The Relationship between the People’s Republic of China and Taiwan from the perspective of international law:
How many Chinas exist in international law?

Matthias Hartwig*  

1. The status quo of the relationship between mainland China and Taiwan  

1.1. Historical developments until 1971  

While after the armed attack by Russia a terrible war is raging in Ukraine, Western politicians time and again give warnings that Taiwan¹ may suffer the same fate if the West does not take a firm stance against any claims by the People’s Republic of China (PRC). To underline the Western position the US ramps up weapons supply to Taiwan, and Western politicians line up to pay visits to Taiwan, the former speaker of the House of Representatives Pelosi only being the most prominent one. German deputies and a German minister also travelled to Taipei to show their support for the independence.² Lithuania permitted Taiwan to open an office under the notion ‘Taiwanese Representative Office in Lithuania’ triggering a strong reaction by the People’s Republic which has limited imports from Lithuania. The question behind this political turmoil is what the relationship between the PRC and the island is.

¹ Senior Researcher at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany).  
² The notion ‘Taiwan’ is highly political and controversial, starting with the names to be used when Taiwan enters international relations with other States or international organizations. In this article it is used to describe the island without any political implications, interchangeably with the notions ‘Formosa’, ‘island of Formosa’ or ‘Republic of China’.  
³ In January 2023, a group of deputies of the liberal party (FDP) and in March 2023, the Federal Minister of Education visited Taiwan.
To understand this, one must look into history. After a century of European colonial settlements on the Island of Formosa, the Chinese Empire incorporated it by the end of the 17th century, first as a part of the province of Fujian, and at the late 19th century as a province of its own. After the Chino-Japanese war, which ended in 1895 with the Treaty of Shimonoseki, Formosa turned into a Japanese colony for half a century. The 1943 Declaration of Cairo by Roosevelt, Churchill, and Chiang Kai-shek as a representative of China held ‘that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China‘. The binding force of this declaration is disputed. It is quite clear, however, that it also included the peace treaty of Shimonoseki which made Formosa a colony of Japan. At least in a political sense Formosa was considered to have remained a part of China; it could by no means be assumed that Formosa had become an independent entity. In 1945, paragraph 8 of the ‘Proclamation Defining Terms for Japanese Surrender‘ as part of the Potsdam Declaration expressly referred to the Cairo Declaration as follows:

‘[t]he terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we [i.e., the President of the United States, the President of China, and the Prime Minister of Great Britain] determine’.

Although the legal character of the Potsdam Declaration is also disputed, there is no discussion regarding the fact that this declaration was implemented; Japan lost control over the island, and Chinese troops took over power. Formosa was thus considered to be part of China. In 1950, the President of the United States Truman declared:

‘Formosa was surrendered to Generalissimo Chiang Kai-shek, and for the past four years, the United States and other Allied Powers have accepted the exercise of Chinese authority over the island. The United


4 ‘First Cairo Conference’ (1943) 3 Bevans 858.
States Government will not pursue a course which will lead to involve-
ment in the civil conflict in China.’ 5

The Western approach to the question changed only during and after
the Korean War, when it became clear that the Communist regime of
mainland China could not be easily toppled and would not remain a tran-
sitional phenomenon. Since then, doubts were cast as to whom the island
belongs. It was argued that former statements on Formosa did not have
binding force or were not clear about the question as to whom the island
was handed over by Japan. In this regard, Article 2(b) of the peace treaty
between Japan and 48 allied powers – not including the USSR and China 6
reads: ‘Japan renounces all right, title and claim to Formosa and the
Pescadores’. Along the same lines, Article 2 of the Treaty between Japan
and the Republic of China of 1952, which was meant to be the peace
treaty between these two countries, refers to the peace treaty of San Fran-
cisco and states: ‘It is recognized that under Article 2 of the Treaty of
Peace with Japan signed at the city of San Francisco in the United States
of America on September 8, 1951 […] Japan has renounced all right, title
and claim to Taiwan (Formosa) and Penghu (The Pescadores) as well as
the Spratly Islands and the Paracel Islands’. In neither of the two instru-
ments, it was expressly specified to whom the territories to which Japan
renounced were ceded, but nobody claimed at that time that Taiwan had
become a new State of its own or that it had become part of another State.
The US Secretary of State Acheson stated already in 1950: ‘The Chinese
have administered Formosa for four years. Neither the United States nor
any other ally questioned that authority and that occupation. When For-
mosa was made a province of China nobody raised any lawyer’s doubts
about that. That was regarded as in accordance with the commitments.’ 7

5 ‘The President’s News Conference of January 5, 1950’ (1950) Public Papers of the
Presidents of the United States: Harry S Truman 11; C Phillips, ‘The International Legal
Status of Taiwan’ (1957) 10 Western Political Quarterly 276, 279.
6 As neither the PRC nor the RoC were parties to this treaty, they were not bound by
it; however, these instruments express the legal position of the parties; see Shen (n 3)
1117.
7 ‘United States Policy Toward Formosa’ (1950) 22 Department of State Bulletin 80;
in this sense, see also I Brownlie, ‘Recognition in Theory and Practice’ (1982) 53 British
YB Intl L 197, 202; J Crawford, The Creation of States in International Law (2nd edn, OUP
2007) 209.
Under these circumstances, it seems far-fetched to claim that these territories, comprising the mainland and the islands, were not given back to China. Article 4 of the 1952 Treaty between Japan and China specified: ‘It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war’9 If among them the 1895 Treaty of Shimonoseki became null and void, it is a logical consequence that Taiwan again was under the rule of China. Nevertheless, the US Secretary of State Dulles declared in 1954: ‘technical sovereignty over Formosa and the Pescadores has never been settled’ and further added: ‘future title is not determined by the Japanese peace treaty, nor is it determined by the peace treaty which was concluded between the Republic of China and Japan’.10 This statement most interestingly conflicted not only with former US statements on this issue but also with the Republic of China’s government’s self-perception: all the time it considered itself as the government of all China including the mainland and the island; it never claimed that Taiwan had become a State or political entity of its own, and it is hardly conceivable that an entity can grow into statehood or become an independent entity while the government denies it.11

1.2. The recognition of the communist regime as sole representative of China and the position of Taiwan

This situation is confirmed by the famous UN General Assembly Resolution 2758 of 1971, sponsored by Albania. By that time many States – among them many decolonized countries, but also the UK since 1950 and France since 1964 – considered the communist government of the mainland the legitimate representative of all China. The way how the change

---

8 In this sense see Crawford (n 7); however, he identifies the treaty of 1952 between Japan and the RoC as the date of the return of the territory to China.


10 See the statement by John Foster Dulles, United States Department of State, ‘Purpose of Treaty with Republic of China’ (1954) 31 Department of State Bulletin 896. In the same sense, see the statement by Anthony Eden, Minister of Foreign Affairs of the UK HC Deb 4 February 1955, vol 536, col 159, quoted by Crawford (n 7) 277.

11 In this sense, Crawford (n 7) 277.
in the representation was brought about clearly indicates the understanding of this substitution. It was a change in the recognition of the legitimate government of all China, and it was not the recognition of a new State. Taiwan was not expelled as a member State, as this would have required the consent of the UN Security Council. The substitution in the representation was achieved by accepting the credentials of the diplomats sent by the government of Beijing. The suggestion of the US to address the issue of who was to represent ‘China’ – meaning Formosa – in the resolution was clearly rejected. As most member States qualified the question at stake as a purely technical one, a supermajority for the vote was not considered necessary. The essential operative part of Resolution 2758 reads:

‘[The General Assembly] Decides to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it’.

This formulation does not leave room for doubts. The resolution was voted by a majority of 76 (among them the United Kingdom and France) to 35 with 17 abstentions.

Later attempts to make Taiwan, as a State of its own right, a member of the UN failed. In 2007, the UN Secretary General Ban Ki Moon rejected a bid by Taiwan to UN membership by referring to UNGA Resolution 2758.

The qualification of Taiwan as a non-State is confirmed by the treatment by the international community. Only 12 countries recognize Tai-

---

13 In 1998 nine States (mostly African and Central American States) asked for the review of the UNGA Res 2758 (XXVI), they argued that it was not the question of State succession that was at issue, but rather of the development of two different States. See UN Doc A/53/145 (8 July 1998).
Taiwan as a State, including microstates such as Nauru and Tuvalu and others such as Paraguay and Haiti – besides the Holy See. Taiwan established trade representations in many States, mostly under the name of Taipei/Republic of China. Withholding recognition, the international community denies a de jure status to the power exercised by the government over the island of Taiwan.

Taiwan concluded many free trade agreements with other countries, and it is member of some international organizations; however, the respective agreements always avoid qualifying Taiwan as a State. It should be underlined that Taiwan became member of the Asian-Pacific Economic Cooperation and of the Asian Development Bank under the name ‘Chinese Taipei’ or ‘Taipei, China’. Taiwan was admitted to the WTO as ‘Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu’, now under the designation ‘Chinese Taipei’. The US communicate with Taiwan through the American Institute in Taiwan, a government-sponsored, non-profit, private corporation which exercises the functions of a de facto US representation in Taiwan; in turn, Taiwan is represented in the US by the Taipei Cultural and Economic Office.

1.3. The position of the US regarding Taiwan

The US as a great power in the Pacific Ocean region was most interested in maintaining influence in this area, and therefore it had to define its relationship with China as the biggest country in the region. The US China policy – specifically with regard to the recognition of the legitimate representation of China – had a deep impact on the policy of other States, although countries like the UK and France had recognized the People’s Republic at an earlier point. Because of the leading role of the US in the global China policy also after the recognition of the communist government as the only legitimate representative of China, the US positions with regard to China shall be examined more in detail.

The US backed the Kuomintang regime as the only legitimate representative of all China up to the seventies of the last century. As pointed

---

15 The PRC severed diplomatic relations with all States recognizing Taiwan as a State; this is what the Federal Republic of Germany – however not coherently – practiced in the fifties and sixties of the last century according to the so-called Hallstein doctrine with regard to States which established diplomatic relations with the German Democratic Republic.
How many Chinas exist in international law?

out, the US was opposed to UNGA Resolution 2758, but as early as 1972 – only one year later – it started its rapprochement to China. The first visit of a US president to China brought about the first US-Chinese Joint Communiqué of 1972. It especially addressed the question of Taiwan. The People’s Republic of China clearly held that:

‘the Government of the People’s Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China’s internal affair in which no other country has the right to interfere […]. The Chinese Government firmly opposes any activities which aim at the creation of ‘one China, one Taiwan’, ‘one China, two governments’, ‘two Chinas’, an ‘independent Taiwan’ or advocate that ‘the status of Taiwan’ remains to be determined’.

The US on its part stated:

‘The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is part of China. The United States Government does not challenge that position’. 16

The US used the soft expression ‘acknowledge’ – instead of ‘accept’ or ‘recognise’ in order to express its position with regard to the People’s Republic of China’s claims. It was interpreted as part of the deliberate or strategic ambiguity whereby the US did not openly reject the position of the People’s Republic of China regarding Taiwan while not expressly sharing it. However, if the US had intended to defend Taiwan as an independent State it could have made a reservation or explained its own position as the People’s Republic of China did in several parts of the Joint Communiqué. The US added to its ‘acknowledgment’ that it will not challenge the claims of the People’s Republic of China. By saying so, the difference between acknowledgement and acceptance disappears, because a position which will not be challenged as a matter of fact is accepted. Besides, a US position to this effect would have contrasted with the US position adopted before 1971, when it treated the Kuomintang government in Taipei as the only representative of all China. If the US

16 Joint Communiqué of the United States of America and the People’s Republic of China (28 February 1972) 11 ILM 443 para 12.
had declared Taiwan not being a part of China, it would have had to explain how Taiwan turned into a State within one year even without an express declaration to this end. Moreover, the US promised to withdraw its armed forces from the island, as it would be improper to have such forces deployed in a territory which – as recognized – belongs to another State.

The US position has been confirmed by a second Joint Communiqué of January 1, 1979:

‘The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China’. 17

At that moment, the US and the People’s Republic of China established diplomatic relations; in this context the US declared: ‘The United States of America recognizes the Government of the People’s Republic of China as the sole legal Government of China’, 18 thus leaving no doubt about the legitimate representation of all China. At the same time, it consequently ended its diplomatic relations with Taiwan. It just made a reservation in the Communiqué that it would ‘maintain commercial, cultural and other unofficial relations with the people of Taiwan’. To mitigate the consequences of the change in the US policy with regard to China, the US government issued Executive Order No. 12143 guaranteeing the further application of US laws regarding Taiwan, the remaining in force of all treaties concluded between the US and Taiwan and the provision of defense articles and services to Taiwan to maintain a sufficient self-defense capability. As explained above, such unofficial relations were carried out through corporations – instead of State organs – which enjoyed immunity like States.

In a third Communiqué of August 17, 1982, the two parties confirmed their positions. 19 The US reiterated statements of the preceding Communiqués:

---

17 Joint Communiqué on the Establishment of Diplomatic Relations between the United States of America and the People’s Republic of China (1 January 1979) 18 ILM 274 para 7.
18 ibid para 2.
19 Joint Communiqué of the United States of America and the People’s Republic of China (17 August 1982) 21 ILM 1147.
‘The United States of America recognized the Government of the People’s Republic of China as the sole legal Government of China, and it acknowledged the Chinese position that there is but one China and Taiwan is part of China.’\textsuperscript{20}

The US did not expressly share the position of the People’s Republic of China that ‘the question of Taiwan is China’s internal affair.’\textsuperscript{21} However, it underscored:

‘The United States Government attaches great importance to its relations with China, and reiterates that it has no intention of infringing on Chinese sovereignty and territorial integrity, or interfering in China’s internal affairs, or pursuing a policy of “two Chinas” or “one China, one Taiwan”.’\textsuperscript{22}

A still open question was that of the arms sales, which the US had continued by that time. It was clear that arms sales to a part of a country to establish its own armed forces would not be compatible with the sovereignty of the State to which that part of the country belongs. This problem was also addressed as follows: ‘[I]n order to bring about, over a period of time, a final settlement of the question of United States arms sales to Taiwan, which is an issue rooted in history, the two Governments will make every effort to adopt measures and create conditions conducive to the thorough settlement of this issue.’\textsuperscript{21} For the US, which had backed the Kuomintang regime as the legitimate representative of China for many decades, it was necessary to save its face by not dropping this regime completely. Otherwise other allies could have doubts on the reliability of the US. The US was well aware of this inconsistency – recognition of China’s sovereignty on the one hand and arms sales to Taiwan on the other. It therefore promised:

‘Having in mind the foregoing statements of both sides, the United States Government states that it 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

\textsuperscript{20} ibid para 1.
\textsuperscript{21} ibid para 4.
\textsuperscript{22} ibid para 5.
\textsuperscript{21} ibid para 7.
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’. 24

The intention to reduce the arm sales was clearly expressed.

Like the second Communiqué in 1979, the third Communiqué was counterbalanced by the so-called six assurances, which were passed as unilateral declaration with regard to this Communiqué, but not attached to it:

‘[W]e did not agree to set a date certain for ending arms sales to Taiwan; We see no mediation role for the United States [between Taiwan and the PRC];
[N]or will we attempt to exert pressure on Taiwan to enter into negotiations with the PRC
[T]here has been no change in our long-standing position on the issue of sovereignty over Taiwan;
We have no plans to seek revisions of the Taiwan Relations Act; and the August 17 Communiqué should not be read to imply that we have agreed to engage in prior consultations with Beijing on arms sales to Taiwan’. 25

These assurances somehow contrast with the official text of the Communiqué providing for a reduction of the arms sales. It was meant to calm the Kuomintang in Taiwan and members of the Congress who could not share the new course of the US foreign policy with regard to China. 26

Specifically the statement on the issue of sovereignty over Taiwan could be read as contradicting the statements in the Communiqués; the wording is telling. Reference to sovereignty over Taiwan is a misleading formulation. Sovereignty is a characteristic of a State. If the fourth assurance speaks of sovereignty over Taiwan it implies that Taiwan itself is consid-

24 ibid para 6.

25 The six assurances were never codified; the wording is a quotation of a statement by then-assistant of State for East Asian and Pacific Affairs John H Holdridge on 17 August 1982, quoted in a Resolution of Congress. See ‘Concurrent Resolution Reaffirming the Taiwan Relations Act and the Six Assurances as cornerstones of United States–Taiwan relations’ HCon Res 88, 114th Congress (2015-2016).

26 As late as 2016 the six assurances got a definitive wording by a concurrent resolution of both houses of the Congress, ibid and SConRes 38, 114th Congress (2015-2016).
How many Chinas exist in international law?

erred to be a territory and not a State; otherwise it should have been formulated ‘sovereignty of Taiwan’; if Taiwan is not a State, then only China remains as holder of sovereignty over Taiwan. The only question which was left unanswered was who was exercising the legitimate sovereignty over Taiwan, the Kuomintang regime in Taipei, still insisting on the representation of all China, or the communist regime in Beijing. In this sense the assurance does not question the unity of China but deals with the legitimacy of the regime.

Formally, however, these unilateral assurances could not restrict the meaning of the statements made by the US in the Communiqué.

Obviously, the three Communiqués described above are not binding treaties. They were not ratified nor did they formally enter into force. However, they express the political positions of the parties: even if these positions cannot be considered as a quid pro quo, they must be qualified as unilateral political statements and thus are not without legal consequences. As is known, under international law, depending on the circumstances, unilateral declarations may have legal effects.\(^{27}\) The recognition of the government of the People’s Republic of China as ‘the sole legal government of China’ means that the US accepted that this government exercises the legal power over the mainland, thereby implicitly recognizing that the Kuomintang government claiming to be entitled to govern the mainland does not exercise legitimate power. Further, as the US acknowledged without any reservation or objection that there is only one China, it accepted that the Kuomintang government in Taiwan has no power to independently represent even Taiwan. As described above, the US therefore severed official diplomatic relations with Taiwan and since 1979 maintained only commercial, cultural, and other unofficial relations with it, in line with the vast majority of the international community.

As a rule, states are free to recognize or not an entity as a State, and, on the other hand, recognition by other States is not constitutive of the statehood of a territorial entity. However, recognizing a territorial entity as a State which still forms part of another State is an illegal intervention into the internal affairs of this latter State.\(^{28}\) Therefore, the US and all

\(^{27}\) See to this end the Judgement of the Permanent Court of International Justice of 1933: *Legal Status of Eastern Greenland (Denmark v Norway)* [1933] PCIJ Rep Series A/B No 53 at 70.

\(^{28}\) Switzerland, Federal Department of Foreign Affairs, The recognition of states and governments under international law (9 May 2022) available at <www.cda.admin.ch/cda/
other States which recognized that Taiwan is part of China must not recognize Taiwan as a State or take other steps to foster Taiwan’s independence from China, because this would constitute an interference in the internal affairs of the People’s Republic of China.

1.4. The relationship between the PRC and Taiwan

Until the nineties of the last century, Taiwan unequivocally defended the position that there is only one China and the dispute between Taiwan and the PRC consisted in the question who is legitimately representing China. In 1992, semi-official delegations of Taiwan and the PRC met and established a consensus:

‘Both sides of the Taiwan Strait agree that there is only one China. However, the two sides of the Strait have different opinions as to the meaning of ‘one China’. To Peking, ‘one China’ means the ‘People’s Republic of China (PRC)’, with Taiwan to become a ‘Special Administration Region’ after unification. Taipei, on the other hand, considers ‘one China’ to mean the Republic of China (ROC), founded in 1911 and with de jure sovereignty over all of China. The ROC, however, currently has jurisdiction only over Taiwan, Penghu, Kinmen, and Matsu. Taiwan is part of China, and the Chinese mainland is part of China as well’. 29

The PRC declared that the question of Taiwan should be solved preferably by peaceful means. However, in 2005 it adopted a law which, while insisting on a peaceful reunification of China, in Article 8 provided for the use of force if Taiwan’s independence forces accomplish the separation from China, if a major event would lead to a separation of Taiwan from China or if all possibilities for a peaceful reunification are lost.30

How many Chinas exist in international law?

Taiwan was zigzagging in the question of its relations to the PRC. It preserved the Constitution adopted in 1947 for all China. It never officially declared independence. In 2000, President Chen Shui-bian – the first president from the Democratic Progressive Party, which has a strong inclination towards the independence of Taiwan – made his famous pledges, the four nos and one without: the RoC would not declare independence, it would not change the name from ‘RoC’ to ‘Republic of Taiwan’, it would not include a doctrine of special State-to-State relation into the Constitution and it would not promote a referendum on unification or independence; besides, it would not abolish the National Unification Council. In 2007, Chen Shui-bian put the pledges into question, while in 2016 President Tsai Ing-wen confirmed that the government of Taiwan will stick to the pledges. At the same time the government of Taiwan has been speaking of the sovereignty of Taiwan, and holding that it is not necessary to declare independence of the RoC, as this Republic of China became independent in 1912.

It is here submitted that the latter argument is not convincing, as the independence of the Republic of China in 1912 affected all China and did not establish an independent State of Taiwan. One cannot conclude the independence of part of the State from the independence of this State. Even at a later point Taiwan did not ‘automatically’ – and without

---

31 The constitution was amended in 1991 and 1994; art 11 of the so-called additional provisions provided for special legislation for mainland Chinese. It is not clear to what extent these amendments imply the renouncement of the applicability of the constitution to the mainland. See Stahn (n 3) 78; Crawford (n 7) 212.
32 The Unification Council was an agency of the Republic of China promoting the integration of the mainland into the Republic of China; it was abolished in 2006.
34 For example, President Shen Shui-bian in his first formal presidential address in 2000 declared: ‘The Republic of China is a sovereign and independent nation, its sovereignty belonging to the 23 million people of Taiwan’. Quoted by C Lin, Taiwan has Already “Declared” its Independence’ Global Asia (March 2008) available at <www.globalasia.org/ vol1/debate/taiwan-has-already-declared-its-independence_cho-shui-bian>; see also Office of the President of the Republic of China, President Tsai delivers 2022 National Day Address (10 October 2022) available at <https://english.president.gov.tw/News/6348>.
35 Declaration by President Shen Shui-bian in an interview with the Deutsche Welle in 1999, quoted by Crawford (n 7) 217; Stahn (n 3) 78; S Allen, ‘Statehood, Self-Determination and the “Taiwan Question”’ (2000) 9 Asian YB Intl L 191, 199.
declaration – become de jure independent. Until the nineties the government claimed to be part of one China, and since then there was no consistent pattern pursuing this goal.\textsuperscript{36}

From what has been argued so far one must conclude that Taiwan forms part of the People’s Republic of China. As the effective power over the island is not exercised by the PRC but by the government in Taipei, Taiwan has to be qualified as a de facto regime.

2. Taiwan and the right to independence

2.1. The right to self-determination and to secession in international law

Having arrived at the conclusion that Taiwan still is part of China, one has to examine if Taiwan has a right to change the status quo, i.e. a right to secession as part of a right to self-determination.

The right to self-determination is one of the most disputed issues in international law. In general, the international community is very reluctant in granting this right. It became one of the principles laid down in the Charter of the United Nations, however without any specification as to its content. Article 1 of both 1966 UN Covenants on human rights expressly mentions the right to self-determination, and the famous UN General Assembly Declaration on Friendly Relations of 1970 also addresses this issue. However, this declaration also expresses the ambiguity surrounding this concept.\textsuperscript{37} First, it is not clear who is bearer of this right. It is generally accepted that a people may claim self-determination. The definition of a people is difficult; the most frequent definition is that a people is a group of persons with a common historical tradition, racial or ethnic identity, culture, language, religion, territory, or economic life.\textsuperscript{38}

\textsuperscript{36} Crawford for this reason denies that Taiwan can have become a State: ‘in the apparent absence of any claim to secede the status of Taiwan can only be that of a part of the State of China under separate administration’ Crawford (n 7) 211.

\textsuperscript{37} UNGA Res 2625 (XXV) (24 October 1970).

The definition does not clarify how much time it takes to form such a people entitled to claim self-determination.

Second, whereas the right to self-determination is established as part of international law, a reservation is made in favor of the principle of territorial integrity.\(^{39}\) The right to self-determination does not include a right to secession, which would impair the territorial integrity of existing States. According to some scholars, this latter principle may be overplayed – meaning that a group of persons sharing common ethnic roots, language, culture or religion may secede – if the State gravely violated the human rights and the right to internal autonomy (remedial secession).\(^{40}\) However, as for now no case of remedial secession has occurred in the international practice, and therefore, it is doubtful if a norm allowing for secession under the described circumstances has grown into a norm of international customary law.\(^{41}\) What can be derived from the right to self-determination –

---

\(^{39}\) See UNGA Res 1514 (XXV) (14 December 1960) (Declaration on the Granting of Independence to Colonial Countries and Peoples) para 6: ‘Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations’; UNGA Res 2625 (n 37) para 1 underlines: ‘Nothing in the foregoing paragraphs shall be construed as authorizing 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 above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour’.


\(^{41}\) See eg Kosovo: despite all human rights abuses in this territory, the UN Security Council still held in its res 1244 of 1999 that Kosovo remains part of Serbia until a settlement has been reached by way of negotiations. In the case of Chechnya, the Western States, while criticizing the manner of Russian warfare, supported the territorial integrity of Russia and rejected independence of Chechnya, see eg US Deputy Secretary of State S Talbott: ‘We support the sovereignty and territorial integrity of the Russian Federation. We oppose attempts to alter international boundaries by force, whether in the form of aggression by one state against another or in the form of armed secessionist movements such as the one led by Dzhokhar Dudayev’ S Talbott, ‘Supporting Democracy and Economic Reform in the New Independent States: Statement before the Subcommittee of Foreign Operations of the Senate Appropriations Committee, Washington, DC, February 9, 1995’ (1995) 5 Department of State Dispatch 119, 120. See also J Crawford, ‘State Practice and International Law in relation to State Succession’ (1998) 69 British YB Intl L 85, 93, who writes: outside the colonial context, the principle of self-determination is
if the prerequisites are met – is a certain autonomy within a State, including the establishment of a local/regional government, the use of a language, and cultural institutions. In the discussion on a right to secession as part of the right to self-determination, there is only one common ground: it applies to all situations of decolonization. In other scenarios, one must conclude that a right to secession leading to independence has no foundation in international law. The principle of territorial integrity prevails.

2.2. Decolonization

As described above, decolonization entitles to self-determination which may end up in independence. With respect to two periods of its history it is discussed if Taiwan was a colony.

The first is from the incorporation into the Chinese empire in the 17th century until the cession to Japan in 1895. It seems difficult to qualify Taiwan as a colony in this time. Although separated from the mainland by 'salt-water', the island is close to the Chinese mainland. Originally inhabited by ethnicities not related to the Han Chinese, the latter immigrated to the island for hundreds of years, and by the time of the incorporation of Taiwan into the Chinese Empire they formed the vast majority of the population. The close geographical and ethnic links between the island and the mainland led to a full integration of the territory into the Chinese empire in a cultural, economic and political sense, comparable to many territorial acquisitions within Europe, excluding the colonial character of this relationship.

In contrast, the Japanese annexation turned the island of Formosa into a colony, but it is beyond doubt that a territory which was part of another State before a colonization process cannot claim independence from this State at the end of the decolonization process, as this would justify a separation which was initiated by colonization itself. Decolonization should not recognized in practice as giving rise to unilateral rights of secession by parts of independent States’. Critical with regard to the existence of a right to remedial secession, M Shaw, ‘Peoples, territorialism, boundaries’ (1997) 8 Eur J Intl L 478, 483.

R Heuser, Taiwan und das Selbstbestimmungsrecht (1980) 40 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 31, 47.

Denying that a right to self-determination derives from the colonial status of Formosa under the Japanese government, see Stahn (n 3) 85.
lead to a status quo ante, not to the continuation of the results of coloni-
ization.

2.3. Development of a people of its own and the right to self-determi-
nation

It is argued that the population of Taiwan developed independently
from the population on the mainland, whose government for more than
125 years almost never exercised sovereign power over the island;44 for
50 years it was governed by Japan and, almost immediately after the sec-
ond World War, the power was exercised by the Kuomintang regime.45
These 100 years do not form a historically uniform period – i.e., with a
separate development, not even with regard to the ethnic composition.
Between 1895 and 1945 there was a Japanese administration, which trig-
gered resistance (like in the mainland) under the Japanese occupation.
During the Chinese civil war in the second half of the forties of the last
century, some two million Chinese from the mainland immigrated to Tai-
wan – amounting to almost 20% of the population – and exercised the
real power on the island in an authoritarian way, always in the conviction
that they represented not only Taiwan, but all China. Until the nineties,
it was not in question that the population of the island was not separate
from the population on the mainland. Therefore, it sounds a bit strange
when scholars claim that the population of the island has developed dif-
ferently.46 Only in the last thirty years one can observe a growing distance
from the mainland.47 However, even now the mainland remains the main
trading partner of Taiwan48 and – although interrupted by Covid19 –

44 Crawford (n 7) 220 argues that even half a century of a separate development was
sufficient to create a separate people. M Ediger (n 38) 1696; Heuser (n 42) 54 ff states
that it cannot be excluded that the population of Taiwan has become a people with an
own identity.
45 In this sense see Stahn (n 3) 86 and Ahl (n 3) para 21. See also Crawford (n 7) 220.
46 In recent polls 66% of the population see themselves as Taiwanese; 28% as Tai-
wanese and Chinese and only 4% as Chinese. See D Davlin, C Huang, ‘In Taiwan Views
on Mainland China mostly Negative’ Pew Research Center (12 May 2020) available at
<www.pewresearch.org/global/2020/05/12/in-taiwan-views-of-mainland-china-mostly-
negative>.
47 The exports from Taiwan to the PRC hit an all-times peak in 2021. See L Maizland,
‘Why China-Taiwan Relations are so Tense’ Council on Foreign Relations (last updated
many visitors from the mainland come to Taiwan and vice versa.49 There are very close interconnections between the People’s Republic and Taiwan. According to polls, most inhabitants of Taiwan prefer to maintain the status quo instead of achieving independence or being incorporated into mainland China.50 The last municipal elections in Taiwan did not strengthen the pro-independence Democratic Progressive Party, but the Kuomintang, which still defends the one China policy.

It seems doubtful that a population which for hundreds of years was a part of one nation – and felt as part of this nation – can develop within some thirty years a new identity which entitles it to a right to self-determination, even though it does not differ from the other part of the population neither by language, nor by history nor by culture and in its majority does not even strive for independence. The only fact that the people lived under a different political system does not imply a right to self-determination.51 Self-determination is based on specific prerequisites as explained above and might lead to a certain autonomy – it is not the other way around, with de facto separation entailing a right to self-determination, as will be explained in the next subsection. It follows therefrom that the people of Taiwan are not vested with a right to self-determination. Even if one comes to the conclusion that Taiwan has a right to self-determination such a right would not include a right to secession, which is not supported by international law as explained above.

2.4. De facto regime

A third approach derives a right to independence from the de facto regime established in Taiwan.52 As has been stated above, Taiwan was ruled for many decades by a government different from that of the mainland. It exercised effective power over a territory and over a people.

49 Before Covid-19 there have been cross strait personnel exchanges up to 6 million per annum. See Ministry of Foreign Affairs, Cross-Strait Relations: Fact Focus (Government Portal of the Republic of China (Taiwan)) available at <www.taiwan.gov.tw/content_6.php>.
50 See (n 47).
51 P Chan, ‘The Legal Status of Taiwan and the Legality of the Use of Force in the Cross-Taiwan Strait Conflict’ (2009) 8 Chinese J Intl Law 455, 469.
52 Ediger (n 38) 1690; Stahn (n 3) 88 ff; S Allen (n 35) 213.
When taking these elements in consideration one has good reasons to qualify the government in Taiwan as a de facto regime.\(^5\)

However, there is no rule in international law that the establishment of a de facto regime, even if stabilized, will automatically imply a right to independence, as such a right – generally – conflicts with the right to territorial integrity of the State from which the de facto regime wants to separate. The high importance which is attached to the principle of territorial integrity in international law has been pointed out above. If a de facto regime regularly led to a right to independence, the distinction between a de facto regime and a de jure regime would not make sense anymore. Every de facto regime would grow into a de jure regime. State practice does not confirm such a state of affairs, as the cases of Northern Cyprus\(^5\), Somaliland\(^5\) and Nagorno-Karabakh\(^5\) show; in none of these cases the international community recognizes a right to self-determination or to independence, even though the objective prerequisites for a de facto regime are met. As far as can be seen, there is no State practice which may prove the contrary.

3. The prevention of independence – through the use of force?

The prohibition of the use of force as laid down in Article 2(4) of the UN Charter protects States. However, the application of the provision extends to so-called stabilized de facto regimes.\(^5\) This extensive interpretation should encompass such situations as that of the two Germanies,

---

\(^{51}\) Shen (n 3) 1118; Crawford (n 7) 219; Heuser (n 42) 67.

\(^{54}\) It is admitted that here the involvement of Turkey and the question of territorial changes by force plays a decisive role; nevertheless, the case proves that a de facto regime has no automatic right to independence.

\(^{55}\) Although Somaliland declared its independence in 1991, it was not recognized as a State by the international community. It is telling that it maintains diplomatic relations only with Taiwan (since 2020).

\(^{56}\) Nagorno-Karabakh, where Azerbaijan did not exercise sovereign power and which had a government of its own since 1992, was never treated as an independent entity, not even by Armenia.

\(^{57}\) See Ediger (n 38) 1690 ff, however restricting the prohibition of the use of force to territorial entities based on an international treaty. See also J Frowein, Das de-facto Regime im Völkerrecht: Eine Untersuchung zur Rechtstellung ‘nichtanerkannter Staaten’ und ähnlicher Gebilde (Carl Heymanns Verlag 1968) 35 ff; Heuser (n 42) 69; and Ahl (n 3) para 25.
when one State (the Federal Republic of Germany) rejected the recognition of the other entity (the German Democratic Republic) as a State even if the latter exercised effective power over a territory and a population. The justification for this extension was found among other things in the Friendly Relations Resolution of 1970, which excluded the use of force even against lines of armistice.\(^58\) The rationale behind this approach to the prohibition of the use of force is the protection of stability in the international community. Once the creation of a new entity – be it a State or not – proves to be stable, it shall not be impaired by the use of force. For the sake of the limitation of the use of force other principles, such as territorial integrity, have to step back behind the main objective of the UN Charter. However, only ‘stabilized’ de facto regimes enjoy the protection of Article 2(4) of the UN Charter. This means that any substantial change in the de facto situation is not covered by this provision, because such changes will impair the stability which is the prerequisite for the extension of the prohibition of the use of force to such situations. If a settled status quo is unilaterally changed, the stability argument falls apart, and with regard to the use of force other arguments – such as the preservation of territorial integrity – may prevail.

As a rule, de facto regimes claim statehood.\(^59\) Therefore, their claim includes independence. As explained above, Taiwan may be qualified as a de facto regime, however, with the particularity – in contrast to most de facto regimes – that it never declared its independence, as until recent times it stuck to the one China policy. As long as this situation continues, the PRC is prevented from re-integrating Taiwan using force, as it would violate Article 2(4) of the UN Charter. If Taiwan changed its political aspirations by trying to become a full-fledged independent State, the de facto regime would lose its stability and therefore the reason for the supremacy of the prohibition of the use of force – which protects Taiwan – over the principle of territorial integrity – which protects the PRC – would end.

The strict obligation of the PRC not to use force against Taiwan will continue as long as Taiwan does not undertake steps to establish a new relationship with the PRC by trying to become an independent State.

\(^{58}\) See UNGA Res 2625 (n 37).
\(^{59}\) See eg German Democratic Republic before 1972, North Vietnam, North Korea, People’s Republic of China before 1971.
Therefore, it must avoid all measures which aim in this direction, including the establishment of embassies under the name of ‘Taiwan’, the application for membership in international organizations as the ‘State of Taiwan’ or the strengthening of defense co-operation with other States.

4. Conclusion

It has become very common in Western States to compare the situation in Ukraine caused by the Russian aggression to the threats by the PRC against Taiwan, thereby equalizing both cases. However, as a matter of fact, one is the opposite of the other. Whereas Russia wants to illegally change established borders – referring without legal foundation, among others, to the right to self-determination of the affected people – the PRC aims at defending its territorial integrity – based on the generally recognized one China policy – denying any right to self-determination to the people of Taiwan. If the use of force could be justified will also depend on the further actions of Taiwan. If Taiwan just preserves the status quo, an armed intervention by the PRC would be a violation of international law. If, conversely, it abandons the one China policy and tries to separate from the mainland, measures could be taken by the PRC to defend its territorial integrity. The Western States which have recognized the one China policy for many decades must abide by international law and refrain from any intervention in the internal affairs of China and encroachment on its territorial integrity, be it by demonstrative visits aiming at underlining the independence of Taiwan from the PRC or by strengthening its defense capacities.

There are good reasons to sympathize with the regime of Taiwan, which in many regards is more advanced in its political and economic development than the People’s Republic of China. However, this sympathy must not lead to torturing international law to get a result born out of wishful thinking. Ideological preferences or strategic considerations cannot prevail over international law. In the given situation it would be best for all parties involved not to unilaterally alter the status quo and to leave all conflicts to a peaceful settlement by negotiations.