

Problems Lurking in Ikeda Cabinet's "China Policy" vis-à-vis The Republic of China

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Max Weber once said that achievement in knowledge lies in raising questions. This tells profound truth, and justifies the attempt made in this short article to point out some heretofore overlooked but important problems hiding at the very bottom of Japan's "China Policy", with possible solutions to them kept intact.

The study of Sino-Japanese relations of the present stage is to a large extent determined by ideology. But with ideology one either falls into criminations and recriminations, or commits the mistake of arbitrariness. No objective and dependable conclusion can be obtained in such case, hence never can achievement be made. This article is written in a manner that it be as much objective as possible, by free choice of material at hand and through judgement according to conscience of learning, at the expense of personal preferences and national bias. Consequently, the terms "Republic of China" and "Red China" are used in this article for convenience's sake, and are not to be misunderstood as having any special implications, ideological or otherwise.

Traditional "China Policy" of Japan after the Second World War has been criticized by many a Japanese as a passive "wait-and-see policy at a standstill." Such attack becomes stronger and stronger day after day, due chiefly to Ikeda Cabinet's somewhat more waddling attitude on the "China Problem", in comparison with the attitude of the former Kishi Cabinet. Since Ikeda came into power, domestic opinion urging a change of Japan's policy toward China, to the effect

that Japan should recognize Red China as early as possible, so as not to "lose the bus", has brought for Japanese Government headache in political and economic spheres. Especially, the unfortunate situation of semi-severance of relations between Japan and the Republic of China, which is the result of the Chou Hung-ching Asylum Case (October 1963-January 1964) followed by the what may be described as "De Gaulle Typhoon" of French "re-establishment" of diplomatic relations with Red China (January 27, 1964), gives room to Japanese specialists in law and in politics and ex-professional diplomats to confirm such opinion which, in turn, is transformed into some kind of pressure, or rather inducement, for Japan to attempt re-considering its "China Policy", in part at least.

However, the Ikeda Cabinet is not free to do so. And this because of three reasons: the too unstable balance-of-power system existing within the ruling Liberal-Democratic Party, which is one of the chief causes of weak leadership of this Cabinet; the potential but clear split in opinion on the problem among the people at large; and the necessity for Japan to cooperate with USA in the matter. One more thing, untold before and hence target of this article, must be added: there exists a vital fact which belongs to common-sense but which is discarded by all who urge such policy-change—between Japan and the Republic of China, due to the Peace Treaty (1952) there exist special juridical relations, in contradistinction to general juridical relations among other States, which destructive aspect⁽¹⁾ of effects must not be under-estimated in political determination of Japan's national interests, hence the existence of the Republic of China is not to be ignored, intentionally or otherwise. Thus, the Ikeda Cabinet's "China Policy" is bound to be nailed down.

The above picture was given a vivid shape in the policy trends of Japan vis-à-vis those of the Republic of China in the Chou Case above referred; and the potential issues appeared after French recognition of Red China. The centre of the picture is the complete

(1) This is the kernel of this article, see Section V below.

distrust on the part of the Republic of Chinese Government toward the Ikeda Cabinet.⁽²⁾ The Chou Case and, with the impacts of French recognition of Red China in the shadow the actions and reactions between Japan and the Republic of China in that case, are therefore unprecedented in postwar Sino-Japanese relations as well as highly instructive for knowing Japan's policy toward China.

I. The Chou Hung-ching Asylum Case—Facts⁽³⁾

According to daily reports on the newspapers and to other sources, the following is a summary of facts of the present case.

In September 1963, a group (The Oil-Squeezing-Machine Technique Observation Delegation) was sent from Red China to Japan. On October 7, immediately before this group was going to leave Japan, its interpreter, Chou Hung-ching, defected from the hotel. He went to the Soviet Embassy in Tokyo, requesting for political asylum (it was reported that he did so by mistake of the taxi-driver, because at the beginning he had intended to go to the Chinese Embassy).

The Soviet Embassy refused Chou's request, and Chou was handed over to Japanese police on October 8. Later, he was transferred to the Immigration Office, and was examined for his illegal stay (over-stay as from the day he defected).

In this period, Chou's desired place to stay in future was said to be: first, Japan; second, Soviet Russia; and third, Japan again.⁽⁴⁾

On October 16 (morning), Chou expressed his intention to go to

(2) On this point, see 'Japan's Tide' (1) - "The China Problem and Ikeda Diplomacy," in "Sekai" (The World), No.219, March issue, 1964, pp. 89-94.

(3) For facts, the readers are referred to "Five Riddles surrounding Mr. Chou Hung-ching", in "Asahi Weekly", January 24 issue, 1964; and "The Kernel of the Chou Hung-ching Case", in "Asahi Journal", January 26 issue, 1964. For excellent critics from viewpoint of Japanese Law, see Edo, "What the Chou Hung-ching Case suggests", in "Sekai", *ibid.*, pp.73-80, especially, pp.77 et seq.; for Japan's court decision on refugee cases after the war, v. Oda, "Precedents concerning 'Exile' in Japan", in "Jurist", No.283, Oct. 1, 1963, pp.61-7.

(4) Edo, *op. cit.*, p.76. There is doubt on this point, and we will dispose of it later in Section III below.

Taiwan (Republic of China). He signed a paper to this effect before the immigration official and the First Secretary of the Chinese Embassy in Tokyo. In the afternoon of the same day, after being permitted to meet with left-wing lawyer, he changed his will verbally: to stay in Japan.

On October 23, after domestic legal procedures, Chou was given the Government decision: deportation. On October 24, he changed his will again: to go back to China Mainland. It was clear that during these days he was persuaded by leftists, apparently with Red China behind them.

On October 26, Chou was served with the Deportation Order, and the destination was Red China.

In Japanese domestic legal procedures, this case was thus settled. However, there are doubts on the matter: whether Chou's real intention must be determined according to his "first will" or to his "final will", and which is his "first will." In other words, unlike the case where a man makes wills before death, whether in our specific case changes of will on the part of a political refugee can, as a matter of law, dominate the decision of the State requested asylum—in case of affirmative (1) whether the fact that Chou was permitted to meet leftists who naturally controlled his "free will", has anything to do with law; in case of negative (2) whether a will expressed in a written form takes precedence over later changed wills. Here (2) is also related to another point: (3) whether the decision of deportation by the Japanese Immigration Office is the standard for determining Chou's will as to "where to stay".⁽⁵⁾

The Republic of China protested, chiefly based on doubt (1) stated above. Japan's Foreign Ministry was reported to have advised the Ministry of Justice to delay granting Chou the Leave Port Permission so as to cool down the Republic of China. On the other hand, Ōno, Vice President of the ruling Liberal-Democratic Party, went

(5) This is important as to which is Chou's "final will", legally speaking, see *infra* note 6.

to the Republic of China for relieving the latter's distrust toward Japan. Atmosphere became better, but about the Chou Case the serious situation remained the same.

According to Japan's Immigration Regulations, in the present case, without permission from the Minister of Justice Chou could not leave Japan. From early November, Chou, again advised by leftists, refused to take food, as a form of protesting the delay in issuing such Permission. To support this protest, left-wing Chinese Overseas in Tokyo, equally with instructions from Red China, made demonstration against the Ministry of Justice, and threatened to apply to Court for a Writ of Habeas Corpus.

From that kind of protest, Chou became weak. The Japanese Government, taking into consideration further probable pressures from left-wing force, released Chou provisionally on November 7, and transferred him to the Japan Red Cross Hospital. There Chou was being surrounded by leftists. Against this, the Republic of China protested once more.

The Japanese Government then got anxious to find out a better form of settlement. But time was needed. It therefore extended the time limit of Chou's Provisional Release (on December 7 and December 20), so as to make legally possible further withholding of the Leave Port Permission.

Since the attitude of the Republic of China seemed to be as hard as before, and since it would give way to Socialist Party to press the Cabinet hard about such delay (and perhaps for fear that part of public opinion might one step forward question the "China Policy" which had been maintained for years), to avoid serious political issues, hence political responsibilities on the part of the Cabinet, the Japanese Government, on December 25, sent Mr. Atomiya, Chief of Asian Bureau of the Foreign Ministry, to the Republic of China for the purpose of "persuading" the latter. The Republic of China, however, took this as a consultation visit, and insisted to have Chou sent to Taiwan according to his "free will." Before his departure from

Taipei, Atomiya expressed that he would consult his Government as to the last measure to take on the case. This meant that up to that very moment the Japanese Government had so far not determined what measure was to be taken, which in turn confirmed the consultative nature of his trip. But this was a mutual mistake. On the next day, the Japanese Government carried out the "ultimate identification of Chou's will", and made final decision to the effect that Chou should be permitted to leave for China Mainland according to his "final will".⁽⁶⁾

On December 31, Japanese Foreign Ministry made a statement on the Chou Case. The next day, January 1, 1964, Chou was issued Permission to leave.

Such measures made the Government of the Republic of China recall its painful experiences vis-à-vis Japan in the old days, perhaps as far back as the Konoe Cabinet of 1938, immediately before the Sino-Japanese War, where the phrase "not to talk with the Chinese Nationalist Government" became words in fashion,⁽⁷⁾ in the context of predicted change of the "China Policy" by Japanese Government in future. It therefore protested on January 3, by withdrawing all important members of its embassy in Tokyo, and made a statement denouncing Japan's such "unfriendly" measures.

Meanwhile, all newspapers in the Republic of China, and some in Hong Kong and other Southeast Asian countries, in their editorials named the measure of Japanese Government as "pro-Communist murder", "tricky", "cheating" and "ambitious", by referring to the Manchuria Incident and other "hateful happenings" before the Second World War.

On January 8, the Republic of China was reported to have decided to sever diplomatic relations with Japan, by requesting Philippines

(6) This relates to the point as to whether the decision of deportation by the Japanese Immigration Office (on October 26) was the standard for determining which was the "final will" of Chou, see *supra* note 5 (reference, Immigration Regulations, Article 53).

(7) Togawa, *Showa Diplomatic History*, 1962, p.167.

to represent its interests in Japan. On the same day, to cool down the Government of the Republic of China, Japanese Government considered to request former Prime Minister Yoshida to Taipei to discuss fundamental problems between the two countries, so as to strengthen their mutual relations. Taipei reacted with a "welcome".

On January 9, Chou left Japan for Red China. For Japan this case came to an end. On the same day, the Republic of China protested with a statement full of angry wordings.

Two days later, the Republic of China suspended its government purchases from Japan. A few hours later, Japanese Government determined not to send Yoshida to the Republic of China because "it is not the right time."

On January 14, a group of Chinese student attacked the Japanese Embassy in Taipei. Japan protested.

Before and after this attack, among Chinese people on Taiwan and those overseas, some kind of anti-Japanese feeling was spreading out. Police authorities of the Republic of China strengthened protection of Japanese nationals there, with a view to avoiding violence done to them.

Thus the relations between the two countries came to the worst point in their post-war intercourse, and have remained semi-severed since January 3.⁽⁸⁾

II. Background of the Chou Case

(8) It was reported on Feb. 8 and 9, that at the request of prime Minister Ikeda, Yoshida would visit the Republic of China for the purpose, inter alia, of recovering and strengthening friendship between the two countries. With the burden of the new situation given rise by French recognition of Red China, the Republic of China is bound to compromise, but will of course carry out more positive diplomacy toward Japan. It is therefore necessary for it to send to Japan veteran diplomats, instead of sending semi-diplomats as it did before, so far as it desires, as it must desire, to carry out active diplomacy toward Japan, in the very near future when it feels such semi-severance of relations with Japan undesirable.

Besides that which was given at the beginning of this article, something, chiefly political in nature, lying in the shadow of this case must not be lost sight of. Without the understanding of such "facts behind the facts", one is apt to observe that the Japanese Government was mistaken in not returning Chou to the Republic of China, or that the Republic of China was purely emotional in its reactions with reasons unknown. In such case, no correct trends of policy can be discovered. As a matter of fact, the unfortunate result of semi-severance of diplomatic relations between the two countries may properly be said to have derived from misunderstandings between the two Governments—they overlooked each other's real intentions in the situation.

To begin with, the then rumoured French recognition of Red China was the decisive point behind the screen. This gave impacts to both countries.

Such rumour brought Japanese public opinion to support the pressure from left-wing on the Government for early recognition of Red China. The Government was reported to tend to reconsider its "China Policy". It was clear that, similar to prime Minister Ikeda's "low posture" defense of the "prudentialism", this was only some kind of pretense tantamount to political and social self-defense as against the Progressive Camp within Japan, seeing that there was, and still is, no hope for realization of such "reconsideration". Nevertheless, such report sounded unpleasant to the Republic of China which did not fully understand the real intention of the Ikeda Cabinet. As a matter of fact, implied in such news reports there was at least possibility that with this chance Japan might get closer to Red China. And to the Republic of China this was interpreted to be something more than it really meant or possibly would mean: that Japan was threatening with the diplomatic arms of "two Chinas" policy. This not only is directly opposed to the fundamental policy line of the Republic of China, but also hurts its feeling that Japan treated it with contempt.

This is no mere speculation. Before the Chou Case occurred, there had already been anger and suspicion on the part of the Republic of China toward Japan, due principally to the fact that Japan had been getting too close to Red China through trade as well as other sorts of intercourse. And the concrete facts are: (1) late in August 1963, Japanese Government approved export of vinylon plant to Red China on the basis of deferred payments; (2) on September 17 of the same year, Prime Minister Ikeda, in an interview with foreign correspondents (from USA), when asked about possibility of success regarding Republic of China's counter-attack against Red China, gave negative reply with seemingly scoffing remarks; (3) Ikeda, in his trips to Southeast Asia, excluded the Republic of China from his itineraries. There are too many examples to be cited. Even during the Chou Case, expressions by the Japanese Government annoyed the Republic of China to a high extent.⁽⁹⁾

Thus, the Chou Case is only a fuse of, nay, rather an unexpected spark on, potential explosive. The very fact that Chou was member of a "delegation" sent from Red China to Japan, itself tells everything true: the Republic of China is disgusted at Japan's trade with Red China, which amounts to "assisting the enemy of the Free World", and at Japan's getting close to Red China in any other form, which in the long run will possibly lead to realization of the "two Chinas" theory most hated by the Republic of China; and there is suspicion on the part of the Republic of China toward Prime Minister Ikeda for his doubtful attitude of the past years, perhaps going back as long as the time when he was his party's

(9) For instance, Prime Minister Ikeda, in his New Year Greeting to the Japanese people and in his New Year Interview with Japanese correspondents on what he would do for Japan, touched the "China Problem" by saying that "that Japan feels close to Red China is a matter of course" ("The Mainichi Shimbun," January 1, 1964), and that "trade with Red China will be increased by geometrical progression; this may not please the Republic of China, but it is Japan's business" ("The Tokyo Shimbun," January 1, 1964); and some other government heads expressed the view that Taiwan's legal status was undetermined, etc.

Secretary-General.

On the disposal of the Chou Case in particular, there were, besides the then scheduled French recognition of Red China, something more behind the diplomatic war between the two countries.

So far as Japan was concerned, leftist force was, and still is, too strong to bring troubles of highly political nature to the Ikeda Cabinet, in case the Government determined to send Chou to the Republic of China. Especially, the Socialist Party, to avoid making Red China angry, was pressing hard on the Ikeda Cabinet in the Diet, so as to impede further attempts by the Government to try relieving the anger of the Republic of China. Even within the ruling Liberal-Democratic Party, Prime Minister Ikeda was in face of the force of pro-Red-China Lobby. With the hope of a "long-term cabinet", Ikeda must prevent troubles, both inside and outside of his party. For him, the fewer troubles, the better; and if troubles be inevitable, he must choose the least troublesome to fight. It is probable, on the other hand, that he, being a realistic person, somewhat tended to give weight to Red China over the Republic of China, though many of his cabinet members might not share his view. One more point: the Japanese Government was in fear that should it send Chou to the Republic of China or let him stay in Japan, during the Tokyo Olympic Games to be held in October 1964, this could become something encouraging representative athletes from Communist countries, in which case it might have to face more serious problems and this might, consequently, spoil Japan's national efforts for that Games which has important bearing on Japan's national pride and international status.

So far as the Republic of China was concerned, the delivery of Chou to Taiwan would not only mean that it won a battle in the diplomatic field as against Red China, but also make a crack between Japan and Red China, seeing that such delivery would naturally push Red China to adopt negative attitude toward trade or other

intercourse with Japan.⁽¹⁰⁾ All these to the Republic of China had much to do with its international status and domestic (including China Mainland) prestige;⁽¹¹⁾ and especially meant too much to it, at a time when the international environment became so bad, as a result of the scheduled recognition of Red China by France. In this regard, two psychological facts must be taken into account in addition: (1) Hatred toward Japan during the Sino-Japanese War had not totally disappeared as among government officials of the Republic of China; and (2) Since the Peace Treaty(1952) between the two countries their economic relation had come so close to each other, that Japan became the biggest buyer, which means, in turn, that the Republic of China to a large extent depended on Japan, so far as national economy was concerned, and therefore, the Chou Case was made use of by the Republic of China to realize the desire of shaking off such economic dependency.⁽¹²⁾

With the above background in mind, both the disposal of the Chou Case by Japan and the reactions by the Republic of China seem to be politically rational. However, juridically, they are both erred.

III. The Real Nature of the Chou Case—the Juridical Aspect

Purifying the background, and we discover that the international juridical issues of the Chou Case rise to the surface. It is very curious that in both countries not a single comment on this case, scholarly or otherwise, has discussed it as a case of international law in the proper sense, or even mentioned its international legal aspect. They treated everything connecting with the "China Problem"

(10) This refers to the "Nagasaki Flag Incident" of 1958, see *infra* note 31.

(11) See *infra* Section III, on "constructive personal jurisdiction" of the Republic of China over people on China Mainland.

(12) More are reserved for later discussions of policy trends. For details on such background, there are too many publications. Two of the best seem to be: Shimura, "Exploding Point at the Chou Hung-ching Case", in "Sekai Shuho" ("The World Weekly"), January 28 issue, 1964, pp. 14 et seq., and Fujii, "Impeaching Japan's 'Benefit at the Expense of Righteousness'", in *ibid.*, p. 20 ff.

as political or moral issue, as if there were no international juridical norms regulating the matter.

In truth, according to the facts stated above, the Chou Case, being a case claimed to be one of political asylum (refugee problem in the broad sense), is a typical case of international law. This critical point being ignored, no wonder the results became so unfortunate.

From beginning to end, it is interesting to see that the assertions of both countries were the same but were meanwhile uncompromising. They were the same, because both resorted to "humanity"; they were uncompromising, because they were parallel—while Japan took this case as one to be determined by her domestic laws, the Republic of China, as one by international law.

Thus, the central point is: whether international law, or municipal law, must prevail, if humanity can not be plural. This, needless to say, is a question of international law.

The Republic of China, on the one hand, contended that this was a case of political asylum, matter of universal human right to flee oppression, hence international law should be applied,⁽¹³⁾ and that the matter should be determined by Chou's first will; Japan, on the other hand, asserted that this was a case of over-stay, hence the Immigration Regulations was the law on the matter (human right to determine one's residence according to one's final will). The two ran directly against each other: "first will" vs. "final will".

Considering the facts given above, that Chou at the very beginning asked for political asylum raises no doubt. The question is, therefore, three-fold. First, which one of Chou's wills, which contents are one in contradiction to the other, should prevail? In

(13) According to Japanese Constitution (Preamble and Article 98), general international law and treaties to which Japan is a party, shall be respected by Japan. This means that such international laws take precedence over domestic laws, the Constitution being excepted. Cf. Yokota, *International Law*, vol. I, 1955, pp. 88-89; Takano, *Constitution and Treaty*, 1960, p. 209. There is no serious question as to which of these two laws was to take precedence in their application to the Chou Case.

other words, whether it was proper for Japan to recognize Chou's "final will" (to return to Red China, hence excluding possibility of "political asylum"), as against his "original will" (to request for political asylum). Secondly, whether Japan was under some international obligation in handling this case. Here, as the *sine qua non*, it must be asked whether there existed international juridical norm (or norms) on "political asylum" in general. Thirdly, if the second question be answered in the affirmative, then, whether there was a norm applicable to the Chou Case in particular; if so, what would be the results?

(1) Which one of Chou's wills should prevail?

On this point there is no rule in the law itself nor precedent *res judicata*.

Chou defected from his group and requested for asylum. The reason for such request was, chiefly if not solely, ideological oppression. Such a case is no doubt political in nature in our age. In an article very rare of the kind, giving a "general" definition to the term "political refugee", Balogh says: "(political refugees are) people who have left their country of origin or domicile because of political or religious events."⁽¹⁴⁾ Religion belongs to the sphere of ideology. And, being a political refugee requesting for political asylum, Chou's psychological condition was the most important thing to be considered. On "Refugee's Mentality", Balogh continues: ".... he (the political refugee) looks back upon his previous life and longs to return to it as the obvious solution to all his difficulties. This longing to return, this hope that he may be able to go back to his homeland, is a fundamental element in the refugee situation and can be termed the basis of refugee-mentality. But what hope of returning has the political refugee? His return depends on a complete reversal of policy in his home-country.... A reversal of policy could probably be effected only by a revolution.... But he would likely not have gone out into exile

(14) E. Balogh, "World Peace and The Refugee Problem," in *Recueil des Cours, L'Académie de Droit International de la Haye*, vol. 75 (1949 II), p. 373. Brackets mine.

if he had not considered submission worse than exile..."⁽¹⁵⁾

It is beyond reasonable doubt that when Chou defected into the Soviet Embassy in Tokyo, he had determined to take all risks, including those which might fall on his family left behind in Red China. He had made a decision, firm enough. Such decision could be altered, in ordinary case, by Red China's change in policy or ideology. But there was no change in Red China's policy or ideology, as there had not been revolution or *coup d'état* leading to such consequence. And due to the reason that it is only the change of will, done freely by the political refugee himself, that shall be considered in case of reasonably determining a political asylum case, the only presumption for Chou's changing his wills would be: that he did so according to his own free will. But, in the context of "refugee mentality", how could this be done? There must have been something psychologically more powerful to overturn his decision of requesting for political asylum. What could be this "something"? Perhaps his worriness about what might happen to his wife and children in Red China. But, again, had he not decided to let his family take the risks? If so, why did he make such contradictory wills? Here it is only conceivable that some pressure was made on him, and objective facts tell that leftists pressed on him for change of will. Under such circumstances, if this can be called "changing will freely", it can only be a 'forced' "free will". And a 'forced' "free will", except in Rousseau's specific sense, is, in all other cases, not a "free" will at all.

We therefore conclude that, reasonably, the disposal of the Chou Case must follow his "original will". In result, Japan acted mistakenly in recognizing the effect of Chou's "final will", whatever it was.

(2) Whether there existed an international juridical norm on "political asylum" in general?

It is very unfortunate that at the present stage of international

(15) Ibid., pp. 389-390. Brackets added.

law the rules on general political fugitive are by no means clear.⁽¹⁶⁾ Whether to grant or not to grant asylum to a political refugee is, as a rule, for the State, which is requested shelter, to decide. This means that it is the requested State, and not the political refugee or another State acting on his behalf as a result of application of law, that has a right of or a claim to asylum.⁽¹⁷⁾

But there is another side of the picture. There exists a special situation in China, and there are special juridical relations between Japan and the Republic of China regulated by the Peace Treaty of 1952. These facts make the Chou Case something *sui generis*, and touch the question as to how it was possible that the Republic of China had the right to require that Chou, who came from Red China, be sent to Taiwan, even if Chou's written intention to go there be taken as his "original will" the effect of which was not recognized.

At the moment Chou stepped on Japanese soil, according to international law Japan's territorial jurisdiction took precedence over the relation, factual for Japan, between Chou and Red China.⁽¹⁸⁾ And since Japan did not, and does not, recognize Red China *de jure* or *de facto*, it would be hard for Japan to admit Red China's claim of personal jurisdiction over Chou when Chou was on Japanese territory. In law Red China could not so claim, not at least toward States not recognizing it.⁽¹⁹⁾ What remained, then, as the only tie

(16) See, Oda, "International Legislation on Protection of Refugees", in "Jurist", No. 282, September 15, 1963, pp. 41-6.

(17) Oppenheim, International Law, Vol. I, 8th ed., 1961, pp. 677-678.

(18) As a matter of course, this must be differentiated from the case of personal jurisdiction *de jure* and *ab initio*.

Cf. Oppenheim, *ibid.*, p. 676; Monaco, *Manuale di Diritto Internazionale Pubblico*, 1960, pp. 302-3; Borchard, *Diplomatic Protection of Citizens Abroad*, 1922, Preface and § 14.

(19) There is therefore difference between this case and similar cases occurred before in the United Kingdom and in Sweden, etc., had such States taken measures similar to those which were taken by Japan in the present case. However, they returned the Red Chinese defectors to the Republic of China with which they maintained no diplomatic relations. The Chou Case is, in this sense, unique and important for the future, and hence the attitude of the Republic of China on this case is quite understandable.

between Chou and Red China was Chou's "sense of allegiance" or obedience which, in this case, became subjective on Chou's part.⁽²⁰⁾ Correspondingly, as soon as Chou signed the paper, to the effect that he would go to the Republic of China, which signified that he would not go back to Red China, his subjective factual link of allegiance toward, and obedience to, Red China was cut off. In such a situation, the Republic of China, being a State recognized by Japan, would have a right to claim that it had personal jurisdiction over Chou, as a result of Chou's free choice. Such jurisdiction may be doubted, as it is constructive in nature; nevertheless, it must be remembered that all personal jurisdictions over citizens abroad are constructive or rather, fictitious in nature — *de jure* jurisdiction in contradistinction to actual bodily control.⁽²¹⁾ This directly relates the concept of "effective control" which has been deemed the decisive point in the "China Problem" and, particularly, in the Peace Treaty between Japan and the Republic of China of 1952. It also signifies that Chinese people not under actual control by Red China on the mainland and, *a fortiori*, twenty million overseas Chinese, are, in law, under the jurisdiction of the Republic of China, on the conditions that this applies to those who obey it and that the States on whose territories such Chinese people reside or stay, recognize the Republic

(20) See Laski, *A Grammar of Politics*, 4th ed. (14th Impr.), 1960, pp. 21, 250; Max Weber, *Die Typen der Herrschaft*, in "Wirtschaft und Gesellschaft", 1925, Dritter Teil, Kap. I, Kap. III.

(21) By the same token, it is clear that, so far as the "nationality" of Chinese abroad is concerned, the Republic of China is of right to claim diplomatic protection, if such Chinese declares his will to this effect. It must not be overlooked that the Japanese Government treats Chinese from Hongkong as belonging to the Republic of China, to the benefit or for the convenience of Japan. Japan is thus estopped in this respect. Cf. Borchard, *op. cit.*, § 4; Kelsen, *Principles of International Law*, 1952, p. 248 ff.; Verdross, *Völkerrecht*, 1950, Kap. X, (D), IV; MacIver, *The Web of Government*, 11th Printing, 1953, Chs. 2-5, Ch. 13. The Sino-Japanese Peace Treaty of 1952 and Exchange of Notes attached thereto, in regard to "effectivity" of the Republic of China over China Mainland and the people there, are, accordingly, irrelevant here.

of China *de jure*. This is the true reason why the Republic of China reacted so furiously in this case. If this is so, then it would appear that the Republic of China had a right, while Japan was under an obligation, both in the juridical sense, to have Chou gone to Taiwan.

Here we have the idea of what may be termed "split of the concept of effectivity"; namely, even if the control of China Mainland (territory and people) by Red China be admitted, a State that recognizes the Republic of China will still have to respond to the claim by the Republic of China of her personal jurisdiction, with the consents of the persons in question, over Chinese not on China Mainland, including those who left China Mainland for a moment but who have declared to submit themselves to the Republic of China. From another angle, at the moment when Chou stepped into the Soviet Embassy in Tokyo and requested for political asylum, that is to say, as soon as he refused to return to Red China, his intention and act made it completely clear that *ipso facto* he no more obeyed Red China. Such obedience, once denied, can be recovered only when Chou actually steps into Red China anew and under actual control by Red China (factual territorial jurisdiction over Chou). This is so for Japan which does not recognize Red China. The situation being such, Chou had as from that moment lost any protection, even factual protection. Under this circumstance, it is legal, and in fact humane, that some State—Japan or the Republic of China— must protect him, if the Soviet Embassy had refused him asylum. And if Japan did not do so or did not want to do so, all would be left to the Republic of China.

But it may be argued that perhaps Chou's "original will" was not to go to the Republic of China, but to stay in Japan, after he had been refused asylum by the Soviet Embassy. That is, as soon as Chou was delivered to the Japanese police authorities, his "original will", namely, the will to stay in Soviet Russia or its embassy, became void and his second will, the will he expressed in the Japanese Immigration Office later, to the effect that he would stay in Japan, took the place

of the "original will".⁽²²⁾

To the above argument, the answer is this : the above norm is not the only one concerning this case ; under international law, there is another norm, of the same category, in another shape, and perhaps the true shape which has not been paid attention to by both the Japanese and the Republic of Chinese governments, nor by any article on this case. This is the norm on "political criminal", to which we now turn.

(3) Whether there was an international juridical norm regulating the Chou Case in particular. If so, what would be the results ?

If the above juridical logic on the Chou Case as one of political refugee (or fugitive) requesting for asylum, holds good, **automatically** it applies to the case of a "political criminal" and, in Chou's case, to his request to stay in Japan, though not necessarily to go to the Republic of China.

According to general international law, a political criminal (or political offender), if identified, is non-extraditable.⁽²³⁾ Accordingly, the points here are : whether Chou could be classified as a "political criminal", and what would be the results if this point is answered in the affirmative.

A political criminal, in an asylum case, differs from an ordinary political refugee, in that he is a "political refugee+committed some political crime against his home State". Hypothetically, if Chou was a political criminal, then Japan would have international juridical obligation in

(22) See, Edo. op. cit., p.76. Here a contrary but seemingly true fact reported by papers, that Chou went to Soviet Embassy only by mistake, is still a serious point to be considered. Fact-finding in this case is, therefore, very consequential. But the question as to which fact is true fact, unfortunately, remains in the circle of "Riddle", as the "Asahi Weekly" called it.

(23) This is a universal principle, see Briggs, the Law of Nations, Cases, Documents and Notes, 1938, p. 315 ; Scott and Jaeger, Cases on International Law, 1937, pp. 392-8, and notes 44, 45 and 49 on following pages ; Oppenheim, op. cit. pp. 707 and 710. See further, *de lege ferenda*, Harvard Research, Draft Convention on "Extradition", Article 5 (in American Journal of International Law, 1935), and the Resolution by the Institut de Droit International (1950).

the disposition of the case. Such obligation would exist, on the international plane, toward the Republic of China, if the latter had personal jurisdiction over Chou and duty to give Chou diplomatic protection. In that case, according to international law Japan could not be free from such obligation, with the only defense that, unlike the laws of many countries (e.g., constitution of France and of West German Republic), in her laws there is no such thing called "political criminal" (as in fact this is the case under postwar Japanese laws). This is so, if we recall that Japan recognizes the government of the Republic of China which was under a duty toward Chou, and had a right toward Japan in regard to Chou, for his diplomatic protection.⁽²⁴⁾ Under this hypothesis, Japan, having paid no heed to Chou's claimed special status as expressed in his original will and the act of defection, instead sent him to Red China according to his final will made under pressure, was in breach of the obligation of non-extradition which, toward the Republic of China, took the form of obligation to answer to the latter's request concerning diplomatic protection in Chou's behalf. If, as having been remarked, Japan had the right to decide whether or not to grant asylum to Chou, and if she decided not to so grant, she should have delivered Chou to the Republic of China, or other countries if Chou wished.

That there were an intention (not to return to Red China but rather to request for asylum) and an act (defection) leaves no doubt in the Chou Case. It stands to reason that for Chou to be a political criminal, either his act of defection, or his intention to refuse to return, must be criminal in nature. But to what should such criminal nature be referred? Since Japan has no such thing called "political crime" in law, it must be referred to Red China's laws. Such laws, for Japan which recognizes the Republic of China, the rival in the civil war aimed at maintaining legitimacy as against Red China, remain pure fact and nothing more than fact.⁽²⁵⁾ Now, in Red China's

(24) Balogh, l.c.; Borchard, op.cit., Preface and § 15.

(25) This is not to be confused with the case where a court of a State, in deciding a case before it, applies a law, or follows a court decision, of

special criminal law (e. g. anti-Revolutionary Regulations, etc.), Chou's act of defection *per se* was a crime subject to very severe punishment (including capital punishment), disregarding his intention and/ or motive behind it.⁽²⁶⁾ Such crime, though juridical, is, doubtlessly, also "political" from viewpoint of the legislative motive giving birth to such regulations as a whole, and of the common nature of the crimes mentioned in that regulations. Chou was therefore a "political" "criminal", pure and simple.

In this respect, warning must follow immediately that a political refugee is not necessarily and always a political criminal. There are a lot of precedents, especially in Latin American countries where *coup d'état* is something *à la mode*, even act of requesting foreign embassy for political asylum (extraterritorial asylum) is not, under domestic laws, a crime at all. It must be further stressed that there are even many treaties to such effect.⁽²⁷⁾ In Chou's case, he became a political refugee and a political criminal simultaneously. It would be impossible for him to commit some visible crimes, political in nature, on China Mainland (e. g., to assassinate Mao Tse-tung, etc.) while he happened to be on Japanese soil, so as to convince the Japanese Government that he was a typical political criminal; and indeed it would be against reason to require of him the committal of such an offense as substantial proof of his qualification.

From the above, it seems that the Republic of China had a right

another State. In such case, such law or precedent, being foreign, is always treated as "pure fact".

- 26) It should be added that even the "intent" to defect is, in Red China, punishable politically, through secret police without due process of law. This is why public opinion in the Republic of China termed Japan's determination to send Chou back to Red China "act of murder". The fact that after returning to Red China Chou was not punished, is a result of political consideration. Such fact, in discussing pure legal points, is irrelevant. Furthermore, since the punishment of "intent" is, in Red China, independent of change of intent (in Chou's case, change of will in favor of Red China), it is hard to be sure that Chou will never be punished, in some special form, by the secret police on political grounds and for his "first will".

(27) Oda, in "Jurist", No. 281, cited in *infra* note 34.

at least to ask that Chou not be sent to Red China.

Naturally, in defense of her position, Japan also has something to say. She may contend that a man like Chou, who changed will from time to time, was not qualified to be treated as political criminal. This is true, but not good defense; for, this is beside the point. The point is: Chou's personal status in Red China being irrelevant (let alone the problem of "will"), Japan had to examine, and after such examination to give determination, and to inform the Republic of China, as to whether Chou's defection was political and/or criminal in nature, with full reasons given. Though it appears that it would be very difficult for Japan to hold the negative, a line must be drawn, as a matter of law, between whether Japan did examine this point, and whether her determinations were reasonable and her measures, appropriate. In the latter case, it is a matter of degree, and there could exist a dispute between the parties on the concept of political refugee or political criminal and on the correctness in cognizance of facts; in the former case, the inaction on the part of Japan infringed the personal sovereignty of the Republic of China and is a matter of juridical principle. Japan, *ab initio*, had not even had the intention to consider whether Chou's defection was political and/or criminal in nature. Such inaction alone entails its international responsibility. Whether Chou was or was not political criminal in fact, is, therefore, no effective basis of argument for excuse.

IV. Policy Trends of the Republic of China and of Japan in the Chou Case

Though the juridical situations are clear, this article is not one restricted to discussions of juridical issues, nor are we interested solely in the pros and cons of juridical logic. After all, the above juridical situations were not seriously considered in the Chou Case. However, they are important for knowing the policy trends of the two countries in the Chou Case which brought about the worst state of affairs in the post-war relations between them and which will base

our predictions. This can be done, through inference from the background and a comparison of the juridical situations with the actual stands taken by the parties.

The background and the juridical situations stated in Sections II and III respectively being kept in mind, it is evident that the true issue in the Chou Case was not at all the Chou Case itself, so far as the foreign policy trends of the two countries are concerned. The true issue is: under the impact of the then scheduled French recognition of Red China, both countries had their difficulties at that time and ambitions for future. That is to say, the Chou Case was a screen, behind which the real actors were fighting for something else.

(1) Japan

(A) Difficulties—Japan's difficulties were, and remain, chiefly domestic. Far more serious than in other States, every issue of foreign affairs is simultaneously and automatically a domestic political issue for Prime Minister Ikeda. The progressive force (chiefly the Socialist Party) and the rival groups inside the ruling Liberal-Democratic Party will lose no chance to make full use of this Japanese political trait, which comes from the fact that in a metaphoric sense there are two Japans (split in public opinion), two governments (labour and student organizations and the Government), and governments behind the Government (factions within the ruling Party).

Confronted by such strong challenges, it is a matter of course that the Government side should avoid politically undesirable happenings to the utmost extent. This determined the Government attitude in the Chou Case.⁽²⁸⁾ There is no supra-party basis for Japan's foreign policy.

(B) Ambitions—But if there were difficulties, there were also ambitions on the part of the Ikeda Cabinet.

Basing on post-war Japanese realism and on the vision of a Great Japan, the Ikeda Cabinet, like all post-war cabinets, is struggling

(28) The readers are referred to Section II above, on background of the case.

for its "independent" diplomacy, as the Conlon Report correctly points out. The Ikeda Cabinet, since its succession to the former Kishi Cabinet, has stressed from time to time that Japan is a Great Power, meaning that she is the leader in Asia and equal partner of USA, under the guide of the principle of "primacy of the United Nations". This is the fundamental line which Prime Minister Ikeda has in mind on foreign affairs. It is a reflection of the national volition and a result of the ever-changing post-war international environment. It is perhaps the *raison d'être* of every post-war cabinet.

What will be the evolved form of this foreign policy line is, in Prime Minister Ikeda's mind, a "co-existence" scene, with economic development, and even economic survival, as its target, and with the absence of political pressures as support in a passive sense.

But such "co-existence" foreign policy line presupposes more trade, and more other sorts of intercourse, with Red China in the first place. This is destined to cause troubles between Japan and the Republic of China. And, since the Ikeda Cabinet, for the time being perhaps, will not, or rather cannot, get too close to Red China without considering the very existence of the Republic of China, its policy trends on all issues related to the "China Problem" lose direction, and sometimes seem to be nopolicy at all.⁽²⁹⁾ This is a dilemma, a somewhat fatal dilemma. Such dilemma did not mean too much to the past cabinets which stood firm, that is, firm in maintaining friendly relations with the Republic of China at the cost of Red China. However, in the case of Ikeda Cabinet's "co-existence" diplomacy, as the name suggests, the dilemma stands on the brink of explosion. If this is correct, then as a matter of political survival Prime Minister Ikeda should solve or try to solve it. It is therefore possible that, at least in the later stage of the Chou Case,⁽³⁰⁾ he made use of it

(29) This was criticized by many a Japanese observers and public opinion at large during the Chou Case as well as before and after it.

(30) It is clear that the Cabinet touched the case only at the later stage where legalism dominated. However, under the law regulating the matter

to test the possibility for his future "forward attitude" towards Red China, and the maximum reactions from the Republic of China on this point. If in fact he did so, then he did so partly for the sake of appeasing the opposition forces, within and out of his Party. It is evident, in any event, that he is desirous of trading with Red China, especially when France seems to have got the chance in advance of Japan. No matter how much he was successful and is to be successful in the establishment of his "unique" policy, and to whatever extent might he think about such trade, there is no doubt that he did not want something similar to the Nagasaki Flag Accident of 1958 to occur.⁽³¹⁾ He could not afford to have it repeated, as objective circumstances within Japan did not allow such repetition with the domestic political *status quo* kept unchanged.

(2) Republic of China

(A) Difficulties—The difficulties of the Republic of China, on the other hand, were mainly international. The Chou Case not only was linked to its fundamental policy of liberating the people on China Mainland, but also touched its international status, within and without the United Nations, at a time when France was going to menace its survival through recognition of Red China. In result, her reactions against Japan had two implications at least: First, through attacking Japan, indirectly requesting France to re-consider the recognition schedule if there was still room for such re-consideration; and secondly, to warn Japan that though she might not be able to stop France from acting, she had arms to stop Japan from doing the same thing (including large scale trade with Red

there was still room for political interference, and even control, by the Cabinet, in favour of the Republic of China.

- (31) In that case the Republic of China protested, and the Kishi Cabinet, taking a firm stand, determined in her favour. As a result, Red China declared interruption of all trades with Japan, and aroused attacks against the Kishi Cabinet. For facts and critics, v. "International Year Book", vol. II, 1958 (published by "Nihon Kokusai Mondai Kenkyujo" -Japan. International Problems Research Institute), p. 141. ff., p. 155 ff.

China which is bound to lead to the situation of "two Chinas" through *fait accompli*).⁽³²⁾

(B) Ambitions—The reactions of the Republic of China in the case were, therefore, tantamount to preventive diplomatic self-defense in the broad sense, less for the Chou Case than for the future, hence more for fear than for angry. This was a hard fight—a chance it must take for any price.

In connection with the above, it is probable that the Republic of China made use of the chance, in a negative manner, to stop Red China's influence in Japan and, in consequence, to destroy all possibilities for Japan to get closer to Red China, in the event where Chou was delivered to her. In such case, she would be in a better position, as a result of a diplomatic victory over Red China, in the matter of her legitimacy in the sense we made clear in Section III.

Such hypothetical effects presuppose the consequential situation similar to that of the Nagasaki Flag Accident referred to in the above. The same arms brought for her a victory in the Kishi Cabinet period, but a defeat in the present case. She overlooked, perhaps intentionally disregarded, the differences between the two cabinets in their leaderships as well as in the social backgrounds of Japan generally. Lack of variability in choosing diplomatic arms adapting to changeable situations, was one of the fatal defects on the part of the Republic of China.

Thus, mistake in this diplomatic war against Japan made the Republic of China suffer a defeat. In other words, it was fully aware of the juridical situations we discussed in Section III⁽³³⁾ but reacted wrongly. In consequence it deprived itself of the juridically favourable

(32) This is "to kill two birds with a single stone", and is also one of the mostly used tactics in traditional Chinese politics, called "killing the chicken so as to teach the monkey".

(33) Nearly all official oral protests and statements by the government of, and many of the editorials on newspapers in, the Republic of China pointed, unconsciously, to the centre of the juridical situations we discussed, in terms, however, of anything except positive international law.

position. It knew what to do, but ignored how to do.

First of all, the Republic of China, though it had a juridical right about the Chou Case as shown in Section III above, nevertheless gave it up unknowingly, by using other arms in attacking Japan.

From beginning to end, it insisted that this was an international juridical case. This is so far correct. However, the basis on which it put its claim was morality, and not international law proper. This not only deprived its assertions of convincing force but, correspondingly, also gave Japan the chance to apply domestic law to the case without any hardness in law.

In alleging "international law (of humanity)", the Republic of China resorted, *inter alia*, to the Declaration of Universal Human Rights adopted by the General Assembly of the United Nations (1948), and the "international usage" carried out by the United Kingdom and Sweden, etc. above referred. It is conceivable that it had also in mind many treaties on the matter signed among many countries after the Second World War.⁽³⁴⁾ It is further thinkable that it was asking Japan to carry out the latter's traditional political principle of giving special consideration to Chinese political fugitives.⁽³⁵⁾ But all these are either not law but political expediency, or though law but law not for Japan and the Republic of China *inter se*.⁽³⁶⁾ Under the circumstances, with moral obligations put aside for the moment, the Republic of China having played wrong cards, there is no surprise that it was taken off diplomatic initiative at

(34) Oda, "International Treaties concerning Refugees", in "Jurist", No. 285, November 1, 1963, pp. 32-6, and "Legal Systems regarding Protection of Political Fugitives", in *ibid.*, No. 281, September 1, 1963.

(35) This goes back as far as the pre-Kuomintang period, where Japan gave shelters to Chinese revolutionists against the Ching Dynasty, nearly without exception. By so doing, in Dr. Sun Yat Sen's idea, Japan became the bed of China's revolutionary movements. Thereafter Japan has carried out this practice consistently, thus gives such practice the nature of a principle or tradition, in the eyes of the Chinese.

(36) Neither the Republic of China nor Japan has signed such kind of treaty, hence no problem of right and obligation arises.

the beginning, and lost the case at the end. She was reported to have prepared to submit this case to the International Court of Justice. If she does, she is destined to lose a law-war.

Secondly, and what is more potential, is the fact that there existed something uncompromising, better qualified "direct crush", between the two countries.

In simple terms, from past experiences in the struggle against Communism the Republic of China asserts that there is only one way, and no other ways, left for anti-Communist movements, namely, force against force, else compromise to surrender. From such extreme and monistic anti-Communism thesis, in its eye it follows that as an anti-Communist country belonging to the Free World Japan should not contact with Red China and, since Japan has no army, what she can offer is only economic blockade: not to trade with Red China. However, on the part of Japan, the what may be called "relative and dualistic anti-Communism thesis" is adopted; to wit, it is not necessarily the severance of all relations with Red China that is the only way of anti-Communist movement. From this the Ikeda Cabinet could say that trade with Red China is exactly one of the Japanese-style of anti-Communist contribution: Japan is facing invisible but continuous economic crises, and only such trade can solve such crises; if such trade be impossible, Japan would fall into domestic economic and political, and may be also social, turmoil; it, therefore, conforms to logic that, in order that Japan may stand against Communism, the pre-requisite is to let her develop her national economy so as to stop political troubles made by leftist force in Japan. Here lies a difference in the means toward the same end—anti-Communism.

But this is exactly what the Republic of China opposes. For the purpose of convincing Japan, it makes three points clear: (1) that Japan should not ignore that the Republic of China and other Asian anti-Communist countries are fighting at the front-line against Red China, which fact is the *sine qua non* for Japan's survival and prosperity;

(2) that Japan should not forget that after the war President

Chiang Kai-shek saved two million Japanese soldiers and civilians on mainland from Communist cruel revenges; and (3) that Japan should remember that the present prosperity of Japan comes from President Chiang's decision of rejecting the suggestion made by USSR immediately after the war, that Japan be made the Second Berlin. Nonetheless, the reality in Japan is: (1) not much people believe in the strategy of "the Island Chain", hence the Republic of China's military contribution to Japan, indirect but paramount, is not widely appreciated; ⁽³⁷⁾ (2) the young generation, which composes of the majority of Japanese voters, paying less attention to morality, does not, as the old generation does, understand the significance of the generosity shown by President Chiang 18 years ago-even among the old generation, many think that Japan's signing of the Peace Treaty in 1952, when the Republic of China retreated to Taiwan, was some kind of repayment for such generosity; and (3) the Japanese people has no solid sense of the pains suffered by a split country. The case being so, it goes without saying that the above warnings made by the Republic of China do not sound convincing to the Japanese people in general.

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From the above, a general picture of policy trends may be drawn.

- (37) More particularly, while the Republic of China is in a state of civil war, post-war Japan is dominated by the utopia of permanent universal peace. Accordingly, the military contributions by the former, in the eyes of a considerable portion of Japanese people, perhaps including also many leaders in all circles (even government Heads), are, curious enough, understood as hindrance to Japan's prosperity and menace to international peace. In this regard, it may be helpful to cite a public opinion poll made a few months ago, with the result that less than half of the Japanese think that Japan should remain in the Free World. This, of course, does not mean that they are pro-Communists. Such result is rather natural from post-war Japanese psychology: with the most important problem of national safety solved by USA military force, they get into some kind of peace-mood inertia. Lack of experience in facing Communist direct aggressions, most Japanese see Communist threats as something unreal.

The policy trend of the Republic of China in this case was dominated by morality. Fitzgerald is right in pointing out that as manifestation of one of the important national character, the Chinese is apt to mix morality with law.⁽³⁸⁾ But such character has as its basis the tendency to confuse the ideal with the real, which, at the present stage, is coloured by military motive.⁽³⁹⁾

By contrast, in the Chou Case Japan based her actions on legal formalism, with economic motive behind; that is, with a vision of enlarging scale of trade with Red China, actively or passively on the part of the Cabinet-economic realism.⁽⁴⁰⁾ Such was the policy trend of Japan shown in her diplomatic war against the Republic of China, made clear in official statements and publications, equally innumerable.⁽⁴¹⁾

Thus, the Chou Case took the shape of direct collision in policy trends: the military and idealistic vs. the economic and realistic. From this *ipso facto* appeared the conflict that, whereas Japan took Chou Case as one *ad hoc*, the Republic of China, a matter of principle. The two were once more parallel. This is the most significant point which led to all unfortunate results. And it is correct,

(38) C.P. Fitzgerald, "Revolution in China", 1952, Ch. One.

(39) Too much evidence can be given in this regard. During the Chou Case, all editorials of the newspapers published in, and all official statements issued by, the Republic of China drew one to come to such conclusion. Even verbal protests made by her against Japan were no exceptions. For important references: Report on an exclusive interview of the Foreign Minister of the Republic of China by Mainichi Shimbun correspondent (the Mainichi Shimbun, January 3, 1964); Comments on Ōno's visit to Taipei (the Asahi Shimbun, January 8, 1964); Official Statement made on December 28, 1963, protesting Japan's provisionally releasing Chou and decision to issue Leave Port Permission; Statement made on January 10, 1964, protesting Japan's returning Chou to Red China.

(40) Cf. C. Martin Wilbur, in H. Borton et alra, "Japan between East and West," 1957, Ch. Five, p. 239; and W. J. Jorden, in *ibid.*, Ch. Six, p. 265. Especially, see C. Yanaga, "Japanese People and Politics", 1956, p. 45.

(41) Government Statement to the Republic of China, made on December 30, 1963, asking for understanding on Japan's disposition of the Chou Case; Prime Minister Ikeda's New Year Greeting to the people and interviews, cited *supra* in note 9.

when many Japanese critics blamed their Government for its ignoring the real meanings of the Chou Case, because there might be no troubles if it studied this case deeper.

Be that as it may, such collision and parallel attitudes are the by-products of the differences between the two countries, in their respective social structures, political ideas and systems, political and economic situations, views on military strategy and national safety as a whole, and on law and politics, and even difference in the "degree" or quantity of anti-Communist ideology, national characters and international environments.

But if the Republic of China lost the case, neither did Japan win one.

On the one hand, the Republic of China lost the case, but abstained from using her ultimate diplomatic arms—formal severance of relations, due, with De Gaulle Typhoon in mind, to the rational political considerations that if she pushed too hard, Japan might be forced to do more in favour of Red China. Here she learnt that such ultimate diplomatic arms is not always effective and practical, and that for her it may even be dangerous. She will no doubt in the near future change her hard-attitude toward Japan.

On the other hand, Japan, though she, with the unexpected help from the impact of the De Gaulle Typhoon on the Republic of China, was saved from a very difficult and undesirable situation, as confronting the Republic of China and USA, did hurt her own moral prestige in the Free World, and to some extent repealed international trustworthiness. She won the case for the moment; but she lost a moral war in the long run. Furthermore, paradoxically speaking, the sending of Chou to Red China would be used by domestic opposition forces as some kind of political estoppel against Ikeda Cabinet's retreat in future, so far as its policy toward Red China is concerned. In such case, Japan will be met with more furious reactions, and this time reactions in new style.⁽⁴²⁾ The Republic of

(42) See *infra* Section V.

China will not lose another law-war.

Here, to conclude this Section, we may say that in the Chou Case, while Japan had a "no-policy" trend of foreign policy toward the Republic of China, in the sense that she had no firm standing nor agreed "primary national interest"; the Republic of China, a "non-policy" trend of foreign policy toward Japan, in the sense that she could not use proper arms to fight at the proper timing in the diplomatic sphere which is only another name for "peaceful battlefield". The two, the "no" and the "non", compound, and we may have a foreign policy in the proper sense of the term. In other words, Japan had tactics without strategy, whereas the Republic of China had strategy without tactics. Poor brothers!

But through the painful experiences in this case, both Governments are made necessary to prepare re-considering their policies vis-à-vis each other.

On the part of Japan, daily reports of interpellations in the Diet show that the Ikeda Cabinet's "China Policy" is still in a nebulous condition, due to the existence of the Peace Treaty between Japan and the Republic of China.

On the part of the Republic of China, its line is to some extent clear. It discovers that, had it claimed Chou with strong reasons backed by law, Japanese public opinion would have changed its view to a great extent and hence, the Ikeda Cabinet might not have determined the Chou Case in the way it actually did. It will, in future, use moral force as diplomatic shield, and law as diplomatic halbers.⁽⁴³⁾

Here lies the source of the problems hiding under Ikeda Cabinet's "China Policy" vis-à-vis the Republic of China.

(43) For proof, see different wordings in the Official Statement made on January 27, 1964 by the Republic of China to France, protesting French recognition of Red China; editorials, articles (some by the present writer), and news reports published on Chinese papers in Taiwan and Hongkong after the Chou Case and before/ after French recognition of Red China, warning to this effect.

V. Problems Lurking in Ikeda Cabinet's "China Policy" vis-à-vis the Republic of China

We now come to the sphere of prediction—speculative problems inferred from the policy trends we found out in the previous Section.

Under the impact of French recognition of Red China⁽⁴⁴⁾, opinion in Japan urging the Japanese Government to re-make its "China Policy" becomes stronger and stronger. This has become the target question of interpellations in Diet, and it seems difficult for the Ikeda Cabinet to resist for long without some new arms.

On the part of the Republic of China, re-consideration of her "Japan Policy" also becomes inevitable, in the context of domestic opinion and international politics,⁽⁴⁵⁾ including her future in the UN.

The impact of French recognition on Japan is chiefly this: that de Gaulle fought a way out for the realization of a certain form of "two-China" theory.⁽⁴⁶⁾ However, the result seems most likely to be in the negative.

(44) For impact of French recognition of Red China, more important materials in Japanese language are: "The Asahi Journal", op. cit., vol. 6, No.6 (February 9, 1964), pp.12-17, pp.18-25 (Special Edition on "France's Recognition of Red China"); "The Economist", February 4 issue, 1964, pp. 6-14, pp.16-18; the "World Weekly", February 11 issue, 1964, pp. 7-10, 14-19, 20-30. See especially Irie, "Jurisprudence on Recognition of Communist Chinese Government", in "Asahi Journal", vol.6, No.5 (February 3, 1964), pp. 20-25. The last is a very good article, though in part too subjective and not necessarily one of "Jurisprudence."

(45) Especially, she also faces pressure from USA, in terms of the "open-door" policy trend made known in speeches by high officials of US State Department like Hilsman recently, which has its derivation in the speech by the late President Kennedy made immediately before his sudden death.

(46) On "Two-China" theory, for Japanese literature, see Ōmura, "Two Chinas", 1962, especially pp. 1-61 178-186, and pp. 187-208; Kondo, "The Destiny of Taiwan", 1961, especially pp. 114-151; "Jijitsushin-sha" (Current Affairs Press) ed., "Peking-Taiwan-The United Nations", 1961, pp. 17 et seq., p. 97 ff., p. 109 ff., p. 141 ff., p.199 ff. For important foreign literature, see, Dean, in Proceedings, American Society of International Law, 1955; R. Carreau, in *Politique Etrangère*, 1959, pp. 67-82; S. K. Hornbeck, "Which Chinese?", in *Foreign Affairs*, 1955-6, pp. 24-39; P.B. Potter, in *American Journal of International Law*, 1956, Ed. Comments,

There are many a problems involved in the "two-China" theory in any form.⁽⁴⁷⁾ To save space, we need only to point out the merits of the "two-China" idea.

So far as the present writer knows, solutions suggested by writers and politicians in USA, the United Kingdom, Canada, Italy Germany, France, India, Japan, Australia, Austria, and in Spain, for the present "China Problem", can be counted to twelve in number, ranging from "two-China"(in many forms), "One-and-Half-China", "Special One-and-Half-China", to "No-China" and "Three-China" theories. Under the circumstances, perhaps in theory a "multi-China" theory (in the event where Red China splits into two or three), and a "New Chinas" theory (meaning that pending legitimacy for future proof, neither the Republic of China nor Red China is to claim identity with "The Republic of China" of the pre-civil war period),⁽⁴⁸⁾ are also conceivable.

It takes a thick book to discuss the above solutions offered. For our purposes suffice it to say here that, to ask the question: "one China or two Chinas? and how?" is to trouble oneself. There is no scholarly answer to such a question, because the question itself does not exist on such plane; if it exists at all, it is certainly open to all answers. It is an ideological issue connecting with one's view on the future world.

Politically, such question can lead to no practical solution. Both the Republic of China and Red China are opposed to it, for it

pp. 417 et seq.; Q. Wright in *ibid.*, 1950, pp. 548-59, and in *ibid.* 1955, pp. 320-338.

(47) For instance, UN Chinese Representation (or Red China's admission), legal status of Taiwan, etc. See, e. g., G. Arangio-Ruiz, "La Question Chinoise", in "Scritto di Diritto Internazionale in onore di T. Perassi, vol. 1", pp. 67 et seq.; Karl Zemanek, "Die völkerrechtliche Stellung Formosas", in *Archiv des Völkerrechts*, Bd. 5, 1955, S. S. 309-319; Nathan Feinberg, "L'Admission de Nouveaux Membres a La Société des Nations et a L'Organisation des Ns. Unies", in *Recueil des Cours*, op. cit., 1952 (I), pp. 297 et seq.

(48) There are too many publications and articles on such theories. The readers can find out bibliographies from the materials cited in note 46.

touches their vital interests in common: that Taiwan belongs to China and that the Chinese Civil War has not come to an end. These are commonsense of today, and find their concrete form in the recent French recognition of Red China.⁽⁴⁹⁾ No solution, not even one based on ideology, is practicable, because all solutions offered are politically undesirable.⁽⁵⁰⁾

The situation being so, the Ikeda Cabinet, confronted by domestic opposition forces and part of public opinion pressing a "positive" attitude in its "China Policy", is put in a very awful and agonizing position.⁽⁵¹⁾ It becomes sliced chicken between two pieces of bread. The Socialist Party and other left-wing force from the outside, and the Pro-Red-China Lobby (Ishibashi and other factions) within the ruling Liberal-Democratic Party, push Prime Minister Ikeda to establish a new "China Policy", which takes as its point of departure recognition of Red China. But a considerable part of public opinion with its supporters among the people, and the Pro-Republic-of-China Lobby in the ruling party (party elder Yoshida, and Ōno, Kishi, Ishii and other factions) which alone is able to sentence the Ikeda Cabinet to a political death, warn Ikeda to remain at the post. Besides these, internationally, the Republic of China is ready to do

(49) Statement by the Republic of China to France made on January 27, 1964, protesting the latter's recognition of Red China (The same was also notified to the Japanese Government); Red China's Statement made on January 28, 1964; also, *People's Daily*, January 29, 1964.

(50) Juridically, such solutions are equally impossible. For our purpose, the point expressed in the text is sufficient to break down any attempt in this regard. For reasonings of such juridical impossibility and for references, see my articles in the "Tien-Sha (The Universe) Magazine", Hong Kong, Nos. 69 and 70, December 1962 and January 1963; in "The Overseas Chinese Life", vol.2, No.3, March 1963; and "The Function of the Concept of 'Peace' in the International order" (excerpt of Spain's Oriu Plaza Prize essay, 1961-62), in *Anales de la Universidad de Valencia*, Spain, 1964. Cf. J. R. de Oriu, *Manual de Derecho Internacional Publico*, Madrid, 1933, S. 246. V. also Jose de Yanguas Messia, *Beligerancia No Intervencion Y Reconocimiento*, Univ. de Salamanca, 1938, p. 33 ff. p.84 ff.

(51) See "Asahi Journal", vol.6, No.7, February 16, 1964, pp. 12-25. It is interesting to see that even within the Socialist Party, there exists split

what it can possibly do; USA warns Japan not to do anything on the problem, at least for a certain period to come; and Red China is doing all it can in Japan to press hard on Ikeda, through left-wing force in Japan.

There is another issue, peculiar to Japan's bureaucracy: Prime Minister Ikeda, himself no doubt anti-Communist and standing in awe of the results of French recognition of Red China, overtly declines to take action for the moment, but is desirous of recovering friendly relations with the Republic of China instead; whereas the Ministry of International Trade and Industry tends to enlarge scale of trade with Red China on the basis of deferred payments which will inevitably agitate the Republic of China, and within the Ministry of Foreign Affairs the "two-China" theory, which has had potential force since 1952-53, is gaining weight. Though foreign policy is according to law basically determined by the Prime Minister and the Minister of Foreign Affairs, both of these two present ministers are laymen to foreign policy and, traditionally, the Japanese bureaucrats as a group, with support from pressure groups, has its own existence and influential force which can not be compared with its counterparts in other countries. This adds one more headache issue for the Ikeda Cabinet as a whole and for Ikeda as the Prime Minister.

Carrying the above on the back, what Prime Minister Ikeda can say at present is that "the 'China Problem' is a world problem to be resolved in the United Nations",⁽⁵²⁾ that "policy toward Red China will be one in line with reality and needs high prudence, while maintaining friendly relations with the Republic of China."⁽⁵³⁾ All these repeat his dilemma. Under such dilemma, again, lies his independent "co-existence" foreign policy line. "In connexion with the independence of Japan's diplomacy, my policy line is: to be trusted

on the problem. Such split is, like in the case of the ruling party, closely connected with inter-factional struggle for power.

(52) Ikeda's Administrative Address on January 21, 1964. Foreign Minister Ohira has repeated these points for times.

by the Free Camp and to be respected by the Communist Camp".⁽⁵³⁾ This, if it is not a nightmare, can at the most be named an "ideal" for a policy line, never the policy line itself.

Thus, at least for the time being Ikeda Cabinet's "China Policy" remains in the same condition described by the New York Times as making the world sleepy.⁽⁵⁴⁾

But what else can he do? Nothing at the present. Why? Because on prime Minister Ikeda's back there are two other issues, and fatal issues, hiding in his own heart, half-conscious but not yet concrete for him. These are the "war reparation" problem and the "Peace Treaty" question.⁽⁵⁵⁾ These issues are special, and are what we mean by "Problems" appearing in the title of the present article.

Of these "problems" the situation is this: so long as Japan maintains friendly relations with the Republic of China without going too close to Red China, no trouble arises. On the other hand, as soon as the Ikeda Cabinet pushes one step forward to Red China at the expense of the Republic of China, a series of serious events might follow as consequences: the destructive effect of the Peace Treaty with the Republic of China, and the veto nature of President Chiang's former promise to give up "war indemnity" from Japan. Prime Minister Ikeda, in his reply to an interpellation in the Diet, said on January 31 to the effect that "Red China has no right to ask for war reparation from Japan, as Japan fought with the Republic of China, and not with Red China". This indirectly touches part of the issues, though not of the foreseeable results behind them. The very existence of the Republic of China, which is the *sine qua non* of the Peace Treaty of 1952, becomes Japan's safety-valve against Red China's possible diplomatic attack!

(53) Prime Minister Ikeda's News Conference on January 18, 1964.

(54) New York Times, Special Edition on "New Japan".

(55) Some have begun to be conscious of the issues but have not fully caught the serious results behind them, see, for instance, Takeuchi's article in "Sekai", op. cit., p.50 ff. See further, Foreign Minister Ohira in "The Economist", op. cit., p. 17.

These issues, on the other hand, become the most powerful arms of the Republic of China in its future diplomatic war against Japan. In her relations with Japan, she asks for "all or nothing". And in case she be clear that there may be "nothing", she will naturally choose these juridical arms at the proper timing to defend her own existence, seeing that, the world situation having changed as a result of the De Gaulle Typhoon, Japan's attitude, paradoxically, tends to dominate US attitude, so far as the "China Problem" is concerned. In this event, again paradoxically enough, such juridical arms, namely, revocation of the promise, made at the time of concluding the Peace Treaty of 1952, of abandoning war reparation, and the abolition of the Peace Treaty itself, protect the Ikeda Cabinet, in the sense that Ikeda Cabinet can make use of them as shield in resisting attacks from opposition force inside Japan.

Up to this stage, we must remind that this article is written under the guide of Max Weber's profound truth quoted at the beginning of this article: we are to point out problems, with solutions kept intact.

The manner of resorting to these arms by the Republic of China would, in *concreto*, be this: (1) in the event Japan gets too close to Red China, or recognizes Red China *de facto*, then promise of abandoning war reparation could be revoked; and (2) in the event Ikeda Cabinet is going to recognize "two Chinas", in any form, or to recognize Red China at the exclusion of the Republic of China, the Peace Treaty could be declared void before such recognition. Both of these two arms are juridically possible,⁽⁵⁶⁾ *inter alia*, under

(56) Oppenheim, *op. cit.*, p.943; and vol. II, 7th ed. 1952, pp. 615-6. Cf. Le Fur, *Précis de Droit International Public*, 1937, ss. 445, 990, 993.

(57) Quadri, *Diritto Internazionale Pubblico*, III ed. 1960, p.165. Such arms may be exercised under the UN Charter, under principles of general international law on reprisal vs. breach of treaty, under the principle of *Rebus sic stantibus*, etc. But to avoid the restriction of the Charter and the ambiguities existing in all other principles, the Republic of China would no doubt choose as basis what is here suggested.

simple jurisprudence that, considering the background of the making of the Peace Treaty, such promise was made under an implied resolute condition,⁽⁵⁷⁾ namely that Japan should not recognize Red China; and that the Peace Treaty was made under an express suspensive condition concerning China Mainland (Exchange of Notes attached to the Peace Treaty of 1952), namely that before the Republic of China returns to the Mainland, the Peace Treaty is not one covering the Mainland.

Here doubt may be cast on whether the Republic of China will exercise such arms in the ways suggested, because such exercise would bring destructive effects not only to Japan but also to the Republic of China. In reply, we refer those who so doubt to past facts: (1) immediately after USSR had recognized Red China on October 2, 1949, the Republic of China, though knowing that nothing could be done in the matter, nevertheless declared void the Sino-Soviet Treaty of Alliance and Friendship (1945); (2) President Chiang's furious attitude in reacting against Japanese actions at Lookaichao (July 7, 1937) which led to the Sino-Japanese war.⁽⁵⁸⁾ While in Japan "Shinju (double suicide)" is typical way of realizing love when hopeless, "mutual destruction", far from romantic, is the traditional way of Chinese political settlement when dead-or-alive question is at stake. And in the above hypotheses about what Japan might do in future, legitimacy⁽⁵⁹⁾ and survival are clearly at stake! It may be added that, if in the near future the Republic of China severs relations with France, as there seems to be no alternative, there will be another example in our support. The probable use of this double-blade sword in future diplomatic war is, evidently, nothing "believe or not".

The plain truth is always subject to forgetfulness. Some may again argue the practical effects of the exercise of such arms by the Repub-

(58) Togawa, *op. cit.*, p. 160. It is helpful to remind that at that time all believed that, pending US assistance which was rather improbable, China could possibly resist only for a few months.

(59) Fitzgerald, 1. c.

lic of China. Our answer is: such argument implies the under-estimation of the juridical effects and political implications of the existence or non-existence of a peace treaty, which is a very special kind of treaty under international law. As soon as the Republic of China revokes the promise of abandoning war indemnity, Red China has as a matter of law a right to claim same; and as soon as the Peace Treaty of 1952 is denounced, Japan has juridical obligation to make one with Red China anew. Here, curiously again, the vital interests of the Republic of China and Red China are in concert, though in different senses. Besides, the denunciation of the Peace Treaty of 1952 before Japan denies to the Republic of China its present juridical status facing Japan, might, in law, cause the problem of resumption of the state of war as between the two countries. Such state of war, being a resumption of the state of affairs of the former Sino-Japanese War, will exclude the application of the UN Charter which prohibits threat of force (state of war, though formal and technical, is within this category).

One may further contend that, on the other hand, Red China will not actually ask Japan to sign a Peace Treaty and claim war reparation, in view of the fact that the "state of war" between Japan and USSR was ended without any peace treaty or war reparation at all. But it is not to be forgotten that whereas USSR has got much from Japan, though it did not suffer anything from Japan during the Second World War;⁽⁶⁰⁾ Red China has got nothing so far, though the Chinese people, in contradistinction to Red Chinese regime itself, suffered much. One must not be too optimistic about Red China's attitude toward Japan on these points. Red China has nothing to love of present Japan; what it might love would be a communized Japan only. Especially when, under the above hypothesis, Japan would recognize Red China, with the background of the Peace Treaty of

(60) In case of Germany, we draw the readers' attention to the fact that USSR, albeit suffered much from Germany during the war, has got more than half of Hitler's Great Germany, plus a trump card in the Berlin situation.

1952 being denounced, Red China would be totally free to, and benefitted by, demanding what it wants from Japan.⁽⁶¹⁾ In such case, Red China would possess effective diplomatic arms *par excellence*.

All these, untold before, are hardly bearable by any responsible Japanese statesman, irrespective of their ideologies and however realistic they be, as such destructive effects may shake Japan's public opinion and the Japanese people at large. This is the most important reality. Even Japan had her de Gaulle and another Monsieur E. Faure whose reasonings on the solution of the "China

Problem" in "Figaro" are far from convincing, and even if Red China were admitted into the UN under whatever form, Japan is not free to do what she wants.

Consequently, no matter what vision the Ikeda Cabinet may possess, its announced foreign policy line, especially the principle of "primacy of UN" which underlies other principles, is, so far as the "China Problem" is concerned, not applicable. Japan must wait for changes, and great changes, inside and/or outside China.

Post Scriptum

Foreign policy trends of two countries vis-à-vis each other appear most clearly in time of dispute between them, hence predictions can be made easier with more dependability. Judged objectively, the reactions of the Republic of China against Japan in the Chou Case appear to be too radical and the execution of their contents beyond capability, and hence result nothing but the undesirable. They give the chance to Japan, and a gap to be filled in by Red China,

(61) Whatever theory of recognition (constitutive or declaratory theory) one may adopt, it remains true that recognition is in the main bilateral. French recognition of Red China is the best example at hand. As long as Japan has diplomatic relations with the Republic of China, Red China, due to necessity and as tactics, shows a somewhat soft attitude toward Japan on the two issues now under discussion. Otherwise, the case will be totally different. The Socialist Party, when it asked the Cabinet to denounce the Peace Treaty with the Republic of China, was perhaps ignorant of such difference, putting aside the fact that such denunciation by Japan

on more non-political intercourse between the two entities. This, however, has already been shown by the aftermath of the Nagasaki Incident. In consequence, the Republic of China will have to admit such reality of intercourse in future, though reluctantly and gradually, as the tide in Japan points to such direction. At this moment, any other Japanese cabinet would have to do the same, and perhaps worse than the Ikeda Cabinet, so far as the Republic of China is concerned. The Republic of China knows this well, but only tries to resist for the sake of "consideration" in return, for "face", or otherwise.

The purpose of this article is to promote friendly relations between Japan and the Republic of China at the present stage so far as possible, by warning irresponsible leaders in the Japanese social circles who urge for prompt recognition of Red China, through making apparent the dangers lying under the problems pointed out in this specific study which bridges a gap in the research of Sino-Japanese relations.

From present state of affairs it must be realized that Japan stands or falls with the Republic of China. They are inseparable parts of the defense line of the Free World in the Far East.

What would be the future and how far the Ikeda Cabinet can stand firm against the pressure and inducement of getting closer to Red China, are hard to predict. But we have a serious, though speculative, situation at sight, unfavourable to Japan's future. The destiny of Japan is in the hands of the Japanese people themselves, to be determined through wisdom of their leaders.

There is no doubt that by and large the Japanese people are in fear of Red China which to them is still unknown. Accordingly, the Ikeda Cabinet's "China Policy" will, in the foreseeable future, remain in the main unchanged. The most what it will do and can do is "positive accumulating form of trade" under the doubtful principle

would be tantamount to declaring another war, as against the Republic of China.

of "severance of the economic from the political". This might be said to have its basis on some kind of national pride for independence in foreign affairs; in the last resort, it is also the categorical imperative for Japan's survival. However, if it is true that without trade Japan as an island country can not live, it is equally true that facing the waddling attitude of Japan, as a country threatened with survival the Republic of China can not but be highly nervous.

It should be reminded that, under the supreme order of common destiny, unity is required. The basic question for the future relations of these two countries is, therefore, not only to maintain but also to strengthen their friendly tie. As a precondition to this, they must try to more understand each other.

15/2/1964