The Strategic Use of International Law in the Crisis of Taiwan Strait

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Abstract

With the People's Republic of China (PRC) poised to seize control over Taiwan, the prospect of forcible unification has heightened regional security concerns. While military and diplomatic efforts are underway to deter such a threat, much less attention has been drawn to legal strategies that Taiwan can employ to buttress its ability to defend itself and lower the PRC's chance of success. Taiwan's contested sovereign status impedes its effort to build legal strategies for national defense because this issue affects its legal capacity to engage in foreign affairs. Nevertheless, there are still ways in which Taiwan can take advantage of the discourse of international law to advance its national interest and enhance political legitimacy, even without invoking sovereignty. This article explores how Taiwan can make strategic use of international law to defend its national interests against threats of forcible unification and offers three illustrations of how international law can be used as an aid to the defense of Taiwan while leaving its sovereign status unsettled.

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I Introduction

President of the People's Republic of China (PRC), Mr. Xi Jinping, has reiterated that the use of force would not be ruled out as an option for taking control over the Republic of China (Taiwan).[1] The Ani-Secession Law, enacted at the Tenth National People's Congress in 2005, provides the legal basis for such an option by indicating the possibility of employing "non-peaceful means."[2] In recent years, Chinese Communist Party leadership has elevated unification with Taiwan to prominence on their political agenda,[3] increasing military, economic, and diplomatic pressures against Taiwan. The People's Liberation Army has been mandated to be ready to seize Taiwan by 2027.[4]

The prospect of forcible unification has heightened regional security concerns. It is not the PRC's sovereignty claim over Taiwan, but rather the unilateral change to the status quo by forcible means, that inflames tensions. This is

1 Yew Lun Tian and Ben Blanchard, "China Will Never Renounce Right to Use Force over Taiwan, Xi Says", *Reuters*, Oct. 16, 2022, https://www.reuters.com/world/china/xi-china-will-never-renounce-right-use-force-over-taiwan-2022-10-16/; Lily Kuo, "'All Necessary Means': Xi Jinping Reserves Right to Use Force Against Taiwan", *The Guardian*, Jan. 1, 2019, https://www.theguardian.com/world/2019/jan/02/all-necessary-means-xi-jinping-reserves-right-to-use-force-against-taiwan.

2 Anti-Secession Law 2005 (PRC) Art. 8. For Taiwan's response, see The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law, Mar. 29, 2005, *available at* https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&s=D1B0D66D5788F2DE (last visited Mar. 16, 2024). For background analysis, see Keyuan Zou, "Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law", 4 *Chinese J. Int'l L.* 455 (2005).

3 People's Republic of China, "White Paper: The Taiwan Question and China's Reunification in the New Era" (2022). The English full text appears in *Xinhua*, Aug. 10, 2022, https://english.news.cn/20220810/df9d3b8702154b34bbfid451b99bf64a/c.html. *See also* People's Republic of China, "White Paper: China's National Defense", Section II (2000); People's Republic of China, "White Paper: The Taiwan Question and Reunification of China" (1993), *reprinted in* 2 *Chinese J. Int'l L.* 717 (2003).

4 Matthew Strong, "Chinese Leader Zi Jinping Wants PLA Ready to Invade Taiwan in 2027", *Taiwan News*, Sept. 17, 2022, https://www.taiwannews.com.tw/en/news/4660651.

clear from the positions expressed by other countries. The United States, for example, has been committed "to counter efforts to change the status quo and to support peaceful resolution acceptable to both sides of the Taiwan Strait."[5] This commitment is consistent with the 1979 Taiwan Relations Act,[6] three Joint Communiques,[7] and President Reagan's Six Assurances to Taiwan.[8] The United Kingdom has likewise maintained that the Taiwan issue should be settled peacefully, and not through any unilateral attempts to change the status quo.[9]

Military analysts are contemplating how forcible incursions against Taiwan might unfold.[10] Likely scenarios range from the employment of a decapitation strategy to a large-scale invasion plan that may or may not involve direct military confrontation with U.S. and Japanese forces. Western states have been exploring strategic options, such as increased arms sales to Taiwan and the imposition of economic sanctions against the PRC,[11] to help Taiwan defend itself in the event of a forcible incursion. However, much less attention has been drawn to legal strategies that Taiwan can employ to buttress its ability to defend itself and lower the PRC's chance of success.

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5 Asia Reassurance Initiative Act, Pub. L. 115–409 §209(a)(3).

6 22 U.S. Code § 3301 (1979).

7 Joint Communique of the United States of America and the People's Republic of China, Feb. 28, 1972, *reprinted in* 11 I.L.M. 443 (Shanghai Communique); Joint Communique of the United States of America and the People's Republic of China, Jan. 1, 1979, *reprinted in* 18 I.L.M. 272 (1979) (concerning the establishment of diplomatic relations); Joint Communique on United States of America and the People' Republic of China, Aug. 17, 1982, *reprinted in* 21 I.L.M. 1147 (1982) (concerning arms sales to Taiwan).

8 "President Reagan's Six Assurances to Taiwan" (Congressional Research Service, June 13, 2023), https://crsreports.congress.gov/product/pdf/IF/IF11665.

9 UK Government, "Integrated Review Refresh 2023: Responding to a More Contested and Volatile World", at 31 (2023).

10 *See, e.g.*, Mark F. Cancian, Matthew Cancian, and Eric Heginbotham, *The First Battle of the Next War: Wargaming a Chinese Invasion of Taiwan* (2023); Timothy R. Heath, Sale Lilly & Eugeniu Han, *Can Taiwan Resist a Large-Scale Military Attack by China? Assessing Strengths and Vulnerabilities in a Potential Conflict* (2023); Hirotaka Yamashita, *Complete Simulation of Taiwan Invasion War* (2023); Ki-Chul Park, "An Analysis of the Scenario of China's Invasion of Taiwan and Implications for South Korea–U.S.–Japan Security Cooperation", 21 *Kor. J. Int'l Stud.* 171 (2023); Robert D. Blackwill & Philip Zelikow, *The United States, China, and Taiwan: A Strategy to Prevent War* 30–40 (2021).

11 Charlie Vest & Agatha Kratz, *Sanctioning China in a Taiwan Crisis: Scenarios and Risks* (2023).

Taiwan's contested sovereign status impedes its effort to build legal strategies for national defense.[12] As the Republic of China, Taiwan established its provincial capital in Taipei on December 8, 1949, when its forces retreated from the mainland during the civil war with the People's Republic revolutionary movement. Since then, the Taiwanese government has acquired a territorial title over Taiwan (consisting of Formosa and the Pescadores as these territories were known at that time) through effective control,[13] while representing the whole of China until they lost diplomatic credentials at the United Nations

12 *See generally* Matthias Hartwig, "The Relationship between the People's Republic of China and Taiwan from the Perspective of International Law: How Many Chinas Exist in International Law?" 97 *Questions of Int'l L.* 23 (2023); Lung-chu Chen, *The U.S.–Taiwan–China Relationship in International Law and Policy* 71–94 (2016); Brad Roth, "The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order", 4 *U. Pa. E. Asia L. Rev.* 91 (2009); Huang-Chih Chiang & Jau-Yuan Hwang, "On the Statehood of Taiwan: A Legal Appraisal", *in The "One China" Dilemma* 57 (Peter C.Y. Chow ed., 2008); Lloyd Sheng-Pao Fan, "My Land, Your Land, But Never China's: An Analysis of Taiwan's Sovereignty and Its Claim to Statehood", 3 *Taiwan Int'l Stud. Q.* 141 (2007); James Crawford, *The Creation of States in International Law* 198–221 (2d ed. 2006); Augusto Hernández-Campos, "The Criteria of Statehood in International Law and the Hallstein Doctrine: The Case of the Republic of China on Taiwan", 2006 *Chinese (Taiwan) Y.B. Int'l L. & Aff.* 75; Steve Allen, "Statehood, Self-Determination and the 'Taiwan Question'", 9 *Asian Y.B. Int'l L.* 191 (2004); Hungdah Chiu, "The Principle of One China and the Legal Status of Taiwan", 7 *Am. J. Chinese Stud.* 177 (2000); Jianming Shen, "Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan", 15 *Am. U. Int'l L. Rev.* 1101 (2000); Jonathan I. Charney & J.R.V. Prescott, "Resolving Cross-Strait Relations Between China and Taiwan", 94 *Am. J. Int'l L.* 453 (2000); Y. Frank Chiang, "State, Sovereignty, and Taiwan", 23 *Fordham Int'l L.J.* 959 (1999); Angeline G. Chen, "Taiwan's International Personality", 20 *Loy. L.A. Int'l & Comp. L.J.* 223 (1998); Tzu-wen Lee, "The International Legal Status of the Republic of China on Taiwan", 1 *UCLA J. Int'l L. & For. Aff.* 351 (1996); Hungdah Chiu, "The International Legal Status of the Republic of China", 1989–90 *Chinese (Taiwan) Y.B. Int'l L. & Aff.* 1; Lung-chu Chen & W.M. Reisman, "Who Owns Taiwan: A Search for International Title", 81 *Yale L.J.* 599 (1972); Barry Kirkham, "The International Legal Status of Formosa", 1968 *Can. Y.B. Int'l L.* 144; J.P. Jain, "The Legal Status of Formosa: A Study of British, Chinese and Indian Views", 57 *Am. J. Int'l L.* 25 (1963).

13 *See* Civil Air Transport Inc v. Central Air Transport Corporation [1953] AC 70, [1952] 2 All ER 733 (Privy Council taking judicial notice of replies by Foreign Office of Feb. 11, 1950). Japan renounced "all right, title and claim to Formosa and the Pescadores" without stating who succeeded sovereign title to these islands: Treaty of Peace with Japan art. 2(b), Sep. 8, 1951 (effective from Apr. 28, 1952) 136 U.N.T.S. 45; Treaty of Peace, Republic of China–Japan art. 2, Apr. 28, 1952, 138 U.N.T.S. 38; John Foster Dulles, "Answer to Soviet Charges Against Japanese Treaty", 25 *Department of St. Bull.* 461, 462 (1951). *Cf.* Japan v. Lai Chin Jung (Tokyo High Court, Dec. 24, 1959); Chang Fukue v. Chang Chin Min, 241 *Hanrei Jiho* 36 (Osaka District Court, June 7, 1960) (recognizing the establishment of ROC's permanent sovereignty over Taiwan upon the Treaty of Peace's entry into force in 1952). English summary of these

(U.N.) in 1971.[14] Taiwan, by all measures, satisfies the requisite conditions for statehood,[15] with a defined territory, approximately 24 million permanent population, a functioning government, and the capacity to conduct international relations.[16] Nevertheless, many States, including key regional partners such as the United States, Australia, and Japan, have refrained from recognizing Taiwan de jure by maintaining a "one China policy" – a policy decision to recognize only one government to represent the state of China. Above all, the Taiwanese government itself has not unequivocally declared independence while reiterating the separateness of Taiwan as a self-governing unit. As D.P. O'Connell famously proclaimed, "[a] government is only recognized for what it claims to be."[17]

As the entire structure of international law hinges upon state sovereignty, disagreement over Taiwan's sovereign status inevitably raises issues with its legal capacity to engage in foreign affairs. Nevertheless, there are still ways in which Taiwan can take advantage of the discourse of international law to advance its national interest and enhance political legitimacy, even without invoking sovereignty. This article explores how Taiwan can make strategic use of international law to defend its national interests against threats of forcible unification. This article first revisits the role of international law in the global discourse of political legitimacy and then offers three illustrations of how international law can be used as an aid to the defense of Taiwan while leaving its sovereign status unsettled.

Japanese court judgments can be found in *Materials on Succession of States*, U.N. Doc. ST/LEG/SER.B/14, 70–71 (1967).

14 G.A. Res. 2758, U.N. Doc. A/RES/2758 (XXVI) (Oct. 25, 1971).

15 Convention on the Rights and Duties of States art. I, Dec. 26, 1933, 165 L.N.T.S. 19. Despite its regional character, these four requisite criteria for statehood have been seen as reflective of the standard definition of the state. *See generally* Crawford, *supra* note 12, at 45–89.

16 *See* Roth, *supra* note 12, at 96–97; Lee, *supra* note 12, at 387–88. The fact that the whole of Taiwan's territorial claim is contested is insufficient, in itself, to bring statehood into question: Crawford, *supra* note 12, at 48–52. Note Shen's argument contrary to it but without any support other than citing Crawford by confusing the issue of statehood with admission to the United Nations: Shen, *supra* note 12, at 1129. Shen's other arguments appear circular, primarily relying on the lack of sovereignty as the basis for denying Taiwan's statehood: *id*. at 1125–40.

17 D.P. O'Connell, "The Status of Formosa and the Chinese Recognition Problem", 50 *Am. J. Int'l L.* 405, 415 (1956).

II The Role of International Law in Cross-Strait Relations

International law, in its essence, is an instrument of foreign policy to manage international relations.[18] Nowadays, few people would question its normative character and political imperatives to adhere to instrumental rules created by states and binding on them. Critics of international law entertain doubts about its effectiveness due to the lack of law enforcement mechanisms.[19] Indeed, the system of international law is primarily premised upon the consent of sovereign states and, for that reason, opportunities for judicial settlement of international disputes are limited.[20] However, limited effectiveness has not diminished international law's normative character. Very few would consider, for example, that human rights treaties have lost their normative value because many states commit human rights violations notwithstanding their legal commitment to respect and protect human rights.[21]

Nevertheless, limited opportunities for international judicial settlement have significant implications for the role that international law can play in managing international relations. This is especially so when disagreement involves interpretive disputes or the choice of law that controls legal outcomes. When competing legal arguments are presented, interpretive or choice-of-law disputes remain unresolved in the absence of judicial determination. In other words, none of these legal arguments can be "validated" as an authoritative application of international law through a judicial settlement of the dispute. In the absence of such an authoritative determination, all legal claims presented by disputing parties compete with each other as a justification for each party's position.

Awareness of this reality in international relations is particularly significant for cross-Strait relations, given that there is no prospect for a third-party adjudication. Legal scholars and other commentators may debate the strengths and weaknesses of each party's argument, but none of these views has an authoritative status under international law with the legal force to quash arguments presented by either side of the dispute. The teachings of these publicists can

18 *See e.g.*, Oscar Schachter, "International Law in Theory and Practice", 178 *Recueil des Cours* 9, 26 (1982) (describing international law as "an instrument to meet changing ends and values").

19 *See e.g.*, Eric A. Posner, *The Perils of Global Legalism* (2009).

20 *See generally* Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law* (2017).

21 For an empirical analysis, see Steven J. Hoffman et al., "International Treaties Have Mostly Failed to Produce Their Intended Effects", 119 *Proc. Nat'l Acad. Sci. U.S.A.* e2122854119 (2022); Oona Hathaway, "Do Human Rights Treaties Make a Difference?", 112 *Yale L.J.* 1935 (2002). *Cf.* Ryan Goodman & Derek Jinks, "Measuring the Effects of Human Rights Treaties", 14 *Eur. J. Int'l L.* 171 (2003).

at most be a subsidiary means for the determination of rules of law as so provided in Article 38, paragraph (1)(d) of the Statute of the International Court of Justice.[22]

International law remains relevant to cross-Strait relations, but the absence of any prospect for a third-party adjudication requires us to re-imagine its role from a different perspective. Rather than as strict standards to be enforced, international law assumes its role as a strategic vocabulary to communicate Taiwan's causes in the global discourse of political legitimacy. The idea is not alien to the study of international law. David Kennedy, for example, discussed international humanitarian law as a strategic vocabulary to express one's professional commitments and to influence other professionals, in the struggles for winning the political legitimacy of wartime actions.[23] This strategic perspective can find a useful application by characterizing cross-Strait disputes in terms of international law, while setting aside the questions of legal validity that remain unresolved due to the issue of sovereignty.

Strategic considerations have indeed pervaded the recent development of international law since the concept of lawfare was introduced into its discourse. Major General (ret.) Charles Dunlap Jr., who originally adopted the concept for modern usage,[24] has defined lawfare as "the strategy of using – or misusing – law as a substitute for traditional military means to achieve a warfighting objective."[25] As such, lawfare is designed to describe the law's impact on warfare. For example, one may deprive enemy forces of access to commercial satellite imagery by signing an exclusivity agreement with satellite image service providers, instead of destroying the satellite. One may reduce the adversary's operational capacity by imposing economic sanctions in lieu of a blockade.[26] These are positive impacts that the use of legal means has to bear on the battlefield in reducing the destructive effect of warfare.

Lawfare can also be used to gain a strategic advantage over countries that embrace respect for the rule of law in their political culture and legal

22 Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, T.S. No. 993.

23 David Kennedy, *Of War and Law* 111–35 (2006).

24 Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century" (prepared for the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Nov. 29, 2001).

25 Charles J. Dunlap, Jr., "Lawfare Today… and Tomorrow", 87 *Int'l L. Stud.* 315, 315 (2011).

26 *See* Charles J. Dunlap, Jr., "Lawfare 101: A Primer", *Mil. Rev.* 8, 9–10 (2017); Charles J. Dunlap, Jr., "Lawfare Today: A Perspective", 3 *Yale J. Int'l Aff.* 146, 147 (2008).

institutions.[27] An oft-cited example is the exploitation of images and reports of civilian casualties in warfighting with a view to undermining public support indispensable for sustaining the political will to fight, especially in democratic countries.[28] This tactics has not only appealed to insurgents engaged in asymmetric warfare but has also provided recalcitrant states with the ability to exploit structural problems of international law to their strategic advantage.[29] As a legal system built on the consent and practice among sovereign states, international law necessarily relies on each state's good faith efforts to implement and internalize their obligations into domestic legal systems and decision-making processes. However, when recalcitrant states take advantage of this commitment to the rule of law, law-compliant states face marked disadvantages in the range of tactical maneuvers available to address hostile activities.

The idea of exploiting the adversary's respect for the rule of law has stretched the modern usage of lawfare to defy the conventional classification of armed conflict. Recalcitrant states exploit legal vocabularies as an unconventional means of gaining strategic advantage or asserting political legitimacy below the thresholds of armed conflict. The PRC government has indeed been engaging in such lawfare by employing legal vocabularies to advance its maritime interests in the South China Sea.[30] Concepts such as sovereignty and historical rights have been used to assert and justify its broad maritime claims within the so-called "Nine-Dash Line."[31] The PRC continues to utilize these legal terms

27 Orde F. Kittrie, *Lawfare: Law as a Weapon of War* 11 (2016). In some domestic constituencies, the conservative lawfare argument has gone even further by undermining and de-legitimizing legal institutions and professions as part of a public relations campaign: see Gregory P. Noone, "Lawfare or Strategic Communication?", 43 *Case W. Res. J. Int'l L.* 73, 75–77 (2010); Susan W. Tiefenbrum, "Semiotic Definition of 'Lawfare'", 43 *Case W. Res. J. Int'l L.* 29, 52–55 (2010).

28 Dunlap, *supra* note 25, at 317–20.

29 For the author's further analysis, see Hitoshi Nasu, "Legal Aspects of Grey Zone and Hybrid Threats: A Primer", *in Hybrid Threats and Grey Zone Conflict: The Challenge to Liberal Democracies* 87 (Mitt Regan & Aurel Sari eds., 2024).

30 For details, see Jill I. Goldenziel, "Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare", 106 *Cornell L. Rev.* 1085, 1102–40 (2021); Kittrie, *supra* note 27, at 161–96.

31 Ministry of Foreign Affairs (PRC), "Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Rights and Interests in the South China Sea", July 12, 2016, *reprinted in* 15 *Chinese J. Int' L.* 903 (2016); Ministry of Foreign Affairs (PRC), "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (Dec. 7, 2014), *reprinted in* 15 *Chinese J. Int'l L.* 431 (2016). *Cf.* Ministry of Foreign Affairs of the Republic of China, "Position Paper on ROC South China Sea Policy: Peace in the South China Sea, National Territory Secure Forever" (May 2016).

despite the fact that the Arbitral Tribunal, established in accordance with Annex VII of the Law of the Sea Convention, found their application invalid.[32] The PRC government even went further by enacting the new Coast Guard Law in January 2021 to legitimize maritime law enforcement action against foreign-flagged vessels operating under the broadly and vaguely defined Chinese jurisdiction.[33]

The PRC's strategy to exploit legal vocabularies has been attributed to Chinese military doctrines such as "people's war" and "unrestricted warfare."[34] In 1999, Colonel Liang Qiao and Colonel Xiangsui Wang produced an influential work exploring new methods of warfare that transcend all boundaries and limits between war and peace, military and non-military.[35] This work is but one Chinese perspective on strategy and warfare,[36] but nonetheless, it provided the philosophical foundation for articulating the idea of employing non-military means of warfare as "three warfares" – public opinion warfare, psychological warfare, and legal warfare.[37] This concept is often cited for its potential link to hybrid warfare;[38] however, for the purposes of the present discussion, its relevance to lawfare is the way in which the PRC has asserted legal rights by way of

32 In the Matter of the South China Sea Arbitration (Phil. v. PRC), PCA Case No. 2013–19, Award (Arb. Trib. under LOSC Annex VII 2016).

33 Adopted at the 25th Meeting of the Standing Committee of the 13th National People's Congress on January 22, 2021. For critical commentaries, see Shigeki Sakamoto, "Anatomy of China's Maritime Strategy: Threatening the Maritime Order Through Its National Legislation and Self-Centered Interpretation of UNCLOS", 100 *Int'l L. Stud.* 374 (2023); Raul (Pete) Pedrozo, "Maritime Police Law of the People's Republic of China", 97 *Int'l L. Stud.* 465 (2021).

34 Stephen R. Schiffman, "Great Power Use of Lawfare: Is the Joint Force Prepared?", *Joint Force Q.*, Oct. 2022, at 15, 17 (2022); Kevin Bilms, "Beyond War and Peace: The PLA's 'Non-War Military Activities' Concept" (Modern War Institute, Jan. 26, 2022), https://mwi.westpoint.edu/beyond-war-and-peace-the-plas-non-war-military-activities-concept/.

35 Liang Qiao & Xiangsui Wang, *Unrestricted Warfare* 12 (1999).

36 *See* Andrew Scobell, "Introduction to Review Essays on 'Unrestricted Warfare'", 11 *Small Wars & Insurgencies* 112, 113 (2000).

37 *See* Peter Mattis, "China's 'Three Warfares' in Perspective", *War on the Rocks*, Jan. 30, 2018, https://warontherocks.com/2018/01/chinas-three-warfares-perspective/; Sangkuk Lee, "China's 'Three Warfares': Origins, Applications, and Organizations", 37 *J. Strategic Stud.* 198 (2014); Dean Cheng, "Chinese Lessons from the Gulf Wars", *in Chinese Lessons from Other People's Wars* 153, 170–88 (Andrew Scobell, David Lai & Roy Kamphausen eds., 2011).

38 *See e.g.*, Hitoshi Nasu, "Challenges of Hybrid Warfare to the Implementation of International Humanitarian Law in the Asia-Pacific", *in Asia-Pacific Perspectives on International Humanitarian Law* 220, 222–23 (Suzannah Linton, Tim McCormack & Sandesh Sivakumaran eds., 2019); Michael Raska, "Hybrid Warfare with Chinese Characteristics", *RSIS Commentary*, Dec. 2, 2015, https://www.rsis.edu.sg/wp-content/uploads/2015/12/CO15262.pdf.

mobilizing public opinion and shaping the narrative in the global discourse of political legitimacy.

The mere assertion of legal rights without respecting their limits poses a fundamental challenge to the international rule of law and rules-based international order. Growing concerns about this trend motivated several Asian leaders to advocate for a rules-based international order as the basis for global peace, stability, and prosperity.[39] The United Kingdom also shares these concerns, recognizing challenges posed to the rules-based international order constructed in the aftermath of World War II as "a shared commitment by all countries to conduct their activities in accordance with agreed rules."[40] Notwithstanding some skepticism about the political motives behind this idea,[41] it is fair to say that these concerns reflect the realization on the part of a growing number of states that lawfare, in particular when it is engaged by exploiting legal vocabularies without heeding normative limits, only diminishes their ability to rely on legal instruments as a means of managing international relations and will, in the long term, run counter to their national interests.

The strategic use of international law must thus be distinguished from lawfare, or as the Chinese military doctrine puts it, legal warfare as a non-military means to achieve political objectives. Differences rest, at fundamental levels, with the degree of reasonableness in the interpretation and application of international law. A reasoned argument grounded in the established methods of international law, as opposed to an arbitrary use of legal vocabularies, is more likely to enjoy general support rather than condemnation from other states. In this respect, strategic considerations are directed toward strengthening one's normative commitments to international law, rather than undermining or circumventing it, as a means of advancing national interests in the global discourse of political legitimacy.

Risk is inevitably involved in novel arguments developed to advance or defend strategic interests. Illustrative is the British legal position that sovereignty, as a general principle of international law, does not prescribe any specific rule or additional prohibition for cyber operations.[42] This legal argument

39 *See* Hitoshi Nasu & See Seng Tan, "A Rules-Based Order in the Asia-Pacific", *in Prospects for the Rules-Based Global Order* 9, 9–10 (Greg Raymond ed., 2017).

40 UK House of Lords Select Committee on International Relations, *UK Foreign Policy in a Shifting World Order: 5th Report of Session 2017–19* ch. 1 (2018).

41 John Dugard, "The Choice Before Us: International Law or a 'Rules-Based International Order'?", 36 *Leiden J. Int'l L.* 223, 226–28 (2023) (depicting the rules-based international order as a U.S. attempt to circumvent the strict rules of international law).

42 Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by

caused controversies, with extensive academic debates about whether the principle of sovereignty operates as a rule of international law capable of violation as an internationally wrongful act that gives rise to state responsibility.[43] On the other hand, the idea that cyber operations conducted against critical infrastructure would amount to a breach of sovereignty or constitute a use of force prohibited under international law appears to be gaining wider support.[44]

Such strategic thinking of international law is particularly relevant to Taiwan in developing its defense against the "one-China principle" that the PRC government promotes with regard to cross-Strait relations. The "one-China principle" stands for the supposedly "indisputable fact" that Taiwan is part of the PRC in an attempt to preclude foreign interference with cross-Strait disputes and delegitimize foreign relations established by Taiwan. According to the PRC, the "one-China principle" reflects a "universal consensus of the international community and a basic norm in international relations."[45] The reference to the law and legal vocabularies, such as principles and basic norms, is indicative of the PRC's intention to demonstrate that the issue is settled as a matter of international law.

To bolster the legitimacy of its position, the PRC deliberately conflates the "one-China principle" with a more nuanced and ambiguous "one-China policy" adopted by other states, including the United States. In reality, however,

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States Submitted by Participating Government Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security Established Pursuant to General Assembly Resolution 73/266, at 117 para. 10, U.N. Doc. A/76/136 (July 13, 2021); Jeremy Wright, "Cyber and International Law in the 21st Century", speech delivered at Chatham House, May 23, 2018, https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

43 *See e.g.*, Michael N. Schmitt & Liis Vihul, "Respect for Sovereignty in Cyberspace", 95 *Texas. L. Rev*. 1639 (2017); Gary P. Corn & Robert Taylor, "Sovereignty in the Age of Cyber", 111 *AJIL Unbound* 207 (2017); Michael N. Schmitt & Liis Vihul, "Sovereignty in Cyberspace: Lex Lata Vel Non?", 111 *AJIL Unbound* 213 (2017); Corey Pray, "It's the Principle: Defining Sovereignty in the Context of Cyber Operations", 7 *Nat. Sec. L.J.* 272 (2021); Henning Lahmann, "On the Politics and Ideologies of the Sovereignty Discourse in Cyberspace", 32 *Duke J. Comp. & Int'l L.* 61 (2021).

44 Costa Rica's Position on the Application of International Law in Cyberspace, paras. 20, 36, July 21, 2023; Ireland Position Paper on the Application of International Law in Cyberspace, paras. 6, 18, July 6, 2023; Official Compendium, *supra* note 42, at 5 (Australia), 26 (Estonia), 34 (Germany), 47 (Japan), 70 (Norway), 84 (Singapore).

45 PRC's 2022 White Paper, *supra* note 3; Statement by the Ministry of Foreign Affairs of the People's Republic of China, para. 2, Aug. 2, 2022. *See also* Pasha L. Hsieh, "The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum", 84(3) *Die Friedens-Warte* 59 (2009); Su Wei, "Some Reflections on the One-China Principle", 23 *Fordham Int'l L.J.* 1169 (1999).

the "one-China policy" merely signifies an official intention to recognize the PRC government de jure, while leaving its sovereign status over Taiwan unattended.[46] The United States, for example, only acknowledges the PRC's position that Taiwan is part of China, without endorsing it, and so does Australia,[47] Canada,[48] and the United Kingdom.[49] The PRC invokes U.N. General Assembly Resolution 2758 as evidence of universal support for the "one-China principle." However, Resolution 2758 merely settled the question of official representation for the state of China as a U.N. member state without any effect of resolving the sovereign status of Taiwan.[50]

Despite these flaws, the "one-China principle" plays its role in shaping the political narrative of cross-Strait relations, particularly among states that remain silent on the Taiwan question. Strategic options are limited for Taiwan's rebuttal because of its contested sovereign status, which inevitably raises issues with its legal capacity to invoke international law rights and entitlements derived from and associated with sovereignty. In the absence of any prospect for a third-party adjudication, Taiwan cannot expect any authoritative determination to invalidate the "one-China principle" or clarify its contours. Under such circumstances, Taiwan has little choice but to consider international law as a strategic vocabulary to communicate its defiance of any unilateral attempt at forcible unification in the global discourse of political legitimacy.

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46 For a variety of "one-China" positions, see Chong Ja Ian, "The Many 'One Chinas': Multiple Approaches to Taiwan and China" (Carnegie Endowment for International Peace, Feb. 9, 2023), https://carnegieendowment.org/2023/02/09/many-one-chinas-multiple-approaches-to-taiwan-and-china-pub-89003; Lee, *supra* note 12, at 357–59.

47 Joint Communiqué, Australia–PRC, Dec. 22, 1972, *reprinted in* 1970–73 *Austl. Y.B. Int'l L.* 149. For a detailed analysis of Australia's recognition policy in relation to Taiwan, see Ivan Shearer, "International Legal Relations between Australia and Taiwan: Behind the Façade", 2001 *Austl. Y.B. Int'l L.* 113, 121–31.

48 House of Commons (Canada), *Interim Report of the Special Committee on the Canada–People's Republic of China Relationship, Canada and Taiwan: A Strong Relationship in Turbulent Times*, at 6 (44th Parliament of Canada, 1st Session, Mar. 2023).

49 Foreign Affairs Select Committee of the House of Commons (UK), *East Asia: Seventh Report of Session 2005–06*, paras. 174–75 (HC 860-I, 2006).

50 For details, see Chien-Huei Wu & Ching-Fu Lin, "Taiwan and the Myth of UN General Assembly Resolution 2758", *VerfBlog*, Apr. 14, 2023, https://verfassungsblog.de/taiwan-and-the-myth-of-un-general-assembly-resolution-2758/; Eric Ting-Lun Huang, "Taiwan's Status in a Changing World: United Nations Representation and Membership for Taiwan", 9 *Ann. Survey Int'l & Comp. L.* 55, 78–85 (2003). For the view that the PRC has not established title over the island of Taiwan, see Y. Frank Chiang, "One-China Policy and Taiwan", 28 *Fordham Int'l L.J.* 1 (2004).

III Legal Strategies in Defiance of Forcible Unification

Taiwan has diverse options to explore in the range of rules, institutions, and processes available under international law. In many ways, Taiwan does already assert various rights and entitlements under international law, where the contested sovereign status does not impede its legal capacity to implement them. For example, Taiwan has enacted domestic laws to designate maritime zones pursuant to customary international law as reflected in the Law of the Sea Convention.[51] Taiwan has also taken advantage of its status as a separate customs territory to commence dispute settlement procedures under the World Trade Organization.[52] Moreover, on September 1, 2022, Taiwan destroyed a surveillance drone launched from mainland China and justified its action as an exercise of the right of self-defense – the inherent right attributed to a sovereign state.[53]

Further, Taiwan could lodge an instrument of accession to the Rome Statute of the International Criminal Court, as the State of Palestine did even though its sovereign status is contested.[54] As Pasha Hsieh suggested, Taiwan could also

51 Law on the Territorial Sea and Contiguous Zone of the Republic of China (1998); Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China (1998). An unofficial English translation by the Ministry of Interior is reproduced in 1998 *Chinese (Taiwan) Y.B. Int'l L. & Aff.* 124–29 and 129–37 respectively (1998).

52 India – Tariff Treatment on Certain Goods in the Information and Communications Technology Sector, WT/DS588; India – Anti-Dumping Duties on USB Flash Drives from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS498; Indonesia – Safeguard on Certain Iron or Steel Products, WT/DS490; Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS482; European Communities and its Member States – Tariff Treatment of Certain Information Technology Products, WT/DS377; India – Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS318; United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS274. *See generally* Der-Chin Horng, "Taiwan Practices in the WTO Main Activities: 2002–2015", 2017 *Chinese (Taiwan) Y.B. Int'l L. & Aff.* 228; Chien-Huei Wu, *WTO and the Greater China: Economic Integration and Dispute Resolution* (2012); Pasha L. Hsieh, "Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization", 39 *J. World Trade* 1195 (2005).

53 Cindy Wang, "Taiwan's Premier Says Military Downed Drone in Self-Defense", *Bloomberg*, Sept. 1, 2022, https://www.bloomberg.com/news/articles/2022-09-02/taiwan-s-premier-says-military-downed-drone-in-self-defense.

54 The State of Palestine acceded to the Rome Statute on January 2, 2015, 3023 U.N.T.S. 354 (effective April 1, 2015). Palestine's instrument of accession was circulated among the States Parties, but no opposition was expressed except by Canada before the U.N. Secretary-General accepted it. The International Criminal Court's Pre-Trial Chamber acknowledged the outcome of the accession procedures as the basis for exercising its jurisdiction without prejudice to any matters of international law arising from the events in relation to Palestine, including its border disputes: Decision on the "Prosecution Request Pursuant

attempt to institute proceedings before the International Court of Justice as a non-UN member state or the International Tribunal for the Law of the Sea as a fishing entity.[55] However, many of these options hinge upon Taiwan's sovereign status as an independent state and, as such, remain precarious in the absence of a resolution of its sovereignty question or at least widespread recognition of its statehood by a majority of states. Therefore, instead of sovereignty-oriented strategies, the following analysis focuses on legal strategies that can be pursued without relying on sovereignty as the basis for entertaining legal claims.

A *Forcible Action against Taiwan Is a Matter of International Concern*

The PRC government claims that the Taiwan question is a domestic affair that allows no external interference according to the one-China principle. Irrespective of its meaning or validity, the "one-China principle" is not determinative of whether the Taiwan question is the PRC's domestic affair, especially when forcible action is to be taken to enforce unification. The determination of matters reserved for the exclusive competence of a state protected from foreign intervention is a question of international law, which is to be settled according to the principle of non-intervention.

Under customary international law,[56] states are prohibited from intervening, directly or indirectly,[57] in the internal or external affairs of another state that are exclusively reserved for its domestic jurisdiction.[58] Within this reserved domain, each state enjoys the freedom to decide its own laws and policies in the exercise of sovereign authority without foreign intervention. The question therefore turns to whether the Taiwan question is exclusively reserved for the PRC's domestic jurisdiction as a matter of sovereignty under international law

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to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine", Case No. ICC-01/18, paras. 100–13 (ICC Pre-Trial Chamber I Feb. 5, 2021).

55 Pasha L. Hsieh, "An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan", 28 *Mich. J. Int'l L.* 765, 795–803 (2007).

56 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, 226–27, para. 162 (Dec. 19); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 108, para. 205 (June 27); Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. 266, at 274–75 (Nov. 20).

57 On different forms of intervention, see Marko Milanovic, "Revisiting Coercion as an Element of Prohibited Intervention in International Law", 117 *Am. J. Int'l L.* 601 (2023).

58 Helsinki Final Act of the Conference on Security and Co-operation in Europe, principle VI, Aug. 1, 1975, *reprinted in* 14 I.L.M. 1292; G.A. Res. 2625(XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970); G.A. Res. 2131(XX), para. 1, U.N. Doc. A/RES/2131(XX) (Dec. 21, 1965); Convention on Rights and Duties of States, art. 8, Dec. 26, 1933 (effective from Dec. 26, 1934) 165 L.N.T.S. 19.

or whether it is a matter of international concern to which international law extends.

There are two different approaches to the identification of domestic jurisdiction. The first is a relativist approach that determines its scope by the reach of international law. This approach draws from the observation made by the Permanent Court of International Justice in its advisory opinion on *Nationality Decrees in Tunis and Morocco*.[59] In this advisory opinion, the Court observed that the question of whether a particular matter is or is not, in principle, regulated by international law is a "relative question; [which] depends upon the development of international relations."[60] According to the relativist approach, the PRC's assertion that the so-called "one-China principle" is a basic norm in international relations becomes an oxymoron. If it were indeed to be recognized as a "principle" of international law, the Taiwan question would no longer be reserved as the PRC's domestic affairs; instead, its validity and contours would depend on how the principle is interpreted and applied under international law.[61] If the PRC's intention were to claim that the Taiwan question is a domestic affair in which no other state should intervene, a more accurate statement would have been that no rule of international law regulates the Taiwan question over which Chinese people enjoy freedom of choice without foreign intervention.

The second is an absolutist approach that considers certain matters fall within the domestic jurisdiction of a state regardless of the reach of international law. The International Court of Justice signaled such a reading in the *Nicaragua* judgment by defining a prohibited intervention as "one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[62] In particular, the Court refers to "the choice of a political, economic, social and cultural system, and the formulation of foreign policy" as examples of domestic affairs. It is therefore possible to characterize the Taiwan question as an issue of secession that concerns the choice of a political system and, on that basis, argues that the "one-China principle" derives from the general principle of territorial integrity, which must not be infringed upon.[63]

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59 Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. Ser. B No. 4 (Feb. 7).

60 *Id*. at 23–24.

61 *See* Chien-Huei Wu, Ching-Fu Lin & Yun-Sheng Lin, 'China's Word Game: A New Narrative of the "One China Principle", *The Diplomat*, Aug. 16, 2023, https://thediplomat.com/2023/08/chinas-word-game-a-new-narrative-of-the-one-china-principle/.

62 Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J., para. 205.

63 Whether the right of remedial secession exists in support of self-determination under certain circumstances remains unsettled: Accordance with International Law of the

However, as noted previously, the issue is not the PRC's sovereignty claim over Taiwan but rather the unilateral attempt to change the status quo by forcible means. Indeed, the United States and other nations stay out of Taiwan's sovereignty question itself. Their concerns are rather directed toward the idea that the PRC may resort to the use of force as a means of settling cross-Strait disputes. In June 2023, G7 leaders made this point clear in the Hiroshima Communiqué by "strongly opposing any unilateral attempts to change the peacefully established status of territories by force or coercion anywhere in the world and reaffirming that the acquisition of territory by force is prohibited".[64] Similar remarks have been made in other forums, emphasizing the importance of peace and stability across the Taiwan Strait.[65]

These views expressed by numerous States underscore the limits of the "one-China principle", no matter how it is conceived, as a means of shielding the Taiwan question entirely from foreign interference. However, whether the PRC's domestic jurisdiction extends to forcible unification, beyond the political settlement of the Taiwan question, turns to the applicability of international law to the use of force in cross-Strait relations. This is because, in principle, the use of force is only prohibited between states (or between a state and a putative state involved in a national liberation movement) under Article 2(4) of the U.N. Charter and, as such, a state's use of force directed against its own citizens or entities within its own territory does not fall foul of this prohibition.[66] The state's military action to suppress insurgency or other uprisings for secession forms part of the reserved domain in which no other states must intervene, for example, by sending arms or providing financial and logistical support.[67]

However, it is debatable whether the PRC's military action against Taiwan constitutes a use of force in "international relations" to which the prohibition

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Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 438, paras. 82–83 (July 22) (declining to address the question). *Cf.* Reference re Secession of Quebec [1998] 2 SCR 217, para. 136.

64 G7 Hiroshima Leaders' Communiqué, para. 2, May 20, 2023.

65 *E.g.*, Joint Statement European Union – Republic of Korea Summit 2023, para. 11, May 22, 2023; Joint Statement Issued on the Occasion of the Meeting between H.E. Mr Hens Stoltenberg, NATO Secretary General and H.E. Mr Kishida Fumio, Prime Minister of Japan, para. 5, Jan. 31, 2023; Carbis Bay G7 Summit Communiqué: Our Shared Agenda for Global Action to Build Back Better, para. 60, June 2021.

66 *See, e.g.*, Christian Henderson, *The Use of Force and International Law* 36–37 (2d ed. 2023); Stuart Casey-Maslen, *Jus ad Bellum: The Law on Inter-State Use of Force* 33–34 (2020); Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* 127–30 (2010).

67 Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J., paras. 242, 245.

applies.[68] As Taiwan's sovereignty question is set aside for the purposes of this article, an argument in favor of the application does not derive from treating cross-Strait relations as an inter-state context without mutual recognition of statehood.[69] Instead, it draws on the view that this fundamental principle applies in cases where rebellious activities have established a stable de facto regime over a portion of sovereign territory.[70] Given Taiwan's peaceful administration over this island nation since 1949, any use of force and even a threat of force is arguably a breach of the non-use of force principle when it is directed against Taiwan as a unilateral attempt to change the status quo.

From a strategic perspective, an exceptional character of cross-Strait relations should be emphasized by distinguishing Taiwan as a de facto regime from other political entities whose claims to statehood might be more controversial. As Corten demonstrates in his detailed study, a broad interpretation of "international relations" as an attempt to include an attack by or against a non-state political entity within the definition of aggression received little support.[71] In its 2009 Report, the Independent International Fact-Finding Mission on the Conflict in Georgia applied the principle of non-use of force to Georgia's action against "the territory of an entity short of statehood outside the jurisdiction of the attacking state."[72] However, the report's findings have been criticized due to methodological flaws. The report confused Georgia's loss of territorial control as a lack of jurisdiction and presumed, without any legal support, that

68 Whether the principle applies to Taiwan under customary international law is a separate question. Its answer hinges upon Taiwan's sovereign status and, therefore, is outside the scope of this article. However, had the principle not been applicable, Taiwan would enjoy absolute freedom to take military action under international law and would, therefore, not be subject to any constraints under the law of self-defense.

69 *See* Corten, *supra* note 66, at 151–52, 159; Anne Hsiu-An Hsiao, "Is China's Policy to Use Force against Taiwan a Violation of the Principle of Non-Use of Force under International Law?", 32 *New Eng. L. Rev.* 715, 730–32 (1998). *Cf.* Phil C.W. Chan, "The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict", 8 *Chinese J. Int'l L.* 455, 482–85 (2009) (denying the applicability of the prohibition based on the position that Taiwan is part of China).

70 *See* Mikaela L. Ediger, "International Law and the Use of Force against Contested States: The Case of Taiwan", 93 *N.Y. Univ. L. Rev.* 1668, 1690–93, 1698–99 (2018); Christian Henderson, "Contested States and the Rights and Obligations of the Jus ad Bellum", 21 *Cardozo J. Int'l L. & Comp. L.* 367, 381–83 (2013); Oliver Dörr & Albrecht Randelzhofer, "Article 2(4)", in I *The Charter of the United Nations: A Commentary* 200, 213 para. 29, 214 para. 32 (Bruno Simma et al. eds., 3d ed. 2012); Jonte van Essen, "De Facto Regimes and International Law", 28 *Utrecht J. Int'l L. & Eur. L.* 31, 37 (2012).

71 Corten, *supra* note 66, at 153–58.

72 II Independent International Fact-Finding Mission on the Conflict in Georgia, *Report* 243 (2009).

various agreements and Security Council resolutions addressed to non-state entities such as South Ossetia and Abkhazia implicated the application of the prohibition on the use of force.[73] Such a broad interpretation of the principle's scope lends itself to abuse as a justification for foreign intervention in support of separatist movements, causing instability rather than peaceful relations that this norm is designed to maintain.

B *Individual Self-Defense Can Be Exercised Collectively*

One of the lingering concerns in cross-Strait relations is whether other democratic countries, such as the United States, Japan, and Australia, will send troops to help Taiwan defend itself in the event of the PRC's forcible incursion. Their commitment to military response has an important strategic value as a political deterrence to the PRC's choice of forcible means to change the status quo. Ultimately, the deployment of military forces in response to the PRC's action is a political decision, but its legitimacy may be called into question if a reasonable legal basis for justification does not exist.

Here, Taiwan's sovereignty question poses challenges to the claim of collective self-defense as the legal justification for military response by other countries. As the International Court of Justice pronounced in the *Nicaragua* judgment, the exercise of collective self-defense is conditioned upon a request by the state that regards itself as the victim of an armed attack.[74] In the event of a military incursion, Taiwan could declare itself as the victim of an armed attack,[75] but the question arises as to whether allied countries can assert their right of collective self-defense without formally recognizing Taiwan as a sovereign state.[76] In addition, Japan has its own legal constraint under Article 9 of the Constitution, which has been interpreted to preclude the deployment of its forces on foreign soil as exceeding measures strictly necessary for self-defense.

However, collective self-defense is not the only ground to justify a collective military response. Each country may be able to find its own justification for the deployment of troops and collectively coordinate military response to aid Taiwan's defense. The United States and Japan, for example, will be able

73 *See* Casey-Maslen, *supra* note 66, at 33–34; Corten, *supra* note 66, at 158.

74 Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J., para. 199.

75 As noted previously, the legality of Taiwan's military action hinges upon the applicability of the prohibition on the use of force to Taiwan. As such, the right question to ask is whether Taiwan needs to justify military action on the basis of self-defense, not whether Taiwan can invoke the right of self-defense. *Cf.* Aaron Dumont, "Just Like Ukraine, But Worse: Some Thoughts on the China-Taiwan Situation", *Völkerrechtsblog*, Nov. 4, 2023, https://voelkerrechtsblog.org/just-like-ukraine-but-worse/.

76 On this question, see Ryan M. Fisher, "Defending Taiwan: Collective Self-Defense of a Contested State", 32 *Fla. J. Int'l L.* 101, 140–45 (2020).

to justify military action as their own self-defense in the event that the People's Liberation Army launches attacks on U.S. warships or Senkaku/Diaoyu Islands, as Lieutenant General He Lei alluded to,[77] prior to or during a military incursion into Taiwan. Even without such direct military confrontation, there are ways in which these countries can deploy military forces on the basis of individual self-defense.

First, individual self-defense can be invoked to protect nationals abroad. As of October 2024, approximately 937,000 foreign residents live in Taiwan, of which sixteen thousand are Japanese and eleven thousand are U.S. nationals. In the event of PRC's incursion into Taiwan, their lives and properties would be placed at risk. While an isolated incident of violence against foreign individuals or a general threat of violence can hardly be equated to an armed attack against the state of their nationality, systematic attacks directed against foreign nationals involving an imminent threat of injury or death would arguably qualify as such and provide a basis for invoking the right of self-defense.[78] The claim of self-defense would be preferred over the consent of local authorities as the latter will be deemed invalid in the absence of de jure recognition of Taiwan as a sovereign state.[79] Their action must be limited to the extent necessary and proportionate to the gravity of threats posed to their own nationals and other third-party nationals who are designated for protection and evacuation.[80] Despite these constraints, foreign troops will be able to contribute to Taiwan's defensive operations, for example, by providing close air support in coordination with local ground troops to facilitate evacuation operations.

Second, if the PRC deploys naval mines, as some analysts predict they do,[81] to help blockade Taiwan or key U.S. Navy ports in the Indo-Pacific region to

77 "Chine 'Not Fearful of War' over Senkakus: Military Officer", *Kyodo*, Dec. 9, 2023, https://english.kyodonews.net/news/2023/12/2cd6be3095a2-china-not-fearful-of-war-over-senkakus-military-officer.html.

78 *See* Ronald Alcala & Hitoshi Nasu, "The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis", 14 *J. Nat. Sec. L. & Pol'y* 1, 7–10 (2023) and literature discussed therein.

79 The legal capacity to request military assistance rests exclusively with the de jure government. *See* Erika de Wet, *Military Assistance on Request and the Use of Force* 21–22 (2020); Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 5 (1998). From a perspective of Japanese domestic law, see Yurika Ishii, "Japanese Legal Challenges in Rescuing Nationals Abroad", 100 *Int'l L. Stud.* 637, 665–67 (2023).

80 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 245, para. 41 (July 8); Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J., paras. 176, 194.

81 A.J. Douglas, "Get Serious about Countering China's Mine Warfare Advantage" (2023) 149 *U.S. Naval Institute Proceedings* at https://www.usni.org/magazines/proceedings/2023/june/get-serious-about-countering-chinas-mine-warfare-advantage; Andrew S. Erickson,

delay U.S. interventions, those naval mines will pose a threat to any vessels exercising freedom of navigation in the region. Blocking the passage of vessels through the Taiwan Strait would constitute a use of force in violation of Article 2(4) of the U.N. Charter and may even amount to an armed attack against the states whose vessels use the strait.[82] So does the mining operation in the U.S. Navy ports.[83] These operations, even without direct military confrontation, are sufficient to invoke the right of individual self-defense.

Third, the PRC's military operation in Taiwan is likely to be preceded and accompanied by massive cyberattacks against the United States and other allied countries.[84] It remains to be seen how cyberattacks might be characterized under international law, but an increasing number of states have expressed the view that cyberattacks directed against critical infrastructure would constitute a use of force and could even amount to an armed attack that would trigger the right of self-defense.[85] Even if cyberattacks were to be, as they currently are, directed against Taiwanese industries,[86] their effects are likely to spill over to other countries. Indeed, Russia's cyberattacks against the Viasat satellite communications network prior to the February 24 invasion of Ukraine disrupted internet connectivity in several European countries.[87] Given the global reach of Taiwan's semiconductor industry, it is not unreasonable to foresee cyberattacks from the PRC affecting multiple countries.

William S. Murray & Lyle J. Goldstein, *Chinese Mine Warfare: A PLA Navy "Assassin's Mace" Capability* (U.S. Naval War College China Maritime Studies No. 3, 2009).

82 Oil Platforms (Iran v. US), Judgment, 2003 I.C.J. 161, 195 para. 72 (Nov. 6) ("The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'").

83 Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J., para. 251.

84 Jeff Seldin, "US Warns of Massive Chinese Cyber Attacks in Taiwan Scenario", *Voice of America*, Feb. 27, 2023, https://www.voanews.com/a/us-warns-of-massive-chinese-cyber attacks-in-taiwan-scenario-/6981396.html.

85 *See* Michael N. Schmitt, "Cyber Symposium – The Evolution of Cyber Jus ad Bellum Thresholds", *Articles of War*, Jul. 28, 2022, https://lieber.westpoint.edu/evolution-cyber-jus-ad-bellum-thresholds/.

86 James Andrew Lewis, "Cyberattack on Civilian Critical Infrastructures in a Taiwan Scenario" (Center for Strategic & International Studies, Aug. 11, 2023), https://www.csis.org/analysis/cyberattack-civilian-critical-infrastructures-taiwan-scenario; Daksh Kapur & Leandro Velasco, "China-Taiwan Tensions Spark Surge in Cyberattacks on Taiwan" (May 17, 2023), https://www.trellix.com/about/newsroom/stories/research/china-taiwan-tensions-spark-surge-in-cyberattacks-on-taiwan/.

87 Jon Bateman, "Russia's Wartime Cyber Operations in Ukraine: Military Impacts, Influences, and Implications" (Dec. 16, 2022), https://carnegieendowment.org/2022/12/16/russia-s-wartime-cyber-operations-in-ukraine-military-impacts-influences-and-implications-pub-88657.

C *Seek the Recognition of Belligerency in the Event of an Armed Conflict*

The de jure recognition of Taiwan as an independent state is an extreme measure, even as a deterrent warning that a military incursion into Taiwan would eviscerate the one-China policy.[88] Leaving aside the questions of political wisdom and strategic value, its legal imperative is less apparent than the need or desire to maintain a trade relationship with Taiwan. For Taiwan, securing international trade will be a priority in order to sustain defensive operations. As has been seen in the Russia-Ukraine conflict, foreign assistance plays an important role to buttress war efforts against an aggressor, if not sufficient to guarantee a positive outcome.[89] The significance of aid is not limited to the supply of weapons and military equipment. Maintaining ordinary trade relationships is also critical to the economy and the livelihood of civilian populations.

It would therefore be imperative for Taiwan to appeal to third states that remain reluctant to commit their troops in response to the PRC's military incursion into Taiwan. Such a political maneuver might be more palatable if Taiwan seeks recognition of belligerency as a means to maintain trade relationships. This is because, unlike de jure recognition of sovereignty, the recognition of belligerency does not grant Taiwan a sovereign status and, as such, does not necessarily run counter to the one-China policy pursued invariably by many states. The recognition of belligerency is designed to achieve a more modest goal – establishing a legal relationship between belligerent parties and neutral states under the law of neutrality, without prejudice to the sovereignty dispute.[90] This way, third countries can maintain a legal relationship with Taiwan as a separate legal entity for the duration of the conflict, giving them the benefit of clarifying the legal status of their own nationals residing in Taiwan and the legality of conducting trade with both belligerent parties in an impartial manner.

The recognition of belligerency is not alien to cross-Strait relations as an opportunity presented itself in 1956 when a Nationalist Chinese F-86 Sabre

88 David Scheffer, "Deterrence Lawfare to Save Taiwan", *Just Security*, Aug. 7, 2023, https://www.justsecurity.org/87486/deterrence-lawfare-to-save-taiwan/.

89 Polina Beliakova & Rachel Tecott Metz, "The Surprising Success of U.S. Military Aid to Ukraine", *Foreign Affairs*, Mar. 17, 2023, https://www.foreignaffairs.com/ukraine/war-security-assistance-lessons.

90 The Prize Cases, 67 U.S 635, 669 (1863). *See generally* H. Lauterpacht, *Recognition in International Law* 175–278 (1948); Ti-Chiang Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States* 303–68 (1951).

jet fighter sought refuge at Hong Kong's Kai Tak airfield.[91] As Hong Kong was under British administration at that time, the PRC demanded that the pilot and aircraft be detained. Indeed, had the British government decided to recognize a state of belligerency, it would have been required to detain them – and any combatants of either party found in British territory – for the duration of the conflict.[92] The British government ultimately returned them to Taiwan, having decided not to recognize a state of belligerency under prevailing circumstances.[93] However, this assessment may warrant a different outcome in the event that the PRC engages in major military operations to seize control over Taiwan.

The recognition of belligerency is justifiable when: (i) there exists an armed conflict of a general character, as opposed to an isolated incident; (ii) a contesting party occupies and administers a substantial portion of national territory; (iii) the contesting party conduct hostilities in accordance with the law of war under a responsible authority; and (iv) the exigencies of the situation demand other states define their relationship with the contesting party.[94] Granting recognition of belligerency when any of these conditions are not met would be seen as premature and even internationally wrongful in breach of the prohibition of intervention under customary international law.

A major military operation in an attempt to seize Taiwan will be characterized as an armed conflict of a general character, unlike isolated skirmishes that ensued in 1956. Although the Nationalists' ability to control any portion of the Chinese territory might have been precarious at early stages, Taiwan's distinct territorial existence is currently undeniable with the stable administration of a defined area. In addition, Taiwan's armed forces are well organized according to modern military command structures. Assuming that they are ready to conduct hostilities in compliance with the law of armed conflict, there is no reason to doubt all of the three factual conditions will be met in the event of a Taiwan crisis.

The last condition is therefore key to the determination of Taiwan's belligerency status. This condition involves a subjective element and leaves room for political calculations that inform each state's assessment. Third states must find it necessary to define their relationship with belligerent parties because

91 For details, see Rob McLaughlin, *Recognition of Belligerency and the Law of Armed Conflict* 89–90 (2020).

92 Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 11, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540.

93 McLaughlin, *supra* note 91 at 91–93.

94 These conditions generally derived from state practices during the 19th to early 20th centuries. *See, e.g.*, McLaughlin, *supra* note 91, at 73–89; Lauterpacht, *supra* note 90, at 175–76; P.K. Menon, "Some Aspects of the Law of Recognition, Part IV: Recognition of Belligerency and Insurgency", 68 *Revue de droit international, de sciences diplomatiques et politiques* 265, 267–72 (1990).

their own rights and interests would otherwise be affected. As Ti-Chiang Chen observed, whether a situation affects the interests of a third State is "entirely a matter of subjective appreciation."[95] This determination hinges on whether third states consider that their rights and interests are adversely affected during the conflict and whether the benefits of granting recognition of belligerency outweigh the harms that may result from doing so.

While a formal declaration of neutrality clearly constitutes a recognition of belligerency, in practice, the intention to recognize a state of belligerency is more likely ascertained through a series of measures assuming an attitude of impartiality.[96] Third states, for example, may prohibit their nationals from serving in the armed forces of either party to the conflict, admit the entry of Taiwan-flagged ships and warships into their ports, and acquiesce in Taiwan's exercise of belligerent rights to conduct ship visit and search. The case for recognition of belligerency will be even stronger when the PRC implements a blockade around Taiwan beyond its territorial sea.[97] Indeed, this practice is historically anchored to President Lincoln's proclamation of a blockade against the Confederate ports during the American Civil War.[98] The British government regarded this measure as a tacit recognition of belligerency, setting the condition for its declaration of neutrality.[99] Third states should be made aware of these indications of belligerency and various measures they are entitled to adopt to protect their rights and interests in the event of a Taiwan crisis.

IV Conclusion

Taiwan's sovereignty question is essentially a political question that needs to be resolved between the two sides of the Taiwan Strait. However, as this article has demonstrated, international law assumes a strategic role in the global discourse of political legitimacy against any forcible attempt to change the status

95 Chen, *supra* note 90, at 366.

96 *See* Lauterpacht, *supra* note 90, at 178–82.

97 Rob McLaughlin, "The Law of Armed Conflict, the Law of Naval Warfare, and a PRC Blockade of Taiwan", *Articles of War*, Jan. 30, 2023, https://lieber.westpoint.edu/loac-law-naval-warfare-prc-blockade-taiwan/.

98 Abraham Lincoln, Proclamation 81 (Apr. 19, 1861), *reproduced in* Mountague Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* 79–80 (1870).

99 British Proclamation for the Observance of Neutrality in the Contest between the United States and the Confederate States of America, May 13, 1861, *reprinted in* 51 *British and Foreign State Papers* 165–69 (1868). Other European states were more reluctant to extend recognition. *See* Philip Drew, *The Law of Maritime Blockade: Past, Present, and Future* 113–14 (2017).

quo. The use of force by the PRC, or even a threat of force directed against Taiwan, as a means of settling this sovereignty dispute undermines the PRC's claim over Taiwan as a domestic affair free from foreign intervention. Third states can find their own legal justification for the deployment of troops in defense of Taiwan without necessarily relying on the right of collective self-defense or continue commerce and trade with Taiwan by granting it a recognition of belligerency.

The legal strategies discussed in this article are by no means sufficient to guarantee the security of Taiwan. Effective deterrence requires coordinated efforts involving military, political, and economic considerations. However, it would be remiss to dismiss these legal strategies when the PRC is actively engaging in the exploitation of legal vocabularies to gain strategic advantage by promoting the "one-China principle" in an effort to advance the political legitimacy of its claim over Taiwan. There is no prospect for a third-party adjudication through which Taiwan can seek to invalidate the "one-China principle" or clarify its contours. The normative value of international law is reduced under these circumstances to strategic appeals as a means of advancing the political legitimacy of Taiwan's struggle to defend itself against forcible unification.

The PRC's anachronistic ambition for territorial expansion is not compatible with modern international law premised upon the peaceful settlement of international disputes and the prohibition of territorial acquisition by force. Taiwan's appeal to international law, on the other hand, has the potential to garner wide support as a reasoned response to aggressive behaviors exhibited by the PRC. Strategic considerations directed toward strengthening its normative commitments to international law will help Taiwan advance its national interests in the global discourse of political legitimacy even without a resolution to its sovereignty question. Above all, Taiwan needs to maintain its place in the wider international community, not just in a bilateral relationship with the PRC.

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