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## Defending Taiwan: Collective Self-Defense of a Contested State

Major Ryan M. Fisher

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## DEFENDING TAIWAN: COLLECTIVE SELF-DEFENSE OF A CONTESTED STATE

*Major Ryan M. Fisher* \*

China's bold threats of war against Taiwan draw increasing attention to the unsettled nature of Taiwan's status in international law. Although Taiwan exhibits many, if not all, of the characteristics of recognized states, it has failed to gain widespread state recognition in the international community. Without statehood, the security of Taiwan faces considerable risk because its right to self-defense under international law is contested. Highlighting this legal ambiguity, the People's Republic of China (P.R.C.) declares that Taiwan must be reunited with Mainland China—even if it requires the use of force. This Article develops the historical and legal relationship between Taiwan and Mainland China and explains the conditions required for Taiwan to lawfully receive collective self-defense, most particularly from the United States. It develops the conditions required by examining the following principles of international law: state recognition, the right to self-determination and secession, the prohibition on the use of force, and national and collective self-defense. Although this Article explains Taiwan already enjoys nearly every aspect of formal state recognition, and thus should receive all the rights and obligations of widely accepted states, it ultimately argues that international law permits third-party states to exercise collective self-defense of Taiwan only if third-party states first formally recognize Taiwan's independence.

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\* Judge Advocate, U.S. Air Force. Presently assigned as an associate professor at The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, VA. LL.M, 2020, in Military Law with a National Security Law Emphasis, The Judge Advocate General's Legal Center and School. J.D., 2013, J. Reuben Clark Law School at Brigham Young University; B.A., 2009, in both Economics and Chinese, Brigham Young University. Previous assignments include Chief of Legal Assistance and Non-judicial Punishment at Mountain Home AFB, ID, 2013–2016; Rule of Law Advisor, Bagram Airfield, Afghanistan, 2015–2016; Chief of Civil Law, Litigation, and Military Justice at Kadena AB, Okinawa, Japan, 2016–2019; Deputy Staff Judge Advocate, Joint Special Operations Command, 2017. Member of the bar of Utah. The views expressed in this Article belong to the author alone and do not represent the U.S. Department of Defense, the Department of the Air Force, the Department of the Army, the Judge Advocate General's Legal Center and School, or any part of the U.S. government.

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INTRODUCTION

In October 1949, the People’s Republic of China (P.R.C.) defeated the Republic of China (R.O.C.), winning the twenty-two-year Chinese Civil War. The P.R.C. established itself as the legitimate government of China, settling the dispute over the governance of Mainland China.<sup>1</sup> But the P.R.C.’s victory also created a new conflict over the proper sovereign of the island of Taiwan. After the R.O.C. lost the civil war, it moved its governmental headquarters to the island of Taiwan and established itself as Taiwan’s effective government.<sup>2</sup> For the last 70 years, the R.O.C. has controlled Taiwan with an independent government, including an independent military, economy, immigration system, and international relationships.

Despite Taiwan’s independent government, the P.R.C. claims it is the legitimate government of both Mainland China and Taiwan. The P.R.C. asserts that the R.O.C. government in Taiwan is merely a rebellious separatist group, and the China-Taiwan dispute is purely an internal

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1. LUNG-CHU CHEN, THE U.S.-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW AND POLICY 15 (2016).

2. Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT’L L. & FOREIGN AFFS., 351, 353 (1996).

conflict.<sup>3</sup> Despite the P.R.C.'s claim, the P.R.C. government has never exercised any control over Taiwan.

Since the P.R.C. defeated the R.O.C. in 1949, tension between the two governments has remained high. Over the last decade the P.R.C. has repeatedly emphasized its willingness to use force to re-unify Taiwan.<sup>4</sup> Additionally, the P.R.C.'s Army (the Peoples Liberation Army, or PLA) appears to be preparing for military conflict across the Taiwan Strait and throughout Southeast Asia.<sup>5</sup> Official statements from the P.R.C. suggest that over one-third of the budget the P.R.C. dedicates to defense is focused specifically on the mission of preventing Taiwan's independence.<sup>6</sup> The P.R.C.'s aggressive position about Taiwan is consistent with the nature of the P.R.C.'s territorial assertions and militarization of the South China Sea.<sup>7</sup> With the constant threat of hostilities, it is essential to understand how international law impacts the conflict between Taiwan and China.

The international law debate surrounding the China-Taiwan conflict centers on whether Taiwan is a state or simply a rebellious province. Due to countries around the world wanting to maintain a good relationship with the P.R.C., few nations are willing to openly support Taiwanese political independence. Today, fourteen United Nations (U.N.) member states recognize Taiwan as a state, and Taiwan engages in "unofficial" state relations with fifty-seven other states, including the United States (U.S.).<sup>8</sup> The U.S. may be the clearest example of a state with "unofficial,"

3. Margaret K. Lewis, *Forging Taiwan's Legal Identity*, 44 BROOK. J. INT'L L. 489, 490 (2019).

4. See Chris Buckley & Chris Horton, *Xi Jinping Warns Taiwan That Unification Is the Goal and Force Is an Option*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/asia/xi-jinping-taiwan-china.html> (discussing the recent statement made by the president of China, Xi Jinping, that unification with Taiwan is unstoppable, and that China "make[s] no promise to abandon the use of force, and retain[s] the option of taking all necessary measures," including using force against any "intervention by external forces.")

5. See Michael J. Green & Andrew Shearer, *Countering China's Militarization of the Indo-Pacific*, WAR ON THE ROCKS (Apr. 23, 2018), <https://warontherocks.com/2018/04/countering-chinas-militarization-of-the-indo-pacific/> (discussing how China is building and planning large infrastructure projects in Vanuatu, Pakistan, Sri Lanka, Malaysia, etc., and that these projects could easily turn into military projection points. Also, China's "Belt and Road Project" is leveraging other nations' debt for control and regional influence).

6. Michael Beckley, *The Emerging Military Balance in East Asia: How China's Neighbors Can Check Chinese Naval Expansion*, 42 INT'L SEC. 78, 83-84 (2017) (describing the PLA's primary war fighting mission as "conquering Taiwan" and the resources currently being used for this mission.).

7. Steven Stashwick, *China's South China Sea Militarization Has Peaked*, FOREIGN POL'Y (Aug. 19, 2019, 4:12 PM), <https://foreignpolicy.com/2019/08/19/chinas-south-china-sea-militarization-has-peaked/> [<https://perma.cc/8SH4-QYFL>].

8. *Embassies & Missions*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN), [https://www.mofa.gov.tw/en/Content\\_List.aspx?n=D7B7F1B4196DD582](https://www.mofa.gov.tw/en/Content_List.aspx?n=D7B7F1B4196DD582) [<https://perma.cc/WE B8-K6AC>] (last visited Apr. 14, 2020).

yet quasi-formal, relations with Taiwan. The strong political and economic ties between the U.S. and Taiwan are highlighted by multi-billion-dollar military sales agreements and extensive international trade.<sup>9</sup>

If China attempts to aggressively re-unify Taiwan, the most vital issue, and the focus of this paper, is whether international law permits third-party nations to exercise collective self-defense of Taiwan. That issue depends primarily on whether international law permits third-party nations to enter a conflict over a contested state.

To answer this question, this Article will explain the historical relationship between China and Taiwan, along with the development of treaties and agreements that impact Taiwan's claim to sovereignty. Then, it will establish the framework of international law that controls the China-Taiwan conflict. Specifically, this Article will examine the laws of state recognition, self-determination, the prohibition on the use of force, and self-defense. After reviewing these laws, this Article will examine whether these laws allow third-party nations, specifically the U.S., to use force to defend Taiwan in the event of a Chinese armed attack. Ultimately, this Article argues the U.S. has a valid international legal basis to exercise collective self-defense of Taiwan against an armed attack by China.

## II. HISTORY OF THE SOVEREIGNTY OF TAIWAN

The relationship between China and Taiwan has several distinct periods, all of which influence Taiwan's status as a contested state. The first period lasted from the early 17th century to the late 19th century, when China formed its first official ties and eventually exercised governance over Taiwan. The second period began after Japan took control of Taiwan under the 1895 Treaty of Shimonoseki. During this period, two separate governments emerged in China—first, the R.O.C., and later the P.R.C.<sup>10</sup> The last and current period started after the end of World War II (WWII) when Japan surrendered control over Taiwan to the R.O.C.

### A. *First Period: The Emergence of China's Influence Over Taiwan*

The first Mainland Chinese government to exercise control over Taiwan was the Ming Dynasty in the 17th century. In 1661, a Ming Dynasty military leader took control of Taiwan while fleeing from the

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9. SUSAN V. LAWRENCE & WAYNE M. MORRISON, CONG. RSCH. SERV., R44996, TAIWAN: ISSUES FOR CONGRESS 29 (2017), <https://fas.org/sgp/crs/row/R44996.pdf> [<https://perma.cc/XD7C-9NZ2>].

10. Lee, *supra* note 2.

invading forces of the Qing Dynasty.<sup>11</sup> In 1683, the Qing Dynasty eventually overthrew what remained of the Ming Dynasty's influence on Taiwan, and Taiwan officially became part of the Chinese Qing Empire.<sup>12</sup>

Over the next two hundred years, Chinese authorities exercised sovereignty over Taiwan with formal systems to control the economy, immigration, and security threats posed by rebellions and Taiwanese aborigines.<sup>13</sup> Starting in the 1830s, as European powers competed for control over trade in Asia, disputes arose over the control of Taiwan's eastern seaboard.<sup>14</sup> In 1858, during the beginning of the Second Opium War between China and Great Britain, China signed the Tianjin Treaties with the U.S., Great Britain, and France. The Tianjin Treaties formally granted the western nations access to specific Taiwanese ports.<sup>15</sup> Although historians generally consider these treaties as a low point in China's history (because China relinquished control over parts of its territory), they solidified China's control over Taiwan.<sup>16</sup> China's control over Taiwan continued until the Sino-Japanese war, which resulted in the 1895 Treaty of Shimonoseki. Through this treaty, China surrendered control of Taiwan to Japan indefinitely.<sup>17</sup> Not long after China lost the Sino-Japanese War, a battle for control of Mainland China developed.

### B. *Second Period: Development of the R.O.C., P.R.C., and the Chinese Civil War*

Within twenty years of the conclusion of the Sino-Japanese War in 1895, two separate revolutionary Governments formed in China—and a civil war soon broke out. In 1912, Dr. Sun Yat-sen led a revolutionary movement that overthrew the Qing Dynasty and formed a democratic government called the R.O.C.<sup>18</sup> Following Sun Yat-sen, Chiang Kai-shek

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11. CHEN, *supra* note 1, at 8–9.

12. Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 454 (2000).

13. JOHN ROBERT SHEPHERD, *STATECRAFT AND POLITICAL ECONOMY ON THE TAIWAN FRONTIER: 1600-1800* 4–5 (1993).

14. Charney & Prescott, *supra* note 12, at 456.

15. Treaty of Peace, Amity and Commerce, China-U.S., June 18, 1858, 119 Consol. T.S. 123; Treaty of Peace, Friendship and Commerce, June 26, 1858, China-Gr. Brit., 119 Consol. T.S. 163; Treaty of Amity, Commerce and Navigation, June 27, 1858, China-Fr., 119 Consol. T.S. 189.

16. Charney & Prescott, *supra* note 12, at 456.

17. Treaty of Shimonoseki, China-Japan, art. 2, Apr. 17, 1895, 181 Consol. T.S. 217.

18. Lawrence W. Beer, *Republic of China Constitutionalism in Asia: Asian views of the American Influence*, 89 OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMP. ASIAN STUD. 35, 36 (1988), <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1088&context=mscas> (The Editorial Note authored by Hungdah Chiu discusses the geography, population and education, history, economy, constitutional development and government structure, and legal

took control of the R.O.C. in 1925 and unsuccessfully attempted to unify China.<sup>19</sup> In 1929, the R.O.C. started a civil war against the newly formed Communist Party of China, which Mao Zedong later transformed into the People's Republic of China (P.R.C.).<sup>20</sup> The civil war between the R.O.C. and the P.R.C. lasted until 1937, when Japan again invaded Northern China.<sup>21</sup> At this point, the P.R.C. and R.O.C. reached a temporary truce in order to jointly fight the Japanese.<sup>22</sup> Although this invasion was called the Second Sino-Japanese War, it was essentially the beginning of the Pacific Theater of WWII.<sup>23</sup>

The R.O.C. was the effective government of China at both the commencement and conclusion of WWII. The R.O.C. represented China in the founding of the U.N. and became a permanent member of the U.N. Security Council (U.N.S.C.).<sup>24</sup> Following the war's end in 1945, U.S. Forces allowed the R.O.C. to occupy Taiwan "as a trustee on behalf of the Allies."<sup>25</sup> After WWII ended, the civil war resumed between the R.O.C. and P.R.C.

After several years of fighting, the P.R.C. defeated the R.O.C. and established itself as the government of Mainland China on October 1, 1949.<sup>26</sup> The R.O.C. immediately moved its governmental headquarters to Taiwan, hoping to eventually stage a counterattack against the P.R.C. and regain control of Mainland China.<sup>27</sup> The R.O.C. fleeing to Taiwan marked the beginning of the third and current period, when a number of states created a series of vague agreements and treaties about Taiwan that compounded the complexity of the Taiwan-China conflict.

### C. Current Period: Development and Changes in the R.O.C.'s International Status

After WWII, the status of the R.O.C.'s recognition and international relationships shifted several times. Although WWII ended in 1945, Japan did not formally surrender sovereignty over Taiwan until 1952, and it did

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system of the Republic of China as a preface to Herbert H. P. Ma's contribution piece entitled, *American Influence on the Formation of the Constitution and Constitutional Law of the Republic of China: Past History and Future Prospects.*)

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; Phil C. W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 CHINESE J. INT'L L. 455, 463 (2009).

24. Charney & Prescott, *supra* note 12, at 458.

25. Mikaela L. Ediger, *International Law and the Use of Force against Contested States: The Case of Taiwan*, 93 N.Y.U. L. REV. 1668, 1678 (2018), <https://www.nyulawreview.org/wp-content/uploads/2018/12/NYULawReview-93-6-Ediger.pdf> [<https://perma.cc/G8XJ-7ZSH>].

26. CHEN, *supra* note 1, at 15.

27. *Id.*

so without naming the successor to Taiwan's sovereignty—an issue that remains unsettled today.<sup>28</sup>

Between 1943 and 1952, many nations signed declarations and treaties regarding Taiwan's status, but none of these agreements clearly settled the issue over Taiwan's proper sovereign.<sup>29</sup> In 1943, the U.S., United Kingdom (U.K.), and China (at that time governed by the R.O.C.), gathered in Cairo, Egypt to declare their future intentions for Taiwan after the end of WWII.<sup>30</sup> In this declaration, later called the Cairo Declaration, the three nations jointly stated that Taiwan belonged to China prior to Japan's 1895 seizure, and thus it should return to the R.O.C. at the end of the war.<sup>31</sup> In 1945, the same nations signed the Potsdam Declaration, which simply reiterated the Cairo Declaration's language about Taiwan's return to R.O.C. rule.<sup>32</sup> Neither of these declarations were legally binding treaties—they were merely statements of present understanding and future intent.

Following the end of WWII, although the Allied Powers had “entrusted” the R.O.C. with administering control over Taiwan in 1945, Japan had not yet formally surrendered control of Taiwan. Japan did not surrender control of Taiwan until 1952, when Japan and 48 Allied Powers (not including China or the U.S.S.R.) signed the San Francisco Treaty.<sup>33</sup> In the treaty, Japan renounced “all right, title and claim to Formosa and the Pescadores.”<sup>34</sup> The treaty did not settle the Taiwan issue, as neither

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28. San Francisco Treaty art. 2, Sept. 8, 1951, 3 U.S.T. 3170, 136 U.N.T.S. 46 (entered into force Apr. 23, 1952), <https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf> [<https://perma.cc/WE52-W9TN>]

29.

[T]he non-participation of China in the San Francisco Peace Treaty was, in fact, a compromise between the United Kingdom, which recognized the PRC government in 1950 and insisted on China's participation, and the United States, which changed its declaration of non-intervention in the Taiwan Strait after the outbreak of the Korean War and proposed that neither the PRC government nor the authorities on Taiwan be invited to the San Francisco Peace Conference, which was accepted.

Chan, *supra* note 23, at 462.

30. Cairo Communiqué (Final version), Dec. 1, 1943, 9 DEP'T STATE BULL. 393, 3 Bevans 858, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-0858.pdf> [<https://perma.cc/QG59-7JB9>] (At the time of the Cairo Declaration, the Republic of China was the only government in China.).

31. *Id.*

32. Potsdam Declaration, July 26, 1945, 13 DEP'T STATE BULL. 137–38, 3 Bevans 1204, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-1204.pdf> [<https://perma.cc/57EP-T2DF>].

33. San Francisco Treaty, *supra* note 28.

34. *Id.*



the R.O.C. nor the P.R.C. were parties to the treaty, and the treaty was silent regarding subsequent control over Taiwan.<sup>35</sup>

In October 1971, the U.N. removed the R.O.C. from its membership. Since 1949, the R.O.C. had exclusive control over Taiwan and only Taiwan, yet it continued to claim authority over all of China. In 1971, the U.N. General Assembly confronted the reality that although the R.O.C. was a founding member of the U.N., it had no realistic claim as the effective government of Mainland China. The U.N. General Assembly passed Resolution 2758 to remove the R.O.C. from the U.N. and replace it with the P.R.C. as the “only lawful representatives of China to the U.N.”<sup>36</sup> The resolution also explicitly stated that the P.R.C. holds one of the five permanent seats on the U.N. Security Council, presumably replacing the R.O.C.’s previous place on the council.<sup>37</sup> Resolution 2758 did not reference the island of Taiwan or its government, and therefore failed to provide any clarity regarding the issue of its sovereignty.<sup>38</sup>

Following the R.O.C.’s removal from the U.N., the R.O.C.’s relationships with many other states shifted significantly. In 1950, President Truman announced that Taiwan was rightfully governed by the R.O.C.<sup>39</sup> However, within six months of that statement, the Korean War started and President Truman stated the issue should instead be determined after the U.S. concluded “a peace settlement with Japan.”<sup>40</sup> By 1954, the U.S. and the R.O.C. entered into a Treaty of Mutual Defense.<sup>41</sup> By the mid-1950s, “territorial status quo had been reached between the R.O.C. on Taiwan and the P.R.C.,” and although the dispute between the R.O.C. and P.R.C. continues, the same territorial status quo remains today.<sup>42</sup>

35. *Supra* note 29.

36. G.A. Res. 2758 (XXVI), Restoration of the Lawful Rights of the People’s Republic of China in the United Nations (Oct. 25, 1971); Sigrid Winkler, *Taiwan’s UN Dilemma: To Be or Not To Be*, BROOKINGS (June 20, 2012), <https://www.brookings.edu/opinions/taiwans-un-dilemma-to-be-or-not-to-be/> [<https://perma.cc/8379-NX57>] (noting that, “The U.S. voted against the resolution and the final vote was 76 in favor with 35 against and 17 abstentions.”).

37. *Id.*

38. *Id.*

39. In a White House press release on January 5, 1950, President Truman stated: “In keeping with these [Cairo and Potsdam] declarations, Formosa [Taiwan] was surrendered to Generalissimo Chiang Kai-shek, and for the past 4 years, the United States and other Allied Powers have accepted the exercise of Chinese authority over the island.” *United States Policy Towards Formosa*, 22 DEP’T STATE BULL. 79 (1950).

40. *U.S. Air and Sea Forces Ordered into Supporting Action*, 23 DEP’T STATE BULL. 5 (1950).

41. Mutual Defense Treaty Between the United States and the Republic of China, China-U.S., Dec. 2, 1954, 6 U.S.T. 433 (entered into force Mar. 3, 1955).

42. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 200 (2d ed. 2006).

After U.N. Resolution 2758, the U.S. and P.R.C. jointly issued a series of executive decrees called “communiqués” that expressed the U.S. and P.R.C. governments’ positions on several key issues of the China-Taiwan dispute. The first communiqué, later called the “Shanghai Communiqué,” was completed in 1972. The U.S. portion of the communiqué stated that the U.S. “*acknowledges* that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position.”<sup>43</sup> It also stated that the U.S. “reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.”<sup>44</sup> The language of the U.S. position was intentionally vague, but it allowed the U.S. to appease the P.R.C.

Next, in 1978, the U.S. and the P.R.C. issued another joint communiqué. It stated that the U.S. “*recognizes* the Government of the People’s Republic of China as the sole legal Government of China,” but that “the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.”<sup>45</sup> The joint communiqué clarified the U.S.’ position on Taiwan, stating: “The Government of the United States of America *acknowledges* the Chinese position that there is but one China and Taiwan is part of China.”<sup>46</sup> This clarification did not state the U.S. agreed with the P.R.C.’s position on Taiwan, rather it merely acknowledged the P.R.C. position.

On January 1, 1979, after these two communiqués established a clearer understanding of U.S.-P.R.C. policy, the U.S. formally ended its diplomatic ties with the R.O.C. At the same time, President Carter also announced that the U.S. would withdraw from the U.S.-Taiwan mutual defense treaty within one year.<sup>47</sup> Strategically, this showed that the U.S. may have ended its formal relationship with Taiwan, but it still maintained a sufficient relationship to uphold the mutual defense treaty, at least for a period of time. The president also removed all U.S. military personnel from the island by May of 1979.<sup>48</sup>

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43. Joint Communiqué of the People’s Republic of China and the United States of America, China-U.S., Feb. 28, 1972, <http://www.china-embassy.org/eng/zmgx/doc/ctc/t36255.htm> [<https://perma.cc/PX23-KE36>] (emphasis added); see also 66 DEP’T STATE BULL. 431–32 (1966).

44. *Id.*

45. Joint Communiqué on the Establishment of Diplomatic Relations between the People’s Republic of China and the United States of America, China-U.S., Dec. 16, 1978, <http://www.china-embassy.org/eng/zmgx/doc/ctc/t36256.htm> [<https://perma.cc/4VKB-CXPL>] (emphasis added); see also 79 DEP’T STATE BULL. 25 (1979).

46. *Id.* (emphasis added).

47. LAWRENCE & MORRISON, *supra* note 9, at 23.

48. *Id.*

In April 1979, the U.S. passed the Taiwan Relations Act (TRA), which, along with the joint communiqués, continues to serve as the foundation of the U.S.-Taiwan relationship.<sup>49</sup> The TRA states that any efforts “to determine the future of Taiwan by other than peaceful means” will be considered “a threat to the peace and security of the Western Pacific.”<sup>50</sup> The TRA also states that the U.S. will maintain the capacity to “resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.”<sup>51</sup> The most important statement regarding the defense of Taiwan is ambiguous, however, because it does not state whether the U.S. will defend Taiwan if attacked. Specifically, the TRA only states that the U.S. “will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”<sup>52</sup> Furthermore, the TRA states that in the event that a threat is posed to Taiwan, “The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the U.S. in response to any such danger.”<sup>53</sup>

The TRA also clarifies how U.S. domestic law will treat Taiwan. It states that “the absence of diplomatic relations or recognition shall not affect the application of the laws of the [U.S.] with respect to Taiwan” as they applied before the U.S. ended its formal relationship with Taiwan.<sup>54</sup> It also says that U.S. laws that refer or relate to foreign “countries, nations, states, governments, or similar entities” shall apply to Taiwan.<sup>55</sup>

The U.S. issued its final communiqué in 1982, which added additional details about the U.S. sale of arms to Taiwan.<sup>56</sup> Clarity was needed because the TRA’s ambiguity about the provision of self-defense articles and services. In this final communiqué, the U.S. expressed a desire for a peaceful resolution, but clearly expressed the U.S.’ intention to continue

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49. Taiwan Relations Act, Pub. L. No. 96-8, § 1, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. § 3301).

50. *Id.* § 2(b)(4).

51. *Id.* § 2(b)(6).

52. *Id.* § 3(a).

53. *Id.* § 3(c).

54. 22 U.S.C. § 3303(a) (2020).

55. *Id.* § 3303(b); Taiwan is treated as a State for the purposes of severing immunity and the act of state doctrine under U.S. law. *See* *Millen Indus. Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879 (D.C. Cir. 1988).

56. Joint Communiqué of the People’s Republic of China and the United States of America, Aug. 17, 1982, China-U.S., [http://www.china-embassy.org/eng/zmgx/doc/ctc/t946\\_664.html](http://www.china-embassy.org/eng/zmgx/doc/ctc/t946_664.html) [<https://perma.cc/A6PC-33NA>] [hereinafter 1982 Communiqué].

to sell arms to the R.O.C. It explained how the U.S. would limit and eventually cease arm sales, but no deadline was stated.<sup>57</sup>

The R.O.C. eventually ceased its claim to Mainland China in 1987. Every year from 1993 to 2007, it requested membership in the U.N.<sup>58</sup> Each of these attempts failed due to the U.N.'s recognition of the P.R.C. as the government of China, and also the U.N.'s recognition of a "one China" policy.<sup>59</sup> As of 2016, Taiwan has ninety-four unofficial representative offices in fifty-eight countries, and it hosts sixty-nine embassies and embassy-like offices from countries around the world.<sup>60</sup> It has formal relationships with fourteen countries, but that number is dwindling quickly.<sup>61</sup> Since 2016, seven states have cut diplomatic ties with Taiwan and opened formal ties with the P.R.C.<sup>62</sup>

The U.S. government's position regarding Taiwan remains unclear. Politicians and scholars have characterized the U.S. policy as "strategic ambiguity," because of the purposeful intent to avoid a final resolution to the dispute.<sup>63</sup>

In summary, not a single agreement, declaration, or treaty produced by the international community settled the question of Taiwan's rightful sovereign. Nor does the centuries-long history of China and Taiwan provide a clear answer. Because of this lack of clarity, the dispute remains mired in ambiguity. To resolve this ambiguity and answer the question of whether the U.S. or other states may defend Taiwan from a P.R.C. armed attack, we turn to international law.

## II. INTERNATIONAL LAW GOVERNING THE TAIWAN-CHINA CONFLICT

Modern international law is founded on the principle of Westphalian sovereignty that originated in the 1600s.<sup>64</sup> Westphalian sovereignty is based on two related principles: first, that sovereign states have absolute

57. The communiqué stated that the U.S. "does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends gradually to reduce its sale of arms to Taiwan, leading, over a period of time, to a final resolution." 1982 Communiqué, *supra* note 56; See also, 82 DEPT. STATE BULL. 19-20 (1950).

58. LAWRENCE & MORRISON, *supra* note 9, at 57.

59. *UN Rejects Taiwan Application for Entry*, N.Y. TIMES (July 24, 2007), <https://www.nytimes.com/2007/07/24/world/asia/24iht-taiwan.1.6799766.html> [<https://perma.cc/2H2J-LDGX>].

60. LAWRENCE & MORRISON, *supra* note 9, at 54.

61. *Embassies & Missions*, *supra* note 8.

62. Kate Lyons, *Taiwan Loses Second Ally in a Week as Kiribati Switches to China*, GUARDIAN, Sept. 20, 2019, <https://www.theguardian.com/world/2019/sep/20/taiwan-loses-second-ally-in-a-week-as-kiribati-switches-to-china> [<https://perma.cc/NVR6-CLHQ>].

63. *U.S. Relations With Taiwan*, U.S. DEP'T OF STATE (2018), <https://www.state.gov/u-s-relations-with-taiwan/> [<https://perma.cc/U9SY-AE96>] (last visited Apr. 15, 2020).

64. Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 26 (1948).

power over their own state, and second, that international law only regulates relations between states, and not within a state's domestic authority.<sup>65</sup> These two principles serve as the foundation for the U.N. Charter.<sup>66</sup>

Thus, because Taiwan's status as a sovereign state is contested, the U.N. Charter does not create a legal paradigm that resolves the conflict between Taiwan and China. Although the U.N. Charter does not directly answer these questions, post-WWII treaties and state practice show that the rights and obligations normally afforded only to sovereign states also apply to contested states. This section discusses the treaty and customary law relevant to the Taiwan-China conflict including: state recognition, self-determination, the prohibition on the use of force, and self-defense.

### A. State Recognition

The rights and obligations of an international entity depend significantly on whether it is recognized as a state. This matter is complicated because the law of state recognition is broadly defined. There is no international organization with the authority to grant statehood, so reviewing state practice is the best way to determine an entity's status. Modern state practice suggests statehood exists as a matter of both internal and external factors: internal being the factual qualities of a state, and external being how a state interacts with other states.<sup>67</sup> As such, membership in the U.N. is a strong indication of external recognition, which is unlikely to be achieved unless other states believe that an entity has fulfilled the internal qualities of statehood. Nevertheless U.N. membership is not necessary for statehood.

The most widely accepted definition for statehood comes from the 1933 Montevideo Convention on the Rights and Duties of States. The Montevideo Convention requires that a state must hold the following four criteria: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into international relations.<sup>68</sup> While these criteria are recognized as customary evidence of statehood, they are only necessary and not sufficient on their own for statehood. For example, Hong Kong meets the Montevideo criteria, but it clearly is not

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65. *Id.* at 28–29.

66. “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” U.N. Charter art. 2, ¶ 7.

67. CRAWFORD, *supra* note 42, at 4–5.

68. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, T.S. No. 881, O.A.S.T.S. No. 37 (entered into force Dec. 26, 1934) [hereinafter Montevideo Convention].

a sovereign state. Hong Kong shows that the Montevideo definition is incomplete, as meeting the Montevideo criteria alone does not grant statehood.

Following the 1933 Montevideo Convention, international law scholars developed two competing theories of state recognition: the “declaratory” and the “constitutive” theories.<sup>69</sup> The declaratory theory simply claims that statehood is achieved if a state meets all the Montevideo criteria.<sup>70</sup> This theory aligns with the Montevideo Convention itself, which says: “[t]he political existence of the state is independent of recognition by the other states.”<sup>71</sup> The declaratory theory suggests that gaining recognition by other states simply bolsters the fact that the sovereign state already exists. Some scholars prefer the declaratory theory over the constitutive theory because “[r]ecognition, as an act of state, is an optional and political act and there is no legal duty in this regard. . . . [I]f an entity bears the marks of statehood other states put themselves at risk legally, if they ignore the basic obligations of state relations.”<sup>72</sup> Furthermore, a state that is unrecognized by some cannot simply be exempt from international law. Once a state meets the Montevideo requirements, and holds itself out as a state, it should receive the benefits and comply with the obligations of a state.

Although some scholars prefer it, the declaratory theory has its weaknesses. Suppose “State B” is widely understood to meet all the Montevideo criteria, yet fails to obtain state recognition from any other state. Accordingly, State B cannot realistically claim to be an international person, because, while it can enter into international relations with other states, it does not actually maintain any international relationships.

The second competing theory is the constitutive theory. This theory says an entity is only a state if it meets the Montevideo criteria *and* is recognized by other states.<sup>73</sup> Crawford, an international expert in the law of statehood, explained the constitutive theory as follows:

[I]n every legal system some organ must be competent to determine with certainty the subjects of the system. In the present international system that can only be done by the States, acting individually or collectively. Since [states] act

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69. CRAWFORD, *supra* note 42, at 4.

70. *Id.*; See also Ediger, *supra* note 25, at 1679–80. However, this theory is flawed because it ignores the “reality that the creation of states is a legal status attached to a state by virtue of certain rules or practices by other states.” as pointed out by Crawford. CRAWFORD, *supra* note 42, at 4–5.

71. Montevideo Convention, *supra* note 68, art. 3.

72. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 89–90 (7th ed. 2008).

73. Ediger, *supra* note 25, at 1679–80; See also CRAWFORD, *supra* note 42, at 4.

in the matter as organs in the system, their determinations must have definitive legal effect.<sup>74</sup>

Oppenheim, a renowned expert in public international law, argued that the constitutive theory is the only acceptable method of state recognition by stating: “A state is and becomes an International Person (sic) through recognition only and exclusively.”<sup>75</sup>

The constitutive theory also has its weaknesses. It provides no clear standard by which nations can be recognized in the international community. Because the theory does not specify the number of states required for recognition, it can create impossible results. For example, if “State A” gains recognition from only a few other states, State A cannot simultaneously hold statehood (because of the states that recognize it) and lack statehood (because of the states that do not recognize it). When viewed in this light, the theory simply emphasizes the fact that states without wide recognition likely lack essential characteristics of recognized states.<sup>76</sup> It may be argued, however, that statehood cannot be realized unless a state gains unanimous recognition around the world.

Modern practice regarding state recognition reveals both internal and external elements that appear to balance the declarative and constitutive theories. That balance often reflects a highly fact-specific analysis that cannot be clearly summarized in a single theory.<sup>77</sup> In many cases, however, state recognition is often simply just a political decision. Another scholar summarized the political reality of this balance by stating that “the rules of state recognition, although legal rules, are legal vehicles for political choices.”<sup>78</sup>

### B. *Self-Determination*

Self-determination is an emerging principle in international law that provides some state-like rights to unique groups of people that lack statehood. Prior to WWII, there was no established law regarding the law

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74. CRAWFORD, *supra* note 42, at 20. Crawford acknowledges that this analogy does not apply perfectly to international law, however, because international law involves “‘difficult circumstances of fact and law,’ but it has never been suggested that the views of particular states are ‘constitutive.’” *Id.*

75. Lee, *supra* note 2, at 382 (quoting Oppenheim). Oppenheim’s opinion must be taken in context, however, because his writings focused on a Western/Christian centric notion of the “Law of Nations.” States became subject to the “Law of Nations” only by the “common consent of Christian nations.” Without recognition by previous members of the “society of nations,” express or implied, no state was considered an “international person.” See CRAWFORD, *supra* note 42, at 14–15.

76. This argument is circular, as the lack of wide recognition shows an entity is not a state, but that same lack of recognition is the very reason why other states will not recognize that entity.

77. CRAWFORD, *supra* note 42, at 4–5.

78. William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT’L L. J. 115, 115–16 (2009).

of self-determination, but the principle already began to emerge. In 1920, an international commission of jurists created a report on the Aaland Islands, which is now an autonomous region of Finland in the Baltic Sea. The report stated that peoples have the right to internal self-determination, or the right of self-governance within their own state. But the report limited the right of external self-determination (or the right to independence) by stating: “Positive International Law does not recognize the right of [peoples] to separate themselves from the State of which they form part by the simple expression of a wish....”<sup>79</sup>

Following WWII, the U.N. Charter and other covenants codified the trend in international law to give a right of self-determination for distinct “peoples.” Article 1(2) of the U.N. Charter states that one of the purposes of the Charter is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .”<sup>80</sup> Within two decades, in 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) declared the right to self-determination.<sup>81</sup> These two Covenants share a common Article 1, which states: “All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>82</sup> These burgeoning expressions of the right to self-determination were limited, though, to distinct groups of “peoples,” which have proven difficult to define.

Defining “peoples” is difficult because some states may wish to prevent groups from receiving the designation of “peoples.” This is because states may consider the rights of “peoples” as an infringement on state sovereignty. Additional factors that make defining “peoples” difficult are the unique distinctions in the history, culture, identities, and geographic locations of peoples around the world. Accordingly, no single definition can indisputably allow populations who claim the status of a “people” to actually receive the rights of “peoples.”

Despite this, in 1960 the U.N. General Assembly provided a general definition of “peoples” in Principle IV of Resolution 1541. It stated that peoples are found in “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”<sup>83</sup>

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79. International Commission of Jurists, *The Aaland Islands Question: Report of the Committee of Jurists*, 3 LEAGUE OF NATIONS OFF. J. SPEC. SUPP. 5 (1920), <https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1.pdf> [<https://perma.cc/9ERJ-3FG3>].

80. U.N. Charter art. 1, ¶ 2.

81. International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 173 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 1 [hereinafter ICESCR].

82. See sources cited *supra* note 81.

83. G.A. Res. 1541 (XV), annex, Principle IV (Dec. 15, 1960).



While the definition of “peoples” and the accompanying rights to self-determination seem generous, they are not unlimited.

In 1970, the U.N. General Assembly adopted, by consensus, the Declaration on Friendly Relations (DFR). The DFR explained some of the limitations of the right of self-determination. It stated, “[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.”<sup>84</sup> But the DFR also stated that the right to self-determination does not infringe on the principles of sovereignty, territorial integrity, and non-intervention.<sup>85</sup>

Additional limits to the right of self-determination are found in customary law. Crawford used thirty examples of attempted unilateral secession in Africa, Asia, Europe, and the Middle East, to argue that “outside the colonial context, the principle of self-determination is not recognized in practice as giving rise to unilateral rights of secession by parts of independent States.”<sup>86</sup> The Canadian Supreme Court expounded on the limits of secession rights in its opinion regarding Quebec’s desire to secede from Canada in the mid-1990s. The court stated, “[A] people” may have a right to secede if they are “denied any meaningful exercise of its right to self-determination.”<sup>87</sup>

Despite the Canadian Supreme Court opinion, international law does not necessarily grant the right of secession, or external self-determination, to “peoples” who are denied the right to self-determination. Crawford cast doubt on this right when he explained that even when humanitarian problems have “triggered widespread concern,” if “the government of the State in question has maintained its opposition to the unilateral secession, such attempts have gained virtually no international support or recognition.”<sup>88</sup> Additionally, amid the diverse and alarming humanitarian crises seen since the creation of the U.N. in 1945, “[N]o State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the

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84. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

85. *Id.* (“Nothing in the foregoing paragraphs shall be construed as authorising (*sic*) or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described. . . .”)

86. James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT’L L. 85, 113 (1998).

87. Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 154 (Can.) [hereinafter *Secession of Quebec*].

88. Crawford, *supra* note 86, at 115–16.

government of the predecessor State.”<sup>89</sup> In all circumstances, consent of the original state has accompanied successful secessions. This includes, for example, the separation or dissolution of Yugoslavia and the breakup of the Soviet Union.<sup>90</sup> Thus, the practice of states has clearly developed to show that “peoples” have the right to internal self-determination, or self-governance, but not to external self-determination unless in the context of colonial domination.

In conclusion, in the context of international disputes and contested states, self-determination plays a limited, but significant, role. The right to self-determination becomes relevant to contested states if the original state accepts the claim of the “peoples” within the contested state. After recognition, although the “people” are unlikely to gain the right to secession, they gain rights that give them quasi-sovereignty over certain aspects of their territory, all within the territorial sovereignty of their original state.

### C. *The Prohibition on the Use of Force*

Article 2(4) of the U.N. Charter codifies the prohibition on the use of force between states, which is considered a *jus cogens* norm of customary international law.<sup>91</sup> Article 2(4) states: “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>92</sup> This section explains how Article 2(4) applies to contested states.

The language of Article 2(4) focuses its prohibition on the use of force to actions that constitute “international relations.”<sup>93</sup> This focus is tied to the Westphalian principle that sovereign states have absolute power within their borders. Historically, many U.N. member states have supported the principle of absolute sovereignty by confirming the right for states to quell unilateral attempts at secession. For example, when Chechnya declared independence from Russia in 1991, although many

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89. *Id.* at 92; *see id.* at 103 (“[T]he right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”).

90. Crawford, *supra* note 86, at 93–105. Crawford explains that in the aftermath of the fall of the Soviet Union, the Russian Federation was recognized by the eleven constituent republics born out of the breakup of the former Soviet Union and the United Nations as the “continuing . . . legal personality” of the former Soviet Union. *Id.* at 93, 98. Thus, as the “continuing . . . legal personality” of the former Soviet Union, it was the Russian Federation that, “accepted the emergence to independence of the other republics and supported their applications for United Nations membership.” *Id.*

91. Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645, 648 (1984) (explaining how non-intervention has increasingly been referred to as a *jus cogens* norm).

92. U.N. Charter art. 2, ¶ 4.

93. *Id.*

states condemned the disproportionate use of force and specific violations of international human rights law, France, the U.K., and the U.S., among others, supported Russia's use of force to protect its territorial integrity.<sup>94</sup> While the U.S. supported Russia's use of force to defend its territory, the U.S. stated that Russia should limit its "use of force to a minimum and respect human rights."<sup>95</sup>

Although the Article 2(4) prohibition seems only to address U.N. Member states using force against other states, the prohibition can also apply to contested states. Article 2(4) can apply to internal relations because it prohibits use of force that is inconsistent with the "purposes of the United Nations."<sup>96</sup> Article 1(1) of the U.N. Charter says that one of the purposes of the United Nations is "to maintain international peace and security... and to bring about by peaceful means... [the] settlement of international disputes or situations that might lead to a breach of the peace."<sup>97</sup> Thus, the U.N. Charter protects contested states from the use of force if it would breach international peace and security.<sup>98</sup>

In practice, however, applying Article 2(4) to contested states is more difficult and limited than it may seem. Applying Article 2(4) to contested states is difficult because there is no clear definition of a "breach of international security," so there is no clear threshold for the Article's application. As demonstrated by the Chechnya example above, an original state can use force against a contested state without breaching international peace or security. Oppositely, if members of the international community do not respect the original state's claim of sovereignty over a contested state, then a use of force against the contested state would inherently be an international issue, and therefore rise to a violation of international law. Other states may argue that, even if they respect the original state's claim, an original state's use of force over a territory dispute can have a detrimental impact beyond the borders of both the original and contested state and therefore threaten "international peace and security."

Lastly, Article 2(4) is not an absolute prohibition on the use of force, because the U.N. Charter provides two other justifications for the use of force. Chapter 7 of the U.N. Charter explains the procedures required to gain U.N. authorization to use force, which ultimately requires authorization from the U.N. Security Council.<sup>99</sup> The last exception to

94. Crawford, *supra* note 86, at 111–12.

95. *Id.* at 112.

96. U.N. Charter art. 2, ¶ 4.

97. U.N. Charter art. 1, ¶ 1; *see also* U.N. Charter art. 33.

98. Many scholars agree that it is "almost generally accepted that de facto regimes exercising their authority in a stabilized manner are also bound and protected by Art 2(4)." Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS, A COMMENTARY* 200, ¶¶ 29, 32 (Bruno Simma et al. eds., 3d ed. 2012).

99. U.N. Charter art. 39.

Article 2(4) is found in Article 51 of Chapter 7, which explains the inherent right to self-defense.<sup>100</sup>

#### D. *Self-Defense*

Article 51 of the U.N. Charter describes the right to self-defense and provides balance to the prohibition on the use of force found in Article 2(4) of the Charter.<sup>101</sup> Article 2(4) has customary roots dating back to the Middle Ages, but Article 51 is founded, at least in part, upon Roman principles that predate even the earliest western notions of just war theory.<sup>102</sup> This norm cemented itself through the centuries because, as Hugo Grotius argued, the “right [of self-defense] is so tied to the instinct of self-preservation that it must transcend simple customary international norms.”<sup>103</sup> Also, as Westphalian sovereignty developed, it became clear that sovereignty wholly depended upon a state’s right “to preserve its very existence.”<sup>104</sup> Because of its fundamental nature, the principle of self-defense is a peremptory, or a *jus cogens*, norm.

For members of the U.N., the right of individual and collective self-defense is clear. The U.N. Charter enshrines the customary law on self-defense as follows: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence (*sic*) if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>105</sup> This provision clarifies that individual and collective self-defense is an inherent right that Member states can exercise without U.N. approval. It is debated, however, whether the Security Council can limit a state’s customary right to self-defense. Regarding collective self-defense, the ICJ’s *Nicaragua* case clarified its customary requirements.<sup>106</sup> The ICJ clarified that the requirements for a third-party state to lawfully intervene on behalf of any other state be that a state must first declare itself a victim of an armed attack and then make an explicit request for defense.<sup>107</sup>

100. U.N. Charter art. 51.

101. *Id.*

102. M. A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1095 (1951); see also Ziyad Motala & David T. ButleRitchie, *Self-Defense in International Law, the United Nations, and the Bosnian Conflict*, 57 UNIV. PITT. L. REV. 1, 9 (1995).

103. Motala & ButleRitchie, *supra* note 102, at 12.

104. *Id.* at 14.

105. U.N. Charter art. 51. The French version of the U.N. Charter characterizes the right as “droit naturel,” or as a “natural right.” *Id.* (French Version).

106. Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Judgment, 1986 I.C.J. 14, ¶¶ 199–200 (June 27, 1986), <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> [<https://perma.cc/DY54-G9JN>] [hereinafter *Nicaragua Case*].

107. *Id.* ¶ 232.

Article 51 discusses only the right of U.N. Member states, making no reference to the rights of non-members. Though the Charter does not reference non-member rights, the language of Article 51 strongly suggests that the “right to self-defense is an inherent right irrespective of membership of the United Nations....”<sup>108</sup> But the right to individual and collective self-defense for contested states is not settled.

Westphalian sovereignty maintains that the right to self-defense is reserved only for recognized states, but some experts suggest that contested states can also hold the right to self-defense. The Council of the European Union addressed the self-defense rights of contested states in its report: *Independent International Fact-Finding Mission on the Conflict in Georgia*.<sup>109</sup> The report stated that customary international law suggests contested states have the right to individual self-defense, but the Council stated that “individual self-defense and collective self-defense are not logically linked,” therefore, it would not be “inconsistent to allow an entity short of statehood to defend itself against armed attack, while at the same time limiting its right to ‘invite’ foreign support.”<sup>110</sup> The European Council further stated that the “right to ‘invite’ foreign support... would not de-escalate, but escalate the conflict and therefore run counter to the objectives of the United Nations.”<sup>111</sup> The principle of non-intervention may support the Council’s finding, but intervention may only become an issue if the “invited” nation does not recognize the statehood of the contested state.

Other scholars argue that international law does permit collective self-defense of contested states. Henderson argues, however, that allowing a contested state to defend itself but denying it collective self-defense is “illogical” because contested states are generally small and unable to defend themselves, rendering individual self-defense meaningless.<sup>112</sup> But international state practice shows few examples of states proclaiming the exercise of Article 51 collective self-defense of contested states. One example of collective self-defense of a contested state is the U.S.’ involvement in the Vietnam War.

108. Chan, *supra* note 23, at 482; *see also* U.N. Charter art. 51.

109. Christian Henderson, *Contested States and the Rights and Obligations of the Jus Ad Bellum*, 21 *CARDOZO J. INT’L & COMP. L.* 367, 404 (2013).

110. Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, at 282 (Sept. 30, 2009), [https://www.mpil.de/files/pdf4/IIFFMCG\\_Volume\\_II1.pdf](https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf) [<https://perma.cc/CC38-NSFB>] [hereinafter IIFFMCG]; *see also* Henderson, *supra* note 109, at 404.

111. Independent International Fact-Finding Mission on the Conflict in Georgia, *supra* note 110, at 282.

112. Henderson, *supra* note 109, at 404. Henderson also acknowledges that this area of the law is unsettled and granting collective self-defense to all contested state could create harm international peace and security. *Id.* at 407.

The U.S. entered the Vietnam War to help defend South Vietnam, a part of the former state of Vietnam that had split into two parts. In 1954, prior to engaging in the Vietnam War, the U.S. signed the Asia Collective Defense Treaty, along with France and other states. After the Gulf of Tonkin incident, the U.S. Congress “adopted a resolution stating it was prepared to take all necessary steps, including the use of armed force, to assist any member [of the treaty] requesting assistance in defense of its freedom.”<sup>113</sup> The U.S.’ justifications for entering the conflict included: (1) North Vietnam committed an armed attack against South Vietnam; (2) South Vietnam was recognized as a separate international entity by approximately 60 states; and (3) South Vietnam requested U.S. assistance.<sup>114</sup> The U.S. said it could help defend South Vietnam based off either the 1954 treaty or the invitation of South Vietnam, but this position faced opposition by international law scholars.<sup>115</sup>

To conclude, the law is unsettled regarding the rights of contested states to individual or collective self-defense. Because international law is inherently permissive in nature, third-party states may lawfully provide collective self-defense for states that they recognize, because doing so is not specifically prohibited under the law. However, prior to a third-party state exercising collective self-defense on behalf of a contested state that is a victim of an armed attack, the third-party state must formally acknowledge the statehood of the victim state, lest it violate the territorial integrity of the attacking state.

To the international community, however, the collective or individual opinions of particular states can influence the world’s perception about the lawfulness of certain actions. The perceived lawfulness regarding a third-party state defending a contested state will hinge on the number of states that formally recognize the contested state. The more states that recognize a contested state, the more likely the international community will determine that it is lawful to defend the contested state.

At this point, this Article has explained the international law regarding state recognition, self-determination, and how the prohibition on the use of force and self-defense impact contested states. These principles provide an analytical foundation for the conflict between China and Taiwan because they show that the rights and obligations of states are not limited to formally recognized states. Nevertheless, the unsettled nature

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113. STANIMIR ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 221 (1996).

114. *Id.*

115. A group of international lawyers opposed the U.S. position, arguing that South Vietnam was not a recognized state and therefore did not have a right to collective self-defense. They stated that the North did not commit an armed attack because the North’s efforts amounted to civil strife. These efforts included a slow stream of infiltrators over the course of a 10-year period. Lastly, they argued that the South Vietnamese government was as client government of the U.S. so their request for assistance could not be considered legitimate. *Id.*

of the law of state recognition prevents contested states from fitting into the traditional paradigm of Westphalian sovereignty, and the *jus cogens* norms regarding the non-use of force and self-defense. Having explained the law, the next section of this Article will apply the aforementioned laws and principles to the conflict between China and Taiwan.

### III. AN ANALYSIS OF TAIWAN'S STATUS IN INTERNATIONAL LAW

Taiwan's internal and external characteristics demonstrate that it exercises the factual and legal qualities of a state. The analysis following will explain Taiwan's status in international law by examining whether it is a recognized state and whether it has a "people" that qualify for self-determination. Next, it will analyze how the prohibition on the use of force and self-defense apply to Taiwan. Ultimately, it describes that the U.S. and other nations may lawfully defend Taiwan provided that they first formally recognize its statehood.

#### A. Taiwan's State Recognition

Taiwan holds all the essential characteristics of a state, but, by most accounts, Taiwan is still not a recognized state. It maintains formal state-to-state relationships with 14 states,<sup>116</sup> and "unofficial" non-diplomatic relationships with 57 other states, including the U.S., Japan, the U.K., Germany, and essentially every other major world power except Russia.<sup>117</sup> The fact that Taiwan lacks widespread formal state recognition shows the inherent weakness in international law's concept of state recognition.

State recognition is determined by a combination of internal and external factors, as described by the constitutive and declarative theories of state recognition, but neither of these theories balance the political reality found in state practice. Accordingly, this section will analyze Taiwan's status under both the declarative and constitutive theories of state recognition and will ultimately demonstrate that Taiwan clearly meets the declarative theory and partly meets the constitutive theory. Taiwan's relationships show that it experiences widespread *de facto* recognition, which in some respects can constitute *de jure* recognition because of the highly political influence the P.R.C. exercises on Taiwan's state recognition.

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116. Tom O'Connor, *Which Countries Still Recognize Taiwan? Two More Nations Switch to China in Less than a Week*, NEWSWEEK (Sept. 20, 2019), <https://www.newsweek.com/who-recognizes-taiwan-two-change-china-1460559> [<https://perma.cc/4Z4L-T8WY>].

117. EMBASSIES & MISSIONS, *supra* note 8.

## 1. Declarative Theory

Under the declarative theory, Taiwan is a state because international legal scholars largely agree that Taiwan meets all four of the Montevideo factors.<sup>118</sup> First, Taiwan has a permanent population. Since 1949, when a massive flood of members of the R.O.C. government fled Mainland China to Taiwan, Taiwan's population has been stable and permanent. Taiwan currently has a permanent, stable population of about 25 million.<sup>119</sup> Taiwan controls its borders, issues its people passports and visas, and controls immigration.<sup>120</sup>

Second, the territory of Taiwan is clearly defined, and its borders have not been disputed since conflicts over outlying islands of Taiwan in the early 1950s. The P.R.C. government does not dispute the boundaries of Taiwan, only the rightful sovereign over the territory.<sup>121</sup>

Third, Taiwan has an effective government that exercises control over the territory to the clear exclusion of any other government. The R.O.C. government of Taiwan has controlled the territory exclusively since 1949, exercising martial law from 1949 until 1987, and then slowly democratizing until the first open democratic elections were completed in 1996.<sup>122</sup> Taiwan exercises full control over its military, economy, immigration, law enforcement, international relations, and every other facet of government. No other government claims to exercise any control over Taiwan's people or territory. Crawford states: "It is true that Taiwan is hardly a renegade province of the P.R.C. The R.O.C. was not part of and was never in fact brought within the governmental system of the P.R.C."<sup>123</sup>

Fourth, and lastly, Taiwan has the capacity to enter into relations with other nations. As discussed above, Taiwan not only has the capacity to enter into relations with other nations, but it in fact also has relationships with 71 other nations, either formal or informal.<sup>124</sup>

Under the declarative theory, Taiwan unambiguously meets all the criteria for state recognition under the Montevideo Convention and should be a recognized state. Recognition by other states is irrelevant under this theory, as the Montevideo Convention itself says, "[t]he

118. Chan, *supra* note 23, at 465 ("Taiwan indeed satisfies all these criteria for statehood."). Even Chan, an opponent to Taiwan's statehood, agrees that Taiwan satisfies these criteria.

119. Ediger *supra* note 25, at 1680.

120. NATIONAL IMMIGRATION AGENCY, <https://www.immigration.gov.tw/5475/> [<https://perma.cc/Q6TQ-EQNZ>] (last visited Jan. 27, 2021); VISA, PASSPORTS, AND AUTHENTICATION, <https://taiwan.gov.tw/content3.php?p=33&c=52> (last visited Jan. 27, 2021).

121. Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 AM. U. INT'L L. REV. 1101, 1129 (2000).

122. Chan, *supra* note 23, at 464, 479 n.136.

123. CRAWFORD, *supra* note 42, at 216.

124. O'Connor, *supra* note 116; EMBASSIES & MISSIONS, *supra* note 8.



political existence of the state is independent of recognition by the other states.”<sup>125</sup>

Despite Taiwan’s clear satisfaction of the Montevideo requirements, some scholars suggest the declaratory theory also requires a formal declaration of independence. Crawford, while admitting that Taiwan meets all the Montevideo requirements, states: “Taiwan is not a state because it still has not unequivocally asserted its separation from China and is not recognized as a state distinct from China.”<sup>126</sup> Crawford’s view is that “claims to statehood are not to be inferred from statements or actions short of explicit declaration.”<sup>127</sup> However, Crawford’s position is too narrowly defined and is not supported by practical reality.

Taiwan has not formally declared its independence from the P.R.C. in a single, stand-alone declaratory event, but it has effectively declared its independence many times. In response to the P.R.C.’s Anti-Secession Law of 2005, Taiwan issued a formal response stating: “based on the Montevideo convention of 1933, it is undeniable that the R.O.C. is a sovereign and independent state.”<sup>128</sup> Also, every year from 1993 to 2007, Taiwan requested membership in the U.N., an organization to which only states may belong.<sup>129</sup> Following its last rejection from the U.N. in 2007, Taiwan’s president sent a letter to the U.N. stating: “Taiwan is an independent sovereign nation.”<sup>130</sup> Despite a few opposing opinions, Taiwan is widely recognized to qualify as a state under the declarative theory of state recognition.

## 2. Constitutive Theory

On the other hand, very few scholars suggest that Taiwan satisfies the definition of statehood under the constitutive theory. While the constitutive theory does not present a specific number of states that must recognize another state for it to gain “recognition,” it seems that 14 out of nearly 200 nations is not enough, and the number of states that recognize Taiwan is dwindling. No large nations have formal ties with Taiwan, and of the 14 states that still recognize it, most of them are small island nations with little to no international influence. For example, of the G20 member states, which represent ninety percent of global GDP, not a single member has formal ties with Taiwan; however, 18 of the 20 maintain non-diplomatic unofficial relations with Taiwan (excluding

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125. Montevideo Convention, *supra* note 68, art. 3.

126. CRAWFORD, *supra* note 42, at 219.

127. CRAWFORD, *supra* note 42, at 211.

128. Anti-Secession Law, *infra* note 134; CRAWFORD, *supra* note 42, at 218.

129. LAWRENCE & MORRISON, *supra* note 9, at 57.

130. Yael Ronen, *Entities that Can Be States But Do Not Claim to Be*, STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 23, 49 n.106 (Duncan French ed., 2015), <https://english.president.gov.tw/NEWS/2733>.

only the P.R.C. and the European Union).<sup>131</sup> With such limited official recognition in the international community, Taiwan fails to clearly demonstrate recognition under the current definition of the constitutive theory.

As previously discussed, the U.N. rejected Taiwan's membership application at least 15 times. Although the U.N. has no official authority to determine state recognition, acceptance into the U.N. may be the clearest benchmark for state recognition under the constitutive theory. Due to the narrow framework provided by international law, Taiwan does not fit into the current paradigm of the constitutive theory of state recognition in general. The reality of Taiwan's unique "state" practice should hold significant weight in international law, and it should be given its proper weight when analyzing Taiwan's recognition under the constitutive theory.<sup>132</sup>

Regarding formal recognition, it is unlikely Taiwan will ever obtain membership into the U.N. In the U.N., state recognition must be recommended by the U.N. Security Council and voted on by the U.N. General Assembly.<sup>133</sup> Even if Taiwan's application to the U.N. is accepted, the P.R.C., with its permanent seat on the Security Council, will invariably veto any effort by Taiwan to gain U.N. recognition. This is also demonstrated by the P.R.C.'s Anti-Secession Law and consistent rhetoric from P.R.C. leadership.<sup>134</sup> In reality, Taiwan's repeated applications from 1993 to 2007 were rejected by the U.N. and never even formally considered.<sup>135</sup>

While the previous section demonstrates that Taiwan may never obtain U.N. membership, it can still become a state under the constitutive theory by gaining recognition from a significant number of states. In fact, the official position of several states already implies Taiwan's official state recognition. The following section will provide a brief overview of most states' official position regarding Taiwan's sovereignty. It will then review certain aspects of Canada, the U.K., Japan, and the U.S.' relationship with Taiwan, with emphasis on the U.S.' relationship. The section will conclude by discussing why the U.S. and other world powers'

131. WHAT IS THE G20, <https://www.g20foundation.org/g20/what-is-the-g20> [<https://perma.cc/3BRC-TXSY>] (last visited Apr. 14, 2020).

132. Charney & Prescott, *supra* note 12, at 453 (arguing that no conclusive answer is possible on the question of whether Taiwan rightfully belongs to the R.O.C. or P.R.C.).

133. ABOUT UN MEMBERSHIP, <https://www.un.org/en/sections/member-states/about-un-membership/index.html> [<https://perma.cc/PK9Z-4XFF>] (last visited Apr. 14, 2020).

134. *Anti-Secession Law*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE UNITED STATES (adopted by the Nat'l People's Cong., Mar. 14, 2005), <http://www.china-embassy.org/eng/zt/999999999/t187406.htm> [<https://perma.cc/UXU6-NVCV>] [hereinafter *Anti-Secession Law*].

135. Winkler, *supra* note 36.

*de facto* recognition of Taiwan should in some respects equate to *de jure* recognition.

Starting in 1970, the P.R.C. started gaining formal recognition from nations around the world; this was in response to the P.R.C.'s rise to power in the international community. When the P.R.C. established diplomatic relations with foreign states, it demanded that states recognize it as the "sole legitimate government of China" and also recognize its claim of sovereignty over Taiwan.<sup>136</sup> The P.R.C. published "joint communiqués" with each nation with which it established a formal relationship.<sup>137</sup> Between 1970 and 1996, 123 nations established formal relations with the P.R.C.<sup>138</sup> Of the 123 joint communiqués established, only Russia expressed affirmative support for the P.R.C.'s position regarding Taiwan.<sup>139</sup> The other states' communiqués expressed various responses to the P.R.C.'s claim of sovereignty over Taiwan. Thirty-three states, mostly former U.S.S.R. states and third world countries, stated that they "recognize" the P.R.C. position on Taiwan; nine states, including the U.S. and most British Commonwealth countries, "acknowledge" it; and twenty states, including Japan, South Korea, and the Netherlands, used non-committal language like "take note of" or "respect" it.<sup>140</sup> Sixty states' communiqués were silent regarding Taiwan.<sup>141</sup> This shows that the official position of nearly every world power remains ambiguous regarding Taiwan's status. In practice, however, these states' actual relationships are more indicative of Taiwan's position in international law.

Nearly all world powers have strong ties with Taiwan. Certain aspects of Canada, the United Kingdom (U.K.), and Japan's relationships with Taiwan show how it is actually treated like a fully recognized state. In Canada's case, negotiations over the P.R.C. joint communiqué stalled because of the Canadian government's belief that "it would be improper and inconsistent with international practices to recognize the P.R.C.'s sovereignty over Taiwan."<sup>142</sup> Canada maintains a *de facto* embassy in Taipei called the "Canadian Trade Office in Taipei," and it also shares a

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136. Lee, *supra* note 2, at 357.

137. *Id.*

138. *Id.*

139. *Id.* at 359; See generally WEST ASIA EMBASSIES AND MISSIONS ABROAD, <https://www.mofa.gov.tw/en/> [<https://perma.cc/H4N3-KDHC>] (follow "Embassies and Missions" hyperlink, then "West Asia" hyperlink, then "Russian Federation" hyperlink) (last visited Apr. 15, 2020) (noting Russia has an economic and cultural office in Taiwan, like so many other major world powers).

140. Lee, *supra* note 2, at 357–59.

141. *Id.* at 360.

142. Lee, *supra* note 2, at 359–61.

visa waiver program with Taiwan, where passport holders from both locations can enter the other state without a visa.<sup>143</sup>

The U.K. maintains only unofficial ties with Taiwan, but it has also enacted legislation that shows implicit support for Taiwan's independent status. In 1991, the U.K. parliament established the "Foreign Corporations Act," a law that suggests Taiwan has the qualities of a recognized state.<sup>144</sup> The law regulated the legal status in U.K. courts of bodies "incorporated in territories not part of a State recognised (*sic*) by the British Government."<sup>145</sup> The primary purpose of the legislation was the concern "about the legal status of commercial institutions incorporated in territories such as Taiwan and North Korea."<sup>146</sup> While the law only contemplates private law matters, "it establishes Taiwan as a stable regime with settled laws as if it were a recognized state."<sup>147</sup> The U.K. has a *de facto* embassy in Taipei and also maintains a visa waiver program, much like nearly every nation in Europe.<sup>148</sup> It, like the U.S., recognizes that the P.R.C. is the "sole legitimate government of China" but only "acknowledges" the P.R.C.'s claim to Taiwan.<sup>149</sup>

Japan is another example of a state that shows support for Taiwan's recognition as a state. In 2014, the Japanese executive authorized a reinterpretation of the formerly restrictive definition of "self-defense" in the Japanese constitution. Previously, the official interpretation of Japan's constitution only allowed Japan to exercise self-defense if there was a direct attack on Japan. The 2014 change allows Japan to defend its allies under three circumstances: (1) "the attack on that country poses a clear danger to Japan's survival or could fundamentally overturn Japanese citizens' constitutional rights to life, liberty and the pursuit of happiness," (2) "there is no other way of repelling the attack and

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143. Canadian citizens may visit the R.O.C. for 90 days without a visa, and R.O.C. citizens may visit Canada for up to 180 days without a visa. CANADA AND TAIWAN RELATIONS, <https://www.international.gc.ca/world-monde/taiwan/relations.aspx?lang=eng> [<https://perma.cc/HT57-Q8BR>]; CANADA ANNOUNCES VISA WAIVER FOR TAIWAN, [https://www.roc-taiwan.org/ussea\\_en/post/5980.html](https://www.roc-taiwan.org/ussea_en/post/5980.html) [<https://perma.cc/BR2D-4A4E>].

144. Ilona Cheyne, *The Foreign Corporations Act*, 40 INT'L & COMP. L. Q. 983, 983–84 (1991) (citing H.L. Bill 51, 1990–1991).

145. *Id.*

146. *Id.*

147. Anne Hsiu-An Hsiao, *Is China's Policy to Use Force against Taiwan a Violation of the Principle of Non-Use of Force under International Law*, 32 NEW ENG. L. REV. 715, 741 (1998).

148. FOREIGN TRAVEL ADVICE: TAIWAN, <https://www.gov.uk/foreign-travel-advice/taiwan/entry-requirements>; VISA-EXEMPT ENTRY, <https://www.boca.gov.tw/cp-149-4486-7785a-2.html> [<https://perma.cc/PD9L-FCKP>] (last visited Apr. 15, 2020).

149. Lee, *supra* note 2, at 357–61.

protecting Japan and its citizens,” or (3) “the use of force is limited to the minimum necessary.”<sup>150</sup>

Some have argued that this change, although not explicit, was directly related to Japan’s ability to defend Taiwan.<sup>151</sup> A draft of the constitutional interpretation stated that Japan would be able to defend countries with which it had “close relations.”<sup>152</sup> Considering China and Korea’s ever present strains of disdain for Japan, and Japan’s decades long disputes with Russia over the Kuril Islands, Taiwan’s government is often considered the most Japan-friendly government in all of Asia.<sup>153</sup> While this Japanese constitutional change is vague (much like nearly all other international Taiwan related legislation), it, at a minimum opens a door for Japanese defense of Taiwan.

In addition to the constitutional change, Japan has also taken other recent steps to promote its security and economic relationship with Taiwan, which also bolsters the case for Taiwan’s recognition. In 2016, Japan held a maritime cooperation dialogue with Taiwan to increase collaboration between Japanese and Taiwanese fisheries and maritime scientific research, as well as collaboration between their Coast Guards.<sup>154</sup> In 2017, Japan changed the name of its *de facto* embassy in Taiwan from “Interchange Association” to “Japan-Taiwan Exchange Association,”<sup>155</sup> which drew a stern rebuke from the P.R.C. for violating the “One-China Policy.”<sup>156</sup>

Just like Canada, the U.K., and Japan, the U.S. does not have formal diplomatic relations with Taiwan, but the U.S. may be the most

150. Ayako Mie, *Abe Wins Battle to Broaden Defense Policy*, JAPAN TIMES (July 1, 2014), <https://www.japantimes.co.jp/news/2014/07/01/national/coalition-agrees-on-scrapping-pacifist-postwar-defense-policy> [<https://perma.cc/73ZH-A5Q9>].

151. Zachary Keck, *Taiwan and Japan’s Collective Self-Defense*, THE DIPLOMAT (July 2, 2014), <https://thediplomat.com/2014/07/taiwan-and-japans-collective-self-defense/> [<https://perma.cc/T32Y-JLDM>].

152. *Rushing on collective self-defense*, JAPAN TIMES (June 29, 2014), <https://www.japan-times.co.jp/opinion/2014/06/29/editorials/rushing-collective-self-defense/> [<https://perma.cc/45R5-6QBR>].

153. Misato Matsuoka & Michal Thim, *The Odd Couple: Japan & Taiwan’s Unlikely Friendship*, THE DIPLOMAT (May 15, 2014), <https://thediplomat.com/2014/05/the-odd-couple-japan-taiwans-unlikely-friendship/> [<https://perma.cc/5QFF-BYD9>].

154. Jeffrey W. Hornung, *Strong But Constrained Japan-Taiwan Ties*, BROOKINGS (Mar. 13, 2018), <https://www.brookings.edu/opinions/strong-but-constrained-japan-taiwan-ties/> [<https://perma.cc/RY2B-WMB4>].

155. Chang Mao-sen, *Foreign Ministry Supports Name Change*, TAIPEI TIMES (Dec. 29, 2016), <https://www.taipeitimes.com/News/front/archives/2016/12/29/2003662107> [<https://perma.cc/HLQ7-DF6A>].

156. A spokesperson from the Chinese Foreign Ministry stated: “We firmly oppose any countries that have forged diplomatic ties with China maintaining official relations with Taiwan in any form.” *China denounces name change of Taiwan body in Japan*, CHINA DAILY (May 5, 2017), [https://www.chinadaily.com.cn/china/2017-05/17/content\\_29389434.htm](https://www.chinadaily.com.cn/china/2017-05/17/content_29389434.htm) [<https://perma.cc/Q2C6-AJ36>].

significant example of a state with *de facto* diplomatic relations with Taiwan. The U.S. State Department's official position is that the U.S. "does not support Taiwan's independence."<sup>157</sup> However, U.S. practice is more complex than the State Department suggests, and it indicates significant characteristics of *de jure* state recognition of Taiwan.

Since the U.N. removed the R.O.C./Taiwan's membership in 1971, the U.S. has laced its relationship with Taiwan with "strategic ambiguity" to preserve its highly political relationship with the P.R.C. In all three of the U.S.-P.R.C. joint communiqués, the U.S. never agreed with the P.R.C.'s claim over Taiwan—it simply "acknowledged" and "recognized" the P.R.C.'s claims.<sup>158</sup> Despite the ambiguity of the communiqués, in 1979 the U.S. Government passed the Taiwan Relations Act (TRA) showing U.S. support for Taiwan, including the commitment to sell "defense articles and defense services" to Taiwan.<sup>159</sup> Since 1979, the U.S. Congress and many White House Administrations have consistently renewed relations with Taiwan.<sup>160</sup>

Since the end of WWII, the U.S. has consistently demonstrated military support for Taiwan.<sup>161</sup> In accordance with the TRA and the joint communiqués, during the last four decades, the U.S. has repeatedly completed multi-billion dollar foreign military sales.<sup>162</sup> These sales make Taiwan the U.S.' second largest customer for foreign military sales.<sup>163</sup> President George W. Bush's administration sold at least \$15 billion of military equipment to Taiwan, and President Obama's administration sold over \$14 billion.<sup>164</sup> President Trump's administration has sold Taiwan nearly \$4.5 billion worth of military equipment.<sup>165</sup> As of April 2019, the president and State Department have approved an additional \$8

157. *U.S. Relations With Taiwan*, U.S. DEP'T OF STATE (2018), <https://www.state.gov/u-s-relations-with-taiwan/> [<https://perma.cc/3DZW-TH5P>] (last visited Apr. 15, 2020).

158. *U.S. Relations With Taiwan*, U.S. DEP'T OF STATE (2018), <https://www.state.gov/u-s-relations-with-taiwan/> [<https://perma.cc/8LPA-WG9P>] (last visited Apr. 15, 2020).

159. Taiwan Relations Act, *supra* note 49 at §3(a).

160. See H.R. Res. 88, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/88/text/eh> [<https://perma.cc/5JYX-FLJP>]; see LAWRENCE & MORRISON, *supra* note 9, at 29–31 (Noting that since the enactment of the Taiwan Relations Act all U.S. presidential administrations have sold armaments to Taiwan, however, "the largest amount" of arms ever sold after the enactment of the Act took place under the Obama administration over a seven year period starting in 2009.).

161. Lindsay Maizland, *US Military Support of Taiwan: What's Changed Under Trump*, COUNCIL ON FOREIGN RELS. (Apr. 3, 2019), <https://www.cfr.org/in-brief/us-military-support-taiwan-whats-changed-under-trump> [<https://perma.cc/PC3Q-G7GC>].

162. LAWRENCE & MORRISON, *supra* note 9, at 1.

163. *Id.*

164. Maizland, *supra* note 161.

165. Cary Huang, *Under Trump, US Arms Sales to Taiwan Could Be the New Normal*, S. CHINA MORNING POST (Aug. 25, 2019), <https://www.scmp.com/week-asia/opinion/article/3024132/under-trump-us-arms-sales-taiwan-could-be-new-normal> [<https://perma.cc/YQY4-ZNP7>].

billion sale, including the most advanced F-16 fighter jets, but the Senate has not yet finalized the sale.<sup>166</sup>

Like Taiwan's recognition status, international law is unclear on the legality of military sales to contested states. On its face, selling arms to an unrecognized state appears to be a violation of international law. With the P.R.C.'s longstanding claim that the dispute between the renegade state of Taiwan and the P.R.C. is purely an internal conflict, the P.R.C. government views the sales as a violation of its sovereignty. In 2019, Geng Shuang, the spokesman for the Chinese Foreign Ministry, said that U.S. arms sales to Taiwan are a violation of international law because they are a "crude interference in China's internal affairs, harming China's sovereignty and security interests."<sup>167</sup>

The International Court of Justice held in the case of *Nicaragua v. U.S.* that the U.S. violated customary international law by selling arms to the anti-Sandinista *contras* because it was unlawful intervention into the internal affairs of another state.<sup>168</sup> Although Taiwan is not a rebel group directly comparable to the Nicaraguan *contras*, it can be argued that the sale of arms to a non-state group is comparable to the Taiwan case. If Taiwan is in fact Chinese sovereign territory, then the sale of arms to Taiwan is likely a violation of customary international law; however, the international community's position on the status of Taiwan is still unclear.

This dispute over U.S. arms sales highlights the U.S.' policy of "strategic ambiguity." As previously discussed, the U.S. does not formally recognize Taiwan and it formally recognizes the P.R.C., but the U.S. has only *acknowledged* (and never *agreed with*) the P.R.C.'s claim of sovereignty over Taiwan.<sup>169</sup> This acknowledgement mirrors the position of essentially every other world power except Russia.<sup>170</sup> Although the U.S. severed formal ties with Taiwan in 1979 for political reasons, the U.S. never formally stated that Taiwan is not a state, and its sale of arms to Taiwan shows that the U.S. treats Taiwan like a fully recognized state. Any other interpretation would suggest that the U.S. is blatantly violating the non-intervention principle of international law by selling arms to a rebellious province of the P.R.C. The state practice of the U.S. and other nations contradicts the P.R.C.'s position that Taiwan

166. Reuters Staff, *State Department approves possible \$8 billion fighter jet sale to Taiwan: Pentagon*, REUTERS (Aug. 20, 2019), <https://www.reuters.com/article/us-usa-taiwan-aircraft/state-dept-approves-possible-8-billion-fighter-jet-sale-to-taiwan-pentagon-idUSKCN1VA29F> [<https://perma.cc/M9NT-TVKH>].

167. *US State Department Approves Possible \$2.2 Billion Arms Sale to Taiwan*, REUTERS (July 8, 2019), <https://www.reuters.com/article/us-usa-taiwan/u-s-state-department-approves-possible-2-2-billion-arms-sale-to-taiwan-idUSKCN1U32HT>.

168. *Nicaragua Case*, *supra* note 106, ¶¶ 242, 246.

169. Lee, *supra* note 2, at 357–59

170. *Id.*

is its sovereign territory, thus it is unlikely that the U.S.' arms sales to Taiwan would violate international law.

In addition to military support, the U.S. also maintains strong cultural and economic ties with Taiwan. As of 2016, the U.S. was Taiwan's second largest trading partner (behind the P.R.C.), and Taiwan was the U.S.' tenth largest trading partner.<sup>171</sup> The U.S. also maintains a visa waiver program with Taiwan.<sup>172</sup> Of the 38 states with which the U.S. maintains a visa waiver program, Taiwan is the only member that does not have diplomatic relations with the U.S.<sup>173</sup> Lastly, although the U.S. only maintains embassies in nations with which it has full diplomatic relations, the U.S. operates a *de facto* embassy in Taiwan called the American Institute in Taiwan (AIT).<sup>174</sup> Over 500 U.S. and local personnel work at the AIT, including active duty military personnel from the Army, Air Force, Navy, and Marine Corps.<sup>175</sup> The AIT provides consular services to U.S. citizens, which are generally only provided by embassies.<sup>176</sup>

The U.S.' cultural, economic, and military ties to Taiwan show that the U.S. effectively treats Taiwan like an independent state. Although the U.S. does not formally recognize Taiwan, its *de facto* recognition should in some respects be recognized by the international community as *de jure* recognition because the relationship is almost identical to *de jure* recognition, particularly with the U.S.' sale of arms to Taiwan. With such an open and notorious deed exclaiming the U.S.' implicit *de jure* recognition of Taiwan, it almost seems strange that the P.R.C. has never sought redress from the U.N. about the matter.<sup>177</sup>

The relationships of the U.S. and other large nations show a strange dichotomy. They all seem to treat Taiwan like an independent state, entirely separate from the P.R.C., yet they do not formally recognize it. Under the constitutive theory, formal recognition is required to achieve state recognition, but formal recognition for Taiwan is highly unlikely due to the P.R.C.'s staunch position against Taiwanese independence. The P.R.C.'s aggressive overtones fuel one of the greatest falsehoods currently observed in international law—that Taiwan looks like a state, acts like a state, is treated like a state, but it is not formally recognized as

171. LAWRENCE & MORRISON, *supra* note 9, at 36.

172. *Id.* at 37.

173. *Id.* at 38.

174. *Id.* at 15.

175. *Id.* at 15; Lawrence Chung, *US Prepares to Open New De Facto Embassy in Taipei Amid 'Policy Shift' on Taiwan*, S. CHINA MORNING POST (Apr. 6, 2019), <https://www.scmp.com/news/china/diplomacy/article/3004910/us-prepares-open-new-de-facto-embassy-taipei-amid-policy-shift> [<https://perma.cc/G3TM-TKR7>].

176. LAWRENCE & MORRISON, *supra* note 9, at 15.

177. It is the author's own assertion that the P.R.C.'s failure to address the issue may also be calculated at protecting status quo.



a state. The current international law framework of state recognition does not account for the P.R.C.'s threats of force to defend what it characterizes (yet only one other state supports) as its own sovereign land. Due to this political reality, Taiwan's *de facto* recognition by so many world powers should at least be partially accepted as *de jure* recognition in the international community, with its accompanying rights and obligations in international law.

Although the real-world practice of so many states supports Taiwan's independence, there are opponents to allowing states to gain recognition without fully complying with the law. These opponents contest that if recognition by a limited number of states actually grants a nation the rights and obligations of widely accepted states, then other nations can use "state recognition" as a weapon to violate international law.<sup>178</sup> For example, Kosovo's widespread recognition in February 2008 may have set a precedent that foreign recognition equates to a state's legality.<sup>179</sup>

In August 2008, Russia, in an apparent retaliation for the U.S. and European recognition of Kosovo, invaded Georgia "to defend the ethnic Russian minorities in the Georgian territories of Abkhazia and South Ossetia."<sup>180</sup> A scholar stated that Russia's "subsequent recognition of the two territories as States independent of Georgia . . . should serve as a stern warning of the importance of legality and the dire consequences of ignoring legal rules and principles that apply to statehood."<sup>181</sup> Based on this argument, Russia or other states could claim to recognize a contested state, then, in order to meet its own national interests, use "collective self-defense" of that state as a pretext for invasion. This position seeks to limit the rights of contested states to ensure stability in international relations. However, Taiwan withstands this argument because, much like Kosovo, it is widely recognized (*de facto, at least*),<sup>182</sup> whereas Russia's recognition of Abkhazia and South Ossetia, and subsequent invasion, was completed in a vacuum with very little outside support.<sup>183</sup>

Robert Chan disputes Taiwan's independence based on both the declaratory and constitutive theories of recognition. He argues that no matter how much Taiwan looks like a state, it cannot be a state under the declaratory theory because its claim to independence is an illegality—it is a belligerent occupation of Chinese territory that never gained

178. Chan, *supra* note 23, at 466.

179. *Id.*

180. *Id.*

181. *Id.*

182. Kosovo is recognized by nearly 100 states. Henderson, *supra* note 109, at 370 n.11.

183. Abkhazia is only recognized by Russia, Syria, Nicaragua, Venezuela, Nauru, Tuvalu, and Vanuatu and also by the partially recognized states of South Ossetia, Transnistria, and Nagorno-Karabakh; South Ossetia is recognized by Russia, Nicaragua, Venezuela, Tuvalu, and Nauru and the partially recognized states of Abkhazia, Nagorno-Karabakh, and Transnistria. Henderson, *supra* note 109, at 369–70 n.10.

independence.<sup>184</sup> Regarding the constitutive theory, Chan uses the Montevideo convention itself, citing Article 3, which says “statehood is independent of recognition.”<sup>185</sup>

In conclusion, Taiwan’s recognition is still unsettled in international law because the current framework of declaratory and constitutive recognition does not sufficiently encompass the political reality of the power that a single state can have on worldwide decision-making. Under the declaratory theory, Taiwan meets all the requirements for statehood, save for the potential requirement of a formal declaration of independence. Under the constitutive theory, Taiwan enjoys widespread *de facto* recognition, but is only formally recognized by 14 small states. The issue stopping Taiwan’s unambiguous recognition under both theories is the P.R.C.’s unabashed position on its sovereignty over the island. At present, the desire of nations around the world to avoid conflict with the P.R.C. prevents Taiwan from receiving all the benefits and obligations of a fully recognized state.

Despite Taiwan’s contested state recognition, it can still enjoy some of the rights of fully recognized states under a different theory of international law: “peoples’ right to self-determination.” Supposing that the P.R.C.’s threats prevent Taiwan from ever gaining widespread formal recognition, the right to self-determination can grant “state-like” rights to the people of Taiwan if the Taiwanese qualify as a distinct “people.”

### B. Taiwan as a “People” and Self-Determination

The burgeoning international law right of self-determination creates state-like rights for groups of “peoples,” and the people of Taiwan are entitled to these rights by international law. Yet, due to the analysis below, the principle of self-determination will not ultimately affect Taiwan’s ability to invite third-party nations to defend it in the event of a P.R.C. attack. In this section I will analyze whether the Taiwanese meet the definition of a “people,” the P.R.C.’s state practice regarding self-determination, how Taiwan currently seems to enjoy the right to self-determination, and how self-determination can neither grant Taiwan the right to secession, nor can it independently grant Taiwan the right to invite collective self-defense.

The definition of “peoples” under international law is not clear, but many experts agree that the Taiwanese qualify as a “people.”<sup>186</sup> A commonly accepted definition of self-determination comes from U.N. General Assembly Resolution 1541, which defined “peoples” as a group

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184. Chan, *supra* note 23.

185. *Id.* at 465.

186. James Crawford stated: “Whether or not there was such a people [as the Taiwanese] in 1947, the experience of half a century of separate self-government has tended to create one.” CRAWFORD, *supra* note 42, at 220.

found in “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”<sup>187</sup> This definition highlights how the right to self-determination does not perfectly apply to Taiwan because the P.R.C. does not exercise any administration over the R.O.C./Taiwan. Although the P.R.C. does not administer Taiwan, it may be argued that the P.R.C. continues to exercise influence over the territory of Taiwan by preventing it from achieving state recognition.

Looking at the U.N. definition more closely, Taiwan, as an island, is unquestionably geographically distinct from Mainland China. The definition also requires a people who are either culturally or ethnically distinct from the administering state. Taiwan has a population of approximately 23 million people, the vast majority of which are ethnically identical to the Han Chinese people of Mainland China.<sup>188</sup> The Han Chinese people first migrated to Taiwan during the 14th–17th century. Then in the 1940s, the R.O.C. fled to Taiwan causing a mass influx of persons from mainland China and increasing the population of Taiwan by approximately seventeen percent.<sup>189</sup> Today, the Han Chinese comprise over ninety-eight percent of the Taiwanese people.<sup>190</sup> The remaining two percent of the population are the aboriginal Austronesian peoples who have lived in Taiwan for many thousands of years.<sup>191</sup> Though they are a small percentage of the people numerically, the aboriginal people’s culture has integrated to create a unique cultural blend with the Han Chinese in Taiwan. Even with the integration of the aboriginal culture, because Taiwan’s truly ethnically distinct people are so few, many experts agree that the Taiwanese qualify as a people not because they are ethnically different, but because they are culturally different.<sup>192</sup>

The Taiwanese have been culturally separated from Mainland China since 1895 when the Japanese took control of the island. During this time, Japanese culture was adopted through many aspects of Taiwanese

187. G.A. Res. 1541 (XV), *supra* note 83.

188. Stephen Allen, *Recreating One China: Internal Self-Determination, Autonomy and the Future of Taiwan*, 4 *Asia-PAC. J. ON HUM. RTS. & L.* 21 33 (2003).

189. Charney & Prescott, *supra* note 12, at 473.

190. Michael Turton, *Ghost of Past Identities*, *TAIPEI TIMES* (Nov. 23, 2020), <https://www.taipetimes.com/News/feat/archives/2020/11/23/2003747415>.

191. Cindy Sui, *Tribal Culture Survives in Taiwan*, *BRIT. BROAD. CO. (BBC)* (Oct. 6, 2011), <http://www.bbc.com/travel/story/20110930-tribal-culture-survives-in-taiwan> [<https://perma.cc/3K9D-WSRJ>].

192. Ediger, *supra* note 25, at 1696–97; *see also* Stephen Allen, *Recreating One China: Internal Self-Determination, Autonomy and the Future of Taiwan*, 4 *Asia-PAC. J. ON HUM. RTS. & L.* 21 33 (2003); *but see*, Shen, *supra* note 121, at 1101. Where Shen argues that “Taiwan does not qualify as a “people.”

society.<sup>193</sup> Since the end of Japanese rule in 1945, R.O.C. governance maintained a culture with stark differences to Mainland China. The largest factors that impact Taiwan's cultural distinctions include the lack of religious suppression, a market economy with international economic exchange, and full democratic freedoms since the 1990s.<sup>194</sup> These unique characteristics of Taiwan's culture fit well into the U.N. Education, Scientific & Cultural Organization's definition of "peoples," which states: "A people is a group of individual human beings with a common historical tradition, racial or ethnic identity, culture, language, religion, territory, or economic life."<sup>195</sup> This broader definition of "peoples" shows that the Taiwanese people satisfy many facets of what make a "people" distinct. The Taiwanese peoples' unique ethnic, religious, economic, and territorial differences from Mainland Chinese show that they are a separate "people" who should qualify for special rights.

It is a sensitive topic on both sides of the Taiwan Strait for the Taiwanese to formally gain the status of a "people." For the Taiwanese, seeking the status of a "people" may implicitly state that, first, the P.R.C. administers control over them to begin with, and second, that it seeks the P.R.C.'s blessing to continue to self-determine its government and status—both of which are unacceptable positions for the Taiwanese. For the P.R.C., granting the Taiwanese such a status would formally require them to yield control of authority to the Taiwanese. The P.R.C. rejects any claims Taiwan may have to self-determination—it treats Taiwan as an integral part of its nation, culturally and ethnically identical—only temporarily separated in government.

In practice, however, the P.R.C. does not actually recognize the notion of "peoples" and their accompanying rights to self-determination under international law.<sup>196</sup> Because of the P.R.C.'s translations and interpretations of international law, even if the Taiwanese were willing to assume the status of a "people" under P.R.C. rule, it is unlikely the P.R.C. government would actually grant them special authority over their territory. The way the P.R.C. government has changed the language of the ICCPR and the ICESCR shows how the government has rejected the notion that "peoples" have any special rights at all. The original Chinese language versions of these two human rights covenants translated the word "peoples" into the Chinese word 民族 (*minzu*), which literally

193. Allen, *supra* note 188.

194. LAWRENCE & MORRISON, *supra* note 9.

195. U.N. Educ., Sci. & Cultural Org., *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, ¶ 22, U.N. Doc. SHS-89/CONF.602/7 (Feb. 22, 1990), [https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/819-UNESCO\\_-\\_Rights\\_of\\_Peoples\\_Official\\_Report.pdf](https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/819-UNESCO_-_Rights_of_Peoples_Official_Report.pdf) [https://perma.cc/UZ5X-S7JU].

196. Anonymous, *China and the Principle of Self-Determination of Peoples*, 6 SAINT ANTHONY'S INT'L REV. 79, 93 (2010), <http://www.columbia.edu/~jds3/Self-determination/Oxford-STAIR%20China&Secession.pdf> [https://perma.cc/WM56-MKBJ].

means ethnic groups, and is generally translated into English as the word “nationalities.”<sup>197</sup> After the P.R.C. took the R.O.C.’s seat at the U.N., it became “alarmed at the notion that its fifty-five officially recognized nationalities . . . might be entitled to self-determine.”<sup>198</sup> Eventually, the P.R.C. government ratified a version of the ICESCR that changed the translation of “peoples” from 民族 (*minzu*, or “ethnic groups”) to 人民 (*renmin*), which translates as “people,” or “citizenry,” and has no connection to the notion of a separate ethnic or cultural group.<sup>199</sup> By altering the meaning of these texts, the P.R.C. has removed the underlying purpose of the covenants that give rights to distinct groups of cultural or ethnic people.

Beyond changing the meaning of international covenants, two examples in past and modern P.R.C. history show how the P.R.C. has not respected the right to self-determination. The two examples are the cases of Tibet and Xinjiang, both of which are internationally recognized to have culturally and ethnically distinct groups of peoples. First, the Tibetans have never exercised self-determination under P.R.C. rule. After the P.R.C. government took actual control over Tibet in the 1950s, and subsequently promised autonomy to the Tibetans, the P.R.C. effectively removed any ability of the Tibetan people to exercise any governance over their people.<sup>200</sup> Consequently, the U.N., over the course of decades, has repeatedly condemned the P.R.C. for violating the Tibetan people’s rights to self-determination.<sup>201</sup>

Second, the P.R.C.’s treatment of the Uighur people in Xinjiang has also drawn an exceptional amount of international attention in recent years. The Uighurs are a Muslim ethnic minority who have been systematically repressed for many decades, and recently, the P.R.C. has interned over one million Uighurs in hundreds of “reeducation camps” all throughout Xinjiang Province.<sup>202</sup> The P.R.C.’s stance is that the detained Uighurs are religious extremists with links to terrorism, but most reports suggest the P.R.C. is waging a war against Muslims in general, with the intent to extinguish all disloyalty to the Communist Party.<sup>203</sup> In

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197. *Id.* at 85.

198. *Id.*

199. *Id.* at 86. While the P.R.C. ratified the ICESCR, they only signed but did not ratify the ICCPR. *Id.*

200. *China and the Principle of Self-Determination of Peoples*, *supra* note 196, at 196.

201. G.A. Res. 1723 (XVI), at 10 (Dec. 20, 1960); see also *China Must Urgently Address Rights Violations in Tibet—UN Senior Official*, U.N. NEWS (Nov. 2, 2012), <https://news.un.org/en/story/2012/11/424662-china-must-urgently-address-rights-violations-tibet-un-senior-official> [<https://perma.cc/YC5S-XTUN>].

202. Lindsay Maizland, *China’s Repression of Uighurs in Xinjiang*, COUNCIL ON FOREIGN RELS. (Nov. 25, 2019), <https://www.cfr.org/background/chinas-repression-ughurs-xinjiang> [<https://perma.cc/UK6X-ELDZ>].

203. *Id.*

recent decades, Uighur riots and protests against the communist party's repressive policies have increasingly drawn global attention, but the P.R.C.'s response seems to grow only more oppressive.<sup>204</sup>

Because the P.R.C. generally rejects the right to self-determination, even if the Taiwanese were willing to exercise political autonomy under P.R.C. administration, this principle would never guarantee Taiwan any political autonomy from the P.R.C. Although the P.R.C. rejects the right of self-determination of "peoples," it has repeatedly offered Taiwan a quasi-self-determination arrangement called "one country, two systems."<sup>205</sup> The president of Taiwan has summarily rejected the P.R.C.'s offers.<sup>206</sup> The P.R.C. uses this "one country, two systems" theme to describe its relationship with Hong Kong and Macau, but the political experience of Hong Kong since 1997 demonstrates how the P.R.C. may not intend to offer any lasting autonomy to Taiwan.<sup>207</sup> On its face, the P.R.C.'s offer seems to guarantee the rights of self-determination—allowing Taiwan to maintain a democratic government and social and religious freedoms, but in light of the promises and subsequent experiences of Tibet, Xinjiang, and now Hong Kong, few see this offer as advantageous for Taiwan.

Although the P.R.C. has repeatedly offered the "one country, two systems" approach, Taiwan's self-governance suggests that it already enjoys all the rights of self-determination. According to Common Article 1 of the ICCPR and the ICESCR, self-determination means that peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>208</sup> The Taiwanese enjoy all of these rights because Taiwan has full control over every aspect of its government and society.

Another key issue is how accepting a "one country, two systems" administration under the P.R.C. may benefit Taiwan under international law. The Canadian Supreme Court, discussing the right to secession, raised the possibility that "peoples" may have the right to secede if they are denied "any meaningful exercise of [the] right to self-determination."<sup>209</sup> This possibility has little support in state practice because, outside of the colonial context, "no state which has been created

204. *Id.*

205. Yimou Lee, *Taiwan Leader Rejects China's 'One Country, Two Systems' Offer*, REUTERS (Oct. 9, 2019), <https://www.reuters.com/article/us-taiwan-anniversary-president/taiwan-leader-rejects-chinas-one-country-two-systems-offer-idUSKBN1WP0A4> [<https://perma.cc/7Q9A-KRUN>].

206. *Id.*

207. *Hong Kong's Political Crisis Deepens After the Worst Day of Violence in Decades*, TIME (Oct. 1, 2019), <https://time.com/5690681/hong-kong-crisis-unrest-protests/> [<https://perma.cc/862T-GXLM>].

208. ICCPR, *supra* note 81; ICESCR, *supra* note 81.

209. *Secession of Quebec*, *supra* note 87.

by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State.”<sup>210</sup>

Thus, if Taiwan accepts a “one country, two systems” administration from the P.R.C., it stands to gain essentially nothing from international law if the P.R.C. infringes on its rights to self-determine, except for international sympathy. A simple review of how the Tibetans and Uighurs have fared under Chinese control demonstrates how little the principle of self-determination, and the accompanying worldwide sympathy, creates remedies for repressed peoples. Most importantly, if Taiwan accepts P.R.C. administration and the rights of self-determination, it will cast off its claim as an independent state and all of its associated claims in international law, including, potentially, the right to self-defense.

Therefore, although the people of Taiwan can qualify for special rights under the principle of self-determination, accepting P.R.C. administration will ultimately prevent Taiwan’s long-term goal of widespread state recognition.<sup>211</sup> In summary, based on international law and Taiwan’s present state of self-governance, the right to self-determination itself will have little impact on Taiwan gaining formal recognition or its ability to lawfully invite the defense of third-party nations.

### C. *Prohibition on the Use of Force Between China and Taiwan*

The U.N. Charter’s Article 2(4) prohibits the P.R.C. from using force against Taiwan if such a use of force would harm international peace and security.<sup>212</sup> The basis for this prohibition comes from vague language, however, so the matter is still contested. This section will explain why Article 2(4) should protect Taiwan from a Chinese use of force, even if the P.R.C. views Taiwan as its own sovereign territory.

The P.R.C. claims that the dispute with Taiwan is purely an internal matter and that no external force should interfere in the matter.<sup>213</sup> Because the P.R.C. views Taiwan as a renegade province that must eventually be reunited with the mainland, it believes it can take any measure necessary, including force, to protect its territorial integrity. But international law

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210. Crawford, *supra* note 86, at 92. It is the author’s own assertion, however, that; However, states do not need to be admitted into the U.N. to gain both the rights and obligations of states—but U.N. membership can indicate widespread recognition of a state.

211. This Article will not discuss the “responsibility to protect” theory of international law, nor discuss examples, like Kosovo, where states have attempted or succeeded to secede from a parent nation due to humanitarian abuses. See generally Christopher R. Rossi, *The International Community, South Sudan, and the Responsibility to Protect*, 49 N.Y.U. J. INT’L L. & POL’Y 129 (2016).

212. U.N. Charter art. 2, ¶ 4.

213. Hsiao, *supra* note 147, at 718.

likely prevents the P.R.C. from using force to reunite Taiwan. Article 2(4) provides that states must “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,”<sup>214</sup> and one of the purposes of the U.N. is “to maintain international peace and security... and to bring about by peaceful means... [the] settlement of international disputes or situations that might lead to a breach of the peace.”<sup>215</sup>

The P.R.C. views a use of force against Taiwan as consistent with international law because Taiwan is an integral part of its sovereign territory, thus any interaction with Taiwan is not a form of “international relations.” Furthermore, the P.R.C. believes any use of force to defend its territorial integrity would benefit international peace and security rather than harm it because preventing states from quelling secession attempts may upend the Westphalian concept of state sovereignty all together. The P.R.C. can cite as an example Russia’s use of force, including gross human rights violations, to prevent secession in Chechnya. In that instance, France, the U.K., and the U.S. supported Russia’s efforts to protect its territorial integrity.

Although the U.S. and other nations have supported the use of force to protect territorial integrity, the factual basis for each use of force is always different, and not every use of force in this context is worthy of support. In the case of Taiwan, the P.R.C. faces a much more complex international environment than the example of Russia and Chechnya because of Taiwan’s extensive international relationships. Taiwan has strong informal relationships with essentially every world power, including the regional Asian powers of Japan and Korea, both of which have strong ties with the U.S. While the U.S., Japan, and Korea all formally recognize the P.R.C. and not Taiwan, all three nations share an interest in a free and open Pacific, and Taiwan’s social and economic freedoms have become a symbol of freedom in the Asia Pacific region.

Because of Taiwan’s extensive international relationships, many nations would view an attack on Taiwan as a breach of international peace. As discussed above, Taiwan is considered Japan’s greatest ally in Asia, and Japan recently changed its constitution to allow the defense of allies if an attack on its ally poses a threat to Japan’s survival.<sup>216</sup> Because Japan and Taiwan share similar territorial disputes with the P.R.C., if there ever was an attack on one of Japan’s allies that could threaten Japan, it would be its greatest ally in Asia—Taiwan. And beyond Taiwan’s relationships in the Far East, Taiwan has strong relationships in the West. Canada specifically stated it does not recognize the P.R.C.’s sovereignty

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214. U.N. Charter, *supra* note 212.

215. U.N. Charter art. 1, ¶ 1.

216. Mie, *supra* note 150.



over Taiwan, very few western nations have expressed support for the P.R.C.'s claim of sovereignty over Taiwan, and the U.S. has enacted specific domestic legislation to support the defense of Taiwan.

Additionally, Taiwan's strong relationships must not be considered in an isolated context. Many of these countries, particularly Japan and the U.S., have had long-standing disputes with the P.R.C., whether they are territorial, economic, historical, or cultural. Also, many in the international community increasingly view the P.R.C. as a threat to international peace and security due to its aggressive and controversial actions throughout the South China Sea.<sup>217</sup> When Taiwan's strong relationships are viewed in context with these significant international disputes with the P.R.C., any use of force against Taiwan is much more likely to face international condemnation and be considered a breach of peace and international security. Accordingly, if the P.R.C. uses force against Taiwan, even if characterized as a purely internal issue, the international community would likely consider it non-peaceful dispute settlement and a breach of the peace, and therefore a violation of the prohibition on the use of force found in Article 2(4) of the U.N. If the P.R.C. uses force against Taiwan, the subsequent legal question is whether third-party states may come to Taiwan's defense, which will be analyzed below.

#### D. *Collective Self-Defense of Taiwan*

Fifty years after Taiwan lost its membership in the U.N., tensions remain high between the P.R.C. and Taiwan. The P.R.C.'s political will to fulfill its "sacred duty" of reunifying Taiwan seems to grow ever stronger.<sup>218</sup> Taiwan's pro-independence president was recently re-elected, and the potential for conflict looms over the Taiwan Strait. If the P.R.C. launches an armed attack against Taiwan, international law supports the U.S. and other states exercising collective self-defense of Taiwan. This is primarily because Taiwan's current status and relationships show that Taiwan already enjoys both the rights and obligation of states. This section will analyze why Taiwan has the right to invite collective self-defense by discussing Taiwan's state recognition, focusing on both the declarative and constitutive theories of recognition. It will also explain what is required of the U.S. and other U.N. members before they exercise a collective self-defense of Taiwan—namely they must formally recognize Taiwan as a state.

The U.N. Charter establishes states' customary rights of individual and collective self-defense, but it is silent about contested states. The reason why international law is generally silent about the rights and

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217. Stashwick, *supra* note 7.

218. Anti-Secession Law, *supra* note 134.

obligations of contested states is because international law is a system based on the agreement of parties, and the system lacks a competent body to “determine with certainty the [parties] of the system.”<sup>219</sup> In international law, no single state or international organization controls whether a state has become a party to the system.

The status of Taiwan’s statehood hinges on the declarative and constitutive theories of state recognition. These theories offer an “all or nothing” approach to state recognition, an approach that is practically and theoretically impossible. Taiwan is widely recognized to meet the requirements of statehood under the declarative theory. And under the constitutive theory, some states, but not all states, support Taiwan’s statehood. Thus, because Taiwan has state status in the eyes of some, it is uncontroversial that the international community requires Taiwan to comply with the obligations required of all states, such as the customary prohibition on the use of force. Yet, as a contested state, Taiwan cannot pretend to be bound by the prohibition on the use of force against only those states that recognize it—Taiwan’s obligations extend to all states. Further, it is illogical to suggest that Taiwan is expected to uphold the obligations of states, yet can be denied the inherent right of a state to individual and collective self-defense—or that it may only exercise self-defense against the nations with which it has formal relationships. In other words, the international community cannot expect that Taiwan hold statehood and lack statehood simultaneously.

Regarding Taiwan’s disputed status, international law provides no solution that will satisfy both Taiwan and the P.R.C. Furthermore, international law lacks the comprehensiveness required to encompass the inherently political nature of state recognition. Under this system, there may always be disagreement about Taiwan’s status and any rights it exercises, including the right to collective self-defense. In essence, disagreements over contested states are related to each individual state’s political will and respective efforts to follow their obligations under international law, whether they are based in custom or treaty. Based on the current U.N. construct, Taiwan will never become a member of the U.N., so Taiwan’s global interaction will be based on only customary international law. U.N. member states’ interactions with Taiwan must comply with both customary law and their U.N. treaty obligations.

From the individual state perspective, Taiwan believes it can exercise individual and collective self-defense because it is a state under both the declaratory and constitutive theories of state recognition. Taiwan believes it satisfies the Montevideo Convention and the declaratory theory of state recognition. Under the constitutive theory, Taiwan acknowledges that there is no specified number of states that must formally recognize

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219. CRAWFORD, *supra* note 42, at 20.

Taiwan before it can unambiguously exercise the rights of a state. Some suggest U.N. membership as an ideal test, but that test is politically and practically flawed in Taiwan's case because of the P.R.C.'s membership on the Security Council. From Taiwan's perspective, because there is no minimum standard for recognition, Taiwan, which has formal relations with 14 states and quasi-formal relations with 57 other states, must qualify to exercise the rights and obligations of a state, including the right to individual and collective self-defense.

Other individual states, namely the P.R.C., unequivocally reject Taiwan's claim to statehood (under either theory of recognition), but their position does not equate to legal authority. Customary law is unclear on the rights of contested states, and the U.N. Charter is also silent on the matter. Despite its dispute with Taiwan, the P.R.C., as a member of the U.N., must comply with the U.N. Charter and its purposes, which focus on territorial integrity, the pacific settlement of disputes, and the non-use of force. It is the P.R.C.'s position that Taiwan violates its sovereignty and territorial integrity by seeking independence and by, among other things, purchasing scores of fighter jets, advanced radars, tanks, and air defense systems from the U.S.<sup>220</sup> But the U.N. Charter does not permit the P.R.C. to use force against Taiwan for its relationship with the U.S.<sup>221</sup> Nor does the Charter prohibit Taiwan from defending itself if the P.R.C. commits an armed attack against it.<sup>222</sup>

Because Taiwan's widespread relationships, any P.R.C. attempt to forcibly reunify Taiwan is likely to face condemnation and potentially collective self-defense. The P.R.C.-Taiwan conflict is different than the conflict between Russia and Chechnya. In that case, the international community supported Russia's use of force against Chechnya only because states agreed Chechnya was within Russia's sovereign territory. Because state recognition is legally ambiguous and inherently political, if third-party states believed Chechnya was a state, and if invited by Chechnya to help, they could have lawfully exercised collective self-

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220. ICJ's Nicaragua case held that the U.S.' provision of arms to the contras were an unlawful intervention into Nicaraguan sovereign affairs. According to the P.R.C. position on its sovereignty over Taiwan, the U.S. sale of arms to Taiwan is also an unlawful intervention to the P.R.C.'s affairs. Even if Taiwan was clearly part of the P.R.C.'s sovereign territory, the P.R.C. cannot use a third party state's unlawful intervention as the basis for an armed attack against Taiwan, because the ICJ stated that "a use of force of a lesser degree of gravity [than an armed attack] cannot... produce any entitlement to take collective countermeasures involving the use of force." Nicaragua Case, *supra* note 106, ¶ 249.

221. *Id.*

222. Article 51's pronouncement of the inherent right of individual and collective self-defense for member states does not, by implication, state that only members can exercise this right. Oppositely, it implied that the right belongs to all, irrespective of U.N. membership. Chan, *supra* note 23, at 482.

defense of Chechnya.<sup>223</sup> Under this circumstance, the third-party states would accuse Russia of breaching the peace, and Russia would argue the interventionists breached peace in its own sovereign territory. The ambiguity of the law of state recognition, or its inherently political nature, obfuscates the definitive legal answer to this issue.

Some may argue that if contested states are permitted to receive collective self-defense it would incentivize secession attempts and disrupt world order. The Council of the European Union argued that contested states exercising collective self-defense would conflict with the peaceful purposes of the U.N.<sup>224</sup> Their position suggests that only the U.N.'s collective decision-making is responsible for ensuring the pacific settlement of disputes. This argument has some merit, but it fails to acknowledge that the U.N. model, because of the P.R.C.'s seat on the Security Council, cannot reasonably apply to the conflict between the P.R.C. and Taiwan. Furthermore, if contested states may not exercise collective self-defense without U.N. Security Council approval, then permanent members of the U.N. Security Council, like China or Russia, have an increased incentive to use armed force to settle their own territorial disputes, or other territorial disputes, whenever and however they please, which also violates the U.N. Charter. In Taiwan's case, the only thing that may have stopped the P.R.C. from invading Taiwan over the last fifty years is belief that the U.S. or other states can lawfully exercise collective self-defense of the contested state.

This type of ambiguity about the rights of contested states suggests that the prohibition on the use of force reigns supreme in customary international law and the U.N. Charter. The prohibition on the use of force in international relations is so central to world peace that it must be matched with a corresponding right, even for contested states, to exercise individual and collective self-defense, which, according to Grotius, is "so tied to the instinct of self-preservation that it must transcend simple customary international norms."<sup>225</sup>

Therefore, if the P.R.C. commits an armed attack against Taiwan, Taiwan would likely consider the attack as a breach of international peace and security and resort to force to defend itself. If Taiwan wishes to benefit from third-party collective self-defense, according to the *Nicaragua* case, it must label itself a victim of an armed attack and explicitly invite defense support from one or more third-party states.<sup>226</sup>

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223. U.N. Charter art. 2. It is the Author's assertion that the U.N. Charter does not strip member states or non-member states' customary rights to self-defense, and the rights of contested states are not clear.

224. Independent International Fact-Finding Mission on the Conflict in Georgia, *supra* note 110, at 282; *see also* Henderson, *supra* note 109 at 404.

225. Motala & ButleRitchie, *supra* note 102, at 12.

226. *Nicaragua Case*, *supra* note 106, ¶ 195.

For the invited states, the exercise of collective self-defense will become a political choice, just as political as the choice to recognize another state.

From the perspective of a third-party state, it can only defend a victim of an armed attack if the victim is a state, otherwise it would violate the parent state's territorial integrity. In the case of the U.S., which is Taiwan's most important ally, it may lawfully act in collective self-defense of Taiwan only if it formally recognizes Taiwan's statehood. Presently, the U.S. treats Taiwan like a state in essentially every way—except formal recognition. The U.S. position on Taiwan is factually clear, but not legally clear—the issue remains officially unsettled.

The U.S. does not recognize the P.R.C.'s claim of sovereignty over Taiwan, and it treats Taiwan like a state, but that does not amount to the formal recognition required for the U.S. to defend Taiwan. As discussed above, the U.S.-P.R.C. joint communiqués show that the U.S. has never agreed with the P.R.C. position on Taiwan. In reality, the U.S.' interactions with Taiwan, including its extensive arms sales, show that the U.S. clearly rejects the P.R.C. position. The U.S. declared its intent to sell arms to Taiwan early during the conflict, as seen in both the Taiwan Relations Act of 1979 and the last U.S.-P.R.C. joint communiqué of 1982.<sup>227</sup> During the presidencies of George W. Bush, Barrack Obama, and Donald Trump, the U.S. has sold nearly \$40 billion worth of military equipment to Taiwan.<sup>228</sup> This sale of arms is evidence that the U.S. views Taiwan as a state; any other interpretation of the arms sales would describe the U.S. intervention as a clear violation of China's territorial integrity. Yet arms sales and other evidence of the U.S.' *de facto* recognition are insufficient to qualify Taiwan as a state with the right to collective self-defense.

International law does not state the duration of time a third-party state must recognize a victim state before it can receive collective self-defense. It seems that this vagueness plays a significant role in the U.S.' policy of "strategic ambiguity." The U.S. has not yet formally recognized Taiwan because doing so would have immediate deleterious effects, against both the U.S. and the people of Taiwan.<sup>229</sup> In 2019, Xi Jinping, the President of the P.R.C., stated that Taiwan must "clearly recognise (*sic*) that Taiwan's independence would only bring profound disaster to

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227. 1982 Communiqué, *supra* note 56; see Taiwan Relations Act, *supra* note 49.

228. LAWRENCE, *supra* note 9, at 75–78.

229. Article 8 of the P.R.C. Anti-Secession Law states the P.R.C. will "employ non-peaceful means and other necessary measures" to prevent the independence of Taiwan if Taiwan attempts to secede or if any "major incidents entailing Taiwan's secession from China should occur." Anti-Secession Law, *supra* note 134, art. 8.

Taiwan.”<sup>230</sup> If the P.R.C. commits an armed attack against Taiwan before the U.S. formally recognizes it, that would not preclude the U.S. from formally recognizing Taiwan and then defending it. If the U.S. recognized Taiwan following a P.R.C. armed attack, and if the U.S. recognition was soon accompanied by recognition from many or all of the 57 other states with which Taiwan maintains informal relationships, the argument that Taiwan is a state under the constitutive theory of state recognition would grow even stronger. Therefore, the legal basis for the U.S. or an international coalition’s exercise of collective self-defense for Taiwan would also be stronger. Such circumstances would be comparable to the status of Vietnam, which was recognized by nearly 60 states, at the time the U.S. entered the Vietnam War.

Nevertheless, if no other states join the U.S. in recognizing Taiwan after a P.R.C. armed attack, the U.S.’ defense of Taiwan would be no less permissible because no single state or international body controls the recognition, rights, or obligations of states. Under customary international law, the right of individual and collective self-defense is afforded to all states, and state recognition “is an optional and political act and there is no legal duty in this regard.”<sup>231</sup> The inherently subjective nature of state recognition and states’ rights is seen in one scholar’s observation that, “if an entity bears the marks of statehood[,] other states put themselves at risk legally, if they ignore the basic obligations of state relations.”<sup>232</sup> Taiwan clearly bears the “marks of statehood,” and a P.R.C. armed attack against it would put not only the P.R.C., but potentially many states worldwide, at great risk of harm.

### CONCLUSION

The status quo relationship between the P.R.C. and Taiwan is tense, but stable. Taiwan enjoys nearly all the rights of widely recognized states, except for the benefits of membership in the U.N., World Health Organization, and other international organizations.

As long as the P.R.C. continues to allow Taiwan to self-govern, and as states maintain the “status quo,” no military intervention or further conflict is expected. It is unlikely that the P.R.C. will launch an aggressive attack on Taiwan, but if it did, such an attack may be Taiwan’s only chance to gain formal recognition from third-party states because states are otherwise unlikely to recognize Taiwan against the P.R.C.’s looming threats of military force.

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230. Lily Kuo, *All Necessary Means: Xi Jinping Reserves Right to Use Force Against Taiwan*, THE GUARDIAN (Jan. 1, 2019), <https://www.theguardian.com/world/2019/jan/02/all-necessary-means-xi-jinping-reserves-right-to-use-force-against-taiwan> [<https://perma.cc/Z7ZK-C7UA>].

231. BROWNLIE, *supra* note 72, at 89.

232. *Id.* at 90.

International law is vague about the rights and obligations of contested states because state recognition is a political, not legal, determination. Taiwan appears to meet all the requirements of statehood under the declaratory theory and Montevideo Convention, and it meets many aspects of the constitutive theory because of its formal and quasi-formal relationships with over 70 nations. Additionally, Taiwan's *de facto* recognition from the U.S. and so many other large nations grants it a unique status that must be accompanied by both the rights and obligations of a state.

The people of Taiwan are culturally distinct from the people of Mainland China and they qualify for the right to self-determination, but it is not beneficial for the Taiwanese to exercise rights under this construct. The rights of self-determination can only be exercised under the administration of a parent state, and the Taiwanese are unwilling to accept any control by the P.R.C. government.

The prohibition on the use of force applies to the dispute between the P.R.C. and Taiwan even though the P.R.C. claims Taiwan as its sovereign territory. Article 2(4) of the U.N. Charter prohibits the use of force in international relations and any other use of force that compromises international peace and security. Because Taiwan has the support of so many states, Article 2(4) prohibits any use of force against it because such force would likely breach international peace and security.

Lastly, although Taiwan is a contested state, it qualifies for the rights of individual and collective self-defense because, according to the perspective of many states, it meets both the declarative and constitutive theory of state recognition. Third-party states may defend Taiwan only if they formally recognize Taiwan as a state, otherwise, they may violate the territorial integrity of the P.R.C. The U.S. and other states' unique relationships with Taiwan show that they already treat Taiwan as a state, nevertheless the U.S. and any other state must formally recognize Taiwan before exercising collective self-defense on behalf of Taiwan.

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