

Constructing “Political Entities”: Proposal for a New International Personality under International Law*

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Abstract:

Recognition of divided states and communities has always been a thorny problem for the international community. Owing to conflicting claims and a “zero-sum” attitude toward international recognition and unification held by the different parts of a divided nation, other states and international organizations have had difficulties in handling their relations with the divided nations. Yet with the introduction of the concepts such as “multi-system nations,” “political entities,” and “intra-national commonwealth,” the author of this paper proposes that both the field of political science and international law should adopt more precise concepts so as to better analyze the problems facing the so-called “divided states” on the one hand and to exercise more flexibility in recognizing different parts of a divided nations or societies on the other. It is also suggested that a new chapter or at least a new section should be added to international law that deals with the recognition of “territorial political entities” and “non-territorial political entities.” Furthermore, another new concept of political-legal institution, i.e., “intra-national commonwealth” should be added to the consideration on resolving the problems of interaction between different parts of a divided nation in the transitional period pending a more concrete and legally based institutional arrangement can be realized.

Keywords: Recognition under international law; political integration; multi-system nations; territorial political entities and non-territorial political entities; intra-national commonwealth

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The unification and division of competing political systems in a divided nation or society has been a continuous and repetitive process in national and international politics. Issues surrounding the so-called “divided nations” or “divided states” pose special problems to political scientists in general and international jurists in particular. For the political scientists, the divided nations create unique problem in the development of more precise definition and methods to analyze more effectively the process of transition and transformation of this type of nations as well as to identify more pragmatic formulas for their integration and unification.

Generally speaking, the problems facing the political scientists studying the so-called “divided nations” can be found in two areas: first, the lack of precise and accurate concepts which can be operationalized for the purpose of empirical research; ; and second, the need for the development of institutional framework which can be applied to analyze and to solve the problems of different parts of the divided nations which are already in the process of approaching rapprochement yet are not ready for the acceptance of more formal structural arrangements such as confederations and federations

As for the international jurists, their problems are more concrete and compelling. Among the questions confronting the decision-makers of various states and the international lawyers are: How can a state or government recognize the various parts of a divided nations yet avoid getting involved in the “internal” debates of the divided nations over government legitimacy, sovereignty, and territorial claims? How can

* The current paper is a revised and updated version of the author’s article in *International Lawyer*. See Yung Wei, “Recognition of Divided States: Implication and Application of Concepts of ‘Multi-System nations,’ ‘Political Entities,’ and ‘Intra-National Commonwealth,’” *International Lawyer*, Volume. 34, Number 3 (Fall 2000), pp. 997-1101.

other countries handle the problem of representation of various parts of a divided nation in international organizations, particularly the United Nations? And above all, what kinds of recognition other states and government should extend to the various parts of a divided states? Should it be state recognition, government recognition, or other types of recognition that have not yet been fully developed in the codes and norms of convention international law? The list of the questions here can be a fairly long one.

The purpose of this essay is to examine the problems of the divided nations from a comparative and interdisciplinary perspective and approach. Emphasis is placed on: (1) clarifying the meaning of “divided nations” or “divided states”; (2) explaining the connotation of “multi-system nations”; (3) investigating the problems of the divided states under international law, particularly in regard to the problem of international recognition and representation in international organizations; and finally (4) proposing new concepts such as “territorial political entities,” “non-territorial political entities,” and “intra-national commonwealth” to the solution of the problems facing the different parts of the divided nations.

I. The problem of the “Divided Nations” and the new concept of “Multi-System Nations”

The division of China, Korea, Vietnam and Germany into communist and non-communist political systems has been a major development since the end of the Second World War. The emergence of divided nations was not only a most unfortunate experience for the peoples of these nations but also one of the major destabilizing factors in international politics. The Berlin Crisis, the Korean War, the Vietnam War and the cross-Taiwan-Strait crises all involved the divided nations and the major powers of the world. What are the prospects for reunification of divided nations? How can governments and peoples of the divided nations work together toward the goal of inter-system reconciliation and national unification? What kind of concepts, legal norms, and institutional paradigms can we use to best analyze and to deal with the problems relating to divided nations? These are but a few of the

questions that have been raised frequently by political leaders and scholars of the divided states.

Yet, comparative study of the divided nations has been a late development in political science. A survey of literature on divided nations reveals two basic problems.¹ First, there is the lack of a commonly accepted term or concept that is neutral and precise enough to serve as an effective instrument for empirical research on the “divided nations.” Second, there is a failure in differentiating two separate types of division and unification processes, i.e., those involving communist political systems and those not involving the confrontation between communist and non-communist systems.

As for basic concepts, a host of terms including “the partitioned nations,” “the divided states,” “the divided nations,” and “two China’s (Korea’s, Germany’s)” has been used. All of these terms designate certain features of the “divided nations,” yet none is accurate and broad enough to reflect and include all the cases. For example, the term “partitioned nations” can not be used to refer to countries which were divided not through international intervention or by international agreements but through internal war, such as the case of China after the end of the Second World War. The concept of “divided states” is broader than “partitioned nation,” yet many of the leaders and scholars of the so-called “divided states” are very reluctant to accept the word “state” in the concept because it implies a more permanent separation of a nation into two or more legal entities under international law. Similarly, most

¹ Juan Diez Medrano, *Divided Nations* (Ithaca: Cornell University Press, 1995); Jaushieh Joseph Wu, *Divided Nations: The Experience of Germany, Korea, and China* (Taipei, Taiwan, Rep. of China: Institute of International Relations, National Chengchi University, 1995); Gregory Henderson, *Divided Nations in a Divided World* (New York: D. McKay Co., 1974); Bruce R. Silvers, *The Divided Nations* (Stanford, Calif.: Stanford University, 1966); Amitai Etzioni, *Political Unification: A Comparative Study of Leaders and Forces*, (New York: Holt, Rinehart and Winston, 1965); Philip E. Jacob and Henry Teune, “The Integration Process: Guidelines for Analysis of the Bases of Political Community”, in *The Integration of Political Communities*, ed. Jacob, Philip E. and James V. Toscano (Philadelphia: J. B. Lippincott, 1964); Karl W. Deutsch, *Nationalism and Social Communication*, (Cambridge, Mass.: M.I.T. Press, 1953); Joseph S. Nye, “Comparative Regional Integration: Concept and Measurement,” *International Organization* 22, no. 4 (Autumn, 1968): 855-80; Stuart A. Scheingold, *The Law in Political Integration* (Cambridge, Mass.: Center for International Affairs, Harvard University, 1971); Henry R. Nau, “From Integration to Interdependence: Gains, Losses, and Continuing Gaps,” *International Organization* 33, no. 1 (Winter, 1979): 119-47; Gerhard Von Glahn, *Law Among Nations*, Seventh Edition (Boston: Allyn and Bacon, 1996), especially Chapter 4, 48-65; Roda Mushkat, *One Country, Two International Legal Personalities, The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997).

of the leaders and people in the “divided states” resent terms such as “two China’s,” “two Korea’s,” and “two Germany’s.” As for “divided nations,” it is a term used most often by social scientists; however, it also has the misleading connotation that there are two or more nations in a “divided” state – an idea that is unacceptable to most leaders and scholars of divided systems.

In order to avoid the shortcomings of the above-mentioned concepts, I propose that we substitute “multi-system nations” for “divided states” and “divided nation.” There are several advantages in using this new term. First, it clarifies the fact that the reality in a so-called “divided nation” is *not* the separation of one nation into two or more nations, but the emergence of more than one political system within *one* nation, either as a result of international arrangement or as the product of internal wars. Secondly and more significantly, the term “multi-system nation” reflects faithfully the true nature and cause of division, i.e., the confrontation and competition between noncommunist systems and communist systems in various countries. In other words, the division of the original nation was caused by the emergence of two different political, social, and economic systems in one nation.

The development of the concept of “multi-system nations” can be traced back to the formation of a “Comparative and Interdisciplinary Studies Section” (CISS) within the International Studies Association (ISA) in 1969. As one of the co-founders of this research section within ISA, I was particularly interested in the complex problems of political partitioning which leads to a host of problems including refugees, migration, minorities, and non-state-nations.² As the coordinator of a workshop on “Political Partitioning, Migration, Refugees and Non-State Nations” within the CISS supported by a grant from the National Endowment for the Humanities, I soon discovered that it is incorrect to call most of the partitioned nations “divided states.” Based upon the finding of this workshop, I decided to coin a new term, “multi-system

² The formation of a “Divided Nations Internet” in the Comparative and interdisciplinary Studies Section of the International Studies Association in 1969 was a pioneering effort toward empirical study of divided systems and peoples. For some examples of the results of this intellectual endeavor, see Yung Wei (ed.), “Political Partitioning, Migration, Minorities, and Non-State Nations: Models, Propositions, and Intellectual Exchanges,” (CISS working paper no. 49, University Center for International Studies, University of Pittsburgh, 1975) and Ray E. Johnston (ed.), *The Politics of Division, Partition, and Unification* (New York: Praeger, 1976).

nations” in 1975, to define more accurately the situation.

The core of the new concept of “multi-system nations” rests on the emphasis that relations between different parts of a divided nation or people of different culture but are between different political systems of within a *single* nation. These competing systems try to deny international status of the other side despite the fact that both sides meet almost all the criteria of an independent state. By advancing the new concept of “multi-system nations,” I propose that we preserve the idea of “one nation” but face the reality of the co-existence of two or more mutually separated political systems within that nation.³ The logical derivations from this concept would be: “one nation, two systems;” “one sovereignty, two jurisdictions;” “one country, two international personalities.”

II. Development in the Divided Nations After the Introduction of the Concept of “Multi-System Nations”

Developments in various so-called “divided states” following the coinage of the concept of multi-system nations more or less have corresponded to the analysis and predictions of the theory of “multi-system nations.”⁴ The “common roof (Dachtheorie) theory” developed in Germany largely echoes the idea of multi-system nations. By asserting the notion of one German nation, East Germany and West

³ For further discussions by this author on the inception, development and policy impact of the concept of multi-system nations, see Wei Yung, “The Unification and Division of Multi-System Nations: A Comparative Analysis of Basic Concepts, Issues, and Approaches,” (Paper delivered at symposium on Functional Integration of Divided Nations, Seoul, Republic of Korea, October 6-7, 1980); later published in *Multi-System Nations and International Law: The International Status of Germany, Korea, and China*, edited by Hungdah Chiu and Robert Downon (Baltimore: School of Law, University of Maryland, 1981). Also see the author’s following papers: “Multi-System Nations Revisited: Interaction Between Theories and Realities” (Paper delivered at the International Conference on Unification of Multi-System Nations, Taipei, September 27-29, 1991). “Unification or Separation: Assessment of Relations between the Two Chinese Political Systems through the Concept of Multi-System Nations” (Paper delivered at the Conference on China’s Constitutional Systems: Convergence or Divergence, Columbia University, New York, 29 April 1994); “Conceptual Schemes for Multi-System Nations and Inter-System Developments” (Paper delivered at Panel on System Integration of Divided Nations, XVI World Congress, International Political Science Association (IPSA), Berlin, 21-25 August 1994); and “From Integration to ‘Intra-National Commonwealth’: Towards Peaceful Resolution of Problems Facing Divided States”, paper delivered at the panel on “Unification Issues in the 21st Century,” (Research Committee 42 on System Integration of Divided Nations, 18th IPSA World Congress, Quebec, Canada, August 1-5, 2000).

⁴ For an example of American international lawyers’ taking note of the concept of “Multi-System Nation,” see Gerhard Von Glahn, *Law Among Nations, An Introduction to Public International Law*, 7th ed. (Boston: Allyn and Bacon, 1996), suggested readings, pp. 64.

Germany managed to separate the issues of sovereignty and jurisdiction. Sovereignty belongs to the abstract German nation while jurisdictions were clearly delineated between the Federal Republic of Germany and Democratic Republic of Germany. Consequently, both West and East Germany were able to be simultaneously recognized by other states as well as to join the international organizations including the United Nations without violating the “one German Nation” principle.⁵

In the case of the two Koreas, the application of “multi-system nations” theory has been more direct and encompassing.⁶ Some officials and scholars, such as Prof. Hakjoon Kim, former special assistant to the President, openly described Korea as a “multi-system nation.”⁷ The December 1991 Communiqué between the representatives of North and South Korea almost completely adopted the concept of “multi-system nations” and clearly defined the situation in the Korean peninsula as two political systems co-existing in one Korean Nation. As a result, relations between the two Korean political systems are not international relations, but special relations to be regulated by specific agreements between the North and South. Today both North and South Korea are members of the United Nations and enjoy dual recognitions in many capitals around the world.⁸

As for the Chinese situation, leaders of the People’s Republic of China (PRC) put forth the notion of “one country, two systems” some time around 1983, shortly after the concept of “multi-system nations” gained international recognition and caused debates in Taiwan. Despite repeated denials by the Beijing authorities, many scholars are of the opinion that before 1983, PRC leaders already were aware of the concept

⁵ See Joyce Marie Mushaben, “A Search for Identity: The German Question in Atlantic Alliance Relations,” *World Politics*, 40 (April 1988), pp. 395-417; and Gottfried-Karl Kindermann, “The Unification of Germany’s Multi-System Nations: the Evolution of West Germany’s Strategies,” (paper delivered at International Conference on the Unification of Multi-System Nations co-sponsored by Vanguard Foundation and American Enterprise Institution, Taipei, Republic of China, September 27-29, 1991).

⁶ See John H. Herz, “Korea and Germany as Divided Nations: The Systemic Impact,” *Asian Survey*, Vol. 15, No. 2 (1975), pp. 957-970.

⁷ See Hakjoon Kim, “Korean Reunification: A Seoul Perspective on the Korean National Community Unification Formula as Seen Through the Various Concepts on the Unification on Multi-System Nations,” (Paper presented at International Conference on the Unification on Multi-System Nations, Taipei, September 27-29, 1991).

⁸ See Hong Nack Kim, “The ‘Two Koreas’ Enter into the United Nations and the Implications for Inter-Korean Relations,” *Korea and World Affairs* (Fall, 1991), pp. 397-413.

and its implication to the cross-Strait relation and to the diplomatic efforts of the ROC. Thus they have borrowed the idea but have skillfully adjusted the content of “multi-system nations” to suit their own political framework and purposes, i.e., the two *systems* in the “One Country Two System” scheme were merely socio-economic institutions without international personalities. Unquestionably, Beijing had both Hong Kong and Taiwan in mind when it put forth the “one-country-two-system” scheme.

In regard to the Republic of China, the inner circle of the ROC government basically concurred the concept of “multi-system nations” and actually called high-level meetings to discuss the implications of the concept to the cross-Strait situation as well as possible positive usage of the concept.⁹ Enthusiastic and generally positive responses also came from the academic community in Taiwan. Only a few senior members of the Legislative Yuan (Parliament) voiced different opinions. Whatever the initial responses, the fact has been that since 1981, the official policies of the ROC government towards the cross-Taiwan-strait relations as well as toward international participation have steadily moved closer to the idea of “multi-system nations.”

The Guideline for National Unification, for instance, advocates the concept of “one China” but allows the co-existence of two “political entities” within one China. The White Paper on Cross-Strait Relations released by the Mainland Affairs Council went further to formally declare that “one China” is a “historical, geographic, and cultural Chinese nation.”¹⁰ Within this nation, the two Chinese political entities are not foreign countries to each other; rather they are inter-system relations to be regulated by agreements signed by both sides of the Taiwan Strait. In their relations with other countries, however both the ROC and the PRC are fully-fledged international personalities. Hence, the idea “one China, two entities” embedded in the Guideline for National Unification corresponds completely to the ideas of “multi-system nations” as defined by official ROC government policy. Responding to interpellation from members of the Legislative Yuan, Dr,

⁹ For an insider’s account of the deliberation process within the ROC Government of the possible application of the concept of multi-system nations, see Yung Wei, “North and South Korea Agreement of 1990 and Multi-System Nations,” *History Monthly* (Sept. 5, 2000), No. 152, pp. 60-66.

¹⁰ *Policy Paper on Cross-Taiwan-Strait Relations* (Taipei: Mainland Affairs Council, 1994), p. 30.

Huang Kuen-hui, Chairman of the Mainland Affairs Council of the Executive Yuan (Cabinet), openly acknowledged in 1992 that the content of the Guideline for National Unification indeed had borrowed the idea of “Multi-System Nations.”¹¹

It must be pointed out, however, that the release by former President Lee Teng-hui of the thesis of “Special state-to-state relations” to refer to cross-Taiwan-Strait situation was a blunt rejection of the “One China” concept and the Guideline of National Unification and was a serious setback in cross-Strait relations. Fortunately, after Chen Shui-bian assumed the Office of the Presidency of the ROC, more moderate and restrained positions have been taken by the ROC Government. Nevertheless, the reluctance of the new ROC government to openly acknowledge “One China” policy and the lack of desire of the PRC to give ROC more international space have led to the current deadlock in cross-Strait relations.

III. International Personalities and the Problems of Recognition: Outdated Classification and Code with Varied Application

Despite gradual dissemination of the idea of “multi-system nations” and the tacit acceptance by international community of the practice of multiple recognition and dual representation of the divided nations, the problem of the international status of the multi-system nation is far from being resolved. In addition, certain political systems within the divided nation, such as the Republic of China in Taiwan, still faces serious of diplomatic recognition. Other political systems that were caught in the process of partitioning in the former Soviet Union and Yugoslavia faced similar problems at one point or another. All these should be the concern of the international lawyers.

An examination of the current content of conventional international law leads to the discovery that the current types of international personalities provided by conventional international law simply are grossly out of date so far as the recognition of the various

¹¹ For an official view of the ROC position on the issue of national reunification, see Lien Chan, “A Pragmatic Strategy for China’s Peaceful Reunification,” *American Asian Review*, 14, No. 1 (Spring 1996), pp. 97-107.

kinds of political systems that are actually in existence in the international community is concerned. A review of the major treatise on international law or laws of nations reveal three major categories of international personalities: state, belligerents, and insurgents.¹² Here one finds that opinion of international jurists deem that “a state proper is in existence when a people is settled in a country under its own sovereign government.”¹³ As for insurgents and belligerents, these are the terms that are used to refer to the parties in the internal conflict of a state that have reached a certain degree of continuity as well as to the situation wherein the contending party has already reached a certain proportion in terms of territorial occupation. If the party is in the initial stage of its organized efforts in contending the central authority and the impact is of limited nature then it may be recognized as an “insurgent.” If, however, the contending party has “attained sufficient stature”¹⁴ and the conflict becomes of a sustained nature, then that party can be recognized as a “belligerent.” In the opinion of one of the leading international jurists, “The principle consequence of recognition of insurgency is to protect the insurgent from having their warlike activities, especially on the high seas, from being regarded as lawless acts of violence which, in the absence of recognition, might subject them to treatment as pirates.”¹⁵

If such a considerate and generous criterion can be applied to the recognition of the divided nation, then almost all the political systems in any of the multi-system nation could all have been considered “international personalities” and have attained recognition by other states. Other than states, belligerents, and insurgents, conventional international law also recognizes several other exotic “international personalities,” including the Holy See (City of Vatican) and the “Sovereign Military Order of the Knights of Malta.”¹⁶ The reasons provided by international

¹² L. Oppenheim, *International Law, A Treatise*, 7th ed. (London: Longmans Green and Co., 1948), Chapter I; Philip C. Jersup, *A Modern Law of Nations, An Introduction* (New York: The Macmillan Co., 1948), Chapter III; J. L. Brierly, *The Law of Nations- An Introduction to the International Law of Peace*, 4th ed. (Oxford: Oxford University Press, 1949), Chapter IV; Herbert W. Briggs (ed.) *The Law of Nations, Cases Documents and Notes*, 2nd ed. (London: Stevens & Sons, 1953), Chapter II, Section I, pp. 99-132; Stefan Talmon, *Recognition in International Law, A Bibliography* (The Hague: Martinus Nijhoff Publishers, 2000).

¹³ Oppenheim, *op. cit.*, p. 118.

¹⁴ Jersup, *op. cit.*, p. 53.

¹⁵ *Ibid.*, p. 53.

¹⁶ Von Glahn, *Law Among Nations, An Introduction to Public International Law, op. cit.*, pp. 59, 60.

jurists to treat these two entities as subjects of international law are not based upon general criteria of statehoods but of convention and customary practice.

A basic problem in regard to the identification of subject of international law as well as in granting recognition to various types of international personalities lies in the fact that the current principles of extending diplomatic recognition were developed from the experience of western European states before the 19th Century. At that time, transition of a nation from unification to division, or vice versa, usually were rather rapid. As a result, the pioneers of conventional international law simply failed to foresee the continuous existence of parallel political systems within an original nation or state for an extended period of time as what have happened in China, Germany, and Korea after the Second World War.

As pointed out previously in this article, in the minds of the founding fathers of international law, besides the *state*, which naturally was assumed to exist for quite some time, other two types of international personalities under conventional international law, the “*belligerents*” and “*insurgents*,” simply were not assumed to be to last for any length of time. Thus recognizing these two categories of “international personalities” was meant purely for the matter of convenience, not for any enduring long-term purposes. Consequently, international law, as it exists today, is grossly inadequate in dealing with the international status of the multi-system nations, particularly in the Chinese case.

Arguments have made to make the non-recognized part of a divided nation, an “entity *sui generis*.”¹⁷ Notwithstanding the archaic nature of its nomenclature, “entity *sui generis*” really carries a rather blurred and uncertain connotation so far as the legal status of unrecognized political system of a multi-system nation is concerned. It should be noted that although the political systems within a divided nation may be somewhat less than a full-fledged state or government, they are definitely of a higher legal stature than those of “belligerents”

¹⁷ See Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law, Cases and Materials*, 2nd ed. (St. Paul, Minn.: West Publishing Co., 1987); also see Philip Yang, “Taiwan’s Legal Status: Going Beyond the Unification-Division Dichotomy.” (paper delivered at the CSIS Seminar on Cross-Strait Relations at the Turn of the Century, September 21-23, 1999).

and “insurgents.”

The major problem facing the international jurists has been that not only there have not been sufficient and up-to-date categories of “international personalities” for other state to choose in regard to recognition, but also that big nations often use recognition or non-recognition as a political instrument to achieve purposes in the name of national interest. Hence the government of the United States had refused to recognize both the Soviet Union and Mainland China decades after their establishment. On the contrary, the US recognized the State of Israel within hour of its declaration on May 14, 1948. At that time, no assurance could be ascertained as the survivability of the newly established state.¹⁸

By the same token, it has been chiefly due to the firm support of the United States that the Republic of China on Taiwan, Republic of Korea (South Korea), and Federal Republic of Germany (West Germany) were able to prevent and deny recognition to Mainland China, North Korea, and East Germany before 1970s. After 1970s, especially after the end of the Vietnam War, the non-communist part of the divided nations, started facing diminishing support from the United States against recognizing the Communist part of the divided nations and were forced to make practical adjustments. Unfortunately, in the case of the Republic of China on Taiwan, it has become a primary example of being a victim to non-recognition as a result of the increasing influence and stature of the PRC in international community.

IV. Sovereignty, Jurisdiction, and the Recognition of Multi-System Nations

It must be pointed out that the categorization of the international personalities into merely “states,” “belligerents,” and “insurgents,” by the pioneers of international law were not as naive as it seemed, for they assumed that the belligerents and insurgents were supposed to exist only for a short period of time. Hence recognition of these “subjects” of international law was only to avoid the legal vacuum to which the existing states and governments might be exposed to. It was anticipated

¹⁸ Von Glahn, *op. cit.*, pp. 68-70.

that a successful “insurgent” would quickly become a formidable “belligerent,” and a succeeding as well as expanding “belligerent” would soon become the legitimate government or a new state. In neither case, there would be any serious problem of granting international recognition.¹⁹

It seldom occurred to these international jurists that they might be compelled to deal with a situation that there could be six categories of situations that international law must deal with, of which only the first three conventional international offers ready solution; these could include: (1) single recognition of a unified nation (state); (2) dual recognition of a legitimate government challenged by a forceful belligerent; (3) dual recognition of a legitimate government challenged by a emerging insurgent group; (4) non-recognition of an existing yet considered not legitimate state or government; (5) non-recognition of multi-system nations; and (6) non-recognition of an insurgent group which is considered too destabilizing for the international community to recognize. (See Table 1)

Other than the failure in perceiving the full range of the problem of international recognition under different situations, another problem hindering international recognition of the multi-system-nation has been the idea of state sovereignty. As a key concept defining nation state, sovereignty is defined as the supreme power enjoyed by a state to have absolute and indivisible authority to rule at home and the sole representative to exercise state power abroad; the former is often called “internal sovereignty,” and the latter, “external sovereignty.”²⁰

The idea of a supreme, indivisible, and non-shareable sovereignty has been challenged both by actual practice in internal and international situations as well as by scholarly opinion among political scientists and international lawyers.²¹ The fact is: even the most powerful state in the

¹⁹ For example, see H. Lauterpacht, (ed.), *Oppenheim's International Law*, 7th ed. (London: Longmans, 1963), pp.121-146.

²⁰ See, for example, Jessup, *op. cit.*, pp. 40-42; Brierly. *op. cit.*, pp. 46-50; and Lauterpacht, *op. cit.*, pp.116-120.

²¹ For examples, see Stephen D. Krasner, *Sovereignty, Organized Hypocrisy* (Princeton, N.J.: Princeton University Press, 1999); William L. Tung, *International Law in an Organizing World* (New York: Thomas & Crowell Co., 1968); Sohail H. Hashmin (ed.) *State Sovereignty, Change and Persistence in International Relations*, foreworded by Stanley Hoffmann (University Park, Penn.:

world has to yield its sovereignty in a variety of cases including the operation of international organizations, implementation of world health as well as environmental regulations, operation of foreign legations, and the activities of transnational organizations as well as multi-national companies. International intervention into the internal affairs of a state in the name of humanitarian concerns is another controversial yet often practiced intrusion and infringement of the so-called sovereignty of a state.

Whether the sovereignty of a state is supreme or not is not the primary concern of our discussion here, what does concern us here is the idea of indivisibility of the sovereignty of a state which has been used time again to deny recognition to some of the political systems of a divided nation.

Concomitant to the idea of sovereignty is the concept of “jurisdiction.” While sovereignty is defined in more abstract terms, “jurisdiction” is customarily defined in a much more concrete fashion. Generally speaking, jurisdiction is related to three central ideas, “governing authority,” “territories of effective control,” and “the people” to whom political as well as legal power is exercised.²² If one can accept the idea that sovereignty can be shared by different *de facto* political systems within a formally united nation or state, then whenever and wherever a political system exercises effective control of a territory and is the ruling authority of a group of people constitutes the legitimate ground for *de facto* international recognition of that system. Here one finds two crucial preconditions for resolving the problems of recognition of the multi-system nations are: first, separation of the ideas of sovereignty and jurisdiction; second, sharing of an abstract common sovereignty by different parts of divided nation having *de facto* jurisdiction in their occupied territories. One may go even further by

The Pennsylvania State University Press, 1977); Rosalyn Higgins, “Integrations of Authority and Control: Trends in the Literature of International Law and International Relations,” in W. Michael Reisman and Burns H. Weston, *Toward World Order and Human Dignity, Essays in Honor of Myres S. McDougal* (New York: The Free Press, 1976), pp. 79-94; and Roda Mushkat, *One Country, Two International Legal Personalities, The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997).

²² See Lauterpecht, *op. cit.*, pp. 293-302; Brierly, *op. cit.*, pp. 150, 168, 109, 112, 180; William L. Tung, *International Law in an Organizing World* (New York: Thomas & Crowell Co., 1968), pp. 32, 124, 126.

asserting that sovereignty belongs to the original nation or state while concrete jurisdictions under that shared sovereignty is shared by the various political systems with temporarily delineated jurisdictions that in turn provide the foundation for international recognition.

V. Solving the problem of “One Nation, Two Realities”: Agenda for Action among the International Jurists

Having examined the concepts of sovereignty, jurisdiction, and the problems facing the divided nations or multi-system nations in connection with recognition under international law, we may now move onto a more concrete and systematic examination of the various problems confronting the multi-system nations.

Here one finds the overlapping claims of both sovereignty and jurisdiction by various parts of different divided states. What they have been trying to do is to win recognition, from other governments and states, of them only not as the government of the territories they actually control but also as the government of the territories which they do not control. As a result, international recognition of the different parts of a divided nation often evolves into a "zero-sum" game wherein other states and governments often become the victims of having to make difficult choices among various parts of a divided nation.

In short, what has been confronting the multi-system nations can be found in the contradiction regarding the preferred ideal state of affairs on the one hand and the political situation in the reality on the other. Thus one finds that while more often than not the leaders and people of the divided nations prefer to believe that there is “one nation,” “one state,” “one sovereignty,” and “one people,” there are actually “two political systems” co-existing in one nation, “two governments” within one state, “two jurisdictions” within one sovereignty, and consequently the emergence of the need to have “dual representation” of the unfortunate people who happen to live on two sides of an original nation or state. Indeed, as an American scholar so aptly dubbed it, this situation was an “organized hypocrisy” and calls for “Alternative Structures.”²³ (See Table 2)

²³ Krasner, *op. cit.*

In order to resolve the discrepancies between the normative preferences and the objective realities, a new chapter or at least a section, should be added to the text of international law, i.e., the recognition and representation of “divided nations,” or “multi-system nations.” The paramount principle in dealing with this subject matter should be the respect of human rights and the effective handling of political realities. To sum up, the added new principles of international law should include:

1. International law should be a stabilizing, not a destabilizing, factor in international relations.

2. To be recognized is a part of human right; international law should not be used as an instrument to deprive the rights of the unfortunate individuals who happen to live in a unrecognized “Multi-System Nation.”

3. Recognition and representation of the various part of a “multi-system nations,” or the “divided nations” should not be a zero-sum game, i.e., other states should not be forced to recognize only *one* of the systems in a divided nation and accept its claim over *all* the territories of a nation, including those which it does not control.

4. Recognition of the different political systems within a multi-system nation does not have done with the separation of the sovereignty of the original nation or state. It can be done on the basis of *de facto* separate jurisdictions.

5. The third state should recognize *all* systems in a multi-system nation without recognizing their claims beyond the territories under effective control yet without denying those claims either.

6. All third states should not take a position on the question of unification of the multi-system nations, neither forcing nor preventing the unification of the different parts of a divided nation into one single state.

7. The principle of multiple recognitions of the multi-system nation should also extend to multiple representations of the different parties of the multi-system nations in the United Nations at least in specialized agencies.

Along with the advancement of the above principles, another new

section should be added to the law of nation. This section should be devoted to the introduction of a new international personality, i.e., “political entities.” By “political entities,” we mean any *de facto* ruling authority that actually commands the loyalty of certain of people and is willing and able to fulfill international objections. There could be two types of political entities: the first one is “territorial political entities,” meaning the existence of a political authority not only with a group of people and effective administration but also a clearly delineated territory under its control. All the political systems in the multi-system nations today are qualified in this category.

Another type of political entities may be called “non-territorial political entities.” These are the entities having an authority as well as a group of people showing allegiance to that authority yet is without a territory under their effective control. Before 1980s, PLO qualified for this category. Recognitions of this type of political entity, however, must be done with great caution, for it may involve conflict with existing state wherein there is serious territorial dispute.

The status of “political entities” should be lower than states and governments, but higher than belligerent in international law. They should be able to accept at least *de facto* recognition by other government and states, to establish representation office in foreign capitals, and become members or at least, observers to international organizations.

To be sure, the above mentioned are merely rudimentary suggestions. Along with their gradual acceptance, more specific rules must be further developed in regard to the actual functioning of the “multi-system nations” or “political entities” which may include a host of practical areas in regard to the operation of a political-legal authority. Among them are: territorial jurisdiction, extraterritoriality, jurisdiction over of personal matters, diplomatic operation and immunity, participation in international organizations, international cooperation in the prevention of cross-national crimes, separation of international relation and inter-system relations between different political systems (entities) within a multi-system nation, the power and process of extradition, the maintenance of military force and the related inter-system

as well as international obligations.

In making suggestions on the recognition of multi-system nations, this author is well aware of the basic conservative attitude among the international jurists in advancing changes in the existing codes of conventional international law. Yet as Rosalyn Higgins, one the leading international jurists and a former vice president of the American Society of International Law, so aptly pointed out: “rules do not change themselves.”²⁴ “International law has its own inbuilt methods for change (treaty revision, progressive development through the International Law Commission, codification, custom). These methods, however, are slow. Hence, to rely merely on accumulated past decision (rules), where their text has changed and their content is unclear, is to encourage contempt among international relations scholars.”²⁵ Other leading international-law scholars including Hans Kelsen, Morton Kaplan, and Harold D. Lasswell seemed to share similar Views.²⁶ It is based upon the spirit that laws must respond to changing human conditions and that international jurists should be able to develop rules that can contribute to the solution of real human problems that the above suggestions of mine are made.

VI. “Intra-National Commonwealth”: A Future Oriented Concept to Unification of the Multi-System Nations

To facilitate rapprochement between different parts of a multi-system nation before eventual unification, further institutional development is needed. Responding to this need, this author has advanced the idea of “Intra-National Commonwealth.” This new concept preserves the notion of “one Chinese nation” on the one hand, yet allow both sides of the Taiwan Strait to gain international recognition without violating the principle and goal of eventual national reunification on the other.

²⁴ Rosalyn Higgins, “Integrations of Authority and Control: Trends in the Literature of International Law and International Relations,” in Reisman and Weston, *op. cit.*, pp. 79-94.

²⁵ *Ibid.*, p. 83.

²⁶ See, for example, Hans Kelsen, *General Theory of Law and State* (New York: Russel & Russel, 1961); Morton A. Kaplan, *The Political Foundation of International Law* (New York: Wiley, 1961); and Harold D. Lasswell, “Introduction” to *Toward World Order and Human Dignity, Essays in Honor of Myres S. McDougal*, *op. cit.*, pp. xiii-xviii.

By most estimates, the current division between the two Chinese political systems probably will last well into the 21st century.²⁷ As for the Korean Peninsula, relations between the two Korean political systems entered into contractual arrangements as early as 1972 and gradually evolved into full mutual understanding of the co-existence of two Koreas in December 1991. Also in 1991, the two Korean political systems became members of the United Nations. Both Koreas are now recognized by major countries of the world and maintain embassies simultaneously in many capitals. Thus the Korean situation is a typical example of a full-blown “multi-system nations.”

Yet despite the success of the two Koreas in resolving their problems on UN memberships and international recognition without violating the one Korean nation concept, actual trade and other types of interactions between North and South have been almost at negligible level. For instance, the meeting of South and North Korean from 1989 through 1994 totaled only 1,111 cases involving only 3,958 persons.²⁸ South Korea’s export to North Korea has achieved some growth in recent years, yet still amounted only US\$ 64,44 million in 1995, which represented only a tiny fraction of South Korea’s total export.²⁹ (See Table 3)

The meeting of the leaders of South and North Korea in Pyongyang in June this year set a new stage is set for reconciliation

²⁷ For further discussion on the increasing interactions between the Chinese political systems, see Yung Wei, “Toward a New Framework of External Relations for the ROC in the 21st Century: Between Oceanic and Continental Strategies,” in Yung Wei, *Tu-Po (Breakthrough, Creating a Future of Broad Perspective)* (Taipei: Commercial Weekly Publishers, 1995), pp. 319-323; for a broader discussion on the interplay of internal and external factors in cross-Taiwan-Strait relations, see Yung Wei, “Democratization, Unification, and Elite Conflict,” in *The Chinese and Their Future: Beijing, Taipei and Hong Kong*, edited by Zhi-ling Lin and Thomas W. Robinson (Washington, DC: The American Enterprise Institute Press, 1994); also see Ralph N. Clough, *Cooperation or Conflict in the Taiwan Strait* (Lanham: Rowman & Littlefield Pub., 1999), p.108; for a projection of Taiwan’s future onto the 21st century, see Yung Wei, “The Interplay between Taiwan’s Internal and External Environments to 2020: A Contingency Analysis,” in *Development in Taiwan to 2020: Implications for Cross-Strait Relations and U.S. Policy*, edited by Karen M. Sutter, with Paul H. B. Godwin and Alfred D. Wilhelm, Jr. as co-rapporteurs (Washington D.C.: The Atlantic Council of the United States, 1996), pp. 3-22.

²⁸ See Werner Pfennig, “Steps Towards Normalization: A Comparative Look at Divided Nations.” in Myoung-Kyu Kang and He Mut Wagner (eds.) *Germany and Korea Cessions in Unification* (Seoul: Seoul National University Press, 1995), pp. 39-71.

²⁹ For a most interesting and comprehensive analysis of the North-South economic interaction, see Murooka Tetsus, “Economic Exchanges between South and North Korea Since the South Korean Activation Measure,” *New Asia*, Vol. 4, No. 2 (Summer, 1997), pp. 22-46.

between the two Koreas. With North Korea directly needing economic aid from the South and with South Korea searching for more independent foreign policy, there is indeed more room for cautioned optimism toward more peaceful development in the Korea peninsula. As of this writing, the reunion of separated families between South and North Korea has already began. On August 16, 2000, one hundred families had their separated members reunited in Seoul. More reunions are in the process of being planned.³⁰

Hence it may be concluded that while the Koreas have more or less resolved their issue of recognition and representation and have become “multi-system nations,” they are far from being linkage communities to each other. The two Chinese political systems on the other hand, are increasingly becoming linkage communities but are still far from becoming “multi-system nations.”

If the experience of Germany reunification is any guide, then Chinese and Koreans have concrete lessons to learn. Both nations must understand that gradual socio-economic integration is an indispensable pre-condition for eventual political unification. While the Republic of Chinese on Taiwan must find ways in resolving their political and legal entanglements with the People’s Republic of China on the mainland, the two Koreas must enhance their trade, cultural, and people-to-people interchange so that gradual concrete, and mutually beneficial socio-economic integration may be achieved before political unification.

Furthermore, the Germany experience of reunification also has taught us a lesson that even the absorption of a less free socialist society and economy into a democratic system with free enterprise can still be rather difficult and sometimes even painful for people in both systems. Hence it may serve the interest of both competing Chinese as well as Korean systems to focus first on the building of an “intra-national commonwealth” before moving onto complete political unification.

The idea of “intra-national commonwealth” derives its notion from the British Commonwealth, which is a union of loosely linked sovereign states which were former colonies within the British Empire. The adjective “intra-national” was added to highlight the nature of the

³⁰ “After 50 Years, Reunions Bring Joy to Koreans,” *New York Times* (Aug. 16, 2000), p. 1.

relationship between different parts of a divided state as differentiated from that among members of the British Commonwealth.

The reason I put forth the idea of “intra-national commonwealth” instead of federation or confederation is because the later two concepts have too concrete legal and institutional prerequisites to be realized under the political realities of the existing multi-system nations. The concept of “federation” require formal merge of the different parts of a multi-system nation into a single unitary state. The idea of “confederation,” on the other hand, rests on the formal and mutual acceptance of separate sovereignties between different parts of a divided state. Both are not possible either in Chinese or Korean case. Hence a loose union between the two parts of a divided states which does not touch upon the issue of separated sovereignties and preserves the notion of “one nation” probably is the only feasible instrument for gradual linkage which may move toward functional integration.

By preserving separate autonomous economic-political systems within a loose framework of commonwealth of same cultural and ethnic roots, Chinese and Koreans may avoid the agonizing process of socio-economic-political adjustments that are still confronting the German people ten years after reunification on the one hand, yet are able to enhance practical interaction between the two sides on the other.³¹

Other than avoiding the thorny issue of sovereignty, another reason that I employ the concept of intra-national commonwealth is owing to the historical precedents in both Chinese and Korean history. During the long history of both China and Korea, the two countries have gone through many different stages of unification and division. Yet despite the co-existence of more than one political system within one China and one Korea, there never had been serious attempts to permanently divide the nation. Furthermore, rather detailed rules of conduct on the relationship among different political systems during the period of division. Since the two Koreas have more or less acquiesced to a confederation model, it is up to Chinese on two sides of the Taiwan Strait to develop something close the “intra-national commonwealth” to handle future relations

³¹ For a forward-looking yet down-to-earth analysis of, as well as suggestions to, the idea of linking Mainland China and Taiwan into a loose confederation with shared sovereignty, see Linda Chao and Ramon Myers, *The Divided China Problems, Conflict Avoidance and Resolution*, Essay in Public Policy. No. 101 (Stanford, Cal.: Hoover Institution on War, Revolution, and Peace, Stanford University, 2000), pp. 48-52.

between the two political systems. A “Chinese Intra-national commonwealth” may be what is really needed here.³²

VII. Law, Power, and the International System: The Predicament of the International Law Regime in the 21st Century

In the foregoing analysis, it has become clear of the various challenges facing international law, especially in the arena of international personality and the problem of recognition. The inborn inertia of the international jurists in making innovative changes reflect the basic weakness of the anarchical nature of the international system and the resultant absence of a law-making mechanism as well as the lacking of an effective law enforcement system. As a result, the international-law community has to take into consideration the responses of major states when it contemplates any innovation and changes in the rules of existing international law. For the “realist” school of international relations and international law, “The states are the primary actors in international relations. Sovereign states inhabit an anarchic world in which military power is the sole guarantor of autonomy.”³³

Yet too much reliance on the sheer power of the state as the supreme element for the enactment and implementation of international law may lead to unprecedented tragic consequences. The weaker states may respond either by using the outdated international law not as a code to regulate their external behavior but as a mere instrument of argumentation to protect their natural interest. This had been the attitude of many non-western countries, including the People’s Republic of China before its admission into the United Nations.

Other special political entities, such as the PLO, resorted to violent methods to press for international recognition of their status. The gradual moderation of the PLO’s external behavior after its admittance into the UN as an observer and the gradual decline of the violent behavior of the people of Armenia and Azerbaijan after they have gained

³² For example, see Yung Wei, “Why not consider a ‘Intra-National Chinese Commonwealth’ as a solution to cross-Taiwan-Strait problem?” *China Times* (July 11, 2000), p. 14.

³³ Hans Morgenthau, *Politics Among Nations* (New York: Knopf, 1948); Marlaine White Esp. and Robert A. Deremark, “International Law and International Relations Theory: Adopting the Bath Water with the Baby?” (paper presented to the 2002 Meeting of the International Studies Association, New Orleans, USA, March 24-27, 2002).

statehood are vivid reminders of the importance of international recognition and respect.³⁴ It is essential, therefore, for the international community to face this demand for recognition by various types of political entities. It is also the conviction of this author that as soon as a political authority can exercise effective control over a territory or command loyalty of a distinct group of people, it is the obligation of the international community to grant recognition to such authority. Failure to do so can only contribute to conflicts in the international system as well as prolonged internecine fights among different political systems within a multi-system nation.

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³⁴ For a discussion on the importance of the recognition of the pluralistic nature of today's international system and the need for the international law regime to respond to it, see Harry D. Gould, "Toward a Neopragmatist International Law," (paper presented to the 2002 Meeting of the International Studies Association, New Orleans, USA, March 24-27, 2002).

Table 1

Relation between the Situation in a Nation (State) and the Issue of Recognition

International Recognition	Situation in a nation (state)		
	Unified nation (state) with a single government	Almost equally competing political systems	One legitimate government challenged by an insurgent group
Yes	Single recognition of a unified nation (state)	One legitimate recognized government with another recognized belligerent	One legitimate recognized government with another recognized insurgent group
No	Pariah state (South Africa before 1980s)	Non-recognized Multi-System Nations	A recognized government with a non-recognized insurgent group (PLO before 1970s, Muslim rebels in the Philippines)

Conceived by Yung Wei, drawn by Lynn Wei

Table 2

**Nation, State, Sovereignty, and International Representation :
Ideals and Realities in regard to multi- system Nations**

	Nation	State	Sovereignty	International Representation
Ideals	One Nation	One State	One Sovereignty	One People
Realities and Adjustments	Two political systems (two separately governed region)	Two governments	Two jurisdiction	Two Representations (dual recognition and membership in International Organizations)

Conceived by Yung Wei, drawn by Lynn Wei

Table 3

**The Separation and the Projects of Unification of China and Korea:
A Comparative Paradigm***

made by Yung Wei

Nov. 15, 1997

	Chinese Case	Korean Case
Nature and Origin of Separation	Prolonged internecine warfare	International and inter-system military conflicts and negotiation
Original Position on National Reunification	Before 1980s, complete rejection of the legitimacy of the opposing system; unification through replacement	Before 1973, complete rejection of the legitimacy of the opposing system; unification through replacement
Revised position on National Reunification	After 1980s, de facto acceptance of opposing regime, peaceful unification by stages for the ROC; PRC prefers peaceful unification but use of forces not ruled out.	After 1980s, gradual acceptance of each other's existence, leading to formal agreement on co-existence in Dec., 1991; conditional acceptance of the idea of confederation by North and South Korea in July, 2000.
Position toward International Recognition	The ROC side tolerates dual recognition since late 1980s; the PRC opposes all kinds of dual recognition	Dual and separate recognition, but still adhere to one-Korean-nation and community notion
Attitude toward International Organizations	The ROC side is for dual memberships in international organizations; the PRC is against it	Dual and separate memberships for all international organizations, including UN
Actual Interaction through trade, cultural exchanges and tourism	Extensive exchange of goods, people, and ideas occurred, with the ROC somewhat on the defensive side	Minimal trade and cross-boarder contacts; reunion of families in the North and South started in August, 2000.
Prospect of Peaceful Transition and Unification	Uncertain; acute crisis have subsided; but renew of para-military confrontation is possible if peaceful exchanges failed	Uncertain; large scale military confrontation still possible; ROK side seems to have the upper hand in long-term peaceful reunification

*This table was first published in Yung Wei, “‘Multi-System Nations’, ‘Linkage Communities’ and ‘Intra-National Commonwealth’: General Concepts on the Unification of Divided States and Their Application to the Chinese as well as Korean Cases,” *New Asia* Vol. 4, No. 4 (Seoul, Korea: Winter, 1997), revised and updated by the author on August 15, 2000.