

Statehood in troubled waters: The international status of the Republic of China and the rules on the use of force

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1. *Introduction*

The blatant aggression of Ukraine by the Russian Federation has exacerbated the already intractable question of the Republic of China (RoC)¹ and made more palpable the risk of a military intervention by the People's Republic of China (PRC).² Given the contempt for the most fundamental international rules demonstrated by the Russian Federation, but also before it by other States intervening in Iraq and elsewhere, the PRC may be tempted to forcibly invade the RoC, which it considers as a renegade province. This paper offers the essential historical background (section 2), and a reflection on the international legal status of the RoC (section 3); the legal relationships between the RoC and the other subjects of the international community (section 4); and the rules on the use of force applicable between the PRC and the RoC (section 5).

2. *Key historical facts*

To understand the current situation existing between the PRC and the RoC as well as their legal relationships with other States, one needs to go back to the end of the Chinese Civil War (1927-1949), when the PRC

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¹ RoC is used in this note as a matter of convenience without prejudice to other denominations such as 'Taiwan' or 'Taipei China'. All websites last visited on 21 December 2022.

² B Lin, J Blanchette, 'China on the Offensive. How the Ukraine War Has Changed Beijing's Strategy' *Foreign Affairs* (1 August 2022) <www.foreignaffairs.com/china/china-offensive>.



firmly established its control over mainland China, while the former Nationalist Government had fled to Taiwan and other islands.³

Both governments claimed that there existed only one China and in 1992 concluded a document recording the ‘common understanding among the Chinese on both sides of the Taiwan Straits on the fundamental question that there is only one China and Taiwan is a part of Chinese territory’.⁴ Yet, the document was ‘ambiguous enough to accommodate different views of the two parties on what “one China” meant’.⁵

In accordance with the One China Principle, Beijing adamantly claims that ‘there is only one China in the world, Taiwan is a part of China and the government of the PRC is the sole legal government representing the whole of China’.⁶ As a result, it refuses to have diplomatic relations with any government that recognizes the RoC.

The Government of the PRC, proclaimed on 1 October 1949 and issued from the insurgents (Chinese Liberation Army), was immediately recognised by the USSR and the other European Communist countries, as well as, in the following months, Burma, India, Pakistan, Ceylon, Norway, Denmark, Israel, Finland, Afghanistan, Sweden and the UK.⁷ The majority of States, however, continued to recognise the RoC, although most of them eventually switched recognition from the RoC to the PRC, including France (27 January 1964), Japan (29 September 1972) and the

³ For an excellent historical study, see LE Eastman, J Ch’en, S Pepper, LP Van Slyke, *The Nationalist Era in China, 1927–1949* (CUP 2010).

⁴ Taiwan Affairs Office and The Information Office of the State Council, The One-China Principle and the Taiwan Issue (21 February 2000) <www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202208/t20220812_10742117.html>. See also Mainland Affairs Council, ‘1992 Consensus of One China, with Respective Interpretations’ Press Release No 63 (9 November 2015) <www.mac.gov.tw/en/News_Content.aspx?n=2BA0753CBE348412&sms=E828F60C4AFBAF90&s=8384D875F53F3B53>.

⁵ Y Jie Chen, ‘One China Contention in China–Taiwan Relations: Law, Politics and Identity’ (2022) 252 *The China Quarterly* 1. See also J Drun, ‘One China, Multiple Interpretations’ (Center for Advanced China Research, 2017) <www.ccpwatch.org/single-post/2017/12/29/one-china-multiple-interpretations>.

⁶ See above (n 4).

⁷ See Keesing’s Contemporary Archives (1950) 10443. On the recognition by the British government see MM Whiteman, *Digest of International Law* vol II (US State Department 1961) 31.

US (1 January 1979).⁸ Today, only very few States recognise the RoC⁹ and this abnormal situation has generated some kind of *recognition shopping*.¹⁰ Most governments, including the US, maintain ‘robust unofficial relationships’, but do not support the independence of the RoC, although some interesting developments are taking place (see Section 3). The RoC government itself has been traditionally somehow reluctant to solemnly declare its independence. Its recent practice, however, offers numerous and unequivocal elements that reveal a sufficiently articulated claim to sovereignty.

Until 1971, furthermore, the RoC continued its membership at the UN as a founding member. In accordance with Article 23 (1) of the Charter it also sat as permanent member in the Security Council. On 25 October 1971, a rather clumsy UN General Assembly resolution ‘expelled’ the RoC representatives at the UN and replaced them with their mainland homologues on the assumption that there existed only one China.¹¹ The adoption of the resolution was possible as following the decolonization process the majority of the membership supported the PRC. The resolution postulates the existence of a single China and considers the PRC government as its legitimate representative. The Soviet Union’s representative, in particular, declared that

‘[t]he ‘two Chinas’ theory conflicts with common sense and with the UN Charter. There is and will be in the world only one China - the PRC. Taiwan is

⁸ See, respectively, J Beauti, ‘La Republique Populaire de Chine et le droit international’ (1964) 68 *Revue Générale de Droit International Public* 350; Joint Communiqué (translation) (1973) 1 *Japanese Annual Intl L* 81; Joint Communiqué, 15 December 1978 (1979) 73 *AJIL* 277.

⁹ According to the RoC Ministry of Foreign Affairs website (<www.mofa.gov.tw>), the RoC is today recognized by Marshall Islands, Nauru, Palau, Tuvalu, Eswatini, Holy See, Belize, Guatemala, Haiti, Honduras, Paraguay, Saint Christopher and Nevis, St. Lucia, Saint Vincent and the Grenadines.

¹⁰ The decision to switch recognition is often dictated or influenced by political and economic reasons, if not a matter of bargain, see, for instance, L Duke, ‘South Africa Cuts Ties With Taiwan; Opens Relations With China’ *Washington Post* (1 January 1998); S Le Belzic, ‘Pourquoi le Burkina Faso tourne le dos à Taïwan’ *Le Monde* (28 May 2018); M Stott, K Hille, ‘Paraguay calls for Taiwan to invest \$1bn to remain allies’ *Financial Times* (29 September 2022).

¹¹ UN GA Res 2758 (XXVI) ‘Restoration of the lawful rights of the PRC in the UN’ (26 September 1971).

not a State. Taiwan is an integral part of China, one of China's provinces over which the sovereignty of the Chinese' people will sooner or later be restored'.¹²

Other States, on the contrary, admitted the existence of two States. The US declared 'the UN should take cognizance of the existence of both the PRC and the RoC and reflect that incontestable reality in the manner by which it makes provision for China's representation'.¹³ Costa Rica observed that

'a new State was created on mainland China, with a communist structure, with a new name, the PRC. The former nationalist State, which since the inception of the UN has been called the RoC, was reduced to the territory of the island of Taiwan and some small neighbouring islands'.¹⁴

The resolution has attracted the critique of leading experts.¹⁵

3. *International legal status of the RoC*

The mother of all questions for the purpose of this paper relates to the international legal status of the RoC. International lawyers have been rather evasive and described RoC as a '*country* within particular context',¹⁶ a '*sui generis*' entity that, although not recognised as a State, has an 'international law identity',¹⁷ 'a *de facto* government in a civil war',¹⁸ an entity possessing 'fragmented legal personality'¹⁹ or a '*personnalité pas*

¹² General Assembly, UN Doc A/PV1156 (18 October 1971) 13.

¹³ Letter from the United States to the General Assembly UN Doc A/8442 (17 August 1971).

¹⁴ General Assembly, UN Doc A/PV.1966 (18 October 1971) 15.

¹⁵ See, in particular, B Conforti, C Focarelli, *The Law and Practice of the United Nations* (5th edn, Brill 2016) 65-6; B Conforti, C Focarelli, *Le Nazioni Unite* (12th edn, Wolters Kluwer-Cedam 2020) 74.

¹⁶ I Brownlie, *Principles of International Law* (7th edn, OUP 2003) 65.

¹⁷ J Crawford, *Brownlie's Principles of International Law* (9th edn, OUP 2019) 115.

¹⁸ J Crawford, *The Creation of States* (2nd edn, CUP 2007) 219.

¹⁹ A Serdy, 'Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity' (2004) 75 British YB Intl L 183, 219.

plenaire',²⁰ a 'quasi-State' entity,²¹ a 'sub-entity',²² an entity 'probably *de jure* part of China',²³ a territory legally belonging to the PRC,²⁴ or one of the two governments competing to represent the entire China on the international plane.²⁵ Other authors admit the existence of two independent States,²⁶ or consider the PRC and the RoC as an example of divided State.²⁷ Finally, Italian scholarship admits since the 1950s the co-existence of two subjects *not qualitatively different* from each other from the standpoint of international law: the PRC, which emerged as such during the civil war, and the RoC, which existed already before the civil war.²⁸

In order to deal with the so-called Chinese question, it is of paramount importance to stress the atypical outcome of the Chinese Civil War. During a civil war, the insurgents may progressively evolve into a *de facto* government competing with the existing government. As a result, two international subjects may coexist, provided they are both able to exercise effectively and independently governmental powers over a territory and a population. As pointed out by the English High Court with regard to the *de facto* government engaged in the Spanish Civil War (1936-1939), '[t]he law, based on reality of facts material to the particular case, must regard as having the essentials of sovereignty a government in effective administrative control over the territory in question and not subordinate to any other government'.²⁹

²⁰ P Daillier, A Pellet, M Forteau, A Miron, Nguyen Quoc Dinh, *Droit International Public* (9th edn, LGDJ 2022) 662.

²¹ S Talmon, 'Article 2(6)', in B Simma, D-E Khan, G Nolte, A Paulus (eds), *The Charter of the UN. A Commentary* vol I (3rd edn, OUP 2012) 252, 258.

²² R Nicholson, *Statehood and the State-Like in International Law* (OUP 2019) 199.

²³ M Shaw, *International Law* (9th edn, CUP 2021) 212.

²⁴ A Orakhelashvili, *Akehurst's Modern Introduction to International Law* (9th edn, Routledge 2022) 93-94.

²⁵ G Hernandez, *International Law* (OUP 2019) 115.

²⁶ Q Wright, 'The Chinese Recognition Problem' (1955) 59 AJIL 320.

²⁷ G von Glahn, J L Taulbee, *Law Among Nations* (11th edn, Pearson 2019) 155-156; J Combacau, S Sur, *Droit International Public* (13rd edn, LGDJ 2019) 318.

²⁸ G Arangio-Ruiz, 'La Questione Cinese', in *Scritti di diritto internazionale in onore di Tomaso Perassi* (Giuffrè 1957) 65.

²⁹ England, High Court [Bucknill J.], *Arantzazu Mendi* [1938] L.R. 233, 245. The House of Lords [Lord Atkin], *Arantzazu Mendi* [1938] A.E.R. 267, held that 'there is no difference for the present purposes between a recognition of a State *de facto* as opposed to *de jure*'.



Normally, civil wars end either with the suppression of the insurrectional movement (as in the American Civil War) or its victory (as in the case of the Spanish Civil War). In both cases one of the two competing entities is defeated. In the case of Chinese Civil War, on the contrary, both entities survived the war. Since 1949, it is argued, two fully independent and functioning States, each with its own government, legislative, judiciary, army and so on, exist, respectively, in mainland China and Taiwan.

This conclusion is fully consistent with Article 1 of the Montevideo Convention on the Rights and Duties of States, according to which a State possesses the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with the other States.³⁰ While the first three qualifications are undisputed, it can be safely argued that the RoC had demonstrated the capacity to enter into relations with other States, as it will be seen at the end of this section and in the next one.

For the time being, it is worth noting that the definition offered in Article 1 of the Montevideo Convention is undoubtedly correct, yet of limited assistance. It offers a static picture of statehood and fails to fully capture the factual and normally incremental process that leads to the creation (and conversely disappearance) of an effective and independent government, which is the essence of statehood. As emphasised by the Arbitral Commission of the Conference on Yugoslavia, '[t]he existence or disappearance of a State is a question of fact [...] the effects of recognition by other States is purely declaratory'.³¹

³⁰ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19. In *Parent and Others v Singapore Airlines Ltd and Civil Aeronautics Administration*, Decision of Superior Court of Quebec 2003 IIJ Can 7285 (QC CS) para 60 the Court held that '[l]a preuve au présent dossier est concluante quant aux quatre éléments constitutifs de l'État : (1) l'île de Taiwan constitue un territoire défini; (2) l'île de Taiwan est occupée par une population permanente; (3) un gouvernement effectif existe à Taiwan et (4) le gouvernement de Taiwan entre en relation avec d'autres états'.

³¹ Opinion 1, 31 ILM (1992) 1494. See also *Parent and Others v Singapore Airlines Ltd* (n 30) para 59. For T-C Chen, *The International Law of Recognition* (Green, 1951) 48, if a State 'exists in fact, [it] must exist in law'. See also G Jellinek, *Allgemeine Staatslehre* (3rd edn, Häring 1922) 332; G Arangio-Ruiz, 'L'Etat dans le sens du droit de gens et la notion du droit international' (1975) 26 *ÖZÖRV* 3; I Brownlie, 'Recognition in Theory and Practice' (1982) 53 *British YB Intl L* 197; T Grant, *Recognition in International Law* (Praeger 1999); Crawford (n 18) 62; G Abi-Saab, 'Conclusions', in MG Kohen (ed),

In *New York Chinese Tv Programs Inc v. U.E. Enterprises Inc.*, the Court of Appeals for the Second Circuit held, precisely with regard to the RoC, that '[a]n entity's status as a nation [...] does not depend on whether it receives diplomatic recognition from other nations'.³² Indeed, after fleeing to Taiwan and the other islands, the Kuomintang government (later government of the RoC) continued to exercise effectively and independently its authority or, in other words, to enjoy its sovereignty.³³

The admission of the coexistence for more than 70 years of two States at once disqualifies the views that see Taiwan as *de facto* or *de jure* part of the PRC, and makes immaterial the legal discussion of the international status of Taiwan and the other islands from the standpoint of the relevant treaties concluded since the 1895 Treaty of Shimonoseki.³⁴ At any rate, neither Japan nor any other third State has put forward in the last decades any territorial claims over Taiwan.

The argument that the government of the RoC has not unequivocally declared its independence³⁵ can be equally dismissed. Leaving aside the folkloristic rhetoric put forward by the RoC to be the sole government of China, there is ample evidence that the RoC has considered and considers itself as a State and as such interacts with the PRC and the rest of the international community (see next section). To start with, Article 141 of the Constitution reads:

‘The foreign policy of the RoC shall, in a spirit of independence and initiative and on the basis of the principles of equality and reciprocity, cultivate good-neighborliness with other nations, and respect treaties and the Charter of the UN, in order to protect the rights and interests

Secession: International Law Perspectives (CUP 2009) 470. See also the resolution adopted by the Institut de droit international (1936) 30 *Annuaire de l'IDI* 300.

³² 954 F. 2d 847 (24 January 1992) para 45.

³³ For the notion of independence and sovereignty, see Judge Anzilotti, *Austrian – German Custom Union Case* [1931] PCIJ Ser A/B, No 41, 37; and Judge Huber, *Island of Palmas case* (2006) 2 RIAA 829, 838.

³⁴ See G Arangio-Ruiz, *Sulla dinamica della base sociale del diritto internazionale* (Giuffrè 1954) 55. On the question of the territorial title over Taiwan, see V Starace, ‘Lo status giuridico internazionale di Formosa’ (1959) 42 *Rivista di Diritto Internazionale* 66, in the sense that there is no doubt that Japan had relinquished all claims over Taiwan and the other islands.

³⁵ As maintained in 2007 by Crawford (n 18) 218-219.



of Chinese citizens residing abroad, promote international cooperation, advance international justice and ensure world peace'.³⁶

Amongst the many official declarations explicitly referring to the independence and sovereignty of the RoC, suffice it to mention the following examples.³⁷ In response to the adoption by the PRC in 2005 of the Anti-Secession Law, the government of the RoC declared that

'it is undeniable that the RoC is a sovereign and independent state. [...] The 'Anti-secession Law'—a domestic law unilaterally enacted by China—claims that Taiwan is a part of China and suggests that non-peaceful means may be arbitrarily employed by China to achieve unification. This is not only a violation of the principle of self-determination but also infringes upon the sovereignty of the RoC'.³⁸

Following the recognition by Kiribati of the PRC, the government of the RoC maintained that it

'will stand firm in upholding Taiwan's sovereignty, making no concessions with regard to its sovereignty in the face of China's diplomatic assaults. [...] The government reiterates that the Republic of China (Taiwan) is a democratic, independent and sovereign nation. [...] Taiwan is not a province of the PRC, and the PRC has never ruled over Taiwan for even a single day'.³⁹

Furthermore, the RoC has frequently attempted to become a member of the UN and its agencies, in accordance with Article 4 of the UN Charter, Rule 58 of the provisional rules of procedure of the Security Council and Rule 134 of the rules of procedure of the General Assembly. This

³⁶ The text is available at <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001>>.

³⁷ Dozens of other examples may be retrieved from the website of the Ministry of Foreign Affairs of the RoC, or the section of contemporary and treaty practice in the Chinese (Taiwan) YB Intl L & Affairs (hereinafter C(T)YBIL&A).

³⁸ The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law <www.maf.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE>.

³⁹ The R.O.C. (Taiwan) government terminates diplomatic relations with Republic of Kiribati with immediate effect to uphold national dignity (20 September 2019) No 002 <https://en.mofa.gov.tw/News_Content.aspx?n=1330&s=34156>.

obviously postulates that the applicant is a State.⁴⁰ Interestingly, in 2007 the request by the government of the RoC to include in the General Assembly agenda an item on Taiwan membership was turned down as ‘unreceivable’ by the Secretary General as ‘[t]here was only “one China” in all the world, and Taiwan was a part of it’.⁴¹ It is argued that both the competence of the Secretary General to reject the application and his position on the Chinese question are highly debatable.

Every possible remaining doubt has been dispelled by recent statements and declarations including this one, issued in September 2022 by the Ministry of Foreign Affairs, according to whom ‘the Republic of China (Taiwan) is a sovereign and independent democratic state and [...] neither the Republic of China (Taiwan) nor the autocratic People’s Republic of China (PRC) is subordinate to the other’.⁴²

With regard to recent practice, finally, the website of the Ministry of Foreign Affairs of the RoC offers numerous examples of the practice of the RoC that unequivocally demonstrate that its government considers the RoC as a sovereign State and as such interacts with other States. From this perspective, it has repeatedly condemned the intrusion by PRC aircraft and vessels in its ‘air defense identification zone and cross the Taiwan Strait median line’,⁴³ praised the concrete steps taken by the US and

⁴⁰ The RoC government described the RoC as a ‘free and peace-loving sovereign State’ (2007) 25 C(T)YBIL&A 243. See, more recently, MOFA Sincerely Appreciates Broad International Support for Taiwan’s 2020 UN Campaign (2 October 2020) <https://en.mofa.gov.tw/News_Content.aspx?n=1329&s=93660>.

⁴¹ Press Release, UN Doc GA/10617 (21 September 2007) <www.press.un.org/en/2007/ga10617.doc.htm>. In the letter dated 23 July 2007, the Secretary General reportedly pointed out that the UN ‘considers Taiwan for all intents and purposes to be an integral part of the PRC’ (2007) 25 C(T)YBIL&A 248.

⁴² MOFA reiterates that neither side of the Taiwan Strait is subordinate to the other, urges China to face reality and stop interfering in Taiwan’s participation in and contributions to the UN system (29 September 2022) <https://en.mofa.gov.tw/News_Content.aspx?n=273&s=98725>.

⁴³ MOFA once again condemns China’s military threats in the strongest terms, thanks international community for continuing to express just words of support for Taiwan (6 August 2022) <https://en.mofa.gov.tw/News_Content.aspx?n=1328&s=98276>.

Canada 'to maintain the Taiwan Strait's legal status as international waters',⁴⁴ put forward territorial claims concerning South China Sea Islands,⁴⁵ sought extradition of RoC nationals,⁴⁶ and complained about extradition of RoC nationals to the PRC.⁴⁷ All these elements clearly support the argument that the RoC is and considered itself for all practical purposes a State.⁴⁸

4. *Legal relationships between the RoC and the other subjects of the international community*

Until the 1970s, the RoC was recognized by the majority of States and maintained diplomatic relations with them, was party to numerous treaties and was member of the UN. Its international legal status was undisputed, although its participation in the Security Council as permanent member was a legal and political opprobrium.

After the massive recognition of the PRC and the simultaneous derecognition – whatever this expression means⁴⁹ – of the RoC, the international legal status of the latter became a matter of controversy. It is of

⁴⁴ MOFA, Regarding the transit of US destroyer USS Higgins and Canadian frigate HMCS Vancouver through the Taiwan Strait (21 September 2022) <https://en.mofa.gov.tw/News_Content.aspx?n=1328&s=98690>.

⁴⁵ MOFA reiterates South China Sea Islands are part of RoC territory: RoC is entitled to all rights over South China Sea islands and their relevant waters in accordance with international law and the law of the sea (24 April 2020) <https://en.mofa.gov.tw/News_Content.aspx?n=1329&s=91769>.

⁴⁶ MOFA, Ministry of Justice Continue to Seek Extradition of Zain Dean (23 September 2016) <https://en.mofa.gov.tw/News_Content.aspx?n=1EADDCFD4C6EC567&s=87FA429AE9B39D05>.

⁴⁷ MOFA strongly protests Malaysia's deportation of 21 RoC nationals to mainland China in violation of principle of national jurisdiction (29 November 2016) <https://en.mofa.gov.tw/News_Content.aspx?n=1EADDCFD4C6EC567&s=87FA429AE9B39D05>.

⁴⁸ As far as questions of state responsibility are concerned, see the compensation claims made by the UK towards the RoC in 1957 (1957) 6 ICLQ 507, or by the US towards the PRC in 1954, in Whiteman (n 7) vol II 651. According to Daillier *et al* (n 20) 662, the capacity of the RoC 'à entrer en relations internationales est incontestable'.

⁴⁹ In *New York Chinese Tv Programs Inc v. U.E. Enterprises Inc* (n 32) the Court held that 'the United States' derecognition of Taiwan did not change Taiwan's status as a nation. Because Taiwan is still a nation, the United States may continue to honor its treaties with Taiwan'.

paramount importance, however, to emphasise a few key elements. The RoC is still recognised by a handful of States with whom it maintains official diplomatic relations. The RoC is equally party to a significant number of treaties.⁵⁰

Importantly, the RoC is in good substance treated as a State by a large number of States, if not all States, despite the lack of recognition, although their relations do not occur through diplomatic channels and their agreements are not formally concluded by governments. Instead, the relations between the RoC and other States are maintained and developed by different forms of associations. Likewise, agreements between the RoC and those States are concluded by associations,⁵¹ or by associations representing, on the one side the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and on the other side the concerned State.⁵²

While a full discussion on recognition – may it be *de jure* and *de facto* – is beyond the purpose of this paper, suffice it to note that normally *de facto* recognition is justified when the long-term viability of the government is doubtful,⁵³ and that recognition certifies the ultimate success of a secessionist movement.⁵⁴ It is argued that the RoC, far from being an entity created through secession, is undoubtedly a well-established State, which until the 1970s was formally recognized by the majority of States. The fact the number of States recognizing it has dramatically dropped since is due to political reasons and does not necessarily impact on its legal personality. From this perspective, *de facto* recognition assumes in

⁵⁰ For instance, according to UNCTAD, Taiwan is currently party to 21 investment agreements. See also PL Hsieh, 'Rethinking non-recognition: The EU's Investment Agreement with Taiwan under the One-China Policy' (2020) 33 Leiden J Intl L 689.

⁵¹ See, for instance, the investment agreement concluded between the Thailand Trade and Economic Office in Taipei and the Taipei Economic and Trade Office in Thailand, which contains cryptic expressions such as 'relevant places' and 'the laws and regulations in either relevant place', which obviously refers to the 'territories' of Thailand and the RoC. For all practical purposes, however, the agreements do not differ from traditional bilateral investment treaties.

⁵² See, for instance the Economic Agreement concluded with Singapore. Incidentally, the first investment claims against the RoC have been brought under this agreement, see J Lo, 'A Story of Two Disputes: (Potential) Investor Claims that Hit Taiwan under the Singapore-Taiwan FTA (ASTEP)' (2020) 38 C(T)YBIL&A 138.

⁵³ Shaw (n 23) 391.

⁵⁴ Canadian Supreme Court, *Reference Re Secession of Quebec* [1998] 2 R.C.S. para 155.

this context a peculiar connotation in the sense that for all practical purposes States continued to treat the RoC as a State in the absence of diplomatic relations.

The relations between the RoC and the US are illustrative.⁵⁵ They are founded on the One-China Policy, which is different from the One China principle⁵⁶ and guided by the 1979 Taiwan Relations Act,⁵⁷ the three US-China Joint Communiques, and the Six Assurances.⁵⁸ Thanks to the One-China Policy, the US have been able at once to enjoy some 'strategic ambiguity'⁵⁹ and built a 'robust unofficial relationship' with the RoC.⁶⁰

Importantly, despite the recognition of the government of the PRC as the sole legal government of China and the termination of diplomatic relations with the RoC, the US continued to treat the RoC 'as a foreign country'. Accordingly, in 1978 the President instructed all Departments that 'international agreements and arrangements in force between the US and Taiwan continued to be applicable'.⁶¹ He also excluded that the recognition of the PRC could affect 'the enforceability in the US Federal and State courts of judgments rendered by courts in Taiwan' and *vice versa*.⁶²

Following the recent escalation of the confrontation between the PRC and the RoC, the US Senate has approved an unprecedented programme of military assistance to the RoC within a bill meant to support

⁵⁵ For an account of US policy, see RC Bush, *A One-China Policy Primer* (Washington D.C. Brookings's Center for East Asia Policy Studies, March 2017) <www.brookings.edu/research/a-one-china-policy-primer>.

⁵⁶ See (n 4).

⁵⁷ Public Law 96-8, 96th Congress (10 April 1979).

⁵⁸ See Congressional Research Service, 'President Reagan's Six Assurances to Taiwan' (8 October 2020) <<https://crsreports.congress.gov/product/pdf/IF/IF11665>>.

⁵⁹ Compare S M Goldstein, 'In Defense of Strategic Ambiguity in the Taiwan Strait' (15 October 2021) <www.nbr.org/publication/in-defense-of-strategic-ambiguity-in-the-taiwan-strait> and T Willasey-Wilsey, 'US Policy on Taiwan and the Perils of 'Strategic Ambiguity' (26 September 2022) <<https://rusi.org/explore-our-research/publications/commentary/us-policy-taiwan-and-perils-strategic-ambiguity>>.

⁶⁰ Department of State's website <www.state.gov/u-s-relations-with-taiwan>.

⁶¹ Memorandum for All Departments and Agencies Relations with the People on Taiwan (30 December 1978) <www.presidency.ucsb.edu/documents/memorandum-from-the-president-united-states-relations-with-the-people-taiwan>.

⁶² *ibid*.

the security of Taiwan and its right of self-determination.⁶³ The bill may mark a turning point in the relations between the US and the RoC. While scrupulously stopping short of explicitly recognizing the RoC, the draft bill refers to the RoC authorities and provides the people of Taiwan with *de facto* diplomatic treatment equivalent to foreign countries, nations, States, governments, or similar entities.⁶⁴ It further clarifies that the UN General Assembly Resolution 2758 ‘did not take a position on the relationship between the People’s Republic of China and Taiwan or include any statement pertaining to Taiwan’s sovereignty’.⁶⁵ Importantly, it recognises as ‘a vital national security interest of the US to defend Taiwan for the purposes of defending the territorial integrity of Indo-Pacific allies, such as Japan’.⁶⁶ It finally prospects a US reaction in case of attempts at (a) undermining, overthrowing, or dismantling the governing institutions in Taiwan; (b) occupying the territory of Taiwan; or (c) interfering with the territorial integrity of Taiwan.⁶⁷ Both the language and the substance of the bill clearly militate in favour of the RoC being treated as a State.

5. Rules on the use of force applicable between the PRC and Taiwan

The admission of the statehood of the RoC requires, as the next logical step, an analysis of the rules on the use of force applicable to the relationships between the PRC and the RoC as well as between them and other States. The point of departure is the existence of certain rights *inherent* in statehood, regardless of recognition, and most importantly the inalienable right to territorial integrity and political independence, as well as the inherent right of individual and collective self-defence against

⁶³ Submitted before the Senate on 16 June 2022, S. 4428, 117th Congress, 2nd Session. See D Sevastopulo, ‘US Senate panel approves \$6.5bn bill to fund weapons for Taiwan’ *Financial Times* (15 September 2022).

⁶⁴ Section 104 (a) (1).

⁶⁵ Section 405.

⁶⁶ Section 2.

⁶⁷ Section 802(a)(2)(C).

armed attacks.⁶⁸ Denying such rights would encroach upon the sovereignty of the subject and amount to a violation of international law.⁶⁹

It follows that the PRC and the RoC are bound – as a matter of customary international law – to refrain from using or threatening to use military force in their relations.⁷⁰ It is illustrative that the UK, which since 1950 does not recognise the RoC and carefully excludes any diplomatic intercourse with it, has systematically cautioned the PRC not to resort to military force to settle any disputes with the RoC.⁷¹ Similarly, the US have stigmatised any plan of forcible intervention by the PRC, regardless to any question of recognition. From this perspective, the Senate has expressed the intention of the US ‘to strenuously oppose any action by the PRC to use force to change the *status quo* of Taiwan; [...] to deter the use of force by the PRC to change the *status quo* of Taiwan [...], to strengthen cooperation with the military of Taiwan’.⁷²

Any argument that the PRC could restore its authority over the entire territory of China (including the territory of the RoC) is legally untenable. The RoC is fully entitled to the respect of its territorial integrity and political independence. Far from restoring the territorial integrity of the allegedly unique China, any military threat or military action against the territorial integrity and political independence of the RoC would be contrary to the basic rule the international legal order is based upon, namely

⁶⁸ See S Talmon, ‘The Constitutive versus the Declaratory Theory of Recognition: *Tertium non Datur?*’ (2004) 75 British YB Intl L 101, 148-154, who relies on H Blix, *Contemporary Aspects of Recognition* (1970) 130 Recueil des Cours de l’Académie de Droit International 587, 623; and provides a list of legal documents supporting this position. See also the 1948 Charter of the Organisation of American States, whose art 13 expressly provides that ‘[t]he political existence of the State is independent from recognition by other States. Even before being recognised the State has the right to defend its integrity and independence’ 119 UNTS 3 (entered into force 13 December 1951, amended by Protocol of Buenos Aires) 721 UNTS 324.

⁶⁹ See Talmon (n 68) 153, relying on I Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 88-89.

⁷⁰ As pointed out by J Crawford, ‘The Criteria for Statehood’ (1978) 48 British YB Intl L 93, 145 ‘Formosa, whether or not a State, is not free to act contrary to international law’.

⁷¹ In 2000, for instance, the UK government declared: ‘We are firmly opposed to the use of military force, and we make that view clear to the Chinese on every appropriate occasion’, HL Debs, Vol. 612, col. 75, 11 April 2000; (2001) 71 British YB Intl L 538.

⁷² See above (n 63) Section 101 (1), (3) (4).

the prohibition of the threat or use of force to settle international disputes.⁷³ Such threat or use of force by the PRC would amount to a breach of the general prohibition on the use of force contained in Article 2(4) of the UN Charter and equally binding under customary international law.⁷⁴

Interestingly, Crawford has admitted that '[a]lthough the PRC denies that there is a "judicial boundary" between the parties [...] the suppression by force of 23 million people cannot be consistent with the Charter. To that extent there must be a cross-Straits boundary for the purpose of the use of force'.⁷⁵ While the reference to 'the suppression by force of 23 million people' remains obscure, it must be emphasised that the rules governing the use of force between States would be applicable to the relationships between the PRC and the RoC, regardless of the uncertainty concerning the international legal status of the latter.

An armed attack against the RoC would trigger the right to respond militarily in the exercise of the individual and collective right of self-defence. The fact that the RoC is not a member of the UN is immaterial, for such rules apply also as a matter of customary international law. The fact that the RoC is not recognised by the States that may intervene in collective self-defence is equally irrelevant as the right to political independence and territorial integrity is inherent in statehood.

The crux of the matter is that the current confrontation between the PRC and the RoC must be seen through the lenses of the sovereignty of two distinct fully functioning and independent States, rather than a territorial dispute. What is at stake is not a claim to a certain territory made by a State and resisted by another. Rather, it is a claim by a State to annex the entire territory of another State, which would inexorably imply the disappearance of the latter. Obviously, in the event of such forcible annexation – which hopefully will never occur – all States must refrain from recognising it.

⁷³ In this sense, see A 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' (1998) 32 *New England L Rev* 715. See also, more recently, A Bultrini, 'The Cross-Straits Relationship between China and Taiwan in Light of International Law: Not Quite a Mere Domestic Affair ...' 9 *Journal on the Use of Force and Intl L* 391.

⁷⁴ The prohibition is also unanimously considered as a peremptory norm.

⁷⁵ Crawford (n 18) 220-221. In the previous edition of the book, published in 1979, 152, the author pointed out that 'while there is no strict "judicial boundary" between the parties, there does appear to be a frontier for the purposes of the use of force'.

Finally, even assuming, for the sake of the argument, that the dispute is a territorial one, the conclusions reached above would not be affected. Indeed, the existence of such a dispute would demonstrate the very existence of two international subjects with competing claims. Moreover, the threat or use of force would remain undoubtably unlawful. As reiterated in the resolution on Friendly Relations, ‘every State has the duty to refrain from the threat or use of force [...] as a means of solving international disputes, including territorial disputes’.⁷⁶ This disqualifies any argument based on previous treaties, including those concluded with Japan.

6. *Conclusions*

The recent unambiguous practice of the government of the RoC has dissipated any possible doubt about its statehood. Regardless to the question of recognition, statehood attracts the inherent right to territorial integrity and political independence. It follows that the PRC and the RoC coexist as fully independent and effective States and as such are bound to refrain from using or threatening to use military force in their relations.

A forceful intervention by the PRC in the RoC would not be a matter of restoring the territorial integrity of the former, but quite the opposite: a blatant attack against the political independence and territorial integrity of the latter, which may pave the way to its disappearance through unlawful annexation. Such intervention would be contrary to the fundamental rules of *jus ad bellum* and may justify the use of military force in the exercise of the individual and collective right to self-defence. At any rate, the outcome of such a military intervention in the RoC cannot be recognised by any State.

⁷⁶ UNGA Res 2625 (XXV) ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN’ (24 October 1970) (1970) 9 ILM 1292 Principle 1 para 10. See also Eritrea-Ethiopia Claims Commission, *Jus Ad Bellum – Ethiopia’s Claims* 1-8 (19 December 2015) <http://www.pca-cpa.org/FINAL%20ET%20JAB0e89.pdf?fil_id=158>. With regard to the recent Ukrainian crisis, the General Assembly has reiterated that ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’ UN Doc A/RES/ES-11/1 (2 March 2022).