THE DEVELOPMENT OF HUMAN RIGHTS IN THE REPUBLIC OF CHINA ON TAIWAN:
RAMIFICATIONS OF RECENT DEMOCRATIC REFORMS AND PROBLEMS OF ENFORCEMENT

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Abstract: October of 1995 marks the Republic of China's ("ROC") fiftieth anniversary of occupation in Taiwan. The ROC's impressive democratization in recent years follows a history of autocratic rule. Fear of government reprisal and a non-rights oriented neo-Confucian culture contributed to the people's slow assertion of their constitutional rights. Presently, the ROC's paradoxical international status raises important accountability issues. Though domestic courts now provide a more impartial forum for claims to be heard, international remedies are drastically limited should domestic ones fail. Expelled from the U.N. in 1971 and not officially recognized by most nation states, the ROC remains frightfully independent in an era of increasing inter-state accountability. Nevertheless, under accepted principles of international law, the ROC qualifies as a sovereign state and remains bound by the customary international law of human rights. For the ROC national whose rights have been infringed upon, there is no international recourse under the many instruments of the United Nations. The only non-domestic legal remedy exists in the United States under the Alien Tort Claims Act.

I. INTRODUCTION: BENEATH THE TAIWAN MIRACLE

The Republic of China ("ROC") on Taiwan¹ is at the most vibrant and dynamic time in its history. Although Taiwan has been ruled by one party, the Kuomintang ("KMT"),² since becoming a part of the Republic of China fifty years ago, the democratization movement that has swept Asia and Europe in recent years has taken Taiwan by storm. Political modernization has been both remarkably fast and comprehensive.³ What

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¹ While Republic of China and Taiwan may be used interchangeably, the present distinction here is to distinguish between the governmental regime (Republic of China) from the island itself (Taiwan).
² The acronym "KMT" and term "Nationalists" both refer to the Kuomintang (Chinese Nationalist Party). However, this Comment uses Nationalists in various contexts to emphasize the fusion of party and state in Taiwan.
³ Though democratic development is difficult to measure and its pace hard to gauge, many scholars have denoted the speed and breadth of democratization in Taiwan; e.g., sinologist John F. Copper writes:

[The Republic of China] is a nation that has clearly experienced profound and broad political change in recent years. It has probably experienced political modernization at a faster rate of speed than any other nation in the world, at least among those that did not self destruct or fail in an effort to democratize. Certainly few would disagree that political change in Taiwan has been phenomenal....
was once a single-party, "hard authoritarian" regime has now become a legitimate though infantile democracy.

Under the leadership of late President Chiang Ching-kuo,\(^5\) the Republic of China has undergone a quasi-revolution in the last eight years. The state has radically overhauled its political structure while maintaining the nation's basic institutions. Specifically, the ROC has: repealed martial law and other laws which have circumvented the people's constitutional rights, legalized opposition parties, revised its constitution, and has implemented various other democratic reforms.\(^6\) These changes have led to an overall improvement of human rights and the release of prominent political prisoners.\(^7\)

Anchoring all of these changes, of course, is Taiwan's formidable economy and social stability. Arguably, without the "Taiwan miracle,"\(^8\) such rapid political and social changes may have created social upheaval. Via U.S. aid, central economic planning, and other means, the KMT transformed Taiwan from an economically depressed country into a model of prosperity.\(^9\) Yet beyond its socioeconomic success lies a tumultuous

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6 These democratic reforms will be discussed in greater detail infra part III.C.


8 Overall, from 1951-1993, ROC's GNP grew an average of 8.7% per year while illiteracy decreased from 33.1% to 5.4%. Percentages were calculated by using figures provided in the ROC STATISTICAL DATA BOOK, 1994. For a critical commentary on the limits of the "Taiwan miracle," see Murray A. Rubinstein, The Taiwan Miracle, in THE OTHER TAIWAN: 1945 TO THE PRESENT 3, 3-12 (Murray A. Rubinstein ed., 1994).

9 The ROC's 15.5% average annual growth in GNP from 1965 to 1990 was the highest in the world [based on a nine page publication provided by the Taipei Economic and Cultural Office (formerly, the Coordination Council for North American Affairs), the unofficial diplomatic consulate of the Republic of China]. For an overview of factors which contributed to the ROC's success, see Jan S. Prybyla, Economics
human rights history. Though not highly publicized in the Taiwan media and in popular American press, the issue of human rights has been a source of much turmoil in Taiwan society. It has fueled public animosity against the KMT and remains a key political agenda for the opposition.10

The Republic of China is a nation of many paradoxes.11 While the Kuomintang holds itself out as a democratic regime, its founders deliberately structured the party after the Leninist party-state model.12 And though its borders have been free from warfare since World War II, the entire nation was under martial law until 1987. From its outset, the ROC has been a government which values human rights on the one hand but a strong administrative state on the other.

The paradox extends to Taiwan’s international status as well. Even though the ROC is independently sovereign, the international community does not recognize its statehood.13 Although the ROC occupied a seat in the United Nations’ (“U.N.”) Security Council for twenty-two years, it is currently not even an observer nation.14 In essence, despite possessing all of the attributes of a nation-state, the Republic of China is politically isolated,15 leaving it less accountable than most nation-states.

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10 According to Professor Alexander Lu of National Taiwan University, human rights reform is one of the Democratic Progressive Party’s (the KMT’s most formidable opposition) three main agendas. See Alexander Y. Lu, Political Opposition in Taiwan: The Development of the Democratic Progressive Party, in POLITICAL CHANGE IN TAIWAN, supra note 4, at 121, 135-36.

11 Many authors have described the paradoxical features of Taiwan in one facet or another. See, e.g., Steve Tsang, Introduction to IN THE SHADOW OF CHINA: POLITICAL DEVELOPMENTS IN TAIWAN SINCE 1949, at 1 (Steve Tsang ed., 1993) [hereinafter IN THE SHADOW OF CHINA]; DENNIS V. HICKEY, UNITED STATES-TAIWAN SECURITY TIES: FROM COLD WAR TO BEYOND CONTAINMENT 5 (1994).

12 Ping-Lung Jiang & Wen Cheng Wu, The Changing Role of the KMT in Taiwan’s Political System, in POLITICAL CHANGE IN TAIWAN, supra note 4, at 75, 76-77.

13 Despite its exile to Taiwan, most nations continued to recognize the ROC as the rightful government of China. Diplomatic ties began deteriorating in the 1960s so that by the mid-1970s, only a handful of nations maintained official ties. See HUNG-MAO TIEN, THE GREAT TRANSITION: POLITICAL AND SOCIAL CHANGE IN THE REPUBLIC OF CHINA 220-22, 223 tbl. 9.1 (1989). Currently, the Republic of China maintains official diplomatic ties with only 29 nations in the world. Interview with H.T. Chen, former Director General for the Taipei Economic and Cultural Office, in Seattle, Washington (Oct. 1994).


15 The People’s Republic of China (“PRC”) actively sought to isolate the ROC by boycotting organizations and severing official ties with any nation which recognized the ROC. See Hungdah Chiu, The International Legal Status of the Republic of China, in 112 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES 16-19 (No. 5. 1992) [hereinafter International Legal Status].
It is within this paradoxical political framework that individual rights in the Republic of China had their birth. This Comment explores how these domestic and international paradoxes have affected Taiwan and how they still affect enforcement problems today. Part II identifies the ROC’s concept of human rights. Though textually western, the ROC’s laws embody a tradition and culture which have hindered the recognition of human rights and made the applicability of those laws difficult. Part III outlines the history of human rights in Taiwan from the ROC’s authoritarian beginning to its present quasi-democratic state. Though the ROC’s constitution and statutes provide adequate safeguards, the state circumvented many of those rights through various legal instruments. However, democratic reforms in the last eight years have brought about a new era of political freedom and human rights.

Lastly, part IV explores current enforcement issues unique to Taiwan. For ROC citizens whose rights have been infringed upon, democratization has made domestic litigation more viable. However, should domestic remedies fail, Taiwan’s international isolation leaves its people with few options. At best, the ROC nationals may litigate their claims in U.S. courts despite the general common law rule prohibiting adjudication over nationals of unrecognized states.

II. THE CONCEPT-OF HUMAN RIGHTS IN THE REPUBLIC OF CHINA

Arguably, the whole notion of individual human rights is Western in nature, stemming from European liberal thought regarding the role of individual and government. Debates have centered on whether the Western, “rights oriented” approach should be asserted against nations which have
different values. Generally, multilateral instruments like those of the United Nations were created to overcome cross-cultural barriers. However, in the case of Taiwan, which is not a party to those instruments, it is not clear to what degree its concept of human rights accords with various standards in the international community.

A. The ROC's Concept of Human Rights: Pre-constitutional Notions

Traditional Chinese law did not recognize individuals much less define civil rights. Hence, the Western concept of human rights has no historical equivalent in Chinese culture.\(^{20}\)

I. The Traditional Chinese Approach to Individual Rights: Nation-State as Family

The traditional Chinese approach to “human rights” is earmarked by several elements that set it apart from Western cultures: relationships, duty, and ethics. First, the individual is not identified by a set of rights but by his relationship within his family and village community.\(^{21}\) Thus, no individual rights exist per se because the basic social unit was not the individual but his familial clan.\(^{22}\) Second, the culture was “duty-oriented,” placing a strong emphasis on responsibility to family and society.\(^{23}\) Such duties were not enforced by law but by \(li\), a Confucian-based ethical code.\(^{24}\) Unlike western cultures where law serves as a mechanism to compel behavior,
ethics was held to be the true regulator of human conduct. Combined, these elements contribute to the conception of the nation-state as family.

Naturally, the role of government and law itself occupied a different position from those in western culture. Historically, law was part of the government administration, serving the interest of the state. In contrast to Roman law, Chinese law was not designed to grant individual human rights. However, people were not necessarily deprived of human rights. Individual rights were naturally protected when each person behaved benevolently towards their fellow “tung-pao” in accordance with the Confucian ethical code. As one author notes, in traditional Chinese culture, “with virtues, all had rights, without virtues no one had any.”

2. Sun’s Three Principles: The Incorporation of Western Liberal Thought in a Chinese Context

In 1911, revolutionaries led by Dr. Sun Yat-sen overthrew the Manchu dynasty and replaced the Confucian orthodoxy with a republic government, thus giving birth to the Republic of China. The current constitution was not promulgated until 1946.

While the ROC constitution is distinctly Western in text, its philosophical underpinnings remain uniquely Chinese. As article I expressly states, the constitution was directly founded upon Sun’s Three Principles of the People. Sun’s Three Principles embodies not only the state philosophy but the very framework of government itself. Sun outlines three fundamental principles which directly affect human rights: the principles of Nationalism, Democracy, and the People’s Livelihood. In short, these three principles were aimed at achieving national unity,
establishing fundamental human rights, and insuring social-economic well being.\textsuperscript{33}

Perhaps the most salient feature of the Three Principles is Dr. Sun's attempt to combine an "all-powerful government" with democratic rule. While an appreciation of Western liberal thought and democratic reform resounds throughout Sun's Three Principles, there exists an equally resonant disdain and skepticism towards its direct application to China.\textsuperscript{34} Unlike liberal thinkers, Sun vehemently felt that a strong government would not jeopardize individual rights but was necessary to sustain democracy.\textsuperscript{35} Sun specifically criticized what he saw as the trend in Western democracy which placed the state in opposition to the individual.\textsuperscript{36} So long as the people had political power over the government, the administrative power of the state should not be feared.\textsuperscript{37} On the contrary, "the finest thing would be an all-powerful government in the employ of all the people and working for the welfare of the people."\textsuperscript{38}

\section*{B. The Republic's Westernized Constitution and its Guarantees}

The Republic of China's constitution codified Sun's Three Principles. Ratified in 1946 after nearly 20 years of revision, the Nationalist constitution was promulgated on January 1, 1947 as the official law of China, including Taiwan. When the KMT retreated to Taiwan in 1949, the constitution was brought over fully intact.

\textsuperscript{33} With respect to human rights, the first principle was intended to achieve national unity by eliminating ethnic localism, class distinctions, and racism. The principle of democracy was intended to establish and "uphold fundamental individual rights against the arbitrary exercise of governmental powers or infringements by officials or legislation." The third principle seeks to protect socioeconomic rights and is intended to ensure the provision of certain social services. See Herbert H.P. Ma, \textit{General Features of the Law and Legal System of the Republic of China}, in TRADE AND INVESTMENT IN TAIWAN I, 4 (Herbert H.P. Ma ed., 1985) [hereinafter \textit{General Features}].

\textsuperscript{34} For example, see Sun's view on Rousseau and his analysis of Western democratic development. \textit{SUN, supra} note 32, at 51-53, 73-85.

\textsuperscript{35} \textit{SUN, supra} note 32, at 89.

\textsuperscript{36} \textit{SUN, supra} note 32, at 90. In essence, Sun directly challenged the underlying Western notion that democracy and the protection of human rights necessarily place limitations on state power. Sun postulated that Western scholars erred in their belief that strong central administrations threaten individual rights. Consequently, Western democracies stumbled because they pitted the individual against the state thereby rendering the state inefficient. \textit{SUN, supra} note 32, at 92-98.

\textsuperscript{37} Sun postulated that people will "not be afraid of the government becoming all-powerful and uncontrollable" as long as they are given the "four political powers": suffrage, recall, initiative, and referendum. \textit{SUN, supra} note 32, at 110, 112. These powers are constitutionally protected in Chapter XII of the \textit{CONSTITUTION OF THE REPUBLIC OF CHINA} [hereinafter ROC CONST.].

\textsuperscript{38} \textit{SUN, supra} note 32, at 89.
Like its Western counterparts, the ROC constitution contains provisions protecting individual rights and establishes the basic framework of a democratic government. Chapter II provides the primary source for constitutional protection of human rights. Generally, "[p]ersonal freedom shall be guaranteed to the people." Since every person is equal before the law "irrespective of sex, religion, race, class, or party affiliation," these rights extend to all citizens of the ROC. As appendix I (see infra) shows, the ROC constitution compares very favorably with those rights protected by the United Nations. Additionally, citizens of the Republic of China are guaranteed the right to legal remedy by "presenting petitions, lodging complaints, or instituting legal proceedings." In the event that a government agent infringes upon a person's freedom, the person may seek compensation from the state for any damages sustained.

Institutional safeguards created pursuant to the constitution also provide an additional source of protection. The most significant development in human rights came with the implementation of a western legal system patterned after Germany's civil law. Most importantly, the new system created an independent judiciary where injured persons may litigate their claims. Since law was historically part of the state administration, "its role was to serve the interests of the state and of society, rather than those of individuals." Hence, no independent judiciary existed in traditional Chinese society. Private law remained undeveloped because

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39 The original constitution is comprised of 14 chapters and 175 articles. On April 22, 1991, after the first of two stages of Constitutional revisions, 10 additional articles were added to restructure the government. Seven more articles were added after the second stage in 1992. See infra note 139.
40 With the exception of articles 15-18, the rights of the people are not framed as rights per se but as "freedoms." The duties of every citizen of the Republic of China include the duty to pay taxes (article 19) and the duty to perform military service in accordance statutory requirements (article 20). Additionally, the people have "the right and the duty" of receiving an education.
41 ROC CONST. ch. II, art. 8.
42 Id. art. 7.
43 Id. art. 16.
44 Id. art. 24.
45 Framers of the constitution adopted Sun's unique vision of a five branch government (ROC CONST. ch. IV-IX) which includes the Executive, Legislative and Judicial branches (each called a "Yuan"). However, Sun added two historically Chinese institutions: the "Examination Yuan," which administers civil service examinations, and the "Control Yuan," which functions as a government censor. Though state administrations were historically very strong, the Chinese were not oblivious to the dangers of autocracy. Hence, the censorial system was designed to critically evaluate the emperor's actions and impeach government officials. See Chiu & Fa. supra note 19, at 2A.40.20.
46 Switzerland's model was also used. General Features, supra note 33, at 18.
47 Chiu & Fa, supra note 19, at 2A.40.11.
disputes were primarily resolved through mediation. However, the establishment of human rights necessitated a judiciary apart from the state where individuals may bring claims without fear of bias or reprisal from the government. The current system provides such a forum.

The Romanization of the ROC’s legal system included the implementation of a Westernized criminal judiciary which stands independently from other branches of government. Aside from the rights guaranteed by the constitution, the ROC’s Code of Criminal Procedure provides an abundant source of (judicial) human rights protection. The Code’s 512 articles include, *inter alia*, provisions which assure judicial impartiality,50 fair investigative procedures,51 and numerous rights for the accused.52 In short, the ROC’s laws are comparable to those of other nations and provide adequate safeguards against human rights violations.53

C. The Effect of Chinese Ideology on Modern Individual Rights

Despite the institution of a fully Westernized legal system, ethics still affect human rights in modern Chinese society. Traditional Chinese notions of society and government maintain a strong foothold on Taiwan.54 One must keep in mind that the evolution towards a rights-oriented society in the

48 Chiu & Fa, supra note 19, at 2A.40.10-2A.40.11.
49 See infra note 163.
50 For example, article 17 of the ROC Code of Criminal Procedure requires that a judge withdraw him/herself if any one of the eight criteria for impartiality are violated. Article 18 expressly grants the defendant the right to file a withdrawal of the judge on article 17 grounds or if circumstances indicate “that the judge may be prejudiced in the exercise of his judicial functions.”
52 See ROC Code of Criminal Procedures, arts. 71-121. Most importantly, article 98 of the Code protects the accused from offensive interrogation procedures, specifying that “no violence, threat, inducement, fraud, or other improper means shall be used.”
53 As John Kaplan, former Professor of Law of Stanford University, remarked:

[J]he government of Taiwan, though Chinese in culture, has adopted Western forms and procedures, such as the trial by an impartial tribunal which various guarantees extended to the criminal defendant. These rights and procedures, as laid down in its own statutes, court opinions, and treatises, show a considerable sensitivity to at least some of the rights often held to be protected by international law.

John Kaplan, *The Court-Martial of the Kaohsiung Defendants* 54 (1981). Though Kaplan was not a Chinese law expert *per se*, his hands-on investigation into the Kaohsiung court martial (discussed infra part III) made him very well acquainted with the judicial system.

54Grand Justice Ma notes that Chinese “legal and moral traditions still affect many aspects of [sic] life in the Chinese society in Taiwan, despite the existence and application of the Westernized law and legal system. In other words, many such traditions are not mere past facts, but a living force to be reckoned with.” See Law and Morality, supra note 20, at 443.
last fifty years runs contrary to the 2,000 year indoctrination of ethics and the relational, duty-oriented approach towards society.\textsuperscript{55} Two ramifications in particular are especially helpful in explaining why the people did not assert their individual rights. First, "the lingering impact of a \textit{li}-dominated and duty-oriented system of values has not given the Chinese people a chance to develop a consciousness of rights."\textsuperscript{56} Hence, despite constitutional and statutory provisions granting individuals the right to sue the state for any deprivation of rights, Chinese society as a whole has not claimed or asserted that power. Second, since ethics placed group harmony above the individual, the assertion of one's individual rights was strongly disapproved.\textsuperscript{57} An individual who sues another has placed his interests above those of the group, and thus faces strong disapproval.\textsuperscript{58} Consequently, people are not accustomed to suing each other, much less suing the "paternalistic" state.

Ultimately, these ramifications suggest that the Republic of China is a nation founded upon contradictory ideals. The government seeks to protect its citizens from arbitrary power on the one hand, but establishes an authoritarian administration on the other. Therefore, Taiwan's history of human rights is the account of a nation's attempt to implement a "mixed"

\textsuperscript{55} See supra note 24.
\textsuperscript{56} Law and Morality, supra note 20, at 451.
\textsuperscript{57} Law and Morality, supra note 20, at 451-52. In fact, the Chinese term for "right," \textit{chuan li}, literally means power and profit, two things Confucian teachings strongly discouraged. \textit{Id.} at 452 n.23.
\textsuperscript{58} MOSER, supra note 24, at 61-67. For his doctoral dissertation, attorney Michael J. Moser spent over a year observing and collecting data on society and law in the rural district of Beiyuan in north-central Taiwan. Remarking on society's attitude towards the litigator, Mr. Moser noted:

\begin{quote}
An individual who goes to court, I was told, has put his own self-interest before all else . . . . By doing so he threatens his opponent with a complete loss of face . . . . Such a person is considered to be an extremely dangerous character, primarily because by his actions he shows that he himself does not care about his own face.
\end{quote}

\textit{Id.} at 64. Mr. Moser goes on to conclude that:

The influence of Confucian precepts on Beiyuan residents' ideological model of dispute behavior goes beyond the voiced distaste for involvement with the law. In addition, it provides the philosophical underpinnings for what is considered to be the proper way to deal with social conflict . . . . Beiyuan villagers say that the ideal man is one who never loses self-control or gives vent to his passions. Rather he will cultivate patience and forbearance (\textit{ren}) and thus avoid conflict with his neighbors. If a dispute should arise, the two parties should attempt to have their differences settled amicably—most often by the intervention of a third party.

\textit{Id.} at 64. Arguably, Taiwan society is much different today from when Moser made his observations in 1974-1976. The urbanization of Taiwan has created a culture markedly different from those of rural districts. Nevertheless, his observations give great insight into the effects of Confucian ethics and on the prevailing Chinese disdain towards the legal system.
constitution within a Westernized legal system, but by a distinctly Chinese society. Given these bold ideological goals and the sociopolitical turmoil in Taiwan and China immediately after World War II, it may have been a formula for failure.

III. THE HISTORY OF HUMAN RIGHTS IN TAIWAN

A. Human Rights in Taiwan From 1945-1949: The Revival of Ethnic Tension

Although fifty years have passed since Japan relinquished Taiwan to the Republic of China, the events which occurred from 1945-49 would affect politics and human rights in Taiwan permanently. Of utmost importance is an understanding that Taiwan’s human rights issue is cloaked within the larger political-ethnic conflict between native Taiwanese and Chinese Mainlanders. The resurrection of this centuries-old ethnic antagonism has been at the heart of Taiwan’s human rights problem since its retrocession back to the ROC.

1. Post-World War II Conditions and the Resurgence of Ethnic Conflict

On October 25th, 1945, two months after Japan surrendered to the allies, Taiwan officially became a part of the Republic of China. Through the Cairo Declaration (Dec. 1, 1943), Franklin D. Roosevelt, Winston Churchill and Chiang Kai-shek agreed that Taiwan and other territories would be returned to the ROC upon Japan’s defeat. See FORMOSA BETRAYED (1974), supra note 60, at 25. However, debate continues over the legal validity of the transfer. See infra note 181.

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59 Taiwan’s population is comprised of four ethnic groups: the Malayo-Polynesian aborigines, two groups of Taiwanese and the post-war Chinese emigrants from the mainland. The “Taiwanese,” descendants of migrants from Fujian and Guangdong provinces, comprise 85% of the population. The “Mainlanders,” comprising 14% of the population, refer to the Chinese who emigrated to Taiwan following the second World War. JOHN F. COPPER, TAIWAN: A NATION STATE OR PROVINCE? 7-9 (1990) [hereinafter NATION STATE OR PROVINCE?].

60 Ethnic strife between Mainlanders and Taiwanese date back to the 17th century. Many of the early “Taiwanese” residents felt exploited and neglected by the central government which did not make Taiwan a province until 1887. GEORGE H. KERR, FORMOSA BETRAYED 5-6 (1965) [hereinafter FORMOSA BETRAYED]. Additionally, mainland officials assigned to Taiwan were often corrupt and unresponsive to local needs, creating unjust taxing policies that sparked widespread resentment and protest. See COHEN, supra note 7, at 5-6; GEORGE H. KERR, FORMOSA: LICENSED REVOLUTION AND THE HOME RULE MOVEMENT 1895-1945, at 6-8 (1976) [hereinafter LICENSED REVOLUTION].

61 See infra note 72.

62 COPPER, supra note 59, at 26. Through the Cairo Declaration (Dec. 1, 1943), Franklin D. Roosevelt, Winston Churchill and Chiang Kai-shek agreed that Taiwan and other territories would be returned to the ROC upon Japan’s defeat. See FORMOSA BETRAYED (1974), supra note 60, at 25. However, debate continues over the legal validity of the transfer. See infra note 181.
incapable of governing Taiwan. Perhaps in haste, Chiang Kai-shek placed Taiwan under military rule and appointed General Chen-Yi as governor.

While socioeconomic factors revived the ethnic tension between mainland China and the Taiwanese, Chen's mismanagement drastically worsened the situation. Significantly, the Taiwanese resented the corruption within Chen's administration and local municipalities. Chen's failure to control the widespread incompetence and corruption within the administration fractured an already fragile Taiwanese-Mainland relationship. As one former mainland newspaperman observed after coming to Taiwan one year after the retrocession:

[T]he rotten corrupt and incompetent official activities had already produced widespread unemployment, hunger, poverty, unrest, and all sorts of evil consequences. These evil consequences created in the hearts of our Taiwan brethren a burning hatred. That hatred was like a powerful bomb that eventually would have to explode... the heart of each Taiwanese is like a time bomb ticking away.

2. The March Massacre and Its Impact on Human Rights and Politics

Taiwanese resentment against the Mainlanders finally exploded in a series of violent riots simply called the "2-28" or the "February 28 (1947)"

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63 China's economic infrastructure was decimated from the war but the ROC had no time to recover. The KMT immediately resumed its civil war with the Mao Tse-teng and the Chinese Communist Party. TSE-HAN LAI ET AL., A TRAGIC BEGINNING: THE TAIWAN UPRISING OF FEBRUARY 28, 1947, at 55 (1991).
64 Though "superficially" qualified to govern Taiwan, the appointment dismayed other ROC leaders as well as the United States. See FORMOSA BETRAYED, supra note 60, at 47-57. See also DAVID M. FINKELSTEIN, WASHINGTON'S TAIWAN DILEMMA 1949-1950, at 52-59 (1994).
65 Differences in language (Taiwanese spoke Fukanese, while most Mainlanders spoke Mandarin), culture and a lack of interaction between the Taiwanese and Mainlanders fostered mutual prejudice and unrealistic expectations. See COPPER, supra note 59, at 26; LAI ET AL., supra note 63, at 47-49. These differences were aggravated by Taiwan's economic crisis and post-war chaos. Id.
66 For a critical account of Chen's mismanagement, see LAI ET AL., supra note 63, at 76-89.
67 According to Kerr, the exploitation was carried on at three levels. First, many undisciplined soldiers stole and looted whatever was unguarded by civilian Taiwanese. Second, senior military officials organized depots where military and civilian supplies could be shipped to the mainland. Lastly, the government by itself seized control of the island's raw materials, agricultural products, and property. For a full account of the economic exploitation, see LICENSED REVOLUTION, supra note 60, at 97-123. See also LAI ET AL., supra note 63, at 71-72.
68 Embezzlement, bribery, and nepotism were widespread. LAI ET AL., supra note 63, at 74-75.
69 LAI ET AL., supra note 63, at 74 n.91 (quoting Hsueh Mu).
uprising.\textsuperscript{70} The events which took place during this two week period\textsuperscript{71} would permanently scar the ROC's record on human rights. Its legacy affects the sociopolitical climate of Taiwan to this day.

The March Massacres forged a permanent chasm between the Mainlanders and Taiwanese.\textsuperscript{72} Both sides sent a potent message to the other. The Taiwanese signified their strong-will and intolerance towards oppressive regimes and the KMT evinced its willingness to set aside the nation's democratic ideals in order to secure obedience. While the KMT's response softened the Taiwanese' willingness to revolt, it created a sense of victimization which still serves as a potent rallying cry for many political movements.\textsuperscript{73} The massacres cultivated a strong, repressed indignation which remains the primary source of ethnic tension. Thousands of Taiwanese were killed, including many of the elite political leaders, businessmen, doctors, and professors.\textsuperscript{74} Though estimates of the death toll varied tremendously, reasonable estimates place the number at 7,000 to 10,000.\textsuperscript{75} If a

\textsuperscript{70} In Mandarin, the incident is simply referred to as "er er ba" or "2-2-8." It is also called the March Massacres, referring to the systematic executions which took place after the initial riots. See COPPER, \textit{supra} note 59, at 27.

\textsuperscript{71} The first riot was triggered after a Taiwanese street vendor was severely beaten by KMT guards for not paying taxes on her cigarettes. A large crowd witnessed the brutality and riots ensued. See LAI ET AL., \textit{supra} note 63, at 102-05 and Kerr's (a former vice-consul to Taiwan) lucid description in FORMOSA BETRAYED, \textit{supra} note 60, at 254-58. Within days, riots were ignited in all of Taiwan's major cities. Taiwanese took over various municipalities and virtually controlled the island from March 1-9, 1947. See FINKELSTEIN, \textit{supra} note 64, at 62. In response, Chen-Yi quickly offered hope of a peaceful settlement. But as reinforcements poured in from the mainland, troops were sent out to reclaim the cities, systematically killing or arresting prominent dissidents as well as innocent bystanders. See Kerr's account in FORMOSA BETRAYED, \textit{supra} note 60, at 255-310 and LAI ET AL., \textit{supra} note 63, at 99-140.

\textsuperscript{72} Remarkably on the current ethnic rift between Taiwanese and Mainlanders, international studies Professor Alan M. Wachman writes:

\begin{quote}
Despite what people would like to believe about the nature of contemporary society in Taiwan, and even if distinctions on the basis of identification are not as blatant as in the past, one cannot escape the impression that people in Taiwan are aware of a "we" and "they" dichotomy. The propensity to classify people in "we" and "they" categories is a reflection of the division between Taiwanese and Mainlanders . . .
\end{quote}

\begin{quote}
For some people these distinctions may be more consequential than for others . . . In the political context—especially among the political elite—the distinction between "we" [Taiwanese] and "they" [Mainlanders] is both consequential and apparent.
\end{quote}

\begin{flushleft}
Alan M. Wachman, \textit{Competing Identities in Taiwan, in The Other Taiwan: 1945 To Present} 17, 30 (Murray A. Rubinstein ed., 1994).
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\textsuperscript{73} Id. at 47-48.

\textsuperscript{74} Much of the core of the Taiwanese elite were killed. See COPPER, \textit{supra} note 59, at 27; LAI ET AL., \textit{supra} note 63, at 160.

\textsuperscript{75} Estimates have ranged from an overly conservative 1,000 to a grossly exaggerated 100,000 people killed. However, many writers have placed the estimate at around 10,000 or less. See, e.g., FORMOSA
silver lining can be found in "2-28," it is that the incident marks the single worst case of human rights violation in the ROC's history on Taiwan. Arguably, the relationship between the Taiwanese and Mainlanders could not get any worse.


The period from 1949-1987 is marked by the ROC's "hard-authoritarian" rule. After their defeat by the Communists in 1949, the Nationalist government and over a million Mainlanders retreated to a densely populated and impoverished island of six million. Though Chiang Kai-shek ultimately executed Chen for his atrocities against the Taiwanese, ethnic animosity intensified under Taiwan's depressed economy. However, after "2-28," people were now afraid to overtly protest KMT rule. While the consolidation of executive power is consistent with Sun's "all-powerful" state, it came at a cost to human rights. All too often during this period, the line was blurred as individual rights gave way to the establishment of a strong administrative state.

1. Legal Impediments to Human Rights

The Nationalist government implemented two legal instruments which increased executive power and military control: The Temporary Provisions Effective During the Period of Communist Rebellion (hereinafter, Temporary Provisions) and martial law. These instruments circumvented many of the rights guaranteed under the ROC constitution.

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BETRAYED, supra note 60, at 310 (Kerr estimates the death toll to be at least 5,000 and perhaps as high as 10,000. The 7,000 to 10,000 estimate encompasses some of the most reasonable estimates derived from more recent studies). For a detailed discussion on the historic accuracy of various estimates, see LAI ET AL., supra note 63, at 158-60.

76 A hard authoritarian regime, like the KMT in its early years, does not allow rival parties, employs military coercion, and "denies any need to appeal to public mandate." Winckler, supra note 4, at 224.

77 Due to the influx of Mainlanders, Taiwan's population increased over 24% from 1946 to 1950, marking the island's highest increase over a five year period in this century. See YEN-TIEN CHANG, POPULATION GROWTH AND FOOD PRODUCTION AND CONSUMPTION IN TAIWAN 7-8, 11 tbl. II-4 (1967).

78 Chen may have been executed for his involvement with Communists. See FORMOSA BETRAYED, supra note 60, at 367-68, 396.
The Temporary Provisions, promulgated on May 10, 1948, gave the Executive power more authority than was granted under the constitution. Amended four times since its initial enactment, the Provisions transformed the ROC’s political structure from a pseudo-parliamentary system into a presidential system. They explicitly bypassed various constitutional restraints, thereby bolstering executive power. For example, under article 3 of the Provision, “the President and Vice President may be re-elected without being subject to the two-term restriction prescribed in article 47 of the constitution.”

Although not fully implemented, martial law extended the military’s authority into a broad spectrum of civilian life. Most significantly, martial law circumvented article 14 of the constitution by prohibiting the creation of new political parties and article 9 by subjecting civilians to military trials. Under article 8 of the decree, military tribunals had jurisdiction over various crimes including theft, espionage and most notably, sedition. In 1976, the military’s jurisdiction was expanded to include homicide, robbery, kidnapping and various other violent crimes. In all, “an estimated ten thousand cases involving civilians were decided in military trials from 1950 to 1986.” While these restrictions suspended many civil rights, their constitutionality has not been addressed by the Council of Grand Justices.

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79 The Temporary Provisions were enacted in accordance with the article 174(1) of the ROC Constitution.
80 The Temporary Provisions were amended in 1960, twice in 1966, and in 1972.
82 The Temporary Provisions enhanced the President’s autonomy by lifting constitutional restrictions which required legislative approval on declaring martial law and issuing emergency decrees. See Temporary Provisions, art. 8; arts. 39 & 43. In all, the Temporary Provisions expressly annulled seven articles to the Constitution. See Temporary Provisions, art. 1 (39), (43); art. 3 (47); art. 6 (26), (64), (91); art. 7 (27); bypassed Constitutional articles in parenthesis.
83 The Executive Yuan issued an order declaring martial law on May 20, 1949. Constitutional Development, supra note 31, at 17 n.34. Martial law was not activated, however, until Chiang Kai-shek issued an emergency decree in January, 1950. TIEN, supra note 13, at 110.
84 Constitutional Development, supra note 31, at 18 n.37.
85 According to Professor Chiu, the expansion of the military tribunal’s jurisdiction was “in response to popular demand for swift and severe punishment against a rising trend of violent crime.” Constitutional Development, supra note 31, at 18. Chiu also notes that these cases were not automatically subject to military trials but required approval by the Executive Yuan on a case by case basis.
86 TIEN, supra note 13, at 111.
87 Constitutional Development, supra note 31, at 19. The Council of Grand Justices is the ROC’s equivalent of the U.S. Supreme Court.
On a more direct level, the KMT suppressed the opposition by vigorously enforcing its vaguely worded sedition laws. Essentially, any person who commits an overt act against the state with the intent to overthrow the government, seize state territory, or other insidious intent, has committed a seditious act. Courts imposed heavy sentences, including the possibility of death, upon those found guilty.

2. Institutional Impediments to Human Rights

The state primarily relied on three institutional organs to carry out the aforementioned laws. The military tribunal was the most immediate impediment to human rights protection. In effect, military trials granted the Executive Yuan control over much of the judicial system. Article 133(1) of the Military Trial Law requires that all judgments be approved by a commanding military officer. With the strong interaction between the military and the Nationalists during this period, the independence of court martials was highly suspect. A person charged with committing seditious acts against the government could not reasonably expect to receive a fair trial under such a system. In practice, court martials provided an abundant source of human rights violations.

88 Though the state enacted various laws against sedition, the instrument used most was the Statute for the Punishment of Sedition, a law passed in May 1949 just before the KMT retreated to Taiwan. COHEN, supra note 7, at 322. Other sedition laws may be found in article 100 of the ROC CRIMINAL CODE and in the National Security Law of 1987.

89 COHEN, supra note 7, at 323. Though Cohen was referring to the Statute for the Punishment of Sedition, article 100 of the ROC CRIMINAL CODE contains an almost identical definition. A seditious person is one who “commits an overt act with intent to destroy the organization of the State, seize State territory, by illegal means change the Constitution, or overthrow the Government.” Articles 101 and 102 go on to delineate punishment for sedition and related crimes. ROC CRIMINAL CODE, arts. 100-102 (1991).

90 Additionally, those found guilty often had their property confiscated and civil rights suspended for a period after serving their sentence. COHEN, supra note 7, at 322.

91 Constitutional Development, supra note 31, at 18 n.41.

92 The military has always played a major role in the government. As Jiang & Wu note:

In its inception the KMT was a revolutionary party. It created its own armed forces to achieve power and to stay in power. In the training program for the cadets in military academies, the leader, the party, and the nation are purposely made conceptually indistinguishable from each other. At every hierarchical level of the military command, military leadership and party leadership are closely fused. The military always has representatives sitting in the highest organ of the party, the Central Standing Committee.

Jiang & Wu, supra note 12, at 91.

93 COHEN, supra note 7, at 309-11. Cohen points out that the trial of civilians in military courts may constitute, ipso facto, a human rights violation.
The Temporary Provisions and Martial Law also created two powerful institutions: the National Security Council ("NSC") and the Garrison Command ("GC"), respectively. Through the president-led NSC, the executive branch was able to exercise powers beyond those granted in the constitution. Its duties encompassed a wide spectrum of affairs, from coordinating military strategy to regulating election laws.

In comparison, the Garrison Command was created to implement martial law. The GC had the authority to restrict various civil rights, including, inter alia, the right to practice religion, free speech and publication, and the right to assemble. Despite assuming a supervisory role for local and judicial matters, the GC "held tremendous extra-constitutional power over the political and social life of Taiwan's citizens."

3. The Impact of Authoritarianism on Human Rights

While the KMT generally moved Taiwan towards democracy, draconian measures were employed whenever the opposition breached the legal confines of martial law. Repressive tactics by the administration were

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94 Since its creation in 1967 (see Temporary Provisions, art. 4) the NSC has developed into one of the ROC's major institutions. See Tien, supra note 13, at 109; Constance S. Meaney, Liberalization, Democratization, and the Role of the KMT, in POLITICAL CHANGE IN TAIWAN, supra note 4, at 95, 110; Constitutional Development, supra note 31, at 16.

95 Presided over by the president, the NSC included cabinet ministers, military officials and the president of the Legislative Yuan. See Hermann Halbeisen, In Search of a New Political Order? Political Reform in Taiwan, in IN THE SHADOW OF CHINA, supra note 11, at 73, 76.

96 Professor Halbeisen argues that the NSC "bridg[ed] the constitutionally envisaged separation of powers." Id. at 76.

97 The NSC also approved the Executive Yuan's annual budget. See Tien, supra note 13, at 109. Additionally, the NSC controls a subsidiary organ, the National Security Bureau, which among other things, plans intelligence work. Meaney, supra note 94, at 110.

98 For example, the Garrison Command banned the New Testament church from settling in a remote area in southern Taiwan. See Hsin-Huang M. Hsiao, The Rise of Social Movements and Civil Protests, in POLITICAL CHANGE IN TAIWAN, supra note 4, at 57, 62-63.

99 Tien, supra note 13, at 110; see also Taiwan's Recent Elections, supra note 3, at 11-12.

100 Tien, supra note 13, at 111.

101 The "Taiwanization" process is one example of mobilization. Fully aware of the reserved resentment shared by many Taiwanese, the Nationalists began recruiting Taiwanese leaders into more elite positions in the 1970s. Consequently, the percentage of Taiwanese in the Central Standing Committee, the KMT's primary decision making organ, rose from 14% in 1973 to 52% in 1988 (see Transformation of Party State, supra note 5, at 40-43), while the number of Taiwanese in the Executive Yuan Cabinet rose from 16% in 1972 to 37% in 1986. And of course, the ROC's current President, Lee Tung-hui, is Taiwanese himself. See Jurgen Domes, The Kuomintang and the Opposition, in IN THE SHADOW OF CHINA, supra note 11, at 117, 121-22.
legally justified because the nation was under siege102 and in a formal state of emergency.103 However, whether the actual conditions warranted such emergency measures is the subject of much debate.104 Ironically, the repressive effect of martial law was not felt by the communist disputants that it was intended to suppress. Instead pro-democracy opposition groups, who vied for the very individual rights that the revolutionaries had fought for, bore the brunt of these measures. If nothing else, the fact that these laws have not been found to be unconstitutional105 demonstrates the immense power the Nationalists exerted in government and society.

Not surprisingly then, the predominant human rights violations committed during this era were politically motivated. The more salient violations included: (1) the imprisonment of political opponents convicted of sedition, unlawful assembly, or some other charge;106 (2) the torture and execution of some of those prisoners;107 (3) the unlawful surveillance of political opponents;108 and (4) the censorship of any literature which heavily criticized the KMT or its policies.109

For most of the martial law era, the Nationalist government successfully used these repressive means against all who actively opposed

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102 Professor Chiu likens martial law in the ROC to a "state of siege" in civil law nations and distinguishes it from martial law in common law countries. Martial law in the ROC, like a state of siege, does not require a total breakdown of civilian courts before resorting to military courts, but the two may coexist. Constitutional Development, supra note 31, at 17.

103 The state of siege in Taiwan constitutes a "de jure" emergency since martial law, as well as the Temporary Provisions, were formally declared. See Joan Fitzpatrick, Human Rights in Crisis: The International System for Protecting Rights During States of Emergency 8 (1994). See also infra note 104.

104 Unquestionably, the PRC's repeated threats of a military takeover were taken seriously. Thomas B. Gold, Taiwan's Quest For Identity in the Shadow of China, in In the Shadow of China, supra note 11, at 169, 172, 176. Still, some argue that the emergency decrees were unwarranted since the PRC never acted on its threats and would never do so. This de facto status of the decree is significant inasmuch as emergencies declared in bad faith seem to be a reasonably reliable indicator of human rights abuse. Fitzpatrick, supra note 103, at 10-11.

105 The constitutionality of martial law and the Temporary Provisions may possibly be justified under article 23 of the ROC Constitution, which states that "all the freedoms and rights enumerated in the [Constitution] shall not be restricted by law except... to avert an imminent crisis, to maintain social order, or to advance public welfare."


107 Cohen, supra note 7, at 331-51; Luce & Rumpf, supra note 106, at 29-39.


Nationalist rule. However, the Tangwai, a predominantly Taiwanese opposition party, bore the brunt of these measures. The Tangwai caught the attention of the state because it openly espoused anti-KMT views. But more importantly, it was able to garner public support while previous movements were not.

The Kaohsiung Incident is a good example of when and how the state used the aforementioned laws and organs against the opposition. On December 10, 1979, Tangwai activists organized a human rights rally on the streets of Kaohsiung, but riots ensued after a confrontation with the police, injuring scores of people. Eight Tangwai leaders, called the "Kaohsiung Eight," were arrested and brought before a court martial. The state argued that the defendants organized the rally as part of an attempt to overthrow the government, but the evidence suggested otherwise. Each of the defendants was convicted of sedition and given sentences from twelve years to life imprisonment.

Aside from evidence of excessively brutal police tactics during and after the riot, many facts surrounding the arrests and trial raise serious human rights issues. Since the case was tried before a military court at the

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110 The government sought to quash all opposition groups. For example, see the case of Lei Chen, a former KMT official who was imprisoned for attempting to start a Mainlander-based opposition group. See also Lu, supra note 10, at 122.
111 Technically illegal during the martial law era, the Tangwai represented many Taiwanese who resented the KMT's dominance. For an account of the origin of the Tangwai, which literally means "outside party," see Lu, supra note 10, at 124-25. Its leaders eventually established the Democratic Progressive Party, the strongest opposition group in Taiwan. Id. at 128. See also id. at 126-28; Tien, supra note 13, at 95-101.
112 Specifically, the Tangwai heavily criticized the KMT for its dictatorial rule and staunchly advocated Taiwan independence. Tien, supra note 13, at 95-101.
113 Especially prior to the 1970s, political opposition during the martial law era garnered little public support. As Professor Alexander Lu of National Taiwan University notes, "oppression by means of martial law made the formation of political opposition a risky venture for those who made the attempt." See Lu, supra note 10, at 121-22. In the same article, Professor Lu attributes the 1970s resurgence of political opposition to the rise of an educated middle class. Id. at 122-23.
114 The rally was organized to commemorate the 31st anniversary of the United Nations Universal Declaration of Human Rights. See Kaplan, supra note 53, at 16.
115 Over a hundred people were injured, including several policemen. Cohen, supra note 7, at 39.
116 Tien, supra note 13, at 97.
117 While the eight had organized the rally, evidence suggests that it was meant to be a peaceful demonstration. See Cohen, supra note 7, at 39. For a thorough account of the events surrounding the rally and why evidence indicates that the eight defendants were not conspiring to overthrow the government, see Kaplan, supra note 53, at 39-52.
118 Kaplan, supra note 53, at 46.
119 Tien, supra note 13, at 97.
120 See Cohen, supra note 7, at 39; Tien, supra note 13, at 97.
Garrison Command Headquarters, the status of the judiciary, as an independent body, is highly questionable. The court refused to hear the defendants’ witnesses and refused to examine physical evidence, which disclosed their non-violent intentions. There was also ample evidence indicating that the police tortured the defendants during pre-trial interrogations and coerced their confessions. Nevertheless, the court refused to delve into the validity and probative value of the confessions. Additionally, the defendants were arbitrarily detained and questioned for months before they were allowed to meet with their attorneys.

The Kaohsiung Incident, like the February 28th uprising, marks a pivotal point in the ROC’s history. Both represent a clash of political ideals and, arguably, of ethnic cultures. But unlike 2-28, the suppression at Kaohsiung did not diminish the opposition or send it into secrecy; instead, the opposition flourished, exerting pressure on the KMT for democratic reform.

C. The Effects of Democratization: Human Rights From 1986 to the Present

Though democratization was seriously discussed as early as the 1970s, real measures were not implemented until the mid-1980s. Legal reformations paved the way for these democratic reforms. The first revolutionary change came on July 15, 1987 when late-president Chiang Ching-kuo announced the end to thirty-seven years of martial law, the longest period of a state under siege in history. The lifting had immediate impact, restoring articles 9 and 14 of the constitution. For the first time

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121 KAPLAN, supra note 53, at ix.
122 KAPLAN, supra note 53, at 52.
123 At least one of the defendants was severely beaten during the interrogations. All eight underwent some type of torture including forced sleeplessness, physical threats and “fatigue bombing,” where the defendant is interrogated around the clock by various interrogators. COHEN, supra note 7, at 39-40; KAPLAN, supra note 53, at 29-30. Note however, that all but one of the eight absolved the state from using physical brutality to acquire information.
124 All of the defendants disavowed his/her confession completely. Numerous factors suggest that the confessions were false or coerced. See KAPLAN, supra note 53, at 28-31, 47-48, and 55.
125 KAPLAN, supra note 53, at 47-52.
126 KAPLAN, supra note 53, at 47-48.
127 Most writers regard 1985 as the onset of Taiwan’s democratization. See Winckler, supra note 4, at 224 n.8.
129 See also supra part III.B.1.
in its history, the Kuomintang had a legitimate opposing party, as the Democratic Progressive Party ("DPP") and various independents became legalized. Perhaps most importantly, civilians were no longer subject to military tribunals.

In April 1991, the National Assembly terminated the Temporary Provisions, curtailing executive power down to its constitutional limits. Though the NSC remains active, its "organic laws [were] to be enacted by the Legislative Yuan," thereby shifting some of the control of the NSC from the executive to the legislative branch of government.

Later in May 1991, the Legislative Yuan voted to abolish the ROC's most austere sedition law. Though other sedition laws remained in the Criminal Code and National Security Law, "none are as ferocious as the newly abolished law, which had mandated the death penalty for those convicted under vaguely defined charges involving attempts to overthrow the government." The momentum of legal reformation ultimately led to a revision of article 100 of the Criminal Code, which originally made non-violent seditious acts an offense. After the revision, only violent acts are prosecutable. Less than two weeks after the signing, the government dropped its non-violent sedition cases pending in court and released more than a dozen political prisoners, including some prominent anti-KMT Taiwanese leaders. In 1993, no new cases of sedition were filed.

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130 Although there were other legalized political parties in the ROC on Taiwan, they were essentially state instruments and did not pose any threat to the KMT. These parties, the Young China Party and the Democratic Socialist Party, received a monthly stipend from the Nationalist government and generally acquired less than one percent of the popular vote. According to Professor Tien, "Most observers consider that the only political purpose of these two parties in the past was to validate the ROC's claim that it was not a one-party authoritarian state. On Taiwan they are described as 'flower vase political parties'... because they are only for show." See Tien, supra note 13, at 92, 91-93.

131 The DPP was officially though unlawfully established on September 26, 1986. Lu, supra note 10, at 121.

132 Since the lifting of martial law, no civilians have been tried in military courts. Constitutional Development, supra note 31, at 19.


135 Id.


137 For example, Huang Hua, a Taiwanese activist convicted of raising money to support the independence movement. Id. at 19-20. For more on Huang Hua, see COHEN, supra note 7, at 329-31.

On a grander scale, the ROC underwent a two-stage revision of its constitution. In the first stage, ten articles were added which reallocated seats in the nation’s three representative bodies. These changes came after a judgment by the Council of Grand Justices ordering the resignation of all members of the representative bodies who were elected on the mainland. The second stage called for, inter alia, direct presidential elections via a method yet to be decided. In essence, these additions granted the Taiwan “province” more representation and called for immediate elections.

Aside from its direct impact on the restoration of constitutional rights, the lifting of martial law and termination of sedition laws also meant relaxation on censorship and increased private ownership of media. Between 1987 to 1993, the number of newspapers increased nearly 900% from 31 to 274 while the number of independent news agencies also grew from 44 to 231. Though the right to publish is a fundamental constitutional right, ownership of news services was heavily regulated, if not directly controlled, by the government during the martial law era. With increased private ownership and less censorship, the press is freer now than it has ever been.

Perhaps no mark of democracy is as important as its effect on society itself. The abolition of martial law, Temporary Provisions and sedition laws laws

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139 ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF CHINA (first stage, 1991; second stage, 1993) [hereinafter ADDITIONAL ARTICLES (1991) will refer to the first stage of revisions; ADDITIONAL ARTICLES (1992) will refer to articles added after the second stage of revisions].


142 ADDITIONAL ARTICLES (1992), art. 12.

143 Using the Control Yuan for example, article 3 of the Additional Articles assigns 25 seats to Taiwan whereas the ROC constitution (art. 91) permitted only five. Similar changes were also made with respect to the National Assembly and the Legislative Yuan. ADDITIONAL ARTICLES (1991), arts. 1 & 2.

144 A press ban was declared in 1951 which prevented the issuance of new press licenses but permitted the trading of existing ones. See Chin-Chuan Lee, Sparking a Fire: The Press And the Ferment of Democratic Change in Taiwan, in JOURNALISM MONOGRAPHS 5 (1993).

145 COUNCIL FOR ECONOMIC PLANNING AND DEVELOPMENT, REPUBLIC OF CHINA, TAIWAN STATISTICAL DATA BOOK 1994, at 10 [hereinafter TAIWAN STATISTICAL DATA BOOK]. Data on publishing corporations were provided by the ROC’s Government Information Office.

146 ROC CONST. art. 11.

147 During the martial law era, there was not only a fusion of party, state, and military, see supra note 92, but also a fusion of party, state, and media. The Nationalist government monopolized all three television channels as well as most radio stations. Moreover, the state exerted tremendous political and economic influence over the island's two major news groups, the United Daily News and the China Times, which combine for two-thirds of Taiwan's newspaper circulation. The publishers of these papers as well as other pro-KMT periodicals were invited to join various prominent administrative committees. See Lee, supra note 144, at 5, 7, and 13-15.
have broadened civil rights in general. People are freer to assemble and express their opinions without fear of government reprisal. Political dissidents, who were once blacklisted from Taiwan, have been permitted to go back.\textsuperscript{148} Naturally, people’s attitudes towards government have changed, reflecting a more autonomous and critical civil society.\textsuperscript{149} With the rise of a better educated, wealthier, more sophisticated middle class came a new generation who understand and are willing to adhere to western liberalism. Since 1986, mass social and political movements have increased in both number and intensity.\textsuperscript{150} Among them is a human rights movement started by ex-political prisoners.\textsuperscript{151}

IV. SAFEGUARDING HUMAN RIGHTS IN TAIWAN

A. Enforcement Problems: Limitations of Democratization and Taiwan’s International Status

Several factors indicate at least the potential to revert back to autocratic rule. First, despite the legalization of new parties, the KMT still dominates Taiwan politics. In the last major election held in December 1994, KMT candidates decisively won all major offices except for the Taipei mayoral race.\textsuperscript{152} In addition, the state has also retained various laws which could be used to quash political opposition. For example, under article 4 of the Law on Assembly and Demonstration, speech and assembly are limited to those which do not advocate communism or Taiwan independence.\textsuperscript{153} Democratization notwithstanding, after the 1991 elections, the government sternly threatened to ban the DPP if it continued to publicly advocate Taiwan independence views.\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{148} For example, Chen Lung-chih, a New York Law School Professor, was allowed to return to Taiwan in 1993 after being blacklisted for serving as a “foreign minister” in the World United Formosans for Independence, a Taiwan independence group. 1993 \textsc{State Dep’t Rep.}, supra note 108, at 624.
\item \textsuperscript{149} Hsiao, supra note 98, at 57-59.
\item \textsuperscript{150} Transformation of Party State, supra note 5, at 47-48.
\item \textsuperscript{151} In 1987, a group of former political prisoners established the Human Rights Promotion Association for social support and to promote political reform. See Hsiao, supra note 98, at 67.
\item \textsuperscript{152} Kuomintang candidates decisively won 48 of the 79 provincial assembly seats, the governorship of Taiwan with 58% of the vote, and the Kaohsiung (Taiwan’s second largest city) mayoral race with 54% of the vote. Moreover, the DPP’s Taipei mayoral candidate, Chen Shui-bian, garnered a mere 44% of the vote in their only major win. In all, “Taipei aside . . . the December 3rd polls were an overwhelming vote of confidence in the KMT.” Julian Baum, Split Ticket, \textsc{Far E. Econ. Rev.}, Dec. 15, 1994, at 14-16.
\item \textsuperscript{153} Tiên supra note 13, at 112.
\item \textsuperscript{154} Julian Baum, \textit{KMT Bares Its Teeth}, \textsc{Far E. Econ. Rev.}, Feb. 27, 1992, at 21.
\end{itemize}
Even if full political liberalization becomes reality, democracy alone cannot assure compliance. Although politically motivated violations have steadily decreased, other violations still persist. Some of the more salient and persistent violations include torture of criminal detainees, cruel treatment of prison inmates, and invasions of privacy. Without inter-state accountability to raise awareness, there can be no assurance that the ROC will conform to international standards of human rights.

Taiwan's paradoxical international status and its political isolation raise some difficult enforcement issues. Since the ROC is not a member of the United Nations, it is categorically excluded from all U.N. covenants. This involuntary exclusion has a two-fold effect on enforcement. First, unlike most nations, the Republic of China has no legal duty to uphold many of the human rights that other nations have obligated themselves to maintain. The Universal Declaration of Human Rights and legally binding agreements, such as the International Covenant on Civil and Political Rights ("ICCPR"), do not apply to Taiwan. The ROC's exclusion from these instruments is not trivial. The creation of legal obligations is at the core of international law and without them, the usual remedies for breaching those obligations are inapplicable.

Taiwan's isolation also leaves it less accountable to other states. The vast array of U.N. enforcement mechanisms available to most nations do not apply to the ROC. Using the International Covenant on Civil and Political Rights as one example, parties to the Covenant must submit an initial report on the measures they have adopted and the progress of human rights in

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155 Generally, Country Reports by the State Department and those by Amnesty International yield progressively fewer politically motivated violations. As the 1993 State Department Report states, "In 1993 Taiwan continued its rapid progress toward a pluralistic system truly representing the island's population. Open political debate and a freewheeling print media contributed to a vigorous democratic environment... [However,] despite a much improved human rights environment, human rights abuses continued." 1993 STATE DEP'T REP., supra note 108, at 620.

156 1993 STATE DEP'T REP., supra note 108, at 621.

157 Non-binding instruments such as the Universal Declaration and binding instruments such as the ICCPR do not apply to non-parties except in those areas which overlap with customary international law.

158 The enforcement of human rights, like other areas of international law, relies heavily on obligations created by the agreements between states. As Louis Henkin, a professor of international law, points out: "The duty to carry out international obligations is the heart of the international legal system... International human rights agreements are like other international agreements, creating legal obligations between the parties and international responsibility for their violation." HENKEN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1016 (1987).

159 The remedies provided under human rights agreements are the same as those of any other international agreement. AGE OF RIGHTS, supra note 19, at 21.
those areas.\textsuperscript{160} More importantly, parties must submit any additional reports whenever the Human Rights Committee so requests.\textsuperscript{161} Since such accountability does not apply to the ROC, awareness of those issues and pressure to change is considerably weaker. Furthermore, remedies available to ROC nationals are also more limited. For example, citizens of states which ratified the Optional Protocol to the Covenant on Civil and Political rights may file a direct complaint to the U.N.'s Human Rights Committee.\textsuperscript{162} Once more, however, this remedy is unavailable to a ROC national since Taiwan cannot be a participant to the protocol.

B. Domestic Enforcement: The Viability of Protecting Human Rights Within Taiwan

With respect to the importance of inter-state accountability, the enforcement of human rights is still first and foremost a domestic affair. In the Republic of China, democratization has made domestic enforcement of human rights much more viable. Generally, enforcing human rights domestically requires two fundamental components: (1) the legal instrument to hold the state accountable, and (2) an independent judiciary which can hear the case impartially.\textsuperscript{163} Though constitutional safeguards were sidestepped under martial law and the Temporary Provisions, democratization has breathed new life into legal safeguards and has brought about a more independent, impartial judiciary.

For private cases against the state, the ROC constitution expressly provides a right of action for persons whose rights have been infringed upon.\textsuperscript{164} Under article 24, an "injured person may, in accordance with law,  

\textsuperscript{160} International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368, art. 40 [hereinafter ICCPR].
\textsuperscript{161} Id.
\textsuperscript{162} See article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 383.
\textsuperscript{163} On the importance of an impartial judiciary, Professor Bodansky notes:
The problem with relying on domestic courts to protect human rights, of course, is that the government whose courts would hear a human rights claim is often the one that is committing the violation. Unless the judiciary has a substantial degree of independence and authority, it may not be able to serve as an effective check on government.


\textsuperscript{164} Suits against the state may be handled by the administrative and civil court. See Hungdah Chiu & Jyh-pin Fa, Law and Justice Since 1966, in THE TAIWAN EXPERIENCE 314, 319-20 (James C. Hsiung et al. eds., 1985) [hereinafter Law and Justice].
claim compensation from the State for damage sustained" when "any public functionary . . . in violation of the law, infringes upon the [person's] freedom or right."165 In addition, the State Compensation Law (1981) provides another right of action for those whose rights have been deliberately or negligently infringed upon by public functionaries.166 With the repudiation of martial law and Temporary Provisions, article 24 becomes especially meaningful because the administration may no longer justify its actions under state of siege grounds. Additionally, with the ROC's westernized judiciary, such claims stand a fair prospect of being heard by an independent and impartial judiciary.167

For criminal cases involving human rights, the end of martial law brought forth a more independent criminal judiciary. The fusion of executive and judicial powers that existed under civilian court martials has been forsaken, thereby diminishing the state's control over sedition and other political crimes that have hindered human rights in the past. Since the termination of martial law, no civilian has been tried by a military court.168 Without obstructions from the administration and the military, the ROC's Code of Criminal Procedure possesses adequate safeguards against bias.169 Hence, hindrances to justice like those exhibited in the Kaohsiung court martial have become less pervasive under this new era without martial law. As the State Department Country Report on Human Rights notes, "The right of fair public trial is provided for by law and generally respected in practice . . . . Although observers in the past have characterized the judiciary as not

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165 The exact wording of article 24 states:

Any public functionary who, in violation of the law, infringes upon the freedom or right of any person shall, in addition to being subject to disciplinary measures in accordance with law, be held responsible under criminal and civil laws. The injured person may, in accordance with law, claim compensation from the State for damage sustained.

ROC CONST. ch. II, art. 24.

166 The State Compensation Law was enacted on June 20, 1980 and went into effect on July 1, 1981. Similar to the U.S. Alien Tort Claims Act (see infra notes 217-19), the law obligates the state to compensate those who have been unlawfully deprived of their rights or physically injured as the result of a deliberate or negligent action by any government official. To reflect the state's sincerity in this act, approximately 16 million U.S. dollars were set aside for compensation upon its enactment in 1980. Law and Justice, supra note 164, at 318-20.

167 However, the Administrative Court has shown some institutional bias. Law and Justice, supra note 164, at 318.

168 As of 1993, no civilian has been subject to a military tribunal. Constitutional Development, supra note 31, at 19.

169 The ROC's Code of Criminal Procedure contains many provisions intended to insure court independence and impartiality. See supra notes 50-52.
fully independent and as susceptible to political and personal pressure, there was little such criticism in 1993.\textsuperscript{170}

Given the graduation of Chinese society towards a more democratic, rights-oriented culture, ROC citizens are more likely to assert their rights than in the past.\textsuperscript{171} With the criminal and civil courts functioning more independently, the judiciary provides a hospitable atmosphere for the safeguarding of human rights in Taiwan.

C. Customary International Law in Domestic Courts and World Politics

In the human rights arena, the need for inter-state accountability is ever present. The world community has generally accepted international customs as a valid source of law.\textsuperscript{172} The customary international law of human rights has also gained wide acceptance, although debate rages over what actually constitutes a custom. While some writers have argued that all provisions in the Universal Declaration have become customary norms, in practice, the scope of customary human rights law is narrower.\textsuperscript{173} Generally, customary international law prohibits states from practicing or condoning genocide, slavery, racial discrimination, arbitrary detention, murder, torture or other cruel or inhumane treatment.\textsuperscript{174} These legally binding customs have the effect of \textit{jus cogens} (permitting no derogation)\textsuperscript{175} and offer a potent addition to agreements and other sources of law.\textsuperscript{176}

\textsuperscript{170} 1993 \textit{STATE DEPT. REP.}, supra note 108, at 622.
\textsuperscript{171} The rise of social protests and other political movements suggests that the society has changed. See a review of these developments in \textit{JAUSHEIH J. WU. TAIWAN'S DEMOCRATIZATION: FORCES BEHIND THE NEW MOMENTUM} 59-70 (1995).
\textsuperscript{172} As evidence of their acceptance, article 38 of the Statute of the International Court of Justice ("ICJ") expressly authorizes the application of "international custom, as evidence of a general practice accepted as law." For a general discussion on the validity of customary international law and the issues related therein, see \textit{HENKIN ET AL. supra note 158}, at 37-69 (1987). \textit{See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES} § 102(2) (1987) (hereinafter \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW}).
\textsuperscript{174} \textit{See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 702.
\textsuperscript{175} Peremptory or \textit{jus cogens} norms are international customs which have been "accepted or recognized by the international community as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 332, 8 I.L.M. 679. Hence, no agreement may circumvent any of these customs.
\textsuperscript{176} \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 702 cmt. n.
1. The Applicability of International Customary Law and the ROC's Legal Status

The Republic of China is bound by customary international law despite the absence of official relations with most nation-states. This conclusion, however, cannot be drawn without addressing some unique issues posed by Taiwan's paradoxical international status. Generally, since customary international law applies to states in the international community, whether the ROC is bound by customary law depends on its international status as a nation-state or province.\(^{177}\) Note that in either case, the island of Taiwan is bound to uphold international customs.\(^{178}\) The real issue is determining which government, the PRC or the ROC, is responsible for violations of customary international law in Taiwan.

International customs in human rights apply to Taiwan because the Republic of China is a \textit{de facto} nation-state.\(^{179}\) Though the ROC is not recognized by the world community and both parties (ROC and PRC) maintain that Taiwan is just a province, the ROC meets the international legal standards of statehood. The American Law Institute delineates the following criteria as established by state practice: “Under international law, a state is an entity that [1] has a defined territory and a permanent population, [2] under the control of its own government, [3] and that engages in, or has the capacity to engage in, formal relations with other such entities.”\(^{180}\) Under these objective standards, the Republic of China qualifies as a state.

\(^{177}\) The application of international law, by definition, applies to states in the international community. As the American Law Institute notes, rules in international law derive from those “accepted as such by the international community of states.” Similarly, “customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” See \textit{Restatement (Third) of Foreign Relations Law} § 102. Additionally, an entity becomes subject to existing international customary law upon achieving statehood. See \textit{Restatement (Third) of Foreign Relations Law} § 206 cmt. a. However, politically unrecognized entities which meet the standards of statehood are also bound to international law. Entities which function as a state, but are not recognized as such, are very much bound by international customs. See, e.g., \textit{Henkin et al.}, supra note 158, at 232.

\(^{178}\) Nation-state or province. Taiwan would still be bound by customary international law. As a province, the central government of China would be responsible for the acts of officials in Taiwan. Thus, the issue turns on which of the two, the ROC or PRC, is the legitimate government of China. If Taiwan is a state, then the \textit{de facto} government of that state, the ROC, would be responsible under international law. See supra note 177.

\(^{179}\) The classification of Taiwan has been most troublesome. Most commentators refer to the Republic of China as the \textit{de facto} government of Taiwan. See, e.g., \textit{Henkin et al.}, supra note 158, at 278; \textit{James Crawford, The Creation of States in International Law} 151 (1979); \textit{International Legal Status}, supra note 15, at 8, 10 (note the opinions of legal scholars Ian Brownlie and Victor Li). Hence, Taiwan itself (or the ROC on Taiwan) is a \textit{de facto} nation-state.

\(^{180}\) \textit{Restatement (Third) of Foreign Relations Law} § 173 (enumeration added).
The ROC has maintained exclusive control over the island of Taiwan and its population since its retrocession fifty years ago. It has also exercised and exhibited many of the traits of an emerging state, such as engaging in diplomatic relations and entering into agreements with other nations. Arguably, the only factor that keeps it from becoming a de jure state is its own insistence that Taiwan is not independent of China.

As a de facto government, the Republic of China has "legal personality" and must abide by rules of international law. Under general practice, "an entity which meets the conditions of statehood cannot, because of the lack of recognition, be denied its rights or escape its obligations." Although detailed research in this area has been lacking, scholars of international law agree that such has been the practice of states. Evidence from U.S. courts also suggests that an unrecognized de facto government retains legal personality. For example, in Upright v. Mercury Business Machines Co., the New York Appellate Court held that, "A foreign

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181 Specifically, the ROC has controlled all 35,981 square kilometers of Taiwan, the Pescadores and a few other islands since the retrocession. Its current population has steadily grown from 7 million in 1950 to 21 million currently. JOHN F. COPPER, A QUIET REVOLUTION 2 (1988) (hereinafter A QUIET REVOLUTION).

Though some writers debate over when Taiwan was legally transferred back to China, see CRAWFORD, supra note 179, at 146-51 (summarizing the arguments), the fact remains that the ROC has exclusively controlled Taiwan since 1945, see supra note 62. Additionally, under international law, an entity may satisfy the territorial requirement even if its territory is claimed by another state. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 10.

182 While the ROC's political behavior has been restricted, it has been able to establish official diplomatic ties with various countries. More importantly, it has established substantive non-official relationships with states on all continents of the world, including, most notably, the United States.

183 Under international law, Taiwan will likely become a de jure nation state if it declares independence because official recognition is generally not a prerequisite to statehood. As Crawford notes, "entities which conform to the requirements for statehood are States, independently of recognition." See CRAWFORD, supra note 179, at 143. Additionally, the U.N. Charter expressly respects the right of people to self determination. See U.N. CHARTER art. 1, para. 2. Technically, the issue of Taiwan's statehood has not arisen since the Republic of China has never asserted that Taiwan is a state.

Nevertheless, this does not mean that other nations will suddenly establish official diplomatic ties with Taiwan. The People's Republic of China has repeatedly threatened a military attack if Taiwan goes independent. See Martin L. Lasater, Taiwan's International Environment, in DEMOCRACY AND DEVELOPMENT IN EAST ASIA 91, 92, 99-100 (Thomas W. Robinson ed., 1991). If the past is any indication, the PRC would, at the very least, continue to exert a great deal of pressure urging its diplomatic partners not to recognize an independent Taiwan.

184 HENKIN ET AL., supra note 158, at 232.

185 See, e.g., HENKIN ET AL., supra note 158, at 232; CRAWFORD, supra note 179, at 79. Professor Chiu notes that "[w]hile no other international lawyers have discussed this issue, none of them seems ever to have suggested that an unrecognized government should be denied any status in the international community." See International Legal Status, supra note 15, at 4-5.

186 Upright v. Mercury Business Machs. Co., 213 N.Y.S.2d 417 (1961). In Upright, the plaintiff was the assignee of a trade acceptance entered into between the defendant and the assignor, a corporation
government, although not recognized by the political arm of the United States government, may nevertheless have de facto existence which is juridically cognizable.\textsuperscript{187}

While the Upright opinion certainly is not binding for Taiwan, it articulates what commentators concede as the general practice of the international community.\textsuperscript{188} A de facto government which remains unrecognized for political reasons must still maintain its obligations in the international community. Hence, the ROC on Taiwan is bound by international law,\textsuperscript{189} including customary human rights law.

Many practical reasons justify why international law has been applied to de facto governments like the ROC. The state recognition process is a highly political endeavor which, taken beyond its political significance, could lead to impractical and unrealistic consequences. Presently, for example, nations which have official ties with the PRC must expressly acknowledge the PRC's claim of sovereignty over Taiwan.\textsuperscript{190} However, if the claim is taken beyond its diplomatic purposes, then the PRC may be accountable for violations in Taiwan\textsuperscript{191} even though it has never controlled

which was controlled and operated by the then unrecognized East German government. The New York Appellate court reversed the dismissal holding that even an unrecognized government may have de facto existence which is juridically cognizable. \textit{See also infra} note 231.

\textsuperscript{187} Upright v. Mercury Business Machs. Co., 213 N.Y.S.2d at 419. The court went on to assert that "There are many things which may occur within the purview of an unrecognized government which . . . will be given customary legal significance in the courts of nations which do not recognize the prevailing de facto government." \textit{Id.} at 422.

\textsuperscript{188} As one international attorney states, "It is generally admitted that an unrecognized government cannot be completely ignored. Its territory cannot be considered to be no-man's land; there is no right to overfly without permission; ships flying its flag cannot be considered stateless and so on." This oft quoted remark was made by Peter J.N. Mugerwa, \textit{reprinted in International Legal Status, supra note 15, at 4-5.}

\textsuperscript{189} In response to the contention that international law does not apply to de facto situations here as elsewhere. For example. Formosa (Taiwan), though not a State, is not free to act contrary to international law, nor does it claim such a liberty. The process of analogy from legal rules applicable to States is quite capable of providing a body of rules applicable to non-state entities.

\textit{CRAWFORD, supra} note 179, at 79.

\textsuperscript{190} Diplomatic ties between the PRC and other states are made on the premise that the state accepts or acknowledges the PRC's claim of sovereignty over Taiwan. For example, a joint statement issued by the PRC and quote taken from the October 6, 1972 edition of the Beijing Review but \textit{reprinted in LET TAIWAN BE TAIWAN: DOCUMENTS ON THE INTERNATIONAL STATUS OF TAIWAN 110 (Marc J. Cohen \\& Emma Tang eds., 1990) [hereinafter LET TAIWAN BE TAIWAN]. Also see the statement made in a joint communiqué between the PRC and Canada. Id.}

\textsuperscript{191} If the PRC's claim of sovereignty is given legal effect, then it would be accountable for violations on Taiwan. Under international law, states are responsible for the acts of local officials. \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 702 cmt. b. \textit{See also infra} note 192.
any part of the island. Clearly no state would make such a claim nor would the claim be valid under international law. In short, the significance of non-recognition does not extend beyond purposes for non-recognition. States are not oblivious to political reality and take a realistic account of the facts as they are. As the *Upright* court states, "only limited effect is given to the fact that the political arm has not recognized a foreign government. Realistically, the courts apprehend that political non-recognition may serve only a narrow purpose."

Since only states which have consistently dissented from a particular custom may be exempt from that custom, the ROC is bound to uphold these customary norms. Additionally, the ROC has maintained an open door policy, extending an invitation to human rights organizations to come and assess conditions in Taiwan firsthand.

2. Customary International Law of Human Rights in Domestic Courts

Domestic courts in Taiwan will likely accept international customs as a source of law. Nothing in the Chinese Civil Code or constitution expressly prohibits or authorizes the use of international customs; nor has the Council of Grand Justices rendered a decision on this issue. However, a few statutes and administrative decrees have authorized courts to apply customary international law. Additionally, the Chinese Civil

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192 States are only responsible for the acts of its own officials, local or national. Additionally, while a state is not required to formally recognize the government of another state, "it is required to treat as the government of another state a regime that is in effective control of that state." *Restatement (Third) of Foreign Relations Law* § 203(1). Hence, the ROC, and not the PRC, is responsible for acts committed on Taiwan.

193 States are not oblivious to the factual reality of the ROC’s effective control over Taiwan. In fact, this issue was discussed in great detail by the U.N. in 1971 just prior to the General Assembly vote. For short excerpts of these discussions, see *Let Taiwan Be Taiwan*, *supra* note 190, at 128-61 or refer directly to these documents, GAOR, 26th session 196th Plenary Meeting.


195 Since only states which have consistently dissented from a particular custom may be exempt from that custom, the ROC is bound to hold customary norms. *See Restatement (Third) of Foreign Relations Law* § 102. reporter’s note 2.

196 The ROC permits all human rights organizations to make direct observations. However, the government does not permit entry by staff members of the Taiwan Communiqué, a publication by the International Committee for Human Rights in Taiwan. *See 1991 State Dep’t Rep.*, *supra* note 108, at 839, 843 (1992).


198 *Id.* at 5.
Code expressly permits the court to look to "customs" when "no provision of law [is] applicable to a case."¹⁹⁹ While the Code pertains to local as opposed to international customs,²⁰⁰ its authorization suggests that ROC courts are not inhospitable to entertaining cases which draw upon non-statutory sources of law.

International customary law has also been recognized in some domestic cases. For example, in Public Prosecutor v. Wang Min-yao and Sung Chen-wu,²⁰¹ the district court held that the state's jurisdiction over a defendant, who committed an offense in the ROC Embassy in Seoul, South Korea, was valid under "a principle generally recognized by international law."²⁰² Though the ROC Supreme Court ultimately affirmed the dismissal of the case, it did not challenge the state procurator's contention that customary international law may apply in ROC courts.²⁰³ Upon reviewing the Wang case and three others involving customary international law in Taiwan, professor of Chinese law Hungdah Chiu concluded the following:

[T]he application of rules of customary international law by Chinese courts or judicial authorities seems to have been taken for granted . . . none of the procurators, attorneys, or judges who participated in these cases raised the question of whether Chinese courts could apply customary international law in exercising their functions, nor have any Chinese writers challenged this practice. For these reasons it appears clear that Chinese courts can apply rules of customary international law in exercising their functions without special authorization by statutes or administrative decrees.²⁰⁴

Admittedly, authoritative answers in this area are wanting and the application of human rights norms may have different ramifications altogether. Still, until the Council of Grand Justices or a legislative organ decides otherwise, the evidence indicates that domestic courts will accept customary international law.

¹⁹⁹ See ROC CIVIL CODE, art. 1. Article 1 expressly provides that "[i]n civil matters, if there is no provision of law applicable to a case, the case shall be decided according to custom."
²⁰⁰ See General Features, supra note 33, at 26-27, nn. 92-94.
²⁰¹ Public Prosecutor v. Wang Min-yao and Sung Chen-wu, 40 INT'L LAW REP. 56 (1965).
²⁰² Id. at 57.
²⁰⁴ Id. at 6.
Like the application of local customs, international customs will probably only apply when no statutory provisions may be found. Hypothetically, if the state commits an act which violates an international custom, the injured party may sue the state for violating that custom. But with all of the constitutional and statutory safeguards found within the ROC’s domestic law, the viability of using customary international law of human rights in domestic litigation becomes minimal. In fact, of the six specific acts that the American Legal Institute classifies as violations of customary human rights, four are expressly prohibited under the ROC’s national laws. The remaining two, genocide and slavery, are clearly violations of the constitution’s intent and purpose of safeguarding the rights of the people. Nevertheless, the customary international law of human rights supplements domestic provisions and may prove to be pivotal as norms develop beyond what is encoded in the ROC’s national laws.

3. Customary International Law of Human Rights in International Politics

Aside from providing an additional source of law in domestic litigation, the role of customary international law in the safeguarding of human rights in Taiwan is confined to politics. Generally, international customs impose obligations erga omnes, binding all states equally. Thus, in theory, any state may pursue a remedy against another state on behalf of an injured victim, even if that victim is not a national of the complaining state.

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205 See supra parts II.D and IV.B.
206 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702.
207 Racial discrimination and prolonged arbitration are expressly prohibited under the ROC’s constitution. Murder and torture are prohibited under the Criminal Code and the Code of Criminal Procedure.
208 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703(2). See also Barcelona Traction, Light and Power Co. (Belgium v. Spain). 1970 I.C.J. 3 (Feb. 5, 1970). The International Court of Justice (“ICJ”) concluded that there are some obligations which “by their nature . . . concern all states” and thus, “all states can be held to have a legal interest in their protection; they are obligations erga omnes.” The ICJ later went on to hold that obligations erga omnes include “principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” 1970 I.C.J. 3 at paras. 33-34.
209 Lawyers at the A.L.I. hold that, “Since obligations of the customary law of human rights are erga omnes . . . any state may pursue remedies for their violation even if the individual victims were not nationals of the complaining state and the violation did not affect any other particular interest of that state.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 cmt. b. See also infra note 236.
Realistically however, the prospect of another state pursuing a claim on behalf of a ROC national is highly improbable. In practice, states usually intercede on behalf of their own nationals or those with some tie to the state.210 Furthermore, such intercessions are made more often through diplomatic intervention than through cumbersome international claims.211

For practical purposes, the customary international law of human rights provides a useful tool for applying political pressure on Taiwan. With the increased awareness of human rights world-wide, most nations care about their human rights image in the international community.212 The Republic of China is no exception and is perhaps even more sensitive than others because of its disadvantaged international standing. Since the ROC is not bound by human rights agreements, customary norms provide the only legally binding benchmark to judge conditions in the ROC. Holding the ROC liable to international customs adds credence and specificity to otherwise general criticisms.

D. International Options for ROC Nationals: Litigating in the United States

With the internationalization of human rights in the last half-century,213 non-domestic adjudication has become increasingly viable. The international community has forsaken the time-honored view that a nation’s treatment of its citizens is strictly a domestic affair.214 Not only may states file complaints against other states in international forums,215 but individuals may directly pursue remedies against the offending state as prescribed under various agreements.216 Yet again, the benefits from these develop-

210 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703. reporter’s note 4.
211 A state has the obligation to protect only its own nationals diplomatically. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703. reporter’s note 4. However, diplomatic intercession on behalf of foreign nationals has been a well established and important practice for centuries. KAMMINGA, supra note 173, at 8-24. In practice, states very rarely file claims on behalf of foreign nationals. Id. at 161.
212 Generally in the last forty years, offending nations have become increasingly willing to be accountable for their actions. KAMMINGA, supra note 173, at 127. Human rights were on every U.N. agenda and have become an integral part of the foreign policy of liberal nations like the United States. AGE OF RIGHTS supra note 19, at 16.
213 See Professor Henkin’s overview on the internationalization of human rights. AGE OF RIGHTS, supra note 19, at 13-29.
214 HENKIN ET AL., supra note 158, at 981.
215 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703(1).
216 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703(2) and reporter’s note 5. Some agreements grant citizens of participating states the right to lodge a complaint directly against the state in
ments have eluded ROC nationals since Taiwan is not a party to such agreements. Citizens of the ROC are, of course, able to pursue claims against the government domestically, but if such remedies fail, their alternatives are drastically limited because of Taiwan's political isolation.

1. **The Viability of U.S. Litigation: Taiwan's Legal Status and Ramifications of the ATCA and TRA**

If domestic remedies become infeasible, courts of the United States may offer the most viable recourse for ROC citizens. There are two principal reasons for this conclusion. First, foreign nationals can bring a claim under the Alien Tort Claims Act ("ATCA") for torts committed "in violation of the law of nations" which occurred outside U.S. territories. Though enacted in 1789 as part of the Judiciary Act, the ATCA was not widely applied or accepted until the 1980s. The now famous *Filartiga* case and others have paved the way and set the standards for claims by foreign nationals. Briefly, courts have held that the ATCA confers jurisdiction and provides an independent right of action for the foreign plaintiff. Highly relevant to Taiwan, violations of the "law of nations" include those against customary international law as well as agreements.
Second, and more importantly, citizens of the Republic of China will not be excluded from the ATCA despite the absence of official recognition by the United States. Initially, three issues may hinder the applicability of the ATCA to plaintiffs from non-recognized states: (1) whether defendants from unrecognized states are bound by the "law of nations," \(^{224}\) (2) whether nationals of unrecognized states have access to U.S. courts;\(^{225}\) and (3) whether the ATCA grants aliens from unrecognized states jurisdiction to sue in U.S. courts.\(^{226}\)

Generally, courts have been inhospitable to ATCA claims brought against non-recognized entities.\(^{227}\) However, in *Kadic v. Karadzic* Judge Newman held that:

The customary international law of human rights applies to states *without distinction* between recognized and unrecognized

civil action and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.

\(^{223}\) The court's holding explicitly rejects Judge Bork's view that the ATCA only confers jurisdiction. *Id.* See Bork's view in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). See also infra notes 224, 228.

\(^{224}\) In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 774, the court, in three separate concurring opinions, affirmed the dismissal of an ATCA claim against, inter alia, the Palestine Liberation Organization ("PLO"). In his concurring opinion, Judge Edwards noted that the PLO is not a recognized state; thus, it does not act under color of any recognized state's law and hence, cannot violate the law of nations. *Id.* at 791. However, Judge Edwards conceded that "it is conceivable that a state not recognized by the United States is a state as defined by international law and therefore bound by international law responsibilities." *Id.* at 791 n.21.

\(^{225}\) Generally, whether a foreign national may sue in a U.S. court depends on whether he or she is a citizen of an officially recognized state. In *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir. 1940), the court held that before a foreign citizen may sue in a U.S. court, "the state must first achieve recognition by our government . . . but once recognized, the foreign sovereign, its subjects and its citizens, including its corporations, may be suitors in our courts." See also, e.g., *Windert Watch Co. v. Remex Elecs. Ltd.*, 468 F. Supp. 1242 (S.D.N.Y. 1979).

\(^{226}\) No party has yet to raise this issue in an ATCA case. However, since citizens of unrecognized states generally may not sue in U.S. courts, *see supra* note 225 and part IV.D.1, defendants in such a case may plausibly seek dismissal on grounds that the ATCA applies only to aliens from recognized states.

\(^{227}\) See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 774. *But see supra* note 224. Also, in a combined judgment for Doe v. Karadzic and Kadic v. Karadzic, 866 F. Supp. 734, 738-41 (S.D.N.Y. 1994), Judge Leisure held that the ATCA did not provide jurisdiction over Radovan Kardzic, "president" of the self-proclaimed Bosnian Serb republic ("Srpska"). Judge Leisure concluded that Srpska was a "military faction" which "does not constitute a recognized state anymore than did the PLO." *Id.* at 741. However, the case was reversed by the Second Circuit. *See Kadic v. Karadzic*, Nos. 94-9069, 1544, 94-9035, 1541, 1995 U.S. App. WL 604585, at *1 (2d Cir. Oct. 13, 1995). See also infra notes 228-30.
states . . . . It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability . . . .

Judge Newman went on to conclude that the ATCA grants jurisdiction over defendants from states which meet the criteria for statehood, irrepective of official recognition.

In essence, the ATCA applies because de facto states simply cannot escape their obligations under international law. The "commercial and cultural realities of the modern world dictate that diversity jurisdiction should be granted to certain governmental entities that have not been formally recognized." Furthermore, while the ATCA does not specify whether "alien" includes those from unrecognized states, the commonly accepted definition used by U.S. immigration makes no such distinction.

The ATCA would still apply to ROC nationals even if, in arguendo, it does not apply to aliens from non-recognized states. The Taiwan Relations Act ("TRA") grants Taiwan the same status as that of recognized states with regard to the application of U.S. laws. Section 4 of the Taiwan Relations Act states in part:

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan . . . .

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228 Karadzic, 1995 WL 604585 at *10.
229 See supra note 180 and part IV.C.1.
233 See generally the Taiwan Relations Act ("TRA"), Apr. 10, 1979, 22 U.S.C. 3300 et seq., 18 I.L.M. 873 (1979). The TRA was enacted almost immediately after the United States terminated its official diplomatic ties with the ROC. In effect, the TRA grants Taiwan the same privileges and obligations that it enjoyed in the United States prior to derecognition. According to Professor Damrosch who participated in the preparation of the TRA, "[t]he gist of the Act is to preserve the relationships and substantive policies that were in effect prior to the change in recognition." See Lori F. Damrosch, The Taiwan Relations Act After Ten Years, in OCCASIONAL PAPERS REPRINT SERIES 3 (1990).
Whenever the laws of the United States refer or relate to foreign countries, nations, states, or governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.234

In short, U.S. laws which apply to foreign nations apply to Taiwan as well. Since the ATCA clearly included ROC citizens prior to derecognition,235 it continues to apply. The TRA explicitly states that U.S. laws apply to Taiwan in the same manner that they did prior to derecognition.236

Unlike nationals from other non-recognized states, ROC nationals have an express right to litigate in U.S. courts in accordance with U.S. laws. The 1946 Treaty of Friendship, Commerce and Navigation237 between the United States and the ROC explicitly grants ROC nationals access to U.S. courts.238 Despite abrogation of official ties, the treaty remains valid because the TRA “approves the continuation in force of all treaties and other international agreements . . . entered into by the United States and the governing authorities on Taiwan.”239 Furthermore, the TRA itself adopts an explicit, nearly identical proviso.240 Hence, not surprisingly, the right of ROC citizens to sue and to be sued in U.S. courts was affirmed in Chang v. Northwestern Memorial Hospital.241 Upon reviewing, inter alia, the express language and intent of the TRA, the court held that a ROC plaintiff

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235 Prior to derecognition, the ROC enjoyed all of the typical rights and obligations of the de jure state. Hence, U.S. laws, such as the ATCA, which applied to foreign nationals applied to ROC nationals.
238 The Treaty of Friendship and Commerce states in relevant part: “[t]he nationals, corporations and associations of either High Contracting Party shall enjoy freedom of access to the courts of justice and to administrative tribunals and agencies . . . of the other High Contracting Party, in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights.” Treaty of Friendship and Commerce, art. VI, para. 4, at 1305.
240 Section 4(b)(7) of the TRA states: “[t]he capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States shall not be abrogated, infringed, modified, denied or otherwise affected in any way by the absence of diplomatic relations.” 22 U.S.C. § 3303(b)(7) (1988).
241 In Chang v. Northwestern Memorial Hospital, 506 F. Supp. 975, 977 (N.D. Ill. 1980), the court held that jurisdiction was valid despite a general rule prohibiting citizens from unrecognized states to sue.
"was a citizen of a 'foreign state' for purpose of establishing alienage jurisdiction."\textsuperscript{242}

Lastly, since one of the express aims of the TRA is to promote human rights in Taiwan,\textsuperscript{243} the application of the ATCA to Taiwan fits within the United States' foreign policy interests.

2. \textit{The Case of Henry Liu and Limitations on U.S. Litigation}

While no ROC national has yet to file a claim under the ATCA, a claim involving human rights was lodged against the government in 1986. In \textit{Liu v. Republic of China},\textsuperscript{244} Helen Liu brought a wrongful death action against the ROC government, Admiral Wong Hsi-ling, and various others for the murder of her husband Henry Liu.\textsuperscript{245} The plaintiff alleged that high ranking officials in the ROC government conspired and hired assassins to murder her husband, a journalist and historian who had published a highly critical biography of Chiang Kai-shek.\textsuperscript{246} In reversing the dismissal, the Ninth Circuit held that the ROC government could stand trial because the suit was not barred by the act of state doctrine and jurisdiction was permitted under the Foreign Sovereign Immunities Act ("FSIA").\textsuperscript{247}

\textsuperscript{242} Id. at 979.
\textsuperscript{243} An express purpose of the TRA, aside from commercial and security purposes, was to protect human rights in Taiwan. Section 1(c) provides:

Nothing contained in this chapter shall contravene the interest of the United States in human rights, especially with respect to the human rights of all the . . . inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people of Taiwan are hereby reaffirmed as objectives of the United States.

\textsuperscript{244} 22 U.S.C. § 3301(c) (1988).
\textsuperscript{246} \textit{Liu v. Republic of China}, 892 F.2d at 1419.
\textsuperscript{247} Id. at 1423. Henry Liu was murdered at his home in Daly City, California on Oct. 15, 1984. Prior to the civil suit, a military tribunal in Taiwan convicted Admiral Wong, Director of the Defense Intelligence Bureau ("DIB") and the two other DIB officials of conspiracy. A civilian court convicted the two assassins of homicide. Id. at 1421-23.

The motives for the murder and to what extent other high ranking ROC officials participated in the conspiracy remains controversial. The ROC's judicial proceedings concluded that Wong and his two subordinates acted privately and that no other government officials were involved. Id. at 1422-23. For contrasting views compare \textit{A Quiet Revolution}, supra note 181, at 28-29 with \textit{Cohen, supra} note 7, at 406-12. For contemporaneous American reports, see Katherine Bishop, \textit{Wisdom Says Asian Gang Arrests May Show Wider Plot in Murder}, N.Y. TIMES, Sept. 20, 1985, § IV, at 16; and Dinah Lee, \textit{California Murder Jars Taiwan Intelligence Agencies}, WASH. POST, Jan. 24, 1985, at A23-24.
Although *Liu v. ROC* is categorically distinguishable from ATCA cases, it nevertheless sheds light on the viability of ROC nationals litigating in the United States. Hence, the *Liu* case will be used only as a foundation for discussion and not as a model. Specifically, two features of the *Liu* case stand out: the court’s basis for jurisdiction and its formulation of the act of state doctrine.

One crucial impediment to U.S. litigation is the Foreign Sovereign Immunities Act. Unlike the plaintiff in *Liu*, potential ROC nationals filing a claim under the ATCA cannot sue the offending state itself. The ATCA alone does not confer jurisdiction over foreign states. In *Argentine Republic v. Amerada Hess Shipping Corporation*, the U.S. Supreme Court held that the FSIA provides the “sole basis for obtaining jurisdiction over a foreign state in our courts.” Additionally, government officials who acted within the scope of their employment may also be immune. Hence, in a hypothetical case similar to *Liu*, the plaintiff must first show that a defendant like Admiral Wong was not acting within the scope of his employment.

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248 Since the plaintiff and victim in *Liu* were both U.S. citizens, jurisdiction was based on the FSIA as opposed to the ATCA, which applies only to foreign nationals. Additionally, since the tort itself was committed in the U.S., California’s state doctrine of *respondeat superior* applied. *See supra* note 247.

249 *See* Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602-1611 (1976). Under section 1330(c) of the FSIA, a foreign state is immune from jurisdiction unless its actions fall under the exceptions enumerated in sections 1605-1607 of the FSIA. *See* FSIA, 28 U.S.C. § 1605(a) (1988) for the exceptions most relevant to human rights. Additionally, FSIA immunity extends to political subdivisions and agencies or instrumentalities which are organs of the foreign state. FSIA, 28 U.S.C. § 1603(a), (b) (1988).

250 For tort claims, the FSIA permits jurisdiction over foreign states so long as such acts occurred in the U.S. territory. *See* FSIA, 28 U.S.C. § 1605(a)(5) (1988).


252 *Id.* at 434.

253 *See*, e.g., *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1098-1105 (9th Cir. 1990). In affirming the dismissal, the court held that individuals may qualify as an “agency or instrumentality” under the FSIA. The court also rejected the plaintiff’s argument that the defendant’s personal motives rendered his action ultra vires and hence, not entitled to immunity. *Id.* at 1106-07. *See also* *Herbage v. Meese*, 946 F.2d 1564 (D.C. Cir. 1991).

254 Assume the same facts except that the violation was committed against an ROC national in Taiwan.

255 A plaintiff may show, without much difficulty, that a defendant like Admiral Wong acted outside of his authority. However, it poses an apparent contradiction in ATCA doctrine that is especially relevant to the ROC and other unrecognized nations. On the one hand, only those officials acting under color of state law may be held liable for violating the law of nations. *See*, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-92 (D.C. Cir. 1984) and *Doe v. Karadzic*, 866 F. Supp. 734, 739-41 (S.D.N.Y. 1994). But on the other hand, if every official who acts within his scope of authority is immune
The *Liu* court directly addressed the other popular defense to ATCA claims, the act of state doctrine, which "bars U.S. courts from reviewing the official acts of a foreign government."256 In *Liu*, the ROC argued that its own judicial proceedings constitute acts of state and since they exonerated the government, hearing the plaintiff's claim would challenge those proceedings in violation of the doctrine.257 The issue for potential ATCA cases is whether an individual like Admiral Wong may impose such a defense. In rejecting the ROC's argument,258 the Liu court asserted that the act of state doctrine is flexible and is "not a jurisdictional limit on courts" per se.259 Hence, the party asserting the defense has the relatively difficult burden of proving the doctrine's applicability,260 which generally does not apply to human rights violations.261

V. CONCLUSION AND FUTURE PROSPECTS

Two possible future developments may significantly alter the ROC's current international status and, subsequently, its human rights condition.

irrespective of his motives (e.g., as *Chuidian v. Philippine Nat'l Bank*, 912 F.2d at 1106-07 suggests), then it's unclear who may be sued.

In *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), the Ninth Circuit affirmed jurisdiction over the defendant under the ATCA, holding that "[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA." *Id.* at 1472 n.8. *See also Trajano v. Marcos*, 978 F.2d 493, 502 (9th Cir. 1992) (The Ninth Circuit rejected FSIA immunity and upheld ATCA jurisdiction over the defendant, daughter of Ferdinand Marcos, who was in charge of the intelligence officer responsible for torturing the victim, the son of the plaintiff). These cases suggest that officials who act under color of state, but without official mandate, are not entitled to FSIA immunity and may be subject to ATCA jurisdiction.


257 The ROC concedes that Henry Liu was murdered by the individuals named in the suit, but asserts that Wong acted privately, independent from the state. *Liu v. Republic of China*, 642 F. Supp. 297, 299-300 (N.D. Cal. 1986).

258 The court concluded that jurisdiction over the ROC was not barred by the doctrine because the present case would not affront the ROC's sovereignty, involve a highly internationalized subject matter, and will not hinder foreign relations. *Id.* at 1431-34. However, the court refrained from determining whether the ROC's courts' decisions were acts of state because the present case does not challenge those decisions. *Id.* at 1433-34.

259 *Id.* at 1431-32.

260 *Id.* at 1432.

261 Courts have generally been reluctant to apply the act of state doctrine to bar jurisdiction where human rights violations are involved. *See e.g.*, *id.* at 1431-33; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) (discussion on the court's rejection of the act of state defense for ATCA claims against the estate of Marcos cases); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (rejecting application of doctrine to Haitian general in an ATCA claim). *See also Lininger, supra* note 256, at 188-89 nn. 78-79.
First is the potential of unification with the Mainland (PRC). Despite the repercussions from ROC President Lee Teng-Hui’s visit to the United States in June 1995, the last five years have witnessed dramatic increases in trade, contact and even the beginning of unofficial talks of unification. Though speculation abounds concerning what a unified regime would look like, such a change would unquestionably alter political life and human rights in Taiwan.

Second is the potential of the ROC’s reentry into the United Nations. Since 1993, the ROC has vigorously stepped up its campaign to rejoin the United Nations. Though the ROC still maintains its “one China” policy, it now vies for “parallel representation” like that of North and South Korea. However, since the PRC occupies a permanent seat in the U.N. Security Council, Taiwan’s reentry into the United Nations remains dubious at best. Nevertheless, the international community would serve itself well by supporting the ROC’s efforts and voting to grant entry. Realistically, Taiwan’s population of twenty-one million and its status as the world’s fourteenth largest trading nation deserves recognition. From a human rights standpoint, granting Taiwan entry could be conditioned upon the ROC’s adoption of U.N. human rights agreements. Furthermore, it

262 The PRC strongly protested President Lee’s visit to give an address at his alma-mater, Cornell University. David W. Chen, Taiwan’s President Tiptoes Around Politics at Cornell, N.Y. TIMES, June 10, 1995, at 4. In retaliation, the PRC fired missiles at Taiwan and employed other pressure tactics. See Julian Baum, A Case of Nerves: Chinese Military Maneuvers Cause Alarm, FAR E. ECON. REV., July 20, 1995, at 26; and Julian Baum, Pressure Cooker, FAR E. ECON. REV., Aug. 24, 1995, at 16-17.

263 Taiwan’s exports to the PRC increased more than six hundred percent, from 1.2 billion U.S. dollars in 1987 to 7.6 billion dollars in 1993. See TAIWAN STATISTICAL DATA BOOK, supra note 145, at 4.

264 The Koo-Wang talks in April 1993 culminated in the signing of four agreements between the two countries. Hungdah Chiu, The Koo-Wang Talks and the Prospect of Building Constructive and Stable Relations Across the Taiwan Straits, in 119 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES 22-25 (No. 6, 1993). Though technically “unofficial,” both Koo Chen-fu (ROC) and Wang Tao-han (PRC) had authority from their respective governments to meet. See also HSIN-HSING WU, BRIDGING THE TAIWAN STRAIT: TAIWAN, CHINA, AND THE PROSPECTS OF REUNIFICATION 159-98 (1995), for an excellent analysis of the various types of contact between the ROC and PRC.

265 In a speech delivered to the National Assembly on April 9, 1993. ROC President Lee Teng-hui announced that the ROC would actively seek to join the United Nations. See REALITY CHECK: THE REPUBLIC OF CHINA BELONGS IN THE UNITED NATIONS 1 (1994) (67 page booklet published by the ROC’s Government Information Office (“GIO”).


267 While the General Assembly may induct new members into the U.N., see U.N. Charter art. 4, para. 2), a recommendation by the Security Council must precede the decision. See Should Taiwan Be Admitted to the United Nations?: Joint Hearing Before the Subcommittees on International Security, International Organizations and Human Rights and Asia and the Pacific of the Committee on Foreign Affairs, 103rd Cong., 2nd Sess. 113 (1994) (Chen Lung-chu’s official comment).

would serve the strongest notice yet against the PRC's domestic human rights problem.

The Republic of China has come a long way in a short period of time. While the current recognition of human rights in Western nations follows centuries of development, conditions in Taiwan are the product of the last fifty years. To its credit, the KMT has successfully mobilized the nation away from its hard-authoritarian roots. However, the true test of the Republic of China's commitment to democracy has yet to come as it progresses from soft-authoritarian rule to real democratic pluralism. Until then, it would be premature to judge whether Sun's conception of an "all-powerful" yet democratic state may exist in fact.
Appendix I
Comparison of the Constitution of the Republic of China with the
Universal Declaration of Human Rights

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* Article 9 protects civilians from being subject to military courts.

** Technically, Article 10 grants "freedom of residence and of change of residence."