

HUMAN RIGHTS IN TAIWAN: SELF RATIFICATION AND REVIEW OF THE TWO COVENANTS IN TAIWAN*

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The unique political and human rights background of Taiwan (Republic of China) led to the island nation finding different ways to assert its international legitimacy despite lacking official recognition by the United Nations. The government in Taiwan attempted to ratify, and successfully incorporated, key international human rights treaties into domestic law in the late 2000s. The implementation included periodic review processes that mimic most of the United Nations' treaty-body procedures. One issue that featured prominently in these human rights reviews was the need to establish an independent National Human Rights Institution in Taiwan. Successive presidents have made strong commitments to establish such a body since the late 1990s; however, as the most recently elected president, President Tsai Ing-Wen, reaches the halfway mark of her first term in office, the creation of such an institution remains a distant dream with no concrete plan of action in place.

I HUMAN RIGHTS IN TAIWAN (REPUBLIC OF CHINA)

The Republic of China ('ROC')¹ Government was expelled from the

* The 'Two Covenants' or '兩公約' (liǎng gōng yuē) is a collective term used in Taiwan to describe the two key United Nations Covenants on Human Rights: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

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¹ Throughout this paper, the terms 'Taiwan' and 'Republic of China' are used interchangeably to refer to the territory of Taiwan and its controlling government. Where there is a distinction, it will be specifically explained in text or in the corresponding footnote.

United Nations ('UN') in 1971 and its membership replaced by the People's Republic of China ('PRC') as the 'only lawful ... China to the United Nations'.² *Resolution 2758* effectively awarded legal (*de jure*) sovereignty of Taiwan³ and its surrounding islands to the PRC Government,⁴ despite the PRC Government having never controlled any part of the territory that is under the effective (*de facto*) control of the ROC Government.⁵ In the subsequent years following the 1971 resolution, while the island state has become increasingly more isolated in the international community,⁶ it has nevertheless developed into a global economic powerhouse relative to its small size and population.⁷

From a human rights perspective, the ruling ROC Government in Taiwan, while denouncing the appalling human rights record of the PRC regime,⁸ itself established an authoritarian regime and imposed strict martial law that endured for more than 38 years after its retreat in 1949.⁹ The ROC Government suspended the operation of its

² United Nations General Assembly, *Restoration of the Lawful Rights of the People's Republic of China in the United Nations*, GA Res 2758, 26th sess, UN Doc A/8429 (21-22 September 1971) ('*UNGA Resolution 2758*').

³ Here 'Taiwan' specifically refers to the island of Taiwan.

⁴ Angeline G Chen, 'Taiwan's International Personality: Crossing the River by Feeling the Stones' (1998) 20 *Loyola of Los Angeles International and Comparative Law Review* 223, 224.

⁵ Pro ROC scholars have argued that the ROC Government acquired *de jure* control of Taiwan after the defeat of Japan in the Second Sino-Japanese War. See, Hungdah Chiu, 'The International Legal Status of Taiwan' in Jean-Marie Henckaerts (ed), *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (Kluwer Law International, 1996) 3, 8. However, the PRC has never accepted this position and states with an official diplomatic relationship with the PRC must also acknowledge their claim over Taiwan.

⁶ Donald G Palmer Jr, 'Taiwan: De Jure or Not De Jure? That is the Question. An Analysis of Taiwan's Legal Status Within the International Community' (1996) 7 *John F Kennedy University Law Review* 65, 73. Prior to *UNGA Resolution 2758*, 81 UN member States maintained diplomatic relations with Taiwan. As of June 2017, the number has reduced to 19.

⁷ Scott Pegg, 'De Facto States in the International System' (Working Paper No 21, Institute of International Relations, University of British Columbia, February 1998) 4.

⁸ For an in-depth discussion on the human rights record of the PRC throughout its history, see Michael Dillon, *China: A Modern History* (I B Tauris, 2012).

⁹ Denny Roy, *Taiwan: A Political History* (Cornell University Press, 2003) 175;

fledgling constitution, which sought to incorporate traditional Chinese ideologies of a paternalistic state with Western liberal thoughts and democratic reforms.¹⁰ The ROC Government removed most civil and political rights from its citizens and engaged in highly repressive and discriminatory treatment against the indigenous Taiwanese residents based on their ‘ethnolinguistic background and place of origin’.¹¹ During this period, Taipei’s propaganda machinery focused on the island’s remarkable economic progress and asserted that curtailments to political freedoms were necessary in order to achieve political stability and the ultimate reunification with mainland China.¹² Between 1949 and 1987 (often referred to as the ‘White Terror’ era in Taiwan) the ROC regime persecuted, imprisoned, tortured, and executed up to 10,000 people arbitrarily charged under various sedition and spying-related crimes.¹³ Martial law was officially lifted on 14 July 1987,¹⁴ ushering in a new era of democratic and human rights reforms and developments in Taiwan.

The legalisation of opposition political parties in 1989 marked the start of Taiwan’s democratic reforms.¹⁵ Subsequent constitutional reforms in 1991 provided for the direct election of Legislative

Winston Hsiao, ‘The Development of Human Rights in the Republic of China on Taiwan: Remifications of Recent Democratic Reforms and Problems of Enforcement’ (1995) 5 *Pacific Rim Law & Policy Journal* 161, 170.

¹⁰ Hsiao, above n 9, 168.

¹¹ Parris Chang and Kok-Ui Lim, ‘Taiwan’s Case for United Nations Membership’ (1996) 1 *UCLA Journal of International Law and Foreign Affairs* 393, 407.

¹² Roy, above n 9, 79.

¹³ Daniel Bowman, ‘Righting the Wrong of the Past? The Human Rights Policies of Chen Shui-Bian and Ma Ying-Jeou’ in David Blundell (ed), *Taiwan Since Martial Law: Society, Culture, Politics, Economy* (National Taiwan University Press, 2012) 485, 490. For in-depth discussion of the White Terror era, see Steven Phillips, ‘Between Assimilation and Independence, Taiwanese Political Aspirations Under Nationalist Chinese Rule, 1945-1948’ in Murray A Rubinstein (ed), *Taiwan: A New History* (M E Sharpe, 2007) 275, 302; Peter Chen-Main Wang, ‘A Bastion Created, A Regime Reformed, An Economy Reengineered, 1949-1970’ in Murray A Rubinstein (ed), *Taiwan: A New History* (M E Sharpe, 2007) 320, 330. For an estimate of victims, see, Roy, above n 9, 77; while Chen, above n 4, 233 estimated that ‘between 10,000 to 20,000 unarmed Taiwanese were massacred by the ROC Government troops’ during the ‘228 incident’ alone.

¹⁴ Roy, above n 9, 175.

¹⁵ *Ibid* 176.

Yuan¹⁶ members by all Taiwan residents. Direct election of the president and vice-president of the ROC followed in 1992 with the first democratically elected president taking office four years later.¹⁷ In 2000, the election of opposition Democratic Progressive Party ('DPP') leader Chen Shui-Bian as the president of the ROC ended more than 50 years of one party rule in Taiwan.¹⁸ Chen's government was the first amongst non-UN recognised states to actively embrace the imposition of international human rights obligations, unlike other 'territorial non-state actors' that often evade the imposition of such obligations.¹⁹ This shift in policy saw the ROC Government transition from pursuing international recognition through formal UN membership to a more pragmatic acceptance of its non-recognition status as it began to seek international legitimacy through the implementation of UN human rights standards.²⁰ In recent years, Taiwan has gone further by self-ratifying the two fundamental human rights covenants, the International Covenant on Civil and Political Rights ('ICCPR')²¹ and the International Covenant on Economic, Social and Cultural Rights ('ICESCR')²²

¹⁶ Under the «中華民國憲法» *Constitution of the Republic of China 1947* (Taiwan), the Government is divided into five branches, or Yuan (院), they are: Executive (Ch 5), Legislative (Ch 6), Judicial (Ch 7), Examination (Ch 8), and Control (Ch 9). See also Ernest Caldwell, 'Chinese Constitutionalism: Five-Power Constitution' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017), [3]; also see, 陳淳文 [Chwen-Wen Chen], «中央政府體制改革的迷思與展望» [The Myth and Perspective of Government System Reform] in 湯德宗 and 廖福特 [Dennis T Tang and Fort Fu-te Liao] (eds), «憲法解釋之理論與實務» *Constitutional Interpretation: Theory and Practice Vol 5* (中央研究院法律研究所 [Academia Sinica Institutum Jurisprudentiae], 2007) 99, 114-120.

¹⁷ Bowman, above n 13, 491.

¹⁸ Shui-Bian Chen, 'Raising the Bar: Human-Rights Initiatives in Taiwan (Perspectives)' (2002) 24 *Harvard International Review* 26.

¹⁹ Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21, 25.

²⁰ Nina Caspersen, 'The Pursuit of International Recognition After Kosovo' (2015) 21 *Global Governance* 393, 404; see also Chang and Lim, above n 11, 397; Chen, above n 4, 254.

²¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

²² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

(more commonly referred to collectively as the ‘Two Covenants’). Taiwan then incorporated these into domestic laws,²³ and implemented an expert review process that is modelled on the UN treaty bodies’.²⁴

Two International Human Rights Covenants Review Conferences have since taken place in March 2013 and January 2017, where ten international human rights experts were invited to review the implementation of the Two Covenants in Taiwan.²⁵ The first review was heralded as a ‘historic and unprecedented feat’ in Taiwan’s human rights development.²⁶ Given this progress, one might have expected a genuine political will by the ROC Government to fully implement the provisions of the Two Covenants and the recommendations made by the Expert Review Committee.

However, eight years after the enactment of the *Two Covenants Implementation Act* in Taiwan, there appears to have been little progress to meaningfully implement the recommendations made by the Expert Review Committee. A recent reflection on the Two Covenants Reviews referred to the ROC Government as continuing

²³ «公民與政治權利國際公約及經濟社會文化權利國際公約施行法» *Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 2009* (Taiwan) hereafter referred to as the *Two Covenants Implementation Act*.

²⁴ Similar reviews are also conducted for other human rights treaties voluntarily ratified and incorporated by the ROC Government, including the *Convention on the Elimination of All Form of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’) and the *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (‘CRPD’).

²⁵ These experts formed the ‘Independent Experts of the Review Committee’ (hereinafter referred to as the ‘Expert Review Committee’). The Committee also referred to itself as the ‘International Group of Independent Experts’.

²⁶ 郭銘禮 [Ming-Li Kuo], «初次國家人權報告之撰寫與審查的初步檢討與展望» [A Preliminary Survey and Prospect of the Drafting and Review of the Nation’s Initial Human Right Reports] (2013) 2(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 73, 74.

to act as a ‘giant wall’ to human rights promotion in Taiwan.²⁷ To date, only four recommendations made by the Expert Review Committee in 2013²⁸ have been substantively advanced by the ROC Government,²⁹ while the government has made no progress on the establishment of an independent National Human Rights Institution (‘NHRI’) that complies with the *Paris Principles*,³⁰ the creation of which was seen as crucial by both civil society and government actors. The Expert Review Committee renewed their urging and recommended that the ROC Government establish an independent NHRI ‘without further delays’ in their second Concluding Observations issued in 2017.³¹

This article examines the attempts by successive ROC regimes to establish Taiwan’s international legitimacy by implementing the UN’s human rights framework, despite not being recognised by the UN as a fully sovereign nation. As the ‘two Chinas’ continue to compete for international recognition and legitimacy, human rights implementation begins to appear as a political question incorporating

²⁷ 施逸翔 [Yi-Xian Shi], «蔡政府漂浮在空中的人權地板：兩公約兩次總結意見比一比» *President Tsai’s Floating Human Rights Standards: a Comparison Between the 2013 and 2017 International Expert Review of the Two Covenants* (26 April 2017) 公視新聞議題中心 [Public Television News Network Taiwan] <<http://bit.ly/2oKSOZU>>; a similar point was made prior to the Second Two Covenant Review: 施逸翔 [Yi-Xian Shi], «說好的國家人權委員會呢» *Where is the National Human Rights Institution* (10 December 2016) 上報 [Up Media] <<http://bit.ly/2uPOquM>>.

²⁸ 李念祖 [Nien-Tsu Li], «國家人權報告國際審查撮要» [Preliminary Summary of the International Review of Taiwan National Human Rights Report] (2013) 2(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 133, 133; citing International Group of Independent Experts, ‘Review of the Initial Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants, Concluding Observations and Recommendations’ (Taipei, Adopted 1 March 2013) [8]-[9]. A total of 81 recommendations were made.

²⁹ 施逸翔 [Shi], *President Tsai’s Floating Human Rights Standards* above n 27.

³⁰ United Nations General Assembly, *National Institutions for the Promotion and Protection of Human Rights (The Paris Principles)*, GA Res 48/134, UN Doc A/RES/48/134 (20 December 1993) (*The Paris Principles*).

³¹ International Group of Independent Experts, ‘Review of the Second Report of the Government of Taiwan on the Implementation of the International Human Rights Covenants, Concluding Observations and Recommendations Adopted by the International Review Committee’ (Taipei, Adopted 20 January 2017) [9].

many factors that may have nothing to do with human rights. The specific focus in this article on the push by civil society actors for the establishment of an independent NHRI in Taiwan further illustrates this point.

II THE INTERNATIONAL HUMAN RIGHTS COVENANTS

A *The Two Covenants, the Two Chinas, and the United Nations*

The Two Covenants, having codified the provisions in the Universal Declaration of Human Rights to form the *International Bill of Rights*,³² were introduced and unanimously passed by the UN General Assembly in 1966.³³ The ROC Government, then still the legitimate government of the whole of China and a member state of the UN,³⁴ voted to pass the resolution.³⁵ However, although the ROC signed both covenants in 1967, they did not ratify the covenants prior to their expulsion from the UN in 1971.³⁶ By the time the Two

³² 陳龍騰 and 林正順 [Long-Teng Chen and Cheng-Shun Lin], «從國際人權法典檢討我國人權基本法之制定» [A Critique of the Taiwanese Basic Law of Human Rights in light of the International Law of Human Rights] (2007) 3 人文社會學報 [*Journal of Liberal Arts and Social Sciences*] 151, 155.

³³ United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200, 21st, UN Doc A/RES/21/2200 (16 December 1966) ('*UNGA Resolution 2200*').

³⁴ As well as one of the five permanent members of the UN Security Council.

³⁵ United Nations General Assembly, *Twenty-First Session Official Records for the 1496th Plenary Meeting*, 21st sess, 1496 plen mtg, UN Doc A/PV.1496 (16 December 1966) 6. Voting record showed a unanimous vote of 106-0 for the ICESCR and 105-0 for the ICCPR.

³⁶ See *UNGA Resolution 2758*, UN Doc A/8429, the international legal and political status of Taiwan (ROC) is a complex discussion beyond the scope of this paper. For a brief introduction, see Jean-Marie Henckaerts, *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (Kluwer Law International, London, 1996); Roy, above n 9.

Covenants came into effect in 1976,³⁷ the PRC representatives to the UN had made a clear declaration that the signatories entered by the ROC in 1967 were ‘null and void’.³⁸ PRC took no further actions until 1998 when they signed both the ICCPR and the ICESCR but did not formally ratify the ICESCR until 2001 and to date have not ratified the ICCPR.³⁹

Both PRC and ROC maintained their position as the ‘sole legal government of China including the Chinese Mainland’ until the early 1990s when the ROC Government in Taiwan adopted a new stance of ‘One China, two equal political entities’,⁴⁰ which was effectively a ‘tacit acknowledgement’ that the ROC Government in Taipei and the PRC Government in Beijing were two distinct entities occupying ‘two separate areas of one China’.⁴¹ During that time, most of the other states around the world manoeuvred to maintain relationships with both the PRC ‘China’ (officially) and the ROC ‘Taiwan’ (unofficially); with the ROC Government losing official diplomatic status in its relationship with most other nations.⁴²

Taipei transitioned its international political agenda from competing with the PRC as the legitimate government of the whole

³⁷ Wen-Chen Chang, ‘The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison’ (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 594, 598.

³⁸ Fort Fu-te Liao, ‘Partly Virtual, Partly Real: Taiwan’s Unique Interaction with International Human Rights Instruments’ (2010) 16 *Asian Yearbook of International Law* 25, 34. It is important to note however that *Resolution 2758* did not specifically address the consequences of the ‘expulsion’ of ROC and whether any ‘voiding’ of ROC’s prior signatories should be done *ab initio* or *ex post facto*.

³⁹ James D Seymour and Patrick Yuk-Tung Wong, ‘China and the International Human Rights Covenants’ (2015) 47 *Critical Asian Studies* 514, 515. However, as the authors pointed out, in an extraordinary twist, the instruments signed and ratified by the PRC Government are ‘not the versions the UNGA passed in 1966. Instead, Beijing embraced revised Chinese-language human rights instruments that mysteriously appeared in 1973’.

⁴⁰ Anne Hsiu-An Hsiao, ‘The International Status of Unrecognized Claimants to Statehood: A Comparative Analysis of Taiwan and the Turkish Republic of Northern Cyprus’ (2011) 47 *Issues and Studies* 1, 13.

⁴¹ *Ibid* 14.

⁴² Chen, above n 4, 225.

of China, to attempting to legitimise its full participation in the international community as an independent 'entity', if not a state fully recognised by the UN.⁴³ Some scholars argued that Taiwan's claim should not be based on the existing precedent of 'divided countries' such as the case with Germany and Korea, nor the continued competition with Beijing as the sole and legitimate 'China'.⁴⁴ Instead, the focus should be on the 'reality that Taiwan is an independent sovereign country'.⁴⁵ This conclusion was supported by international scholars who argued that admission into the UN should not be determined by politics, but on the substantive 'sovereignty' of the government in Taiwan over the territory it controls.⁴⁶ Further support came from the notion that the Communist PRC Government has never had control of the territory held by the ROC despite their continued strong assertion and military threat that Taiwan ought to remain an 'integral part' of China.⁴⁷

In hindsight, these sentiments and expressions of entitlement during the 1990s by ROC officials and academics seem inherently misplaced. Fuelled by the break-up of the former Soviet Union and Yugoslavia, which created more than 18 new independent states in the early 1990s, the people of Taiwan believed that they could overcome the political obstacles and achieve an 'independent sovereign entity' in some form that would allow them to re-join the international community.⁴⁸ Such sense of entitlement was best articulated by Chiu when he concluded that the exclusion of Taiwan's '21 million people from participation in the United Nations

⁴³ See Chang and Lim, above n 11, 424; also see, Hung-dah Chiu, 'The Right of the Republic of China and its 21 Million Chinese People to Participate in the United Nations' (1994) 28 *John Marshall Law Review* 247, 247.

⁴⁴ Chang and Lim, above n 11, 425.

⁴⁵ Ibid 427. Here 'Taiwan' is referred to as a distinct sovereign entity separate from the ROC.

⁴⁶ See David Lloyd, 'Succession, Secession, and State Membership in the United Nations' (1994) 26 *New York University Journal of International Law and Politics* 761, 762.

⁴⁷ Chen, above n 4, 238.

⁴⁸ See, Lloyd, above n 46 792. Also see 陳隆志 [Long-Zhi Chen], «台灣要正名入聯» [Taiwan's Admission into the United Nations] [2012] (60) *新世紀智庫論壇* [*New Century Think Tank Forum*] 4, 5, advocating for an 'independent Taiwan' without openly calling for secession from 'China'.

... is one of the greatest injustices in the world today'.⁴⁹ The sense of entitlement was challenged at the time by more 'neutral' academics arguing that Taiwan's full independence cannot be achieved as long as the ROC Government continued its 'belligerent status as a contestant for control of one China',⁵⁰ and that China would 'almost certainly use force against Taiwan' to counter any perceived change to Taiwan's political status.⁵¹

It is not surprising that after more than 40 years of bitter divisions and concerted propaganda efforts by both sides, it is virtually impossible to maintain an objective and impartial discourse about the issue of Taiwan's sovereignty and independence. The issue of self-determination and UN membership is therefore always inherently a 'political question', and not a legal one.⁵² Even prominent Taiwanese scholars were eventually forced to concede that the question of 'Taiwan's independence' is not one of logic but is intrinsically linked with global and regional politics.⁵³

From the human rights development perspective, it is important to compare and further examine the experiences of the 'two Chinas' and their respective experiences in respecting and implementing the provisions of the Two Covenants, one from within the UN system and one outside of it.

⁴⁹ Chiu, 'The Right of the ROC', above n 43, 256. Despite the fact that Professor Chiu was then affiliated to the University of Maryland, he also served in the public service and diplomatic corps of the ROC Government.

⁵⁰ Brad R Roth, 'The Entity That Dare Not Speak its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order' (2009) 4 *East Asia Law Review* 91, 101.

⁵¹ Thomas Christensen, 'Chinese Realpolitik' (1996) 75(5) *Foreign Affairs* 37, 45.

⁵² Nisuke Ando, 'Secession or Independence - Self-Determination and Human Rights: A Japanese View of Three Basic Issues of International Law Concerning "Taiwan"' in Mahnoush H Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, 2011) 387, 393.

⁵³ Huang-Chih Chiang and Jau-Yuan Hwang, 'On the Statehood of Taiwan: A Legal Reappraisal' in Peter Chow (ed), *The "One China" Dilemma* (Palgrave Macmillan, 2008) 57, 64.

B *PRC's Experience with the UN Treaty Bodies*

Since its ejection from the UN, Taiwan has also been excluded from all UN treaty- and charter-based human rights monitoring and review procedures, including the more recently introduced Universal Periodic Review ('UPR') process through the UN Human Rights Council, leaving it 'less accountable [for its human rights record] than most nation-states'.⁵⁴ The PRC Government on the other hand, has been able to fully participate in the UN human rights systems, including signing and ratifying key human rights treaties and fully participating in the UPR process, both as a member state being reviewed and as a member of the Human Rights Council conducting periodic reviews of other member states.

PRC's engagement with the UN human rights regimes and domestic political reform has been described as occurring in 'ebbs and flows' coinciding with each party leadership change or key human rights events.⁵⁵ After PRC was recognised by the UN as the legitimate government of China in 1971, it was not until the death of Mao Zedong and the eventual rise of Deng Xiaoping into PRC's leadership in the early 1980s that the PRC started to engage with the international human rights system.⁵⁶ During Deng's reign, PRC ratified four human rights treaties with their own reporting procedures.⁵⁷ However, the event and massacre at Tiananmen Square on 4 June 1989⁵⁸ marked another significant shift in the PRC's

⁵⁴ Hsiao, above n 9, 163.

⁵⁵ Manik V Suri, 'Conceptualizing China within the Kantian Peace' (2013) 54 *Harvard International Law Journal* 219, 253.

⁵⁶ Sophia Woodman, 'Human Rights as Foreign Affairs: China's Reporting Under Human Rights Treaties' (2005) 35 *Hong Kong Law Journal* 179, 181.

⁵⁷ Ibid. The four treaties ratified in chronological order: *Convention on the Elimination of All Forms of Discrimination Against Women* (1980), *International Convention on the Elimination of All Forms of Racial Discrimination* (1981), *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (1988), and *Convention on the Rights of the Child* (1992).

⁵⁸ For more detailed analysis of the events leading up to and during the Tiananmen Square massacre on 4 June 1989, see, eg, Nan Lin, *The Struggle for Tiananmen: Anatomy of the 1989 Mass Movement* (Praeger, 1992). For a more journalistic account, see, Louisa Lim, *The People's Republic of Amnesia: Tiananmen Revisited*

human rights interactions with the UN, especially against western powers to increasingly diminish international human rights pressure on the PRC Government through ‘tactical learning’ and ‘making only erratic decisions’.⁵⁹ In the decade after the Tiananmen massacre, the PRC Government, led by Jiang Zemin, only signed the Two Covenants and has never subsequently ratified the ICCPR.⁶⁰ There was a flurry of activity throughout the 2000s, including more treaty ratifications,⁶¹ and active engagement in the UPR process under the leadership of Hu Jintao, as the PRC Government sought to use its remarkable economic growth and new found international political leverage ‘to reshape international human rights institutions ... [to] suit its own interests’.⁶² Most recently, another shift coinciding with Xi Jinping’s assumption of PRC leadership in 2012 saw China acting more assertively than ever to protect its sovereignty against the perceived attempts to erode it through international human rights discourse.⁶³ This has been criticised by some as an attempt to ‘impede international human rights scrutiny’ in China’s interaction with the UN.⁶⁴

The introduction of the UPR process within the UN Human Rights Council in 2006 was instrumental in ensuring some kind of engagement takes place between the UN human rights regime and all UN member states.⁶⁵ It was argued that the UPR process created a more ‘supportive environment to encourage the promotion and

(Oxford University Press, 2015).

⁵⁹ Björn Ahl, ‘The Rise of China and International Human Rights Law’ (2015) 37 *Human Rights Quarterly* 637, 639.

⁶⁰ Woodman, above n 56, 182.

⁶¹ The PRC government ratified the ICESCR in 2001, the two optional protocols on the *Convention of the Rights of the Child* in 2002 and 2008, and the *Convention on the Rights of Persons with Disabilities* also in 2008.

⁶² Ahl, above n 59, 639.

⁶³ Anna Michalski and Zhongqi Pan, *Unlikely Partners? China, The European Union and the Forging of a Strategic Partnership* (Palgrave, 2017)

⁶⁴ Ahl, above n 59, 639.

⁶⁵ Rhona Smith, ‘Form Over Substance? China’s Contribution to Human Rights Through Universal Periodic Review’ (2011) 17 *Asian Yearbook of International Law* 2011 85, 89. For a summary of the UPR process see, United Nations Office of the High Commissioner for Human Rights, *Fact Sheet: Human Rights Council - Universal Periodic Review* (November 2008) <<http://bit.ly/21AxVA2>>.

protection of human rights' that applied universally across all member states.⁶⁶ However, the 'supportive environment' also means that the UPR process is inherently a 'political mechanism',⁶⁷ with states often offering positive or congratulatory comments to their political allies under review rather than providing non-politicised and objective comments and criticisms as required by the central mission of the UPR process.⁶⁸

Overall, it can be concluded that China's human rights transformation started with their admission into the UN in 1971, which allowed them to either 'establish or normalise' relations with the UN and its member states.⁶⁹ This normalisation has allowed the UN and its various human rights regimes to put a certain amount of external pressure on China to actively be seen to promote and uphold key human rights principles.⁷⁰ However, as UN Special Rapporteur Rhona Smith⁷¹ pointed out, China's participation in the UN human rights regime is a 'classic case of "much ado about nothing" — justifying ... credit ... without any underpinning substance'.⁷²

C *Human Rights Development in Taiwan – 'Ratifying' the Two Covenants*

Conversely, despite its rapid democratic development in the late 1980s and 1990s, Taiwan was by all accounts shut out of the UN

⁶⁶ Smith, above n 65, 89. For further discussion, see Felice D Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109.

⁶⁷ Valentina Carraro, 'The United Nations Treaty Body and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?' (2017) 39 *Human Rights Quarterly* 943, 965.

⁶⁸ Smith, above n 65, 93.

⁶⁹ Dingding Chen, 'China's Participation in International Human Rights Regime: A State Identity Perspective' (2009) 2 *Chinese Journal of International Politics* 399, 410.

⁷⁰ *Ibid* 414.

⁷¹ Rhona Smith was appointed by the Human Rights Council as Special Rapporteur on the situation of human rights in Cambodia in March 2015.

⁷² Smith, above n 65, 115 citing Human Rights Council's Resolution 5/1 adopted on 18 June 2007.

human rights mechanisms. The PRC Government ensured the exclusion of Taiwan from participating in *any* international bodies, including arguably non-political entities such as the World Health Organisation and the International Civil Aviation Organisation.⁷³ As a result of this disconnection between the ROC Government and the international community as a whole, Taiwan was largely left out of the continued development of international human rights law. This lack of human rights expertise and knowledge in Taiwan was evident immediately following the lifting of martial law, with only a few hundred volumes on the subject of human rights available across all major libraries in Taiwan and less than ten ‘expert’ human rights scholars based in Taiwan by the end of the 1990s.⁷⁴

During the period immediately following the 1987 lifting of martial law, democratic reform and an increased feeling of security by the people of Taiwan resulted in high voter participation and strong candidate competition in subsequent local elections.⁷⁵ These were lauded as achievements in Taiwan’s civil and political rights, despite the fact that, at the time, Taiwan remained a one-party state and the creation of any opposing political parties was still outlawed.⁷⁶ The ROC Government also continued to ‘strictly [prohibit] any expression of sympathy for Chinese communism ... or Taiwan independence’⁷⁷ across the board and this did not change until laws were passed that allowed for the creation of new political parties and direct presidential elections in the early 1990s.⁷⁸

⁷³ Palmer Jr, above n 6, 89. Also see, Chiu, ‘The Right of the ROC’, above n 43, 252; Hsiao, above n 40, 23.

⁷⁴ 行政院 [Executive Yuan], «人權立國與人權保障的基礎建設：2002年國家人權政策白皮書» *Human Rights Infrastructure-Building for a Human Rights State—2002 Human Rights Policy White Paper of the Republic of China (Taiwan)* (February 2002) 17, citing a 1994 study.

⁷⁵ Hung-Chao Tai, ‘Taiwan’ in James C Hsiung (ed), *Human Rights in East Asia: A Cultural Perspective* (Paragon House, 1985) 79, 96.

⁷⁶ Ibid.

⁷⁷ Ibid 97.

⁷⁸ See generally, Jyh-Pin Fa, ‘Legislation and Constitutional Interpretations on Human Rights in the Republic of China, 1982-1983: An Overview’ (1983) 3 *Chinese Taiwan Yearbook of International Law and Affairs* 87.

The election of Mr Chen Shui-Bian, the first Taiwanese president not affiliated with the previously ruling Nationalist Party or Kuomintang ('KMT')⁷⁹ in 2000, marked a major turning point in Taiwan's human rights development and brought with it the creation of a 'Human Rights State' in Taiwan.⁸⁰ President Chen aggressively pursued an agenda that promoted the 'ratification' and implementation of key UN human rights treaties as well as establishing an independent NHRI in accordance with the *Paris Principles*.⁸¹ The creation of a NHRI was seen as crucial in addressing ongoing human rights issues in Taiwan as well as providing important oversight for ensuring that human rights remain the predominant consideration for all future legal and government reforms.⁸² Importantly, Chen saw that the ratification of the Two Covenants, and their planned deposit with the UN General Assembly would serve a political purpose of gaining much needed 'support against the international isolation of the Taiwan government'.⁸³ Chen was the first Chinese head of state (from either side of the Taiwan strait) to make a pledge on the creation of an independent NHRI early in his administration.⁸⁴ His office hosted an international conference on NHRIs where an action plan was put in place to achieve that goal.⁸⁵ The subsequent whitepaper published by the Executive Yuan outlined the government's plan to establish the NHRI, and highlighted possible conflicts between the proposed institution and the Control Yuan,⁸⁶ one of the five main branches of government vested with ombudsman-like power by the *Constitution* to monitor other branches of the ROC Government.⁸⁷ The whitepaper warned that the investigating power of the proposed

⁷⁹ The Nationalists Party of China, also called the Kuomintang is usually abbreviated to 'KMT' by convention.

⁸⁰ Chen, above n 18, 28.

⁸¹ 行政院 [Executive Yuan], above n 74, 20, 24-28. See also Bowman, above n 3, 493.

⁸² 行政院 [Executive Yuan], above n 74; for civil society perspectives, see Fort Fu-te Liao, 'Establishing a National Human Rights Commission in Taiwan: The Role of NGOs and Challenges Ahead' (2001) 2 *Asia-Pacific Journal on Human Rights and the Law* 90.

⁸³ Bowman, above n 13, 495.

⁸⁴ Liao, 'Establishing a NHRC in Taiwan', above n 82, 95.

⁸⁵ Bowman, above n 13, 499.

⁸⁶ 行政院 [Executive Yuan], above n 74, 27-28.

⁸⁷ Caldwell, above n 16, [9].

NHRI should not be ‘antagonistic’ to the functions of the Control Yuan, though no solution was offered by the whitepaper as to how this conflict might be resolved.⁸⁸ However, with Chen himself embroiled in a series of corruption scandals throughout his second term of office (2004-2008) and his public approval rating dropping below 10 per cent,⁸⁹ no further action on these ambitious human rights policies was advanced by the end of his presidency.⁹⁰

The election of President Ma Ying-Jeou in 2008 brought a new administration that prioritised improving relations with the PRC via a focus on economic integration between the ‘two Chinas’ and circumspection on continuing Chen’s human rights policies.⁹¹ While acknowledging that the lack of a formal treaty ratification does not significantly impede the incorporation of the treaty content into Taiwan’s domestic legal regime,⁹² Ma nevertheless committed himself during the early part of his administration to continue pushing for the formal ratification process of the two Covenants with the UN, including attempting to deposit the ratifications with the General Assembly.⁹³ By then, there was no mention of establishing an independent NHRI promoted by his predecessor. On 31 March 2009, the Legislative Yuan approved the ratification of the Two Covenants,⁹⁴ and formally incorporated the provisions of both the ICCPR and the ICESCR into domestic law.⁹⁵ Attempts by the ROC

⁸⁸ Bowman, above n 13, 501.

⁸⁹ John Copper, ‘The Devolution of Taiwan’s Democracy During the Chen Shui-Bian Era’ (2009) 18 *Journal of Contemporary China* 463, 473.

⁹⁰ Note although Chen’s government ‘ratified’ CEDAW in 2007, the enforcing legislation 《消除對婦女一切形式歧視公約施行法》 *Enforcement Act of Convention on the Elimination of All Forms of Discrimination against Women 2011 (Taiwan)* did not take effect until 2011, during Ma’s presidency.

⁹¹ Bowman, above n 13, 507, while Yu-Jie Chen, ‘Human Rights in China-Taiwan Relations: How Taiwan Can Engage China’ (2015) 45 *Hong Kong Law Journal* 565, 568 referred to this as a ‘policy of “easy issues first, difficult ones later”’.

⁹² Wen-Chen Chang, ‘An Isolated Nation with Global-Minded Citizens: Bottom-Up Transnational Constitutionalism in Taiwan’ (2009) 4 *National Taiwan University Law Review* 203, 206.

⁹³ Bowman, above n 13, 507.

⁹⁴ Peter Huang, *A Breakthrough in Human Rights* (8 April 2009) Taipei Times <<http://bit.ly/2f3lbSS>>.

⁹⁵ *Two Covenants Implementation Act 2009* (Taiwan).

Government to deposit the ratifications with the UN General Assembly were summarily rejected by then UN Secretary General Ban Ki-Moon.⁹⁶ Other attempts by some of Taiwan's UN member-state allies to support the deposit of Taiwan's ratification, and to promote a more inclusive participation in various international agencies, were met with strong rebuke from the PRC representatives at the UN.⁹⁷

These attempts to deposit Taiwan's ratification of international human rights treaties were not made purely for political show and were not without legal basis. Both the ICCPR and the ICESCR (as with most other UN human rights treaties) provided for possible signatures by states who are not UN members: 'The present Covenant is open for signature ... by any other State which has been invited by the General Assembly ... to become a party to the present Covenant'.⁹⁸ However, the UN, at the urging and insistence of the PRC Government, has never considered the ROC Government in Taiwan as a sovereign state capable of ratifying and depositing legal instruments with the UN.⁹⁹ Whether or not Taiwan and other *de-facto* states around the world could be part of the UN human rights mechanisms was really a question of politics, not legality.¹⁰⁰

D *Incorporation of the Two Covenants into Domestic Law*

The term 'ratification' can also be a contentious one as UN regulations stipulate that 'ratified covenants only take formal effect three months after they have been deposited [and accepted] at the

⁹⁶ The China Post, *Rights Ratification Documents Sent to U.N.* (15 June 2009) <<http://bit.ly/2f3xiQ2>>. Note the ROC Government's attempt to ratify CEDAW in 2007 was also rejected by the UN Secretary General.

⁹⁷ See United Nations General Assembly, *Letter Dated 5 November 2009 from the Permanent Representative of China to the United Nations Addressed to the Secretary-General*, 64th sess, Agenda Item 117, UN Doc A64/515 (6 November 2009) ('*China Letter to UNGA 2009*') referring to statements made by Belize, Gambia, Palau, Tuvalu, and Saint Vincent and the Grenadines.

⁹⁸ ICCPR, art 48(1); and ICESCR, art 26(1).

⁹⁹ Liao, 'Partly Virtual, Partly Real', above n 38, 55.

¹⁰⁰ Ando, above n 52, 393.

UN'.¹⁰¹ However, the then-President Ma seemed to brush aside any concerns over the technical status of the Two Covenants. He contended that the subsequent unilateral actions of the ROC Government rendered the Two Covenants (along with any other UN instruments ratified by the ROC Government) ratified and incorporated into domestic law.¹⁰² He referred to the ROC *Constitution*, saying '... Republic of China shall ... respect treaties and the Charter of the United Nations ...'.¹⁰³ This interpretation was later supported by the ROC Supreme Administrative Court when it began to actively consider alleged breaches of the provisions of ICCPR in their judgments.¹⁰⁴

It is further argued that Article 3 of the *Two Covenants Implementation Act* should imply that the incorporation of the Two Covenants also includes the relevant Treaty Body General Comments into the domestic laws of Taiwan.¹⁰⁵ This would be a

¹⁰¹ Ying-jeou Ma, 'President Ma Holds Press Conference on the Release of Taiwan's First Human Rights Report' (2012) 30 *Chinese (Taiwan) Yearbook of International Law & Affairs* 183, 184. See also, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('Vienna Convention').

¹⁰² Ma, above n 101, 185.

¹⁰³ Ibid 184, quoting *ROC Constitution 1947* (Taiwan) art 141. See also 陳龍騰 and 林正順 [Chen and Lin], above n 32, 162.

¹⁰⁴ See eg, Chun-I Chen, 'Contemporary Practice and Judicial Decisions of the Republic of China (Taiwan) Relating to International Law, 2012' (2012) 30 *Chinese (Taiwan) Yearbook of International Law & Affairs* 143, 188, Supreme Administrative Court Judgment No 101-Pan-Zi-1014 29 November 2012. However, for criticism of the courts, see 侯士雋 [Shih-Chun Hou], «論兩公約與我國互動過程所產生之現況» [On the Current Situations Formed by the Interaction of ICCPR/ICESCR and Taiwan] in 陳起行 et al [Chi-Shing Chen et al] (eds), «後繼受時代的東亞法文化: 第八屆東亞法哲學研討會論文集» *Post-Colonial East-Asian Legal Culture: Proceedings of the 8th East Asian Legal Philosophy Conference* (National Chengchi University College of Law, 2012) 683, 699-701.

¹⁰⁵ 張文貞 [Wen-Chen Chang], «演進中的法: 一般性意見作為國際人權公約的權威解釋» [Evolving Law: General Comments as Authoritative Interpretations of Human Rights Covenants] (2012) 1(2) 台灣人權學刊 [*Taiwan Human Rights Journal*] 25, 40-41. Chang pointed out that the 'error' in article 3 of the *Two Covenants Implementation Act 2009* (Taiwan), where it refers to the 'Human Rights Committee' as the Two Covenants' interpretation authority when of course

significant step forward in the domestic enforcement of international human rights covenants, as General Comments issued by both the Human Rights Committee ('HRCt') and the Committee on Economic, Social and Cultural Rights ('CtESCR') are not normally viewed as having acquired the same status as their parent covenants, which have been ratified by contracting states and either constitutionally or legislatively incorporated into respective domestic laws.¹⁰⁶ Different scholars and practitioners have taken different approaches to the binding nature of the General Comments made by the HRCt and the CtESCR. On the one side, former UN Special Rapporteur on Torture, Manfred Nowak, who also served as a member of the Expert Review Committee in both of Taiwan's Two Covenants reviews, seemingly accepted without question that the General Comments provided an 'authoritative interpretation of treaty provisions' in domestic implementation.¹⁰⁷ Other academics and legal scholars have questioned whether interpretations made by the relevant committees that markedly depart from the original text of the Covenant after ratification can be 'incorporated' into domestic law.¹⁰⁸ Despite these differences, it does seem clear that judicial institutions in Taiwan, including the first instance district courts, are using General Comments as a source of authoritative interpretation

it is only the authority for the ICCPR. By logical extension, Chang argues that the ROC Ministry of Justice must have intended that the authority should also include the CtESCR. In contrast, 廖福特 [Fort Fu-te Liao] argued that article 3 deliberately omitted the General Comments of CtESCR as the Judicial Yuan would not want to be bound by it: 廖福特 [Fort Fu-te Liao] «台灣與聯合國兩人權公約接軌之檢討» [A Review of Taiwan's Compliance of the United Nations Two Human Rights Covenants] [2012] (60) 新世紀智庫論壇 [New Century Think Tank Forum] 20, 22.

¹⁰⁶ See Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework' (1985) 35 *The University of Toronto Law Journal* 219, 223.

¹⁰⁷ Manfred Nowak, 'The Implementation of the International Covenant on Civil and Political Rights' (2012) 1(2) *Taiwan Human Rights Journal* 79, 85 (emphasis added).

¹⁰⁸ A good example of this can be seen in United Nations Committee on Economic Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 29th, UN Doc E/C.12/2002/11 (20 January 2003) ('CtESCR General Comment No 15') where a 'new found' right to water was interpreted into existing provisions of the ICESCR. This was discussed in 張文貞 [Chang], 'Evolving Law', above n 105, 38.

on the provisions of the Two Covenants.¹⁰⁹ It remains to be seen if the courts would be as willing to adopt the more ‘contentious’ rights forwarded by some of the later General Comments.¹¹⁰

President Ma did not initially favour the UN style review process and instead proposed that the Presidential Human Rights Consultative Committee (‘the Consultative Committee’), created in 2010, should be the sole agency responsible for the preparation and release of a periodic comprehensive human rights implementation reports. This proposal was soundly criticised by civil society actors and academics as insufficient to fulfil the government’s reporting obligations under articles 6 and 7 of the *Two Covenants Implementation Act*.¹¹¹ Ultimately, the Government accepted and agreed to follow the review process already adopted by the HRCt and the CtESCR.¹¹² The government published and launched its first State Report on the implementation of the Two Covenants to much fanfare in April 2012 in readiness for the first ad hoc review conference, which was held a year later.¹¹³ On the question of the Consultative Committee, scholars pointed out that the creation of such an institution under the direct control of the President’s office did not align with the requirement for a properly functioning NHRI as required under the *Paris Principles*.¹¹⁴ It could not, therefore, exercise that function, nor be considered as an independent NHRI.

¹⁰⁹ See examples provided by 郭銘禮 [Ming-Li Kuo], «臺北地院民事判決適用兩人權公約之分析» [An Analysis of the Application of the Two Rights Covenants in Civil Decisions of the Taipei District Court] (2015) 3(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 59.

¹¹⁰ 張文貞 [Chang], ‘Evolving Law’, above n 105, 30. See Table 1 as Chang tracks the evolution of General Comments.

¹¹¹ Hou, above n 104, 698.

¹¹² Mark L Shope, ‘The Adoption and Function of International Instruments: Thoughts on Taiwan’s Enactment of the Act to Implement the ICCPR and the ICESCR’ (2012) 22(1) *Indiana International & Comparative Law Review* 159, 179.

¹¹³ See Ma, above n 101.

¹¹⁴ See Hou, above n 104, 697; 黃嵩立 [Song-Lih Huang], «公民團體對國家人權委員會之意見» [The Opinion of Taiwan Civil Society Organizations on a National Human Rights Commission] (2014) 2(3) 台灣人權學刊 [*Taiwan Human Rights Journal*] 81, 84.

III NATIONAL HUMAN RIGHTS INSTITUTION

Since the adoption of the *Paris Principles*, the existence of a domestic independent NHRI has been shown to greatly contribute to the implementation of international human rights standards in contracting states.¹¹⁵ As previously discussed, the push for the establishment of an independent NHRI in Taiwan began as early as the late-1990s, when a group of prominent Non-Governmental Organisation (NGO) leaders started advocating for the creation of such a body. Taking a two-pronged approach, the group worked on ‘persuading the [then] presidential candidates to endorse the goal’ while drafting a proposed Bill on the creation of an NHRI to present to the Legislative Yuan.¹¹⁶ The NGOs seemed to be well on track when the newly elected President Chen, trying to distinguish his presidency against the former repressive KMT regimes,¹¹⁷ announced his commitment to create such an institution in his inaugural speech in 2000.¹¹⁸ Halfway through his first term in office, Chen’s administration appeared to be making progress with the creation of an advisory committee on human rights, and further public commitments made by the President and the different branches of the ROC Government.¹¹⁹ The prevailing sentiment at the time was that an independent NHRI would be set up by the end of President Chen’s first term in office.¹²⁰ In his 2001 article, Liao focused his discussion on some of the challenges and opportunities a newly created NHRI in Taiwan would face, including its jurisdiction, operation, and Taiwan’s inclusion in the international community through potential membership in the Asia-Pacific Forum of the National Human Rights Institutions and the International Coordinating Committee of National Institutions.¹²¹

¹¹⁵ Christof Heyns and Frans Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 *Human Rights Quarterly* 483, 529. Also see, Morten Kjaerum, ‘National Human Rights Institutions - Implementing Human Rights’ (The Danish Institute for Human Rights, 2003) 20

¹¹⁶ Liao, ‘Establishing a NHRC in Taiwan’, above n 82, 94.

¹¹⁷ Bowman, above n 13, 493.

¹¹⁸ Liao, ‘Establishing a NHRC in Taiwan’, above n 82, 100.

¹¹⁹ *Ibid.* 101.

¹²⁰ *Ibid.* 108.

¹²¹ *Ibid.* However, Dr Liao did concede at the end of his article that it was ‘difficult to

However, with hindsight, subsequent events will show that Professor Liao's optimism was misplaced. Given a typical implementation period of 12-14 years after the ratification of a key human rights treaty (including the establishment of NHRIs),¹²² it was somewhat unrealistic to believe that the then ROC Government had the necessary political will and resources to fulfil their human rights promises made only a few years earlier. As Taiwan remained excluded from the UN human rights system, there was simply no external pressure on Chen's administration to make good on his promise.¹²³ Further, President Chen was faced with a bureaucratic machine that was still largely loyal to the KMT, and a lost majority in the Legislative Yuan in his second term of presidency (2004-2008), making it difficult for him to move his human rights mandate forward without KMT support.¹²⁴ Bills presented to the Legislative Yuan were rebuked by KMT members as they contended that the establishment of an independent NHRI was not necessary, with the Control Yuan already fulfilling the role as the sole investigative body for any human rights abuse allegations.¹²⁵ It was further argued that the institution cannot be properly set up without the complex process of amending the *Constitution*.¹²⁶ It was clear that the NHRI agenda had firmly dropped off the radar towards the end of Chen's presidency. Between constant corruption allegations and Chen's inability to mobilise KMT lawmakers for their support, his office simply stopped its attempts to advance the NHRI cause.¹²⁷ Some

anticipate when or whether the National Human Rights Commission Bill will become an act'.

¹²² Wade Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights Treaties' (2015) 69 *International Organization* 405, 411.

¹²³ Silvia Atanassova Croydon, 'Towards a Regional Human Rights Mechanism in the Asia Pacific? Exploring the Potential of the Asia Pacific Forum' (2014) 27 *The Pacific Review* 289, 299.

¹²⁴ Bowman, above n 13, 493.

¹²⁵ Christian Schafferer, 'Debating "Unpopular" Issues in Taiwan' in Brendan Howe (ed), *Democratic Governance in Northeast Asia* (Palgrave Macmillan, 2015) 130, 138; for the Control Yuan, see, Ernest Caldwell, 'Widening the Constitutional Gap in China and Taiwan: History, Reform, and the Transformation of the Control Yuan' (2017) *University of Illinois Law Review* 739.

¹²⁶ Croydon, above n 123, 299; also see *ROC Constitution 1947* (Taiwan) art 174 on amending the *Constitution*.

¹²⁷ Bowman, above n 13, 502, citing Christian Schafferer, 'State of Democracy in

commentators went as far as asserting that the so-called human rights agenda advanced by Chen was simply a campaign rhetoric that had served its populist purpose by the time he won his second (and last) presidential term.¹²⁸

It was telling that within the first twelve months of President Ma's presidency, the Legislative Yuan, now on the same side as the president, passed the *Two Covenants Implementation Act*, which symbolically took effect on International Human Rights Day on 10 December 2009.¹²⁹ During the public 'signing ceremony' of the Two Covenants, local and international NGO representatives openly questioned Ma's commitment to meaningfully implementing the Two Covenants, especially the ICCPR, given the KMT government had just passed a new Assembly and Protest Law that NGO groups claimed was repressive and contrary to the provisions of the ICCPR.¹³⁰ More importantly, Ma did not revisit the issue of establishing an independent NHRI despite the initial flurry of activities related to the Two Covenants and this was also omitted in the State Report adopted in 2012 for the Initial Two Covenants Review. This omission led to criticisms that there was a complete lack of political will to actually implement international human

Taiwan: Tracing the Obstacles to Future Democratic Development' (Paper presented at the Prosepects of Democracy in East Asia for the 21st Century: Issues, Threats, and Challenges, Jakarta, 28-29 November 2008), 2; Copper, above n 89, 471.

¹²⁸ Bowman, above n 13, 502. Under the *ROC Constitution 1947* (Taiwan) (Article 2(6) of the *Additional Articles of the Constitution of the Republic of China*), ROC presidential term is limited to two consequents four year terms.

¹²⁹ 中華民國立法院 [Legislative Yuan (Taiwan)], «立法院公報» *Official Gazette of the Legislative Yuan* (第98卷第14期 [Volume 98 Issue 14], 31 March 2009) 518. This was charted in 姚孟昌 [Meng-Chang Yao], «中華民國政府落實兩公約之檢討—以總統訓示及國家人權報告撰寫與審查過程為對象» [Reflection on the Implementation of the Two Covenants in ROC, Focusing on the President's Instructions and the Process of Proposing and Reviewing of the Taiwan National Human Rights Report] (2013) 2(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 151, 151.

¹³⁰ 大紀元時報 [Epoch Times], «馬英九簽國際人權公約 民間團體場外抗議» *Ma Ying-Jeou Signs International Human Rights Treaties with Civil Society Groups Protest Outside* (15 May 2009) <<http://bit.ly/2vqW1DC>>.

rights standards in Taiwan.¹³¹

The responsibility of drafting the initial state report for submission to the Expert Review Committee was given to the Consultative Committee, comprised of members from government, academia, and NGO sectors. However, the ambiguous status of the Consultative Committee meant it was never clear to what extent the committee had the power to compel information from individual government departments and agencies in the course of their work.¹³² It was therefore very difficult for the Consultative Committee to obtain accurate (often damaging) information from health, environmental, and educational agencies. This highlighted the lack of comprehensive human rights and covenants training for government officials, and a continued fear of exposing the serious deficiencies in these agencies.¹³³ The establishment of an independent NHRI would feature prominently in both human rights reviews discussed in the following section of this paper, but it remains unrealised.

IV THE COVENANTS REVIEW PROCESS

One of the early criticisms of the ROC Government's action immediately after the enactment of the *Two Covenants Implementation Act* was the slow progress in formulating the human rights Report as required by Article 6 of the Act.¹³⁴ This criticism appears unduly harsh as although UN practice requires state parties

¹³¹ 姚孟昌 [Yao], above n 129, 158. See also Croydon, above n 123, 300.

¹³² 王幼玲 [Yo-Ling Wang], «參與國家人權報告撰寫的奇幻之旅» [A Fantastic Journey of Attending the Work of Proposing the Taiwan National Human Rights Report] (2013) 2(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 107, 109. Author's note: The official English translation of the title of this article is erroneous in this author's opinion. The original Chinese characters '奇幻之旅' would be better translated as 'A Fantastical Journey...' as the Chinese characters in the title denote a journey that is 'surreal' or 'unrealistic'.

¹³³ Ibid 111.

¹³⁴ See eg, Hou, above n 104, 698; 廖福特 [Liao], 'Taiwan's Compliance of the Two Covenants', above n 105, 23.

ratifying human rights conventions to submit their initial reports within the first or second year of ratification, this requirement is rarely adhered to. The UN's own statistics show that 10 per cent of contracting states have never submitted their initial report after ratifying the ICCPR and 18 per cent for the ICESCR, while most others are submitted late.¹³⁵ Overall, the number of state reports that are currently overdue across the whole UN human rights treaty system amounts to more than 34 per cent of the total reports due.¹³⁶ The fact that under President Ma's steerage, the government was able to publish and launch their State Report by April 2012, just shy of three years after the enactment of the *Two Covenant Implementation Act*, demonstrated President Ma's commitment to the reforms.¹³⁷

A *First Review*

Due to Taiwan's inability to actually deposit the ratification of the Two Covenants with the UN, the HRCt and the CtESCR themselves could not be involved in the review of Taiwan's treaty implementation.¹³⁸ This led to the adoption of a creative and innovative solution by President Ma's office: if they could not go to the treaty bodies themselves, they would instead bring the treaty bodies to Taiwan.¹³⁹ The modelling of the review process was made easier by the fact that although the ten UN human rights treaty

¹³⁵ United Nations Secretariat, *Compliance by States Parties with their Reporting Obligations to International Human Rights Treaty Bodies: note by the Secretariat*, 29th mtg of Chairs of the human rights treaty bodies, prov Agenda Item, UN Doc HRI/MC/2017/2 (2 May 2017) 8 ('UN Secretariat note HRI/MC/2017/2').

¹³⁶ *Ibid.*

¹³⁷ Ma, above n 101, 183. See also, Hou, above n 104, 696 where he praised the Ma Administration.

¹³⁸ Croydon, above n 123, 299-300.

¹³⁹ See, 陳玉潔 [Yu-Jie Chen], «對台灣人權報告國際審查的一些觀察» [Some Observations on the International Review of Taiwan National Human Rights Report] (2013) 2(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 161 for general comments. An English (non-peer reviewed) version of this paper was posted on the US-Asia Law Institute website, Yu-Jie Chen, *A New Experiment for International Human Rights Treaty Review: Taiwan's Experience* (11 January 2016) US-Asia Law Institute <<http://bit.ly/2n6laB8>>.

bodies have independent mandates,¹⁴⁰ over time, these bodies have evolved ‘into a *de facto* system that functions as a “comprehensive whole”’.¹⁴¹ This led to the Taiwanese Government creating a unified review process, triggered by the adoption of the state report published in April 2012.¹⁴²

A ten-member Expert Review Committee was then convened, comprising of international human rights experts, to review the state report adopted by the ROC Government as well as the ‘shadow reports’ submitted by civil society organisations (‘CSOs’) and NGOs.¹⁴³ The committee was then assembled in Taipei in March 2013 to conduct the interactive dialogue sessions with the ROC Government, and to meet with key civil society representatives. Despite the fact that these experts were invited to Taiwan to participate essentially as ‘private citizens’ with no official affiliation with the UN or any of the UN agencies, all ten members received communication from representatives of the PRC Government ‘enquiring as to the nature of their purpose for attending the meetings in the PRC Territory of Taiwan’.¹⁴⁴

In fact, most observers and participants of the 2013 Two Covenants Review agreed that the necessity of hosting the review process on the ground in Taiwan, instead of in distant locations such

¹⁴⁰ See Billy Chia-Lung Tai and Katherine Lee, ‘NGO Engage: Report on Cambodian NGOs’ Engagement with United Nations Human Rights Treaty Bodies’ (Cambodian Human Rights Action Committee, 15 August 2015) 1-2 for a table of the ten treaty bodies.

¹⁴¹ Suzanne Egan, ‘Strengthening the United Nations Human Rights Treaty Body System’ (2013) 13(2) *Human Rights Law Review* 209, 211.

¹⁴² 中華民國 [Republic of China], «公民與政治權利國際公約初次報告» *Implementation of the International Covenant on Civil and Political Rights, Initial Report Submitted Under Article 40 of the Covenant* (Taipei, September 2012). See also, Tai and Lee, above n 140, 3 for the reporting cycle adopted by UN treaty bodies.

¹⁴³ 郭銘禮 [Kuo], ‘A Preliminary Survey of the Initial Human Right Reports’, above n 26, 88.

¹⁴⁴ *Ibid* 92. Kuo stated that he believed the individual phone calls had warned the participating experts of ‘threatening consequences’ should they continued with their participation.

as Geneva or New York City, resulted in a much greater engagement from both government and civil society representatives.¹⁴⁵ Having the interactive dialogue sessions running over three days also allowed the Expert Review Committee to grant CSOs over four hours of formal meeting time, unheard of in other official UN treaty body reviews.¹⁴⁶

Of course, the review process was not without critique. CSO representatives complained that they were not given enough time to air their concerns and grievances to the Expert Review Committee,¹⁴⁷ and criticised the government for their lack of meaningful official engagement. One official was famously quoted as saying ‘I am a government representative but I cannot represent the government’.¹⁴⁸ The government ministries and departments in turn lamented the general lack of capacity within their rank and file staff, as well as the overly adversarial attitude towards the government taken by CSOs.¹⁴⁹ It is interesting to note that these complaints largely mirrored the UN treaty review process experienced by other states.¹⁵⁰ However, the open and transparent

¹⁴⁵ 黃崑立 [Song-Lih Huang], «從公民社會的角度觀察初次國家人權報告的撰寫和審查» [Observing the Proposing and Reviewing of the Initial Taiwan National Human Rights Report from the View of Civil Society] (2013) 2(1) 台灣人權學刊 [*Taiwan Human Rights Journal*] 123, 127. More than 30 domestic and international NGOs participated in the submission of 15 shadow reports to the Expert Review Committee, while 郭銘禮 [Kuo], ‘A Preliminary Survey of the Initial Human Right Reports’, above n 26, 100 reported 946 ROC Government officials attended the three-day interactive dialogue sessions. See also, 陳玉潔 [Chen], ‘Observations of Taiwan Human Rights Report.’, above n 139, 162

¹⁴⁶ 黃崑立 [Huang], ‘Observing the Initial Review’, above n 145, 128.

¹⁴⁷ Ibid 127, note that CSO representatives had requested up to nine hours of meeting time with the Expert Review Committee, but this was allegedly never conveyed to the committee. Given the established international process, it is unlikely they would have been granted this time in any case.

¹⁴⁸ Ibid 128.

¹⁴⁹ See generally, 郭銘禮 [Kuo], ‘A Preliminary Survey of the Initial Human Right Reports’, above n 26.

¹⁵⁰ See, Steve Charnovitz, ‘Nongovernmental Organizations and International Law’ (2006) 100 *The American Journal of International Law* 348; and Gamze Erdem Türkelli, Wouter Vandenhoe and Arne Vandenberg, ‘NGO Impact on Law Making: The Case of a Complaint Procedure Under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the

review involving prominent international experts would no doubt lend legitimacy to the ROC Government and their human rights credentials.¹⁵¹

The Expert Review Committee made 81 recommendations in their Concluding Observations.¹⁵² On the issue of an independent NHRI for Taiwan, the committee urged the ROC Government to focus on the ‘creation of an independent national human rights commission...that meets the requirements of independence and autonomy set out in the Paris Principles ... as a priority objective’.¹⁵³

B *Second Review*

The ROC Government waited until April 2016, more than three years after the initial review and with less than twelve months before the second review (which was scheduled to be held in January 2017), to release their response to the initial Concluding Observations.¹⁵⁴ Incidentally, the ‘Response’ document was released at around the same time as the second state party report to the Expert Review Committee,¹⁵⁵ and in the last month of President Ma’s term, before

Child’ (2013) 6 *Journal of Human Rights Practice* 1. For a specific country example, see Tai and Lee, above n 140.

¹⁵¹ Fanny Candido, ‘The Politics of Recognition: Did the Exception Become the Rule? Lessons from Kosovo, South Ossetia and Abkhazia’ (2014) 11 *POLIS Journal of Politics and International Studies* 4, 15.

¹⁵² The major thematic recommendations made by the Expert Review Committee included NHRI, the death penalty, migrant workers’ rights and human trafficking, land, and indigenous rights. See International Group of Independent Experts, ‘Initial Concluding Observations’, above n 28; For CSO responses to the Concluding Observations, see, International Federation for Human Rights (FIDH) and Taiwan Association for Human Rights (TAHR), ‘The Hidden Face of Taiwan: Lessons Learnt from the ICCPR/ICESCR Review Process’ (Taipei, February 2013).

¹⁵³ International Group of Independent Experts, ‘Initial Concluding Observations’, above n 28, [8]-[9].

¹⁵⁴ 中華民國 [Republic of China], «回應兩公約初次國家報告結論性意見與建議» *Response to the Concluding Observations and Recommendations Adopted by the International Group of Independent Experts on March 1 2013* (Taipei, April 2016).

¹⁵⁵ 中華民國 [Republic of China], «公民與政治權利國際公約第二次國家報告»

the newly elected President Tsai Ing-Wen took office in May 2016. This raised allegations that it was done for the purpose of political point scoring.¹⁵⁶ The response report simply outlined the progress made by the ROC Government, namely in the consultations and discussions held between different arms of government and NGOs, academics, and experts in formulating the *National Human Rights Institution Research and Planning Proposal*.¹⁵⁷ However, the report set no specific timeframe for the creation of an NHRI as recommended by the Expert Review Committee,¹⁵⁸ and in fact, the issue of an NHRI was again not mentioned in the second state report issued by the ROC Government.¹⁵⁹

Unsurprisingly, the Expert Review Committee stated their concerns in their second Concluding Observations that the ROC Government had not even decided on ‘whether it should establish a completely independent institution or to subordinate it to either the Presidential Office or the Control Yuan’.¹⁶⁰ The Review Committee went on to reiterate the same recommendation made in 2013 that the ROC Government should establish, ‘*without further delay*, a completely independent and pluralistic national human rights commission in full compliance with the Paris Principles’.¹⁶¹ This

Implementation of the International Covenant on Civil and Political Rights, Second Report Submitted Under Article 40 of the Covenant (Taipei, April 2016).

¹⁵⁶ 人權公約施行監督聯盟 [Covenants Watch], «民間影子報告: 回應兩公約 81 點總結意見» *Civil Society Shadow Report Responding to the Concluding Observations and Recommendations Adopted by the International Group of Independent Experts* (Taipei, December 2015), note the foreword section of the report criticise the lack of government actions after the initial review in 2013. Also note the fact that the civil society shadow response was published independently (and ahead) of the 中華民國 [Republic of China], *Response to the Initial Concluding Observations*, above n 154.

¹⁵⁷ 中華民國 [Republic of China], *Response to the Initial Concluding Observations*, above n 154, [1]-[3].

¹⁵⁸ See International Group of Independent Experts, ‘Initial Concluding Observations’, above n 28, [9].

¹⁵⁹ 中華民國 [Republic of China], *Second ICCPR State Report of Taiwan*, above n 155.

¹⁶⁰ International Group of Independent Experts, ‘Second Concluding Observations’, above n 31, [9].

¹⁶¹ *Ibid* (emphasis added).

recommendation was immediately echoed by President Tsai during a news conference, which took place on the same day that the Concluding Observations were released, when she acknowledged the importance of establishing an independent NHRI and her ‘hope that there will be a clear decision by the end of the year’.¹⁶² Other reports, including the Expert Review Committee’s own ‘List of Issues’, published prior to the review sessions, pointed out that President Tsai had already made a pledge to establish an independent NHRI during her presidential election campaign in November 2016, making her the third successive presidential candidate to do so during their campaign.¹⁶³

V NEXT STEPS

Contrary to the arguments of some scholars, Taiwan has shown that democratisation and respect for human rights can be advanced in *de facto* states.¹⁶⁴ Taiwan’s status as one of the longest established *de facto* states has provided it with ample time to advance its human rights agenda. Even so, it still required more than 40 years for Taiwan to develop as ‘one of the most democratic countries in Asia’,¹⁶⁵ and in a piecemeal fashion.¹⁶⁶

¹⁶² 林朝億 [Chao-Yi Lin], «蔡英文：兩公約是人權地板 不是天花板» *Tsai Ing-Wen: the Two Covenants Represent Human Rights Standards, Not Ceilings* (20 January 2017) Newtalk [新頭殼] <<http://bit.ly/2uPwTmy>>.

¹⁶³ International Group of Independent Experts, ‘List of Issues Submitted by Review Committee for Second ICCPR Report’ (Taipei, June 2016). The Speech referred to was reported in 林朝億 [Chao-Yi Lin], «蔡英文：成立國家人權委員會 誠實撰寫人權報告» *Tsai Ing-Wen, Establishing a National Human Rights Institution and Truthfully Drafting Human Rights Report* (9 December 2015) 新頭殼 [Newtalk] <<http://bit.ly/2fAkjFG>>.

¹⁶⁴ Nina Caspersen, ‘Democracy, Nationalism and (Lack of) Sovereignty: The Complex Dynamics of Democratisation in Unrecognised States’ (2011) 17 *Nations and Nationalism* 337, 339.

¹⁶⁵ Christian Schafferer, ‘Taiwanese Democracy’ in Brendan Howe (ed), *Democratic Governance in Northeast Asia* (Palgrave Macmillan, 2015) 105, 106.

¹⁶⁶ Caldwell, ‘Chinese Constitutionalism’, above n 16, [3].

Of course, treaty ratifications and periodic reviews themselves are not the ‘magic bullet’ that will suddenly improve a state’s human rights record,¹⁶⁷ especially as the process of states submitting themselves to periodic reviews by treaty bodies is often more about diplomacy than the intended quasi-judicial process.¹⁶⁸ The UN has itself acknowledged deficiencies in its own monitoring procedures, including becoming more ‘complex, opaque and cumbersome’,¹⁶⁹ with the main criticisms targeted at the inherent ‘weakness of supranational’ human rights bodies given the voluntary nature of multi-lateral treaty making.¹⁷⁰

Similarly, the practice of incorporating human rights standards into domestic law alone does not necessarily equate to a positive impact on substantive human rights.¹⁷¹ However, studies in other states have shown positively that the existence of an independent NHRI exercising its functions beyond merely drafting human rights reports can ‘help States prevent human rights violations’.¹⁷² Without a robust international human rights court or tribunal system in the

¹⁶⁷ Xinyuan Dai, ‘The Conditional Effects of International Human Rights Institutions’ (2014) 36 *Human Rights Quarterly* 569, 572. This was recently expanded further in Gráinne de Búrca, ‘Human Rights Experimentalism’ (2017) 111 *American Journal of International Law* 277, 299.

¹⁶⁸ Michael O’Flaherty, ‘The United Nations Human Rights Treaty Bodies as Diplomatic Actors’ in Michael O’Flaherty et al (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff, 2011) 155, 165.

¹⁶⁹ Michael O’Flaherty, ‘The Strengthening Process of the Human Rights Treaty Bodies’ (2014) 108 *American Society of International Law Proceedings Annual Meetings* 285, 286.

¹⁷⁰ The provisions within the ICCPR and the ICESCR have no effect on individual State practice unless the State voluntarily accedes to the treaty and submits itself to the relevant treaty body through the ratification of the Optional Protocol that allows for individual citizens to submit complaints. See, Brudner, above n 106, 220. Also see, Cole, above n 122, 410; Catalina Nuta, *Human Rights in Internationally Unrecognized Entities: The Case of Abkhazia and Transnistria. What Role for the European Union?* (MA Thesis, College of Europe Department of European Interdisciplinary Studies, 2012) 16.

¹⁷¹ Gauthier de Beco, ‘Human Rights Impact Assessments’ (2009) 27 *Netherlands Quarterly of Human Rights* 139, 150.

¹⁷² Ibid 146, also see, Richard Carver, ‘A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law’ (2010) 10 *Human Rights Law Review* 1, 20.

Asian region, pure ratification or incorporation by state governments has been shown to be ineffective.¹⁷³ What is needed is a strong domestic institution either in the form of a judiciary (such as found in the United Kingdom) or an independent NHRI as discussed throughout this article.¹⁷⁴

A *The National Human Rights Museum*

Instead of pursuing the establishment of an independent NHRI as recommended by the Expert Review Committee, the Tsai Government decided to switch focus and instead push the Legislative Yuan to establish the National Human Rights Museum ahead of the 2017 International Human Rights Day. The Executive Yuan passed the draft law to establish the museum as proposed by the Ministry of Culture in July 2017.¹⁷⁵ The draft law was then rushed through the Legislative Yuan and adopted as law on 28 November 2017.¹⁷⁶ It is worth noting that the proposed National Human Rights Museum elevates and incorporates the existing White Terror memorial sites in Jingmei district in Taipei and the remote Green Island into the museum, with a stated purpose of promoting ‘Taiwan’s core values of democracy, freedom and justice’.¹⁷⁷ KMT legislators have accused the ruling DPP of historical bias and politicising human rights in Taiwan as the five clauses of the proposed legislation will only address human rights abuses committed by the KMT during the White Terror era, instead of focusing more broadly on other human rights issues facing Taiwan.¹⁷⁸ This is in stark contrast with the

¹⁷³ Heyns and Viljoen, above n 115, 488.

¹⁷⁴ Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals* (Cambridge University Press, 2013) 99.

¹⁷⁵ 文化部 [Ministry of Culture], «促進轉型正義 臺灣人權邁大步 行政院會通過國家人權博物館組織法» *Promote Transitional Justice, Taiwan Human Rights Takes Another Major Step as Executive Yuan Passes National Human Rights Museum Bill* (20 July 2017) Ministry of Culture <<http://bit.ly/2lekyFK>>.

¹⁷⁶ 文化部 [Ministry of Culture], «臺灣人權邁大步 立法院三讀通過國家人權博物館組織法» *Legislative Yuan Passes National Human Rights Museum Act* (28 November 2017) Ministry of Culture <<http://bit.ly/2D00n6t>>.

¹⁷⁷ 文化部 [Ministry of Culture], *Executive Yuan Passes National Human Rights Museum Bill* above n 175.

¹⁷⁸ Sean Lin, *Legislature Passes Organizational Act on Establishing Human*

original 2010 mandate of the National Human Rights Museum Preparatory Office to expand on the existing White Terror memorial sites to create a broad human rights-themed network of museums across Taiwan.¹⁷⁹

The Government has touted this development as a ‘giant step’ in Taiwan’s human rights development after two rounds of independent international expert reviews.¹⁸⁰ However, given the fundamental differences in the core functions between a National Human Rights Museum — that is, memorialisation and education of past human rights abuses — and that of an independent institution tasked with investigating new complaints as they happen and actively promoting core human rights values, it is difficult not to see this ‘step’ as a political one.

It is also worth examining the timeline of the policy to create a human rights museum more closely. Both the Green Island (2001) and Jingmei (2007) sites were created during the presidency of Chen Shui-Bian, the first DPP President of Taiwan. Both sites had the specific mandate of memorialising the human rights abuses committed by successive KMT governments during the White Terror era. While the National Human Rights Preparatory Office was set up during former President Ma’s tenure, the KMT insisted on broadening the scope of the proposed human rights museum.¹⁸¹ Current DPP President Tsai seems to have seen this as the perfect opportunity to bring the proposed human rights museum to fruition while restricting its mandate to the original DPP mandate under

Rights Museum (29 November 2017) Taipei Times <<http://bit.ly/2leWUby>>; also see, 新聞雲 [ET Today News], «**國家人權博物館組織法三讀通過 國民黨團：製造族群對立**» *National Human Rights Museum Organization Act Passed its Third Reading in the Legislative Yuan, Criticised by the KMT as Creating Tensions Between Ethnic Groups* (29 November 2017) <<http://bit.ly/2pzXx5r>>.

¹⁷⁹ 林靜雯 [Ching-Wen Lin], «**國家人權博物館籌備處的初期挑戰與未來的使命**» [Initial Challenges and Missions of the Preparatory Office of the National Human Rights Museum] (2014) 28(3) 博物館學季刊 [*Museology Quarterly*] 111, 115.

¹⁸⁰ 文化部 [Ministry of Culture], *Legislative Yuan Passes National Human Rights Museum Act* above n 176.

¹⁸¹ 林靜雯 [Lin], above n 179, 115.

former President Chen. In the end, a museum documenting the past is an inherently political entity,¹⁸² as the ‘best place to promote the policies and interests of those in power’.¹⁸³

B *An Independent NHRI: A Question of Political Will*

Ultimately, the creation and function of an independent NHRI will mostly be dependent on the contracting state government for its implementation,¹⁸⁴ and the question of whether Taiwan will establish an institution that, in its operations, conforms to the *Paris Principles* is essentially a question of the political will of the ROC Government and its current incumbent President. Reflecting after the publication of the Concluding Observations made by the Expert Review Committee, Wang summed up civil society’s view when she stated that an independent NHRI, vested with the powers to investigate human rights violations and able to compel critical information from government agencies was crucial in any human rights implementation strategies in Taiwan.¹⁸⁵ President Tsai herself made another commitment to formulate a concrete action plan towards the creation of an independent NHRI by the end of the year (2017).¹⁸⁶ However, as the President fell silent on the matter again during the 2017 Human Rights Day commemoration event,¹⁸⁷ it seems increasingly unlikely that Taiwan will have its NHRI promises fulfilled during the Tsai administration.

¹⁸² 耿鳳英 [Feng-Ying Ken], «突破與創新—論國家博物館展示的新視野» [Breakthrough and Innovation: New Visions for National Museum Exhibitions] (2017) 31(3) 博物館學季刊 [*Museology Quarterly*] 79, 84.

¹⁸³ 劉婉珍 [Wan-Chen Liu], «反制宰制——博物館人的能動性與政治行動» [De-Oppressing Oppression: Museum Workers’ Agency and Political Actions] (2010) 24(3) 博物館學季刊 [*Museology Quarterly*] 5, 15.

¹⁸⁴ Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge University Press, 2014) 136.

¹⁸⁵ 王幼玲 [Wang], above n 132, 119. See also 黃嵩立 [Huang], ‘Opinion of CSO on a NHRI’, above n 114, 88.

¹⁸⁶ 中央廣播電台 [Radio Taiwan International], «兩公約審查 設國家人權委員會受關注» *Focus Shifts to the Establishment of a National Human Rights Institution After the Latest Two Covenants Review* (31 January 2017) <<http://bit.ly/2x7Nep7>>.

¹⁸⁷ Office of the President Republic of China (Taiwan), *President Tsai Commemorates Human Rights Day 2017* (10 December 2017) <<http://bit.ly/2qboFb9>>.

Looking further afield, the Asia Pacific Forum of National Human Rights Institutions has 24 NHRI members across the region, representing approximately 45 per cent of the UN member states in the region.¹⁸⁸ During a recent meeting in Taipei, attended by the author, Ms Rosslyn Noonan, a former board member of the Asia Pacific Forum, expressed her view that the establishment of an independent NHRI would greatly increase Taiwan's standing and claim for legitimacy in the international arena.¹⁸⁹ However, the deeply entrenched blame culture among Taiwan's public service sector and government agencies has resulted in a deep-seated fear of acknowledging institutional human rights weaknesses.¹⁹⁰ As NHRIs in other parts of Asia have experienced, it may not be possible for a future NHRI in Taiwan to be entirely free from 'interference or obstruction from any branch of government or any public ... body'.¹⁹¹ Ms Noonan nevertheless concluded in her keynote speech during the meeting that Taiwan should continue to progress towards establishing an independent NHRI to continue to shine as the 'beacon of development in Asia'.

After 17 years of continued promises by successive presidents in Taiwan to set up an independent NHRI, the lack of concrete action taken by the ROC Government during that time means that it is unlikely the Tsai administration is capable of positively responding to the Expert Review Committee's insistence on the creation of such a body during her presidential term. The government has received many proposals and action plans from CSOs and the Legislative Yuan working group on NHRI. Even the Control Yuan, the branch of government that the proposed NHRI could have the greatest impact on, has submitted its own proposals to the president's office on the creation and function of an independent body tasked with the

¹⁸⁸ United Nations, *Asia and the Pacific* <<http://bit.ly/2v3dyPM>>.

¹⁸⁹ The forum was held on 24 July 2017 addressing the issue of NHRI organised by NGO Covenants Watch. Ms Rosslyn Noonan, also publicly stated that the Asia-Pacific Forum would formally admit Taiwan as a Member State to the Forum if an independent NHRI is set up by the ROC Government.

¹⁹⁰ 黃嵩立 [Huang], 'Opinion of CSO on a NHRI', above n 114, 89.

¹⁹¹ Ann Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 *Human Rights Quarterly* 904, 912.

promotion and protection of core human rights values in Taiwan.¹⁹²
The Government is running out of excuses.

¹⁹² 施逸翔 [Shi], *Where is the NHRI?* above n 27.