwide contain regulations that resembles notions upheld by both schools.<sup>342</sup> As, for example, seen in China where a separation of different kinds of treaties is not accepted, but where at the same time, the government holds the view that domestic laws need to be adopted in order to fulfil the provisions of the treaty.<sup>343</sup> This, probably as a method of giving the provisions a Chinese character; for example, implementation of the notion of subsistence, something that will be presented further below.

According to the monistic school, a relationship of dominance and inferiority exist between international law and domestic law. Thereby, once the treaty has been concluded in accordance with the national constitution and has entered into force for the state, the provisions of the treaty becomes implemented in the state’s domestic law without domestic laws being enacted.<sup>344</sup>

The dualistic school takes a different turn when discussing treaties vis-à-vis domestic laws and their interaction. According to the dualistic

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<sup>338</sup> Aust, pp. 75, and 144, Schwarzenberger, pp. 21-23 and 125, Shearer, p. 413, Jennings and Watts, p. 1206, and, Shaw, p. 633.

<sup>339</sup> Article 2(1b) VCLT: ‘ratification ... mean in each case the international act ... whereby a State establishes on the international plane its consent to be bound by a treaty.’

<sup>340</sup> Schwarzenberger, p. 123, Shaw, pp. 639-641, Shearer, p. 399, and, Scott, pp. 49-50.

<sup>341</sup> Aust, p. 143.

<sup>342</sup> Aust, p. 145.

<sup>343</sup> Shao, pp. 199-200.

<sup>344</sup> Aust, p. 146, and, Shao, p. 199.

notion both legal forms are seen as divided and autonomous. The effect of this notion is that treaties are not given any special status in the domestic constitution and the provisions in the treaty have no effect in the ratifying state unless implemented via domestic law.<sup>345</sup>

## 5.2 The Chinese View

Above it has been suggested that treaties and their domestic implementation does play a major role in the West and states notion of international law. Nevertheless, when researching China and its view of treaties and their, both international and domestic implications, one must presume that the Chinese view of the legalistic weight of treaties is the same as in the West. Otherwise, there would be little point in using Western notions and Western thought as an indicator of Chinese behaviour and perception. If not, plausible differences in, experiences of, and notions of, history, culture and economics, might exacerbate the already underlying differences between states and their perception of international law. It is also important to keep the Chinese argument concerning unequal treaties in mind. This since the West presumably does not regard states as politically equals and thereby adheres to the explanation that, since states never are truly equals the entire concept of unequal treaties plausibly could undermine the entire stability of treaty relations. Whereby, the Chinese notion, nevertheless, is to regard only equal treaties as legitimate sources of international law.<sup>346</sup>

All through the reforms of Deng Xiaoping, during the late 1970s and early 1980s, international law and its domestic implementation did become more important to the Chinese government as they adopted the Chinese 'open-door' policy,<sup>347</sup> and even the classical, maoistic view of sovereignty seemed less important to the Chinese. The most plausible explanation to this is probably that of a growing governmental acceptance and recognition of international law and that a faithful implementation and adherence to treaties was closely linked to China's international reputation.<sup>348</sup> Nevertheless, the Chinese government were strongly in favour of an independent foreign policy, thus meaning that China wanted international recognition and membership but, on its own terms.<sup>349</sup>

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<sup>345</sup> Shao, p. 97, Schwarzenberger, p. 37, and, Aust, pp. 143, and 150-151.

<sup>346</sup> Scott, p. 60, and, *The People's Republic of China and the Law of Treaties*; Chiu, pp. 5 and 60-63. See also Chapter 3.1 '*Introduction*.'

<sup>347</sup> Foot, pp. 12, and, 226, Goldman, pp. 10, 18-22, 45-49, and, 109-112, 'Main Points of Deng Xiaoping's Talks in Wuchang, Shenzhen, Zhuhai, and Shanghai from January 18 to February 21, 1992,' cited from Sullivan, pp. 150-154. See also, Jianhua, in full, and, Harris.

<<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011394.pdf>>  
last visited 24 August 2004.

<sup>348</sup> Starke, p. 1, Scott, pp. 48-49, Shaw, p. 36, Shao pp. 197-198, and, *International Organizations in Chinese Foreign Policy*; Kim, p. 145.

<sup>349</sup> As depicted in the Preamble of the Chinese 1982 Constitution. See also, Shao, p. 198, as he discusses the link between an independent foreign policy and the Chinese Five Principles of Sovereignty. For Chinese arguments with regard to the Five Principles, see also, UN Doc. S/PV. 2899, 20 December 1989, p. 22; concerning the Panama issue.



However, the Chinese, after the 1989 Tiananmen incident,<sup>350</sup> found themselves being under massive international scrutiny and pressure from both a human rights angle and a sovereignty angle.<sup>351</sup> And the Chinese government also found themselves subjected to a historical United Nations resolution condemning China, being a permanent member of the Security Council, for violating human rights domestically.<sup>352</sup> The Chinese answer, however, gave another picture of the Tiananmen incident as it was depicted as a counter-revolutionary rebellion compounded of anti-china forces. The acclaimed human rights abuses was by Chinese authorities explained as being merely a method of maintaining law and order and to ‘protect the life and property of the broad masses of the people.’ and that ‘[t]he purpose of the Chinese government in quelling the rebellion was precisely to safeguard the basic human rights and freedom of the overwhelming majority of the people.’ It was also stated that the actions undertaken by the Chinese government fell within the Chinese sovereignty and no international interference was tolerated.<sup>353</sup> These statements clearly emphasises the Chinese notion of rights seen as collectivistic instead of individualistic, further considered below. However, the Tiananmen crisis affected Chinese international status only for a few years and China was welcomed back in from the cold during the second Gulf conflict in the 1990s.<sup>354</sup> Another effect of the international pressure was China demanding recognition of a new international political and economic order (NIPEO). It is vital to understand the underlying reasons and substance of NIPEO, this since it can be found in some of China’s statements with regard to subsistence. According to Kim, NIPEO was just another method allowing the Chinese government and the CCP to secure domestic legitimisation and, once again, strengthening the Chinese notion of state sovereignty.<sup>355</sup> Thus, after the Tiananmen incident in 1989, China within the NIPEO, which contained Five Principles that resembled in large parts the old Chinese notion of an authoritarian

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<sup>350</sup> Goldman, pp. 324-325.

<sup>351</sup> Foot, pp. 243-245; on the response from US Congress. Chan, pp. 87-88, China, the United Nations, and Human Rights, the Limits of Compliance, Kent, pp. 146-149, Between Freedom and Subsistence, China and Human Rights, Kent, p. 213, and, Saich, pp. 129 and 276-277. See also, Letter dated 14 June 1989 from the Chargé d’affaires a.i. of the Permanent Mission of El Salvador to the United Nations addressed to the Secretary-General, UN Doc. A/44/325, 15 June 1989, Summary Record of the General Assembly’s Third Committee’s 53<sup>rd</sup> Meeting, UN Doc. A/C.3/44/SR.53, 4 December 1989, paras, 7 and 44, and, News from Asia Watch, for instance, 12 June, 24 June, 24 June, 19 July, 6 August and 15 November 1989.

<sup>352</sup> United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1989/58, and, Sub-Committee resolution, 1989/5, 41<sup>st</sup> session, 37<sup>th</sup> meeting, 31 August 1989. See also, International Organizations in Chinese Foreign Policy; Kim, p. 144, and, Yearbook of the United Nations, 1989, p. 556.

<sup>353</sup> UN Docs. A/44/367, 3 July 1989, and A/44/504, 6 September 1989. See also, China, the United Nations, and Human Rights, the Limits of Compliance; Kent, pp. 148-149, and, Saich, pp. 276-277. See also, Article 1(2) of the Chinese Constitution, stating that disruptions of the socialist system by any individual or group is prohibited, and Article 4 of the Law of the People’s Republic of China on Law-Making, where, once again, the collectivistic and state-centric notion is well depicted.

<sup>354</sup> See, for instance, Foot, pp. 247-249.

<sup>355</sup> China’s International Organizational Behaviour; Kim, p. 415.

Westphalian sovereignty, once again laid emphasis on state sovereignty with regard to international organisations and treaties.<sup>356</sup>

Despite the Chinese government's newborn resistance with regard to international interference within Chinese domestic affairs, as an effect of the Tiananmen incident and external pressure, China, in 1991, published its first White Paper 'Human Rights in China'. This Paper is interesting because of its explanation of the Chinese notion of treaties and how a treaty's regulations can be interpreted and implemented domestically by referring to social and economic rights in particular and specific notions, such as cultural values and subsistence.<sup>357</sup>

### 5.2.1 The Chinese Constitution

When examining the normative weight a state places on treaties it is truly most prudent, first of all, to examine the state's Constitution.<sup>358</sup> The Chinese Constitution from 1982, however, does not, directly focus on the Chinese stance of treaties in their domestic legal system.<sup>359</sup> As a consequence, scholars, for instance Shao Shaping and Jonas Grimheden, hold the perception that domestic laws and treaties have the same status, thus allowing treaties direct application and binding force in domestic China.<sup>360</sup> This perception is, however, countered by Wendy I. Zeldin, as she places treaties just below the Chinese Constitution, but above domestic laws.<sup>361</sup> However, despite the uncertainty, it is via Chinese state praxis quite clear that China does regard treaties as important sources of international law;<sup>362</sup> the precise hierarchal order with regard to the Constitution, treaties and basic domestic laws is, therefore, not important.

The process of treaty implementation in China can probably not be fully understood if not the entire Chinese process when approaching treaties are depicted. In general, and according to the '*Law of the People's Republic of China on the Procedure of the Conclusion of Treaties*,'<sup>363</sup> it is the Central People's Government that concludes treaties and the Standing Committee of

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<sup>356</sup> Chinas International Organizational Behaviour; Kim, p. 415, China as a Great Power; Kim, p. 457, and, International Organizations in Chinese Foreign Policy; Kim, p. 160.

<sup>357</sup> The Chinese 'White Papers' will be discussed further below. See also, Between Freedom and Subsistence, China and Human Rights, Kent, pp. 212-213.

<sup>358</sup> Constitution of China, adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982, Zhonghua Renmin Gonghuo falü/ Laws of the People's Republic of China.

<sup>359</sup> Shao, pp. 198-199.

<sup>360</sup> Shao, pp. 198-200, Grimheden, pp. 173-174, and, 180, The People's Republic of China and the Law of Treaties; Chiu, pp. 3-4, and, Wang and Zhang, pp. 266, 446, and, 516-517.

<sup>361</sup> Zeldin, p. 95.

<sup>362</sup> Scott, pp. 51, and 59. See also, 'China's White Paper on Human Rights 2003,' Chapters foreword, and VIII.

<<http://losangeles.china-consulate.org/eng/news/topnews/81107.htm>> last visited 30 July 2004.

<sup>363</sup> Adopted at the 17<sup>th</sup> Meeting of the Standing Committee of the Seventh National People's Congress on December 28, 1990. In force on December 28, 1990. Zhonghua Renmin Gonghuo falü/Laws of the People's Republic of China, p. 621.

the National People's Congress that decides on the ratification of the treaty, whereas the President of the People's Republic of China does the actual ratification of the treaty in question.<sup>364</sup> Seeing that one of the general notions of treaties in China stipulate that treaties are directly applicable domestically when ratified, there are exceptions and the most logical exception is when the treaty specifically stipulate the duty of adopting legislative and judicial measures for parties to the treaty.<sup>365</sup> Along with a consideration of treaties in general and treaties concerning human rights in a more specific sense, it is possible to state that despite that a country's record of ratification not fully represents its *de facto* adherence and implementation, it does, nevertheless, represent at least a *prima facie* acknowledgment of international law and treaties normative regulations.<sup>366</sup> As the Chinese view on state sovereignty is, most plausibly, built on a strong nationalism, and, their historical experiences, thus, not tolerating any infringements in their sovereignty,<sup>367</sup> China has developed a method of avoiding norm conflicts between domestic laws, and international laws and treaties by taking measures to avoid and reduce conflicts when adopting domestic laws and taking China's background and practical situation of economic, political and cultural realities into account when implementing ratified treaties.<sup>368</sup>

## 5.2.2 Cultural Relativism and Subsistence

The implications of cultural relativism<sup>369</sup> is not something exclusively Chinese, as even the Sunni-Muslim Taliban's made claims in line of cultural relativism.<sup>370</sup> However, the Chinese notion of human rights is, most conceivably, built on their political history, traditional Chinese values and history; but most often political goals overshadows true cultural beliefs.<sup>371</sup> The basic foundation of the cultural relativist notion is that the idea of human rights is a Western one allowing Western states to sell of there own political ideologies and values and, thereby judges actions of other nations, and Western human rights are thus inappropriate and impossible to implement in China. The reason for being that standards of morality differ

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<sup>364</sup> Article 3, paras, 1-3, Article 5, and, Article 7, the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties. See also, Articles 67 and 89 of the Chinese 1982 Constitution stating the same. These provisions is, according to Shao Shaping, fully compatible with VCLT, Shao, p. 200.

<sup>365</sup> Shao, pp. 199, and, 201-202.

<sup>366</sup> Eldridge, p. 63.

<sup>367</sup> Scott, pp. 48-50.

<sup>368</sup> Shao, pp. 202-206, 'China's White Paper on Human Rights 1991,' Chapter X, <<http://www.chinesehumanrightsreader.org/governments/91wp/91hr-wp.html>> and, 'Protecting Human Rights: China's Priority in 21<sup>st</sup> century,' People's Daily, 1 March 2004. <[http://english.peopledaily.com.cn/200403/01/print20040301\\_136257.html](http://english.peopledaily.com.cn/200403/01/print20040301_136257.html)> both last visited 2 July 2004.

<sup>369</sup> China, the United Nations, and Human Rights, the Limits of Compliance, Kent, p. 20-25, Brown, p. 92, and, Asian Values and the Universality of Human Rights; Li, pp. 32-35.

<sup>370</sup> Cited from interview with Maulvizada, June 1997, Rashid, pp. 111-112.

<sup>371</sup> The Chinese conception of human rights; Svensson, pp. 33-34 and 37, The Chinese Debate on Asian Values and Human Rights; Svensson, p. 201, and, Davis, p. 21.

between different societies and that each state's cultural and historical background must be allowed to set the foundation for that state's depiction of human rights.<sup>372</sup> As examples of the difference between Chinese and Western human rights policies, the notions of individual contra collective rights and the duties and rights of individuals might be mentioned, as China regards human rights as being a collective rather than individual nature, depicted as secondary to state sovereignty.<sup>373</sup> Another difference between China and the West is that the former approaches human rights from the perspective of duties of individuals, whereas the latter starts with rights entrusted to the individual,<sup>374</sup> and as an example of the emphasis on duties of the Chinese people one might mention Article 52 of the Chinese Constitution stating that 'it is the duty of citizens of the People's Republic of China to safeguard the unification of the country and the unity of all its nationalities.'<sup>375</sup>

After the Tiananmen incident in 1989, and probably as a direct effect of it, China began issuing 'White Papers' depicting the human rights situation in China. For this paper, the human rights situation in itself is not interesting, nevertheless, these 'White Papers' tells us something about the Chinese view on treaties being domestically interpreted and implemented in line with the domestic situation.

The Chinese 'White Papers' speak of the specific Chinese situation and right to subsistence<sup>376</sup> – being named China's 'final weapon in [its] formal official arsenal'<sup>377</sup> - as being a fundamental right of providing food and livelihood for its people namely, '[t]o eat their fill and dress warmly'<sup>378</sup>

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<sup>372</sup> Despite these statements; according to Marina Svensson, the Communist Chinese when struggling the, then ruling, KMT, made claims that the KMT had violated human rights, *The Chinese Debate on Asian Values and Human Rights*; Svensson, pp. 204-205, 'China's White Paper on Human Rights 1991,' Chapters II and X. <http://www.chinesehumanrightsreader.org/governments/91wp/91hr-wp.html> Last visited 2 August 2004. The Chinese conception of human rights; Svensson, p. 26. China as a Great Power; Kim, p. 456. Tang, citing statement by Liu Huaqiu, Head of the Chinese Delegation, Vienna, 17 June 1993, p. 214. See also, statement by Mr. Buzo from Beylorussian SSR, Summary Record of the General Assembly's Third Committee's 53<sup>rd</sup> Meeting, UN Doc. A/C.3/44/SR.53, 4 December 1989, para. 57.

<sup>373</sup> Chan, pp. 74-75, 81-82, Saich, p. 129, *The Chinese conception of human rights*; Svensson, pp 34, and 36, Brems, p. 52, Tang, pp. 214-215, citing statement by Liu Huaqiu, Head of the Chinese Delegation, Vienna, 17 June 1993, *Between Freedom and Subsistence, China and Human Rights*; Kent, pp. 30 and 45, *China, the United Nations, and Human Rights, the Limits of Compliance*; Kent, pp. 20-25, and, Scott, p. 42.

<sup>374</sup> The Chinese conception of human rights; Svensson, pp. 39 and 43, *Chinese Law, Towards an Understanding of Chinese Law, its Nature and Development*; Chen, pp. 90-93, Tang, p. 215, citing statement by Liu Huaqiu, Head of the Chinese Delegation, Vienna, 17 June 1993, and, 'China's White Paper on Human Rights 1991,' chapter II.

<sup>375</sup> China's Constitution, *Zhonghua Renmin Gonghuo falü/ Laws of the People's Republic of China*, p. 18.

<sup>376</sup> 'The provision of support for animal life; the furnishing of food or provender.' 'The upkeep of an army; the provision of supplies for troops,' 'Means of supporting life in persons or animals; means of support or livelihood.' *The Oxford English Dictionary*, 2nd edition, Vol. XVII, p. 62.

<sup>377</sup> Davis, p. 16.

<sup>378</sup> 'China's White Paper on Human Rights 1991'

i.e. a development first argument with a focus on economic and social rights instead of political and civilian rights.<sup>379</sup> The argument builds on the experience of the Chinese people and that is has generated the Chinese notion of rights.<sup>380</sup> As part of a Chinese method of principle rhetoric and acting in silence the ‘Law of the People’s Republic of China on Law-Making’ will be relevant to consider as its Article 1 states that the Chinese legal system and laws enacted shall bear Chinese characteristics.<sup>381</sup> Thus, in silence transforming international law into domestic with a Chinese twist.

### 5.2.3 A Westphalian Notion

As the twentieth century was and the twenty-first century is largely still dominated by the sovereign state, the claims and reasons for sovereignty, however, have shifted. In early day’s sovereignty was the protection of boundaries and ownership of territory, today sovereignty stands for the rediscovery by countries that sovereignty will strengthen their world role in, for instance intergovernmental organizations, and the rediscovered national independence of the Third World.<sup>382</sup>

China has been depicted and criticized as a state adhering to the Westphalian and pre-Nuremberg notion of state sovereignty.<sup>383</sup> Therefore it is prudent to clarify the underlying concept of the Westphalian notion and how Chinese statements fit into this concept. According to Steiner and Alston, Westphalian sovereignty concentrates on two notions, namely, territoriality, seen as the cornerstone of sovereignty, and the exclusion of external actors from domestic authority structures.<sup>384</sup> The notion of territoriality means that states are assumed to exercise supreme and exclusive authority within their territories, independently of other states. Naturally, the Westphalian notion of state sovereignty has its primary

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<<http://www.chinesehumanrightsreader.org/governments/91wp/91hr-wp.html>> last visited 2 August 2004. Concerning the likely geopolitical repercussions of providing food for the entire Chinese population, see Boland, pp. 55-76.

<sup>379</sup> Chan, pp. 81-82, citing Yan Xuetong, *Analysis of China’s National Interest*, Tianjin People’s Press, 1996, p. 2, Brems, pp. 51-53, Saich, p. 130, and, *Between Freedom and Subsistence, China and Human Rights*; Kent, pp. 222-223, and, Shih, pp. 640-646.

<sup>380</sup> Brems, p. 52, *Between Freedom and Subsistence, China and Human Rights*; Kent, pp. 222-223, and, Summary Record of the General Assembly’s Third Committee’s 53<sup>rd</sup> Meeting, UN Doc. A/C.3/44/SR.53, 4 December 1989, para. 79.

<sup>381</sup> *Law-Making in the People’s Republic of China*, ed. Otto, Polak, Chen and Li, Appendix 2, pp. 257-258. For further references concerning Chinese practical legality and characteristics, see, Shih, p. 634-640.

<sup>382</sup> See, for instance, Osiander, pp. 251-287, where he claims that Westphalian sovereignty is a product of the fixation states awarded sovereignty during the nineteenth and twentieth centuries.

<sup>383</sup> See, for instance, Saich, p. 275, and, *The People’s Republic of China and the Charter-based International Legal Order*; Kim, p. 347.

<sup>384</sup> Steiner and Alston, pp. 575-577, and, van Staden and Vollaard, pp. 165-166 and 171-172.

function in the Third World, as testified by the many claims of supreme authority over a certain territory.<sup>385</sup>

In a speech by the Chinese representative Liu Hauqiu, some of the Westphalian sovereignty's basic arguments were addressed, as it is stressed that 'nobody should be allowed to use the human rights issue to exert political and economic pressures on other countries.'<sup>386</sup> Thereby, placing human rights into China's domestic sphere to discourage external interference.<sup>387</sup> Probably as a response to the Chinese belief that Western countries provoke and force their views on other states, with emphasis on developing and Third World states.<sup>388</sup> In general, Chinese statements depicts a notion of opposition to any country making use of its own values, ideology, economic development and political standards when 'interfering' in affairs described by the Chinese as domestic.<sup>389</sup> The reasons for this would be that any intervention, whatever the reason, would be a violation of Chinese sovereignty in large. As a foundation for these statements, China relies on Article 2(7) of the Charter of the United Nations, described by the Chinese as an internationally recognized principle of international law, even when discussing human rights.<sup>390</sup> The notion of the West that human rights does not fall under a state's domestic affairs and, thus, does not fall under Article 2(7) of the Charter is, by the Chinese, proclaimed as a demand contrary to international law and state sovereignty.

## 5.2.4 Bilateral Discussions and Multilateral Critique

The Chinese notion of sovereignty, by theorists named Westphalian sovereignty, explains the apparent contradiction in China's international behaviour. As China wants to be considered as being a serious member of the international sphere and seeks a part to play in the global governance, but at the same time does not approve of external pressure on itself or on other states, the dedication to sovereignty and a territorial definition of China causes international uncertainty.<sup>391</sup> This is also made evident by China's reluctance to move discussions and dispute settlement out of a bilateral framework – depicted as a 'quiet diplomacy' by Western diplomats

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<sup>385</sup> Chan, p. 79. See, for instance, 'Sovereignty over Pedra Branca/Palau, Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore),' still ongoing, 2003-, 'Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia),' Merits, ICJ, 17 December 2002, and, 'Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia),' Merits, ICJ, 13 December 1999.

<sup>386</sup> Brems, p. 62, citing 'Statements by Liu Huaqiu, Head of the Chinese Delegation, Vienna, 17 June 1993, in Tang, pp. 213-217. For further references, see also 'Chinas White Paper on Human Rights 1991,' <<http://chinesehumanrightsreader.org/governments/91wp/91hr-wp.html>> last visited 2 August 2004.

<sup>387</sup> Chan, p. 88, Davis, p. 16, and, Summary Record of the General Assembly's Third Committee's 53<sup>rd</sup> Meeting, UN Doc. A/C.3/44/SR.53, 4 December 1989, para. 76.

<sup>388</sup> Tang, p. 215, and, Chan, p. 82.

<sup>389</sup> Scott, pp. 49-50, and, Chan, pp. 79-84, and, 88-89.

<sup>390</sup> Summary Record of the General Assembly's Third Committee's 53<sup>rd</sup> Meeting, UN Doc. A/C.3/44/SR.53, 4 December 1989, paras. 75, 77 and 80, and, 'The United Nations,' Chiu, p. 211.

<sup>391</sup> Saich, pp. 272, and 275.

- into the multi-polar arena.<sup>392</sup> As two primary examples one might mention the fact that China has not recognized the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute of the Court and that China ‘does not recognize the competence of the Committee against Torture as provided for in article 20 of the Convention [Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or punishment, 10 December 1984].’<sup>393</sup> The reason for these actions lies most likely in a Chinese reluctance of allowing or giving another entity, not controlled by China, mandate to decide for China and, thus, plausibly decide against Chinese will and conception.<sup>394</sup>

### 5.3 Treaties versus Sovereignty

Among writers and states, the idea that as treaties, when ratified bind the state, they also limit or erode the state’s sovereignty, i.e. the state’s ability to act in a certain way or not to act in a certain way. And this ability of states, to limit their own sovereignty, is often described as the ultimate use of state sovereignty;<sup>395</sup> despite the notion of the sovereign state as the creator and enforcer of international law and treaties.<sup>396</sup>

Since the foundation of the United Nations, the principles of treaties in general and human rights in particular have gained weight. Plausibly to the loss of the territory-centric notion of sovereignty that also used to exist in the West. Though the United Nations Charter in its Article 2(7) safeguards state sovereignty when stating that the domestic affairs of a member state shall be protected from outside interference, it does not, nowadays, place the lack of respect for human rights within state sovereignty. Thus, as long as the state in question has ratified the Convention in question, its government become accountable to the international community without being able to play the domestic affairs card.<sup>397</sup>

Nevertheless, as a result of the limitation of a state’s sovereignty via ratification of a treaty, it gains other rights and options which might be seen

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<sup>392</sup> For further references, see Report from ‘Human Rights in China,’ pp. 10-15.

<sup>393</sup> ‘Multilateral Treaties Deposited with the Secretary General/United Nations,’ ST/LEG/SER.E/22, Vol. I, Part I, Chapters I to XI, p. 272. See also, Scott, pp. 49-50, Saich, pp. 130-131 and 280, and, ‘Chinas White Paper on Human Rights 2003,’ <<http://losangeles.china-consulate.org/eng/news/topnews/81107.htm>> last visited 30 July 2004, Becquelin and Chan, pp. 34-35, Eldridge, pp. 64-65, and, The People’s Republic of China and the Charter-Based International Legal Order; Kim, pp. 319-321.

<sup>394</sup> Steiner and Alston, pp. 557 and 562.

<sup>395</sup> Jennings, pp. 31-32, and 35, Chayes and Chayes, pp. 26-27, and, van Staden and Vollaard, p. 167.

<sup>396</sup> Jennings, p. 35.

<sup>397</sup> van Staden and Vollaard, pp. 171, and 187, Schermers, pp. 186-187, and, Steiner and Alston, p. 570, citing Daniel Bodansky, Reporting Obligations in Environmental Regimes: Lessons for Human Rights Supervision, in ed. Philip Alston and J. Crawford, ‘the Future of UN Human Rights Treaty Monitoring, 2000, p. 363.

as an international sovereignty, for instance, rights of international decision-making through membership of different international organisations.<sup>398</sup>

China, however, does not subscribe to the idea of ‘limited sovereignty’ suggested by some states, nor does it go along with the idea of ‘the fading away of sovereignty’ as a result of increasing interdependence.<sup>399</sup>

## 5.4 Reservations

The reservation seen as a unilateral act with the purpose of modifying all or specific terms of a particular treaty, thereby in specific parts, not fully binding a future party to the treaty, is regarded as an demonstration of state sovereignty and state equality.<sup>400</sup> As stated before, it is not the objections made towards a particular reservation that is interesting, since an objection only depicts the policy of the state making the objection. Of interest is the reservation in itself, as it depicts the policy of the state making the reservation with regard to treaties, the particular subject provisioned in the treaty, and also the reserving state’s notion of state sovereignty and the state’s will of preserving its sovereignty in full or in part; i.e. a successful reservation preserves state sovereignty, but an claimed reservation depicts a state’s view of their sovereignty.<sup>401</sup>

Reservations, made by China, to multilateral human rights treaties follow a certain pattern, as the most common exclamation when it comes to China and, in this case, human rights treaties is that the signing and/or ratification made by the Taiwanese authorities are illegal and, as such, null and void.<sup>402</sup> These statements are not, however, reservations in a strict sense, as they are more of a declaratory status. Nevertheless, these declarations also tell the reader something about the Chinese notion with regard to succession to treaties;

‘1. With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People’s Republic of China, my Government will

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<sup>398</sup> Jennings, p. 36. China, the United Nations, and Human Rights, the Limits of Compliance; Kent, p. 27, Chayes and Chayes, p. 27, and, van Staden and Vollaard, p. 172.

<sup>399</sup> Chan, pp. 76, and 79.

<sup>400</sup> Schwarzenberger, p. 126, Shearer, pp 421-422, Shaw, pp. 641-642, Sevastik, p. 48, Horn, p. 9, and, Council of Europe and British Institute of International and Comparative Law, pp. 12-13. The VCLT defines reservation as an ‘unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application of that state’ (Article 2(1d)).

<sup>401</sup> Eldridge, pp. 31 and 63.

<sup>402</sup> The People’s Republic of China and the Law of Treaties; Chiu, p. 47. See, for instance, ‘Multilateral Treaties Deposited With the Secretary-General/United Nations,’ ST/LEG/SER.E/22, Vol. I, part I, p. 125; *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948), p. 136; *International Convention on the Elimination of All Forms of Racial Discrimination* (7 March 1966), p. 157; *ICESCR* (16 December 1966), p. 172; *ICCPR* (16 December 1966), and, ST/LEG/SER.E/22, Vol. II, part I, p. 327; *VCLT* (23 May 1969).



examine their contents before making a decision in the light of the circumstances as to whether or not they should be *recognized*.

2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of "China" are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be *acceded to*.<sup>403</sup>

The statement is clearly not in line with Western thoughts, as the general Western notion is that no state can avoid being bound by a treaty concluded by a former government.<sup>404</sup> Otherwise, reservations made by the Chinese government are consistently in line with the Chinese resistance against external, third party interference in Chinese domestic affairs. Examples of this can be seen, for instance, in China's reservations to Article 9 of the *Genocide Convention*,<sup>405</sup> to Article 22 of the *Racial Discrimination Convention*,<sup>406</sup> to Article 29(1) of *CEDAW*,<sup>407</sup> to Articles 20 and 30(1) of *CAT*,<sup>408</sup> and, to Article 66 of *VCLT*.<sup>409</sup> With the effect that no dispute, with China as one of the parties, concerning the interpretation, application, fulfilment, and/or, responsibility questions of the said Conventions can be submitted to arbitration, to the International Court of Justice, or, the Secretary-General of the United Nations.<sup>410</sup>

## 5.5 Conclusions Regarding Treaties

In the case of treaties and their potential limitation of sovereignty, the challenge, not only to Chinese sovereignty, but the sovereignty of every state, arises from the globalization of finance, regional and global interdependence, and that international legislation have leaked into the domestic sphere and thereby have begun eroding the bases of state

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<sup>403</sup> Statement by the PRC's Minister of Foreign Affairs on 29 September 1972 to the Secretary-General. Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, Etc. As at 31 December 1976, UN Doc. ST/LEG/SER.D/10 (1977), pp. iii-iv, cited from *The People's Republic of China and the Charter-Based International Legal Order*; Kim, pp. 322-323.

<sup>404</sup> See, for instance, Jennings and Watts, p. 1253.

<sup>405</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948. UNTS registration number: 1021, volume number: 78.

<sup>406</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966. UNTS registration number: 9464, volume number: 660.

<sup>407</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979. UNTS registration number: 20378, volume number: 1249.

<sup>408</sup> *Convention Against Torture and Other Cruel, Unhuman or Degrading treatment or punishment*, 10 December 1984. UNTS registration number: 24841, volume number: 1465.

<sup>409</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969. UNTS registration number: 18232, volume number: 1155.

<sup>410</sup> 'Multilateral Treaties Deposited with the Secretary-General/United Nations,' ST/LEG/SER.E/22, Vol. I, Part I, pp. 125, 136, 234, 272, and, ST/LEG/SER.E/22, Vol. II, Part I, p. 327. For further references, see also <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp>> last visited 23 August 2004, and, Grimheden, pp. 180-182.

sovereignty, thus giving it an subordinate function (this according to a Western notion).<sup>411</sup> The effect of which is that the Chinese principle of bilateral discussions are being crippled due to the possibility of external criticism.<sup>412</sup>

To some analysts, the Chinese notion of state sovereignty might come of as a bit strong. However, according to Article 1(1) of the *ICCPR*, Article 1(1) of the *ICESCR*, and, General Assembly resolution 2625 (XXV), all peoples have the right to choose their own political, cultural and economic system and, implicitly, other countries have no right to interfere in this process. When these rights are seen as a part of a ‘nation or state proclaimed self-determination,’ as maintained by the Chinese government,<sup>413</sup> instead of a peoples right of self-determination, political statements made by the Chinese does not appear to far fetched; as the Chinese claim of subsistence and collectively based rights can be explained as being part of this ‘state right of self-determination’ and as long as China does not actively encumber rights depicted in the *ICCPR* – which China ‘only’ has signed<sup>414</sup> – no genuine legalistic critique can be directed against China for not upholding civil and/or political rights. China are following these specific treaties, however, influenced with a Chinese right to determine their political status, economic and development goals.

As one example of the difficulties states and international organisations encounter when arguing the linkage and/or superiority, inferiority situation between sovereignty, treaties and human rights, one might mention the regretful dualism in the Charter of the United Nations, where human rights and sovereignty are regarded as having equal importance; this when analyzed in a strictly textual sense. In its Article 1(3) the Charter states that one of its purposes is to promote and encourage respect for human rights. However, in Article 2(7) of the Charter the domestic affairs of any state is protected from external interference and that the *only* (emphasis added) exception from this is enforcement measures under Chapter VII of the Charter. As such, these two Articles confirm the Chinese notion that human rights belong to the domestic sphere of a state as they allows for a selective choice.<sup>415</sup>

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<sup>411</sup> Steiner and Alston, p. 573, Carazza, pp. 64, and, 66, and, Zhibing, in full, <[http://www.chinadaily.com.cn/english/doc/2004-08/14/content\\_365409.htm](http://www.chinadaily.com.cn/english/doc/2004-08/14/content_365409.htm)> last visited 24 August 2004.

<sup>412</sup> The People’s Republic of China and the Charter-Based International Legal Order; Kim, p. 317.

<sup>413</sup> Between Freedom and Subsistence, China and Human Rights; Kent, pp. 21-22, Brems, p. 53, ‘Chinese White Paper on Human Rights 1991,’ <<http://www.chinesehumanrightsreader.org/governments/91wp/91hr-wp.html>> last visited 2 August 2004, and, Tang, p. 213, citing statement by Liu Huaqiu, Head of the Chinese Delegation, Vienna, 17 June 1993.

<sup>414</sup> Article 18 VCLT; ‘[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty ... until it shall have made its intention clear not to become a party to the treaty.’ The *ICCPR* was, according to Multilateral Treaties Deposited with the Secretary-General/United Nations, ST/LEG/SER.E/22, Vol. I, Part I, p. 169, signed by China on the 5 October 1998.

<sup>415</sup> For further elaboration, see also, China, the United Nations, and Human Rights, the Limits of Compliance; Kent, p. 26.

As stated above, the Chinese government regards human rights strictly as a domestic affair, where any critique on their human rights record by another state or international organization is regarded an act of interference in Chinese domestic affairs, thus using human rights as a method of changing the political, economic, and social system of China. A notion that nicely fits into China's conception of sovereignty, especially the Westphalian sovereignty principle, which, can be translated into the notion that state sovereignty and domestic interests are the foundation of the international system and that this should be based on the notion of equality of states, respect for different political systems, cultures, and development, and views of human rights, and non-interference in each other's domestic affairs.<sup>416</sup>

Some of China's legalistic abnormalities and implementation deficiencies can be explained by an unwillingness to surrender normative and sovereign power. However, to some extent, China's human rights record depends on a built in problem in its legal system depicted as an indistinct connection between domestic law and the judiciary, and the political will of the ruling Communist Party, i.e. in China, the law and domestic politics are closely intertwined. Granted, the connection between national politics and the domestic law with its judiciary, is not something uniquely Chinese as it will be hard finding any state where the political climate does not colour the states' legalistic process. But, in China politics *is* law.<sup>417</sup> Therefore, phenomenon such as regional and local protectionism,<sup>418</sup> hampered jurisdiction,<sup>419</sup> and a semi-collapsed social-security system in large,<sup>420</sup> represents one of the largest problems contemporary China is facing to day.

As a final conclusion with regard to the Chinese notion of treaties and their probable impact on state sovereignty it might be prudent to quote Gerald Chan as he states that '[o]ne Chinese analyst argues that the decision as to whether or not to give up part of a state's sovereignty is up to the state itself. In the pursuit of some long-term interests or political ideals, a state may have to make a compromise to give up temporarily the exercise of its sovereignty. However, this does not affect such basic conditions of sovereignty as independence, equality, and autonomy.'<sup>421</sup> In other words, the exercise and existence of state autonomy and sovereignty is a demonstration of the ongoing precedence of sovereignty over human rights.<sup>422</sup>

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<sup>416</sup> Chan, pp. 74, 78, and, 84-89.

<sup>417</sup> Keller, especially pp. 719 and 729, Cohen, especially, pp. 797-798, and, Grimheden, pp. 202-248, especially, pp. 202-208.

<sup>418</sup> Cohen, pp. 799-800, and, Grimheden, pp. 215- 218.

<sup>419</sup> Grimheden, pp. 218-235, and, Cohen, pp. 800- 802.

<sup>420</sup> Between Freedom and Subsistence, China and Human Rights; Kent, pp. 212-213.

<sup>421</sup> Chan, p. 77, citing Guo Longlong, 'International intervention and the problem of state sovereignty,' *International Survey*, No. 6, 1994, pp. 2-3.

<sup>422</sup> See, discussion in Carazza, p. 63.

## 6 Conclusions Regarding the Chinese View on Sovereignty

In the introduction of this thesis, three questions were put forward; namely, (1), what is state sovereignty from a Western point of view, and how may it be legally defined? (2), is the view on sovereignty universal or are there any regional discrepancies in both concept of sovereignty and definition? And, (3), are claims of sovereignty, made by states, within our outside the defined limits of state sovereignty, and which relevance does competing claims on the notion of sovereignty have? As question number one already have been answered, focus will be placed upon questions number two and three, this in light of the answer from question number one.

With regard to the plausible universal notion of sovereignty and its definition and concept, it is prudent to conclude, due to the premises stated and elucidated in this thesis, that the definition of sovereignty, as a principle rule, truly is universal in terms of that sovereignty is equally defined both in the West and in China, i.e. that the notion of unmitigated internal freedom and permitted external freedom exist on a universal level. The perception of sovereignty, however, is not equivalent, since Western states adhere to the notion of 'limited sovereignty' due to ratification of treaties, whereas China does not. There is also a differentiation between how far Western states and China are willing to push state sovereignty, thus, how large the secured sphere of unilateral state conduct, without external interference, is. According to the Western notion, the external, third-party judicial intervention and treaty based commission systems, is regarded as an option of solving disputes, criticism, and highlighting problems without turning to violence. Whereas, China has made reservations to all plausible treaty based third-party forms of intervention. The point of which is that China adheres to a more narrow or classical notion of the state as sovereign and, therefore, cannot approve of another state or international entity passing judgement over China as sovereign. This is also made evident due to Chinese claims, concerning human rights, which in principle, confirms that human rights, despite ratified treaty provisions and customary international law, fall under Article 2(7) of the Charter of the United Nations, hence depicting the strong Chinese notion of internal territorial sovereignty. Consequently, there is no difference in the concept of sovereignty, merely a differentiation in how far states adhere to the classical notion of sovereignty. Both China and the West adheres to the same source when claiming sovereignty, however, they do so in different levels of intensity.

As a conceivable answer to the differentiated adherence to sovereignty, one might argue historical experiences and state's self-perception. Regarding historical experiences, and if not including the defeated parties at the end of both World Wars; no Western state has been, by other states, during the twentieth century, forced to enter into treaties with the effect that its sovereignty is rigidly hampered. Therefore, the notion of, limited sovereignty, external humiliation and gun-boat diplomacy has

not coloured Western thinking and, thus, allows for a more liberal ‘give-and-receive’ political philosophy. Whereas, China, on the other hand, during the late half of the nineteenth century and early twentieth century, has been subjected to massive external pressure due to forced treaty provisions and foreign military presence. Hence, China’s rigid defence of its sovereignty. However, merely historical references cannot, of course, explain the entire sovereignty safeguarding picture depicted by Chinese state-practice and governmental statements.

The historical experiences of China and its self-perception set aside, a plausible answer to Chinese state protectionism ought to be connected with the Chinese Communist Party and its legitimacy and power foundations. The classical domestic notion of the Party and its political and normative power, has since Deng Xiaoping’s reform era, been lessened to a point where active participation within the international sphere is accepted as being within Chinese interest. However, a built in psychological brake-block still exist, as international participation is, at the same time, seen by, both the Party and governmental officials, as deflating the Party’s sphere of power and influence over domestic and international politics and law. Hence, the rhetoric summersaults demonstrated by Chinese officials, this as the Chinese authorities are still not quite convinced on which foot they should stand.

Everything accounted for in this thesis, leads to the conclusion that states, as an effect of their different experiences and political climate, value statehood differently. Whereas the majority of Western states voluntarily adheres to and take active part in the international community, for instance via membership in international organizations, and, thus, relinquish lesser or greater parts of their sovereign sphere, China, on the other hand, has just started to realise the immense importance international cooperation represent. Or, more accurately, China does recognize the importance of cooperation represented within the international sphere, however due to the domestic political climate difficulties still remain to be settled; this since a heightened degree of adherence to, and activity within, the international sphere would unmistakably cause a lessened degree of Chinese state independence. This might explain the ambivalence shown by China within the United Nations Security Council, as the Chinese government, on the one hand, aspires for being regarded as a major and active international player, whereas on the other hand, shows reluctance towards United Nations mandated political and military interventions, adopted via Security Council resolutions, that may, according to Chinese statements, violate state sovereignty. The reason for these Chinese statements is most probably a concern that the both political and normative precedence created by every Council resolution might, in the future, be turned to Chinas’ disadvantage, i.e. inflicting damage to Chinese sovereignty or spheres of interest. As examples of this, one might argue the abstentions cast by China in the Council, concerning United Nations conduct under Chapter VII of the Charter. This conception is also perfectly emphasised when comparing Chinese practice and statements in international financial relations vis-à-vis international civil and political relations. The reasons for being; in a financial relationship, no limitations will be cast upon the sovereignty of

China, and the probability and mode of any future repercussion, will strictly be a monetary one. Whereas, a political or civil international relationship, for instance via the United Nations, will almost certainly produce a limitation of sovereignty, that might, with greater probability, create precedents with future negative effects for China and its sovereignty.

Therefore, the answers, to questions number two and three, must be, that there exist a universal conception of sovereignty, and I have found nothing that leads to the conclusion that any regional discrepancies *per se* in the definition of sovereignty exist, however, I have found that the historical experience of a state and its self-image, is the underlying foundation as how far the state is willing to adhere to an extended or limited sphere of state sovereignty, i.e. there are, as a principal rule, no regionally based similarities with regard to the notion of sovereignty, however there exist a state-to-state based view as to how the sphere of sovereignty and its substance is depicted.

The question with regard to if statements and domestic notions are within or outside the defined limits of sovereignty will undoubtedly lead to an ambivalent answer. This since the Chinese notion, in principle, is more narrow than the Western notion, thus placing it within the limits of the working definition of sovereignty. However, from a different point of view, as the Chinese notion is more restricted and classical than the Western, another answer might be that China is outside the limits of sovereignty, as China only adheres to parts of the defined principle of sovereignty and the limiting functions thereof.

Today, competing claims of sovereignty or more accurately, competing claims concerning the sphere and content of sovereignty, will most probably represent one of the major problems within the international community. This since no further expansion of international cooperation and integration will be permitted if not, beforehand, a universal redefinition of the contents of sovereignty have taken place. This, in it self, of course, will most likely be regarded as a limitation of state sovereignty. And as already stated, without sovereignty, states as we know them, cannot exist. However, without a redefinition of the contents of sovereignty, the international community will not be able to expand and develop.

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