

BOFAXE

Just Like Ukraine, But Worse? (Part 1)

SOME THOUGHTS ON THE CHINA-TAIWAN SITUATION

— Since the summer of 2022, the Chinese government has begun large-scale military drills and missile tests in the area around Taiwan – these exercises continue to this day. Those drills, among other things, were China’s reaction to Nancy Pelosi’s visit to Taiwan in August 2022. It was intended to demonstrate China’s preparedness to incorporate Taiwan into the Chinese sovereign sphere “by military force if necessary.” The commander of the People’s Liberation Army (‘PLA’) stressed that the PLA would continue monitoring the situation around Taiwan and conduct military training and preparations for combat in the future. For that, China receives support from Russia, which also condemns Pelosi’s visit. President Biden, on the other side, has pledged military support for Taiwan in the event of a conflict. This state of affairs seems reminiscent of the Russia-Ukraine situation: a powerful State tries to threaten a supposedly weaker one. This blogpost analyses the international status of Taiwan and addresses the question whether Taiwan can invoke (collective) self-defense against China. It will also briefly analyze, whether Taiwan’s status could imply a worse situation than Ukraine’s.

Is Taiwan a State?

Even though the criteria for statehood are not comprehensively agreed on, the classical criteria of statehood are: a national territory, a permanent population, as well as effective sovereignty described as permanent governmental power over its territory and ‘people’. These essential criteria are rooted in Article 1 of the Montevideo Convention. Even though Article 1 (d) of the convention includes the “capacity to enter into relations with other states”, it should not be seen as a ‘precondition’ of statehood but rather as a consequence. (Crawford, p. 61). Article 3 defines that “the political existence of the state is independent of recognition by other states” (Declarative Theory, p. 12). Still, to be a sovereign and self-determined state, the entity must at least regard itself as such permanently.

The determination of the Taiwanese national territory to the island of Taiwan does not seem to pose a problem. Moreover, Taiwan has 23 million inhabitants who follow a common constitutional and legal order. Despite sporadic criticism (Chan, p. 485) regarding the existence of a *people*, its existence can be assumed after 70 years of independent administration and identity formation (Crawford, p. 220). The Republic of China (ROC) also effectively exercises governance over the territory of the Taiwanese island. As all three state elements are fulfilled, one could consider Taiwan an autonomous state. However, it is questionable whether Taiwan understands itself as an independent state. Not having a ‘will to statehood’ can be described as a ‘negative criterion of statehood’. An entity can only be recognized for what its government claims to be (O’Connell, p. 415). That ‘will’ might be found in a formal declaration of independence, the Taiwanese constitution, or in pursuing a consistent foreign policy (Neukirchen).

Taiwan has not formally declared its independence yet, since China has announced that it is willing to take military action against Taiwan if it declares independence. Taiwan’s constitution neither indicates a presumed independence idea either. Even though it was reformed and democratized multiple times since 1947, it never completely abandoned the idea of the “One-China-Principle” under the control of the ROC (Neukirchen, p. 301, Chiang, p. 985).

Only 14 states have diplomatic relations with Taiwan. ‘Private visits’ by foreign politicians have increased since Taiwan’s democratization (Neukirchen, p. 304) – such as the recent visit by Nancy Pelosi and politicians from Congress. However, these are precisely not inter-state relations. Formal meetings with representatives of other states are often avoided (Hilpert et al., p. 82). Most of Taiwan’s (non-diplomatic) international relations are handled through think tanks and representative offices (Abb and Yang, p. 75). This cannot be regarded as a ‘consistent foreign policy’.

Without any claim to independence or statehood, Taiwan can only be seen as a part of China yet (Crawford, p. 211).

Worse Situation Than Ukraine? Taiwan’s Right to Self-Defense

It seems that Taiwan’s independence does not exist at present and will not exist even through secession (the legality would be highly doubtful) soon. However, Taiwan is not defenceless in this regard. Taiwan is declared a prime example of a “stabilized de-facto regime” (Epping). De-facto regimes are defined as: entities with a defined territory, controlled by an independent government but are not yet states due to non-recognition or other reasons (Frowein, p. 7). Taiwan is not yet defined as a state because of its missing will to sovereignty and unfulfilled secession; furthermore, it is not frequently recognized by other states even though it controls a defined territory. As such, Taiwan is a de-facto regime and, by that, partially obliged and also protected by international law.

Stabilized de-facto regimes are protected (and bound) by Article 2 (4) United Nations Charter (UNCh) (Simma, p. 213; Frowein, p. 69, Verdross and Simma, p. 240-241; Epping and Heinegg, p. 1144; Bothe, p. 772). Although Art. 2 (4) UNCh is generally directed to states only, it also declares that all member states have to “refrain [...] from the threat or use of force [...] inconsistent with the Purposes of the United Nations.” In addition, Art. 1 (1) UNCh states that one of the purposes of the UN 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”. In other words: Any use of force is prohibited when it threatens international peace and security.



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SOME THOUGHTS ON THE CHINA-TAIWAN SITUATION

Despite the fact that Taiwan is not recognized as a 'state' by most states, it has some relations with allies such as the US, Japan, and Korea. The [Taiwan Policy Act](#) that the US Senate Foreign Relations Committee recently approved includes an authorization of 4.5 billion USD for military assistance to Taiwan (Sec. 204). Japan referred in its [Defense Whitepaper](#) of 2022 that it had paid close attention to the Taiwan situation, stressed its systemic and value-based closeness to Taiwan, and pointed out that a stabilized surrounding would be necessary to ensure Japan's security and international peace. These documents show that parts of the international community would classify serious military aggressions of China against Taiwan as a 'non-peaceful dispute settlement', even if China would see this as a merely domestic and non-international conflict (which would make the use of force legal). A breach of peace can also exist if force is used against a stabilized de-facto regime ([Simma](#), p. 1293). Such a 'threat of international peace' would classify a Chinese aggression as a violation of Art. 2 (4) UNCh ([Fisher](#), p. 140). It would be risky to deny stabilized de-facto regimes the protection of Article 2 (4), as aggressor states could just deny the statehood of their victims and by that would not feel bound by Article 2 (4) ([Bowett](#), p. 153).

One crucial question remains unanswered: Can Taiwan invoke (individual/collective) self-defense under Article 51 UNCh, even though it is not a (recognized) state? The [Nicaragua Merits](#) (para. 193) stated that customary international law includes an inherent right to individual self-defense, similar to Article 51 ([Stahn](#), p. 81). Even though the right to self-defense under Article 51 UNCh is usually only granted to states, it would be paradoxical to oblige Taiwan, as a de-facto regime, to refrain from the "use of force" but not allow it to defend itself individually if the prohibition is violated to its detriment ([Fisher](#), p. 140, [Charney](#), p. 477). As Henderson already mentioned: "The right of individual self-defense is a necessary counterpart to the prohibition of the use of force" (p. 400). Taiwan has already [invoked](#) individual self-defense in the case of a recent drone strike.

It is more complex to answer the question of how Taiwan could invoke collective self-defense. The principles of territorial integrity and non-interference in internal affairs could be nullified if third-party states intervene in the Taiwan-Situation, fear critics ([Chan](#), p. 485). The right to collective self-defense by contested states is not conclusively determined. ([Fisher](#), p. 120). State practice shows few examples of states accepting the right to collective self-defense by contested states and de-facto regimes. Some authors ([Henderson](#), p. 404) claim it would be inconsistent to allow contested states to defend themselves but not ask for help – as they were, by definition, usually smaller and militarily inferior compared to their aggressors.

In its [Report on the Conflict in Georgia](#), the Independent International Fact-Finding Mission suggested that contested states do not have the right to exercise collective self-defense, as it would be in conflict with the UN purposes. This would mean that third-state intervention would only be possible with the UN Security Council's (SC) approval. Especially the case of Taiwan shows that this mechanism is insufficient for guaranteeing international peace, as the P5 member China will always veto such approval by the Council. The right to self-defense must be a matching mechanism to face the realities of aggressions. The prohibition on the use of force is *the central* norm for international security and peace. To endorse this exposed position, the invoked right to self-defense must be equally strong – even for de-facto regimes (Similar: [Fisher](#), p. 143). Smaller (de facto) States are dependent on help from allies, to defend themselves against inferior aggressors. Even though Taiwan should already have a right to ask for collective self-defense as a de facto regime, it would still be helpful to formally declare independence in the case of military aggression and, accordingly to the [Nicaragua Case](#), label itself as a victim of an armed attack (para. 195). Their reason not to do it – to secure the status quo – would have already been nullified by the Chinese aggression. They could formally ask other states to help defend their sovereignty by that. Then, the asked states would have to politically decide whether they would recognize Taiwan's sovereignty (statehood). By this formal process, third states could contribute to Taiwan's self-defense without fearing to violate China's territorial integrity.

Comparison to Ukraine Conflict

From a political point of view, a parallel can undoubtedly be drawn to the Ukraine conflict. China – the more powerful state – eagers to reintegrate supposedly renegade individualists, if necessary, by force. The difference is that Taiwan – unlike Ukraine – is not a sovereign state yet. However, monitoring how the Taiwanese population's opinion will develop soon is crucial. Current [surveys](#) indicate a growing urge for declaring independence among the Taiwanese population (although the increase is slight). The current head of state's [views](#) might also cautiously suggest a paradigm shift in ROC's view on independence. When it comes to *recognition* of other states or entities, one should also be mindful of the [decision](#) by the Court of Justice of the European Union, which pronounced that under European Law, there was no difference between "third countries" and "third states". As the EU and Taiwan concluded several [agreements](#) with each other, Taiwan can be envisioned as a "third country" under EU Law, which would now have to be equated as a "third state" under EU Law (e.g. [here](#)). As a stabilized de-facto regime, Taiwan can derive some protection from international law regarding the prohibition of the use of force. By that, Taiwan could use its inherent right to individual self-defense. Invoking the collective right of self-defense, on the other hand, remains challenging. Political dimensions of an escalation also play a role – especially concerning far-reaching tensions between the USA and China.