

USALI Perspectives

Does International Law Protect Taiwan?

It does not provide justification for taking the island by force

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Will China invade Taiwan? Some [argue](#) that China only became seen as an imminent threat to Taiwan when American perceptions of China shifted. However, looking at the bigger picture, we find confirmation that China's growing territorial ambitions are real. The recent experiences of the [Philippines](#), [Vietnam](#), [Japan](#), and especially [India](#) have validated the assertion that under Xi Jinping, China is the most territorially aggressive it has been in recent decades. Yet these states enjoy some legal protection from Chinese incursions by virtue of their statehood. We must ask a painful yet

essential question: Can the global legal system safeguard Taiwan's de facto independent status?

Beijing claims that Taiwan is an indispensable part of its territory and that Taiwan's de facto separation is a legacy of colonization. Hence, China justifies its use of coercion and possible force against Taiwan as "righting wrongs." Historically, this approach proved successful in Beijing's subjugation of Tibet. A legal inquiry of the International Commission of Jurists concluded in 1960 that "Tibet was at the very least a de facto independent state"

before its annexation by the People's Republic of China (PRC) in 1951. In a series of resolutions in 1959, 1961, and 1965, the UN General Assembly (UNGA) called for an end to violations of the fundamental freedoms of the Tibetan people, including their right to self-determination. But the UN lacked the political will to act on its resolutions.

Taiwan is in a much weaker situation. The Republic of China (ROC) that fled to Taiwan at the end of China's civil war claimed to represent the entire state of China for decades. For many years, the [hustle](#) between the ROC and the PRC in the international arena was about which was the rightful representative of China, not about the separate statehood of Taiwan. When UNGA [Resolution 2758](#) expelled Taiwan from the United Nations in 1972 and when the US government, Taiwan's closest ally, granted recognition to the PRC in 1978 and withdrew recognition of the ROC, the issue being determined was the identity of the legitimate government of China.

The US government position on Taiwan statehood is ambiguous. The 1972 [Shanghai communique](#) states: "The United States 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." (Emphasis added.) International practice, however,

gives a fairly consistent response. UN Secretary-General Kofi Annan, following a major earthquake in Taiwan in 1999, [requested](#) UN agencies to wait for the PRC's approval before the UN Office for the Coordination of Humanitarian Affairs and related organizations could send a disaster assessment team to what he called "the Taiwan province of China." The ROC had to apply as a customs territory called "the Customs Territory of Taiwan, Penghu, Kinmen, and Matsu" to be a member of the World Trade Organization. The ROC is still unable to [gain a seat](#) in the World Health Organization after years of application and despite its largely successful campaign against COVID-19.

Even US courts have treated Taiwan as a part of the PRC when addressing the question of whether the [Warsaw Convention](#) applies to Taiwan. In cases from *John Lee and Margaret Lee v. China Airlines Ltd.* to *Atlantic Mutual Insurance Co. v. Northwest Airlines*, courts asserted that the Warsaw Convention would figure prominently in the decision-making process because Taiwan "adheres to it," implying that Taiwan is a party to the Warsaw Convention. In fact, at the time of the adjudications, the ROC had not ratified or officially adhered to the convention, but the PRC had.

As the late Judge Lauterpacht of the International Court of Justice [noted](#),

even though a state may exist as long as it fulfills the conditions of statehood laid down by international law, it is the recognition of other states that establishes ordinary diplomatic relations and materializes the rights and obligations of the recognized state.

In fact, “Is Taiwan a state?” is the wrong question when pondering the PRC’s possible use of force against the island. First of all, Article 2(4) of the UN Charter mandates that the threat or use of force against the territorial integrity or political independence of any state is prohibited. Some might argue that, since Taiwan is not a state, Article 2(4) does not protect the territorial integrity or political independence of Taiwan. But that is an incomplete interpretation of Article 2(4). Further clarified in [UNGA Resolution 2625](#) on the Principles of International Law Concerning Friendly Relations and Cooperation among States, the prohibition of the use of force also requires states to honor “the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.”

In Taiwan, the world sees a prosperous economy, an effective and well-respected democracy, and a functioning government that has managed to contain COVID-19 surges while also safeguarding its citizens’ human rights. Taiwan’s legal status may be uncertain, but the awareness of Taiwanese people

concerning their right to self-determination and freedom is far greater than in many recognized modern states. An invasion intended to overthrow such an established political system and the independence of that system should be seen as a violation of Resolution 2625.

Second, there are strictly two kinds of war that are accepted by international law: wars of self-defense under UN Charter art. 51 and collective security measures under the auspices of the Security Council as provided in the charter’s Chapter VII. If China unilaterally uses force to resolve the Taiwan question, it must find justification under art. 51.

Recent history has shown us that the international community rejects attempts to abuse the self-defense rule. The United States had to drop its “preemptive self-defense” justification in the 2003 invasion of Iraq and depend on [UNGA Resolution 678](#) of 1990, asserting that the 13-year-old resolution still authorized member states to use “all necessary means” to force Iraq out of Kuwait and “restore international peace and security in the area.” Vietnam’s self-defense justification for its invasion of 1978 Cambodia was rejected unanimously by the international community and legal scholars.

The 2020 resumption of conflict between Azerbaijan and Armenia in Nagorno-Karabakh raised the question

of whether the unlawful occupation of territory constitutes a continuing armed attack that permits recourse to self-defense. Tom Ruys and Felipe Rodríguez Silvestre *argue persuasively* that protection of territorial integrity cannot be pursued at all costs, disregarding other core values in the UN Charter such as the peaceful settlement

of disputes and maintenance of peace and stability between nations.

It is even harder in the case of Taiwan, where no unlawful occupation has occurred, to find a self-defense justification for a PRC attempt to take the island by force that comports with the basic principles of contemporary international law.



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