The one China principle and its legal consequences, domestically and abroad: the disputed control over Taiwan and the anti-secession law. Much Ado about Nothing?

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Abstract: The article explores two of the fundamental characteristics of the one China principle: from an international perspective, and from a domestic one. The first paragraph, which analyses international law relevant to the matter, deals with the disputed sovereignty of the Republic of China, commonly named Taiwan. The second one explores the hidden meaning and the preparatory works of a domestic Chinese (People's Republic of China) statute: the anti-secession law. Because of this contested sovereignty, it is debated if people in Taiwan would be protected by the UN Charter in case of armed aggression. The first part of these pages will be consequently dedicated to demonstrating how the island of Formosa falls under UN jurisdiction and specifically that Taiwan meets all the criteria for statehood. As for the second chapter, it will be argued that the anti-secession law, despite an aggressive attitude, did not increase the chances for armed aggression against the Republic of China, as it was passed to appease the increasing nationalist public opinion.

Keywords: Law; China; Taiwan; sovereignty; anti-secession

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1. *Introduction*

Following the rapid and apparently relentless economic rise of the People's Republic of China, the Taiwan Strait has become the cornerstone for the global competition between Beijing and Washington. The former is firmly decided to symbolically terminate the century of humiliation with the annexation of Formosa, while the latter is committed to squashing any opposing claim, as the island is the core of the American thalassocracy in the region, the pivot for the aero naval containment in the Indo-Pacific. Over the last decades, scholars have wondered if the Republic of China (ROC), commonly named Taiwan, might be considered a sovereign state, and therefore, if armed aggression against it would constitute a breach of international law: all the evidence so far gathered suggests so. Over the question of Taiwanese sovereignty, several issues have been raised in the last seventy years, since the People's Republic of China has never accepted the independence of this small island from the mainland, and, under the principle of one China, refuses to recognize it as a sovereign state.

In this article, it will be argued that Taiwan must be considered a sovereign country under international law, and therefore - even though the Island is not a member of the UN - unprovoked and armed aggression against it would constitute a breach of the United Nations Charter, and generally, of customary international law. The first paragraph will move on to consider Taiwanese history and the evolution of the interpretation of the Charter. A more detailed account of Chinese domestic legislation towards this small island is given in the second paragraph, as it will be focused on the anti-secession law passed by the National People's Congress in 2005, which shows the influence of nationalism and pragmatism in modern Chinese legislation. That is why this part takes into account the preparatory works and the text of what will be argued is just a symbolic statute. To understand this ongoing quarrel, it may be useful to look firstly at the history (specifically from a constitutional and political perspective) of the 150 km Strait.

2. *The Taiwanese Sovereignty*

2.1. *Is Taiwan an Independent and Sovereign Nation?*

According to Taipei, there was no central ruling prior to the 1600s, when Portuguese explorers named the place *Ilha Formosa* "beautiful island". Then a group of Dutch sailors founded the harbor of Taoyuan "terraced bay" which attracted several Chinese immigrants from the province of Fujian, who were escaping the chaos caused by the fall of the Ming dynasty (1644), until in 1683 the Qing emperor Kangxi conquered the entire Island[1]. Imperial China ruled Taiwan for almost two centuries, up to 1895 when it ceded Taiwan to Japan under the Treaty of Shimonoseki "in perpetuity"[2]. Japanese rulers reduced the Chinese cultural influence among the population, governing the island *manu militari*. Scholars such as Chen argue that the cession of the island was invalid because mainland China, officially "The People's Republic of China" (PRC), would later repudiate the Treaty of Shimonoseki as having been unequal[3], but there are no precedents in international law for unequal conditions being sufficient grounds to invalidate an international treaty[4]. In the 1943 Cairo Declaration, the Allies expressed the intention to give Taiwan back to China (which had become a Republic in 1912), but as a declaration of intent, it had no legal effects[5]. In 1949, after a bloody civil war against the communist party, the

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1. See John Robert Shepherd, *Statecraft and political economy on the Taiwan frontier, 1600-1800* at 2-5 (Stanford University Press 1993).

2. Treaty of Peace China-Japan, Art II (April 17, 1895), reprinted in John V.A. MacMurray, *Treaties and agreements with and concerning China 1894-1919* at 18-19 (Howard Fertig 1973).

3. Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 American University International Law Review 1101, 1105-1109 (2000).

4. Anthony Aust, *Unequal Treaties: a response* at 81, 83 in Matthew C. R. Craven and Malgosia Fitzmaurice (ed.), *Interrogating the treaty: essays in the contemporary law of treaties* (Wolf Legal Publisher 2005).

5. See James Crawford, *The creation of States in international law* at 207-209 (Oxford University Press 2nd ed 2006).

Chinese nationalist party, the Kuomintang, fled to Formosa founding the Republic of China (ROC). Meanwhile, in the San Francisco Treaty, Japan had renounced "all right, title and claim to Formosa and the Pescadores" but the treaty did not specify to which state the territory would now belong[6]. The Communist Party was eventually recognized as the rightful successor government of the state of China in 1972 when UN Resolution 2758 expelled the ROC from the United Nations and named PRC China's sole representative[7]. Kuomintang ruled the island through martial law for 38 years under an extreme right-wing dictatorship until 1987, when it was lifted by a Presidential order promulgated by President Chiang Ching-kuo[8]. From that moment onward, the island became a full parliamentary democracy, based on free elections: a completely different path from the one followed by the PRC.

Since 1949, the ROC's government has ruled over Taiwan, the Quemoy archipelago, and the Matsu Islands according to the *uti possidetis* principle (i.e., as you possess, you shall continue to possess)[9]. When nothing is in fact stipulated regarding conquered territory (in the case of Taiwan "freed territory" looks more appropriate, as the majority of the population was actually Chinese), it remains in the hands of the possessor, who is free to annex it. This is a principle well known in international law: the Italian - Turkish treaty of 1912 did not provide for the transfer of Libya to Italy, but no one raised any question when Italy announced its annexation[10]. Similarly, D.P. O'Conell argued that after the Japanese renunciation of the island, the newly formed government in Taiwan appropriated the *terra derelicta* (i.e., abandoned land) by converting belligerent occupation into definite sovereignty[11]. Furthermore, the independent government of

6. Treaty of Peace with Japan Art. 2, 136 U.N.T.S. 45 (September 8, 1951).

7. Lung-Chu Chen, *The U.S.- Taiwan-China relationship in International law and policy* at 74-75 (Oxford University Press 2016).

8. Han Chueng, *Taiwan in Time: The precursor to total control* (Taipei Times, 15 May 2016), available at https://www.taipeitimes.com/News/feat/archives/2016/05/15/2003646284 (last visited November 4, 2022).

9. See Lassa Oppenheim, *International law, Volume 2* at 611 (Longman Green 7th ed 1952).

10. See *id.* at 611-612.

11. Daniel Patrick O'Connel, *The status of Formosa and the Chinese recognition problem*, 50(2) The American Journal of International Law 405, 415 (1956).

Taiwan has been undisturbed for more than 70 years, a de facto exercise of uninterrupted governmental authority, labeled as principle of prescription, that leaves no doubts about the legitimacy of the ROC government[12]. In the case in question, no cession or purchase was required: for customary international law, nationalist China may have acquired legal title to Formosa by occupation or subjugation[13]. This has been settled in the case *Legal status of eastern Greenland*, discussed before the Permanent Court of International Justice in 1933: "acquisition of title by occupation involves the intention and will to act as sovereign and some actual exercise of such authority"[14]; as *terrae nullius* (i.e , lands belonging to no one) can be acquired by occupation, and since the Taiwanese government has been acting as a sovereign one, it can be said that Taiwan is a sovereign nation.

On the other side of the Strait, the People's Republic of China claims Taiwan as a mere Chinese province denying its existence as a sovereign state. But the principles of international law do not support the PRC's claims to Taiwan for several reasons. Firstly, the PRC cannot invoke the 1952 ROC-Japan treaty (with which Japan had renounced the island) to support its claim that Taiwan is part of China. Indeed, the PRC denies the right of the ROC government to conclude any treaty in the name of China and has rejected the validity of the San Francisco Treaty, hence cannot invoke it to its advantage[15]. Consequently, the prescription and occupation principles are not applicable to the PRC because they presuppose the validity of the two peace treaties by which Japan renounced its claims to Taiwan making it *terra nullius*. Even considering the Japanese renunciation as a unilateral act (which would not need the recognition of the PRC) communist China could not acquire title over Taiwan since it had

12. See Frank P. Morello and Paul K. T. Sih, *The international legal status of Formosa* at 92 (Springer 2012).

13. Arthur H. Dean, *International law and current problems in the Far East*, 49 Proceedings of the American society of international law at its annual meeting 29th April 1955 86, 95-97 (Cambridge University Press 2017).

14. *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (April 5).

15. Hsinhua News Agency, *Daily News Release, n. 777, Beijing*, as quoted in Hungdah Chiu, *The principle of one China and the legal status of Taiwan*, 7(2) American Journal of Chinese Studies 177, 183 (2000).

no physical control over the island[16]. Scholars such as Shao Chin-Fu consider the island as Chinese province because Taiwan was originally Chinese territory, hence a treaty to transfer it back would not be necessary[17]. But international practice does not support this view, as it does not appear to be any precedent supporting this position. Furthermore, Chin-Fu's idea has aberrant practical consequences: any velleity around the world, such as the annexation of New York to a newly formed British Empire, would be authorized just because of ancient territorial claims. Lastly, the principle of self-determination overrules any historical claim[18].

The Taiwanese people has in fact developed its own characteristics, which differentiate it from the continental one: 96.5% of the population consists of Ethnic Chinese Han, including Hoklo from Fujian, Hakka from Guangdong (who fled the continent during the Qing dynasty), and other ethnic groups originating from mainland China who followed Chiang Kai-shek in 1949. The remaining 3.5% is formed by Austronesian indigenous, although differently from continental China, 70% of the whole population claims indigenous ancestry. More than 80% of the population speaks mandarin (in the traditional form) along with Hokkien and Hoklo dialects[19]. Therefore, it is unsurprising that a sense of distinct Taiwanese identity has grown among the population: just 3.5% of it identifies itself as Chinese, 33% as a "mixed ethnicity", and the majority exclusively as Taiwanese[20]. This growing feeling among the local population, and the evidence presented thus far support the idea that the Taiwanese People has the right to self-determine their own form of government and to resist armed aggression.

16. See *id*. at 183.

17. See Shao Chin-Fu, *The absurd theory of "Two Chinas", and Principles of International law*, 2 Journal of International studies 7, 14 ("Kuo-chi wen- t'i yen-chiu, 1959).

18. Huangdah Chiu, *The principle of one China and the legal status of Taiwan* at 186 (cited in note 15). For a comprehensive approach, see at 4-5 of this essay.

19. National Bureau of Statistics of China, *China Population and Housing Census 2010*, available at https://ghdx.healthdata.org/record/china-population-and-housing-census-2010#:~:text=The%202010%20census%20measured%20a,annual%20growth%20rate%20was%200.57%25 (last visited November 7, 2022).

20. See Election Study Center - National Chengchi University, available at https://esc.nccu.edu.tw/eng/PageFront (last visited November 3, 2022).

2.2. *Does Taiwan fall under the Protection of the UN?*

Having defined that the ROC government is legitimate, I will now move on to discuss if Taiwan is a sovereign nation and if it falls under the protection of the UN Charter. The small island has in fact no seat in this international organization. The criteria for statehood, accepted as customary law[21], are encoded in the Montevideo Convention[22]. According to art. 1: "State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other States." As regards the first three criteria, no one can deny they are all met by Taiwan (a characteristic and enduring population that lives in an area of 35,808 square kilometers, under a democratic central government in Taipei). But according to the constitutive theory[23], Taiwan could not be considered a sovereign state, as it is recognized just by a group of nineteen small states and the Holy See. Consequently, it would not meet criterion (d) of the Montevideo Convention. However, a serious weakness of this argument is that art. 3 of the Convention clearly states that "the political existence of the State is independent of recognition by the other States." A reasonable interpretation of articles 1 and 3 would seem to suggest that "the fourth Montevideo criterion is not a question of whether the entity is recognized by other states such that they have established state-to-state relations, but whether the entity has the capacity to conduct relations on an international plane"[24]. The capacity of Taiwan to conduct international relations is demonstrated by the seventy-eight missions that Taipei has abroad, called "Taipei Economic and Cultural Representative Offices"[25], and by the fact that the ROC conducts international re-

21. Cedric Ryngaert and Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 Leiden Journal of International Law 467, 470 (2011).

22. See Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (December 26, 1933).

23. James Crawford, *The creation of States in international law* at 4 (cited in note 5).

24. See Vaughan Lowe, *International law* at 157-158 (Oxford University Press 2007).

25. The list of these missions is available at Republic of China Embassies & Missions Abroad, Bureau Consular affairs, Ministry of Foreign Affairs, Republic China

lations not subject to the legal authority of the PRC[26]. In any case, Shen and Crawford polemically insisted that Taiwan cannot be considered a state, even though it meets the Montevideo requirements, because it has never declared the will to become an independent state[27]. This assertion has been challenged by Brad Roth, who wisely pointed out that a self-declaration of independence is not a criterion of statehood, otherwise just former colonies would be considered sovereign nations, while countries such as the UK, France, or continental China itself, which have never needed a self-declaration, would not be considered sovereign countries[28]. Moreover, Taiwan has made its aspirations for statehood clear enough on many occasions[29].

As was pointed out in this paper, for customary international law the Republic of China (or Taiwan -independently from its official name) shall be considered an independent and sovereign nation. Nonetheless, it is a matter of fact that Taipei is not a member of the United Nations (UN), thus the UN Charter (particularly according to article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations") seems incapable of protecting people in Taiwan in case of an armed conflict. Moreover, Randelzhofer and Dörr stated that the prohibition on the use of force in the UN Charter was understood to apply only to inter-state relations, while states preserved absolute sovereignty over their domestic affairs (such as the protection of people). So, the fact that Taiwan

(Taiwan), available at https://www.boca.gov.tw/sp-foof-countrylp-01-2.html (last visited November 9, 2022).

26. 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?*, New England Law Review 715, 737-738 (1998).

27. Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan* at 1134 (cited in note 3); James Crawford, *The creation of States in international law* at 219 (cited in note 5).

28. Brad Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 East Asia Law Review 91, 101-102 (2009).

29. See *id*. at 101-103.

is an internal Chinese affair should be ignored by international law academics[30]. Scholars from the "Westphalian model"[31] (or at least those who consider Taiwan a rebel Chinese province) believe that there is no customary practice to support the applicability of article 2(4) beyond state-to-state interactions[32], as customary international law forbids states from interfering in each other's domestic affairs[33]. This all-or-nothing conception supports the self-determination of peoples, but at the same time acquiesces to the use of force by states in order to quell secession attempts[34], considering as an example the UN's inaction during the Russian use of force to put down Chechnya's secession attempt in the early 1990s, or in the Katanga - Congo crisis[35].

Nevertheless, the Westphalian model of international relations is fading, as contested states and peoples can be rights-holders under international law[36]. The customary practice has eroded *de facto* the traditional understanding of international law that accords rights only to states[37]. Indeed, an emerging body of UN precedents, rooted in the primacy of the human right of self-determination, has been focusing on the protection of distinct "peoples" from use of force by states. Currently, nations that repress their populations may be

30. See Albrecht Randelzhofer and Oliver Dörr, *Chapter 1 - Purposes and Principles*, *Article 2(4)*, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (ed.), *The Charter of the United Nations: A commentary* at 29, 32 (3rd ed 2012).

31. See John J. Mearsheimer, *The tragedy of great power politics* at 31 (WW Norton & Co 2001).

32. See Oliver Corten and Bruno Simma, *The law against war: the prohibition on the use of force in contemporary international law* at 159 (Bloomsbury publishing 2010); Jonte van Essen, *De Facto Regimes in International Law*, 28(74) Merkourios-Utrecht Journal of International and European Law 31, 37 (2012).

33. Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78(3) The American Journal of International Law 645, 648 (1984).

34. Crawford, *The creation of States in international law* at 389-390 (cited in note 5).

35. Gail Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 International Security 5, 41-42 (1998).

36. See Jonathan I. Charney and John R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94(3) The American Journal of International Law 453, 465-466 (2000).

37. See *ibid*.

subject to humanitarian intervention from the international community[38], a demonstration of how the rise of human rights has recentred international legal protections on individuals, not (only) on states[39]. In the case of Taiwan, the principle of self-determination, defined by Sterio as "people's right to exercise their political, cultural, linguistic, and religious rights within a state", grants to the Taiwanese people a minimum level of protection against armed invasions[40]. As ruled in article 1(2) of the UN Charter, developing "friendly relations among nations based on respect for the principle of self-determination of peoples" is one of the UN's main purposes[41]. The self-determination principle is also incorporated into both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), whose first article states that "all peoples have the right of self-determination [...] and by its virtue, they freely determine their political status"[42]. Moreover, under the International Court of Justice's jurisprudence, these covenants conferred self-determination as the character of fundamental human rights[43]. Having defined self-determination as a principle that underlines the UN Charter, denying people their political autonomy through the use of force would constitute a breach of Article 2(4). States shall in fact "refrain from the use of force [...] in any other manner inconsistent with the Purposes of the United Nations"[44]. Hence it is possible to read a prohibition on using force against people, as respecting self-determination is one of the United Nations' main purposes under article 1 of the UN Charter[45]. The extent to which the

38. See Martti Koskenniemi, *The Future of Statehood*, 32(2) Harvard International Law Journal 397, 397-401 (1991).

39. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law* 84(4) American Journal of International Law 866, 866-868 (1990).

40. Milena Sterio, *The right to self-determination under international law* (Routledge 2013).

41. Charter of the United Nations, Art. 1 (1945).

42. International Covenant on Economic, Social and Cultural Rights, Art. 1(1), 993 U.N.T.S. 3 (December 16, 1966); International Covenant on Civil and Political Rights, Art. 1(1), 999 U.N.T.S. 171 (December 19, 1966).

43. Daniel Thürer and Thomas Burri, *Self-Determination* at 8 (Max Planck Encyclopedia of Public International Law 2012).

44. Charter of the United Nations, Art. 2(4) (1945).

45. *Id.*, Art. 1(2).

principle of respect for self-determination in article 1(2) creates legal rights for peoples within states, is enhanced by the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States (1970 Declaration). It affirms that "every State has the duty to refrain from any forcible action which deprives peoples [...] of their right to self-determination"[46]. This declaration was adopted without a vote, signaling that it represented a consensus, a common understanding among UN members, which binds them to respect the principle of self-determination[47]. The 1970 Declaration had been previously supported by the General Assembly Resolution 2160 (XXI) from 1966, which states that "any forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status [...] constitutes a violation of the Charter of the United Nations"[48]. This is a vivid example of how international law and the UN Charter accord rights to people in Taiwan. Further support is given from the Additional Protocol I (1977) to the General Conventions on the law relating to the protection of victims of international armed conflicts, which expressly includes conflicts in which peoples are fighting "in the exercise of their right of self-determination"[49].

A second challenge to the Westphalian approach comes from the drafting of Article 2(4) since several governments had proposed to extend the rule to all territorial entities, rather than just states[50]. Thus, even if Taiwan was not considered a sovereign nation, state practice would suggest that nations have to respect the borders of *de facto* regimes and that states consider it illegal to change the status of a *de facto*

46. Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations, UN General Assembly (October 24, 1970) A/RES/2625(XXV).

47. See Helen Keller, *Friendly Relations Declaration (1970)* at 1 (Max Planck Encyclopedia of Public International Law 2021).

48. Resolution 2160 (XXI), UN General Assembly (November 30, 1966) A/RES/2160(XXI).

49. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 1 and 4, 1125 U.N.T.S. 3 (June 8, 1977).

50. Essen, *De Facto Regimes in International Law* at 37 (cited in note 32).

regime by force[51]. The broadening of Article 2(4) is certainly true in the cases of North Vietnam before reunification, the German Democratic Republic before 1972, North Cyprus, Abkhazia, and South Ossetia[52]. The final argument that Taiwan falls under the protection of the UN Charter derives from article 33: "The parties to any dispute [...] shall, first of all, seek a solution by negotiation [...] or other peaceful means of their own choice..."[53]. Unlike article 2, this provision uses the term "parties" and not "states", suggesting that the article could apply to disputes between a member state of the UN (which is bound by article 33) and a contested state to which it laid claim[54]. Besides, there is state practice to support the idea that "threats to international peace"[55] need not occur between states. The Security Council has several times intervened in response to threats that have arisen within a single state, as during the Korean war[56]. Since North Korea was not a widely recognized state, the conflict could have been regarded as a civil war[57], and since then, the UN has found threats to international peace arising from conflicts in Rwanda, Somalia, and the former Yugoslavia, all of which were internal to those states[58]. Lastly, the UN intervention in the Libyan civil war labeled the conflict between rival factions as a threat to international peace, suggesting that article 33 could be interpreted to impose an obligation on states to resolve conflicts with their own contested elements peacefully[59].

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51. See Jochen A. Frowein, *De Facto Regime* at 4, in Anne Peters and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013).

52. See *ibid*. at 73.

53. Charter of the United Nations, Art. 33(1) (1945).

54. Christian Tomuschat, *Chapter 6 - Pacific Settlement of Disputes*, *Article 33* in Simma, Khan, Nolte, Paulus and Wessendorf *The Charter of the United Nations: A Commentary* at 9 (cited in note 30).

55. Charter of the United Nations, Art. 39 (1945).

56. See Christian Henderson, *Contested States and the Rights and Obligations of the Jus ad Bellum*, 21 Cardozo Journal of International law 367, 382 (2013).

57. See Bruce Cumings, *The Korean war: a history* at 64-67 (Random House Publishing Group 2010).

58. Charney and Prescott, *Resolving Cross-Strait Relations Between China and Taiwan* at 453 (cited in note 36); Frederic Lee Kirgis, Jr, *Prior consultation in international law: a study of state practice* at 359-360 (University Press of Virginia, 1983).

59. Resolution 2362, UN Security Council (June 29, 2017) UN Doc. S/RES/2362.

So far, this paper has focused on the role of Taiwan in international law, stating that under *uti possidetis*, *self-determination* and Montevideo principles, the island can be labeled as a sovereign nation, protected against armed aggression, particularly thanks to article 33 and the broadening interpretation of art. 2 of the UN Charter. The following and final chapter will discuss the role played by China in this chess game after the country enacted the "anti-secession" law. The Economist has in fact recently described the Taiwan Strait as "the most dangerous place on earth"[60], and this statute can be easily accused of warmongery. Nonetheless, albeit with rising nationalism in the country, it seems that the anti-secession law has not heightened the conditions for an armed attack. Available data suggest instead that this measure has simply codified a 40-years-standing policy.

3. *The Anti-Secession Law and its Implicit Meaning*

3.1. *Much Ado about Nothing*

In 2005, the Chinese People's Republic passed the "anti-secession law", a controversial act, considered by most of Western chancelleries a law of war that would have enabled the People's Liberation Army to invade the island of Taiwan in a few months. As we have instead sorted out, after more than 15 years, Taiwan is all but a mere Chinese province. In concrete, evidence suggests that China may have considered naval warfare as a solution, but the middle empire is aware that military aggression would constitute a breach of international law under the UN Charter and the recently signed United Nations Convention on the Law of the Sea (UNCLOS)[61]. But as far as tensions across the Strait have been getting tougher and tougher in the last couple of years, it is natural to wonder if, in the twisty system of international relations, the anti-secession law was just a bluff (as the

60. See *The most dangerous place on earth: America and China must work harder to avoid war over the future of Taiwan*, The Economist (May 1, 2021), available at https://www.economist.com/leaders/2021/05/01/the-most-dangerous-place-on-earth (last visited November 5, 2022).

61. See Nigel Biggar, *Just War and International Law: A Response to Mary Ellen O'Connell*, 35 No 2 Journal of the Society of Christian Ethics 53, 53-62 (2015).

last fifteen years might confirm), or a dangerous step towards war in the Strait.

On March 15th, 2005, after just four months of preliminary discussion, the third session of the X National People's Congress passed the anti-secession law, "to prevent the island of Taiwan to secede from the fatherland"[62]. The act, depicted by the People's Daily (the main Chinese newspaper and voice of the communist party) as an extraordinary example of patriotism, was intended to regularize the relationship between the island of Taiwan and the People's Republic of China (China). Unsurprisingly, the law was internationally seen as an act of aggression, and a breach of the principle of self-determination of peoples by the Taiwanese government[63]. But as we look closer at the short 10 articles which form the body of this law, we can detect through them the core of the Chinese foreign policy, which is clearly oriented to obtain a dominant position in the Far East, but, as evidence will suggest, has not substantially changed in the last forty years.

If we inspect the text of this controversial law, it will be surprising to note that the only article dedicated to the use of force is art. 8, while the remaining others regard the use of pacific and diplomatic measures to obtain the reunification, or simply narrate the history of China and Taiwan[64]. Chinese legislators have many times changed their political attitudes towards the annexation of the island, but their purpose has never been questioned in almost a century of troubled relations: Taiwan is part of China, and it will come back one way or

62. See *China Enacted Historical Anti-Secession Law - Statement from the People's Republic of China Embassy in Namibia* (March 18, 2005), available at http://bw.china-embassy.gov.cn/eng/zfgx/200503/t20050318_5709600.htm (last visited November 7, 2022).

63. See *The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law* (March 29, 2005), available at https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE#:~:text=Since%20the%20%E2%80%9CAnti%2Dsecession%20Law,is%20not%20applicable%20to%20Taiwan (last visited November 7, 2022).

64. See generally an English translation of the full text of the Anti-Secession (Anti-Separation) Law, available at https://www.mfa.gov.cn/ce/ceus/eng/zt/999999999/t187406.htm (last visited November 7, 2022).

another[65]. As the XVIII national congress of the communist party has in fact approved, patriotism has a fundamental role in shaping modern Chinese legislation, a path that is rooted in the Confucian values of loyalty and brotherhood[66].

Although in more than seventy years Chinese naval forces have never crossed the 150 km Strait, (in the aftermath of the Revolution, Mao focused his attention and the few available resources in the Korean war) China has developed a peculiar strategy: the *Liang Shou Celue* grand strategy, often referred to as the "carrot and stick approach"[67]. According to the Confucian tradition of *talking tough but acting prudently*, the anti-secession law in fact threatens the use of force as a lasting resource, favoring negotiations among the Strait at the same time[68]. Albeit the PRC is not a liberal democracy, at first sight, we can be surprised that the *nomenklatura* needed a legislative act to authorize an amphibious landing on the Island. But the truth is that *ubi societas ibi ius*, and modern China has to deal with a rising nationalism that the communist party (CCP) could no longer ignore[69]. Furthermore, the CCP has lost total control of the House: since the constitutional reforms that followed the death of Mao and the accession of Deng Xiaoping, the party controls today "only" 70% of all the seats, with the remaining third shared among eight minor parties, which have been anyway forced to swear allegiance to the regime and to acknowledge the supremacy of the communist party[70]. That is why lawmakers wanted to secure, and then obtained, a solid consensus

65. See Guo Zhenyuan, *Evolution of China's Taiwan-related foreign policy and its main features and causes (1949-2007)*, 31 China International Studies 153, 153-170 (2011).

66. See Ivan Cardillo and Yu Ronggen, *La cultura giuridica cinese tra tradizione e modernità*, 49(1) Quaderni fiorentini, per la storia del pensiero giuridico moderno 97 (2020).

67. See Suisheng Zhao, *Conflict prevention across the Taiwan strait and the making of China's anti-secession law*, 30(1) Asian Perspective 79 (2006).

68. Anti-secession law, Art 8.

69. See James Townsend, *Chinese nationalism*, 27 The Australian Journal of Chinese Affairs 97, 97-130 (1992).

70. Constitution of the People's Republic of China, Art. 1 §2 (December 4, 1982). For a comprehensive discussion of the topic see generally Xiaodan Zhang, *The Leadership of the CCP: From the Preamble to the Main Body of the Constitution - What Are Its Consequences for the Chinese Socialist Rule of Law?*, 12(1) Hague Journal on the Rule of Law 147, 147-166 (2020).

around this nationalist theme: the law passed with an overwhelming majority of 2986 yes and 2 abstentions[71]. Nationalism is indeed a powerful ally to raise consensus, and scholars have identified an evolution throughout Chinese nationalism during the last century and how this feeling has shaped domestic and foreign legislation. Nevertheless, this feeling has been also deployed in China by the dominant ethnic group (the Han clan) to keep the fifty-six different Chinese ethnicities in conflict with each other[72]. This modern version of *divide et impera* has provoked tremendous economic growth in the east of the country, whilst also allowing atrocities that seem to violate the central tenets of human rights, such as the policy towards the Uyghur minority[73]. Three different kinds of nationalism have been identified, each of which has shaped the legislation from the imperial to the socialist era. Nativism is the oldest one, and it looks with favor to traditional institutions and legal arrangements, abhorring any attempt to establish Western legal institutes. (e.g., the imperial decrees which had expelled Western diplomats during the boxer revolt in 1901). Nativism was heavily criticized during the Cultural Revolution when the country built an Eastern European socialist state (with a praesidium, and a central military commission) mostly copying the soviet form of government. This anti-traditional nationalism, clearly more aggressive, sees the imperial Chinese past as the main cause of the country's backwardness. Lastly, pragmatism gained momentum through the ruling class, and that is perfectly visible in the hybridization between the market economy and the communist principles of government[74]. There is no doubt that pragmatism today is prevalent, and the anti-secession law mirrors it trying to strike a fair balance between a more demanding nationalistic public opinion, and the willingness to maintain the status quo in the Strait since a war with the USA (Arleigh Burke-class destroyers, the backbone of the US Navy's VII fleet constantly patrol

71. See *China Enacted Historical Anti-Secession Law* (cited in note 62).

72. See Emma Iannini, *Cultivating Civilization: The Confucian Principles behind the Chinese Communist Party's Mass Imprisonment of Ethnic Minorities in Xinjiang and What Human Rights Advocates Can Do to Stop It*, 53(1) New York University Journal of International Law and Politics 189, 189-227 (2020).

73. See *ibid.*

74. See Suisheng Zhao, *A Nation-State by Construction: Dynamics of Modern Chinese Nationalism* (Stanford University press 2004).

the Taiwanese coasts[75]) would deteriorate the Chinese technological supply chain, which is largely dependent on TMSC, a multinational Taiwanese company that manufactures around 50% of all semiconductors in the world[76].

3.2. *The Preparatory Works*

Moving now to analyze the preparatory works, which can tell us more about the real intentions of lawmakers, it is noteworthy that, despite the hysterical reactions by Taiwanese authorities, scholars do not consider the law as a shift in the direction of a more aggressive foreign policy[77]. In fact, the anti-secession law codifies the same policy that China had adopted in the previous decades, allowing the use of force, but not expanding it[78]. As a matter of fact, in 2000, a month before the Taiwanese general elections, a white paper of the central military commission (CMC) indicated three conditions that could have allowed military actions against Taiwan: a formal declaration of independence, an invasion of the island by a third country (basically the USA and Japan), or the perpetual refusal by Taiwanese authorities to a pacific reunification[79]. Furthermore, although grave menaces persisted up to three days before elections when the pro-independence Democratic Progressive Party (DPP) won majority votes, no military actions followed: a demonstration of the *Liang Shou Celue* grand strategy. The idea for the anti-secession law gained momentum years later

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75. See Lara Seligman and Lee Hudson, *Provision Would Prevent Inactivation: Senators Blast Navy's Plan To Defer Decision On Carrier RCOH Until FY-16*, 27(23) Inside the Navy 1, 1-9 (2014); Brad Lendon, *US Navy sends its most advanced surface warship to east Asia*, CNN (September 27, 2022), available at https://edition.cnn.com/2022/09/26/asia/uss-zumwalt-warship-us-navy-deployment-intl-hnk-ml/index.html (last visited November 7, 2022).

76. See Yen Nee Lee, *2 charts show how much the world depends on Taiwan for semiconductors*, CNBC (March 15, 2021), available at https://www.cnbc.com/2021/03/16/2-charts-show-how-much-the-world-depends-on-taiwan-for-semiconductors.html (last visited November 7, 2022).

77. See *The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law* (cited in note 63).

78. See Zhao, *Conflict prevention across the Taiwan strait and the making of China's anti-secession law* at 86 (cited in note 67).

79. See *id*. at 86-87.

when former Taiwan president Chen proposed to amend the constitution in order to change the names of the foreign ministry and state companies. The failure of the referendum, followed by Chen's defeat in 2006, did not prevent the National People's Congress from passing the bill, pushed by public opinion. To pour cold water, President Hu Jintao promised to decrease duties on Taiwan imports, and, in the following days, Kuomintang leaders flew to Beijing for a historical handshake (today, the nationalist Taiwanese party is Beijing's main ally on the Island). To summarize, the anti-secession law simply codifies what was only an attitude of the communist leadership, a path called 依法治国 "yifa zhiguo", known as "governing the country in accordance with the law". For the first time, a law was agreed upon in article 87 of the Constitution, a legal base for the use of force. What the law does not clarify, even though the Constitution declares "holy" the reunification with Taiwan, is a deadline, an ultimatum for the reunification[80]. It simply forbids a formal declaration of independence (admitting backroom, *de facto* independence of the Island)[81]. Even before the present Constitution came into force, Chinese legislators had codified the current policy regarding the South China Sea, like in the 1958 Declaration on China's Territorial Sea and the 1992 Law on the Territorial Sea and the Contiguous Zone, followed by the signature of the United Nations Convention on the Law of the Sea[82].

3.3. *The Text*

Let us now consider the text, and we will immediately spot the *Liang Shou Celue* approach, or the carrot-stick method, in articles 8 and 6. The latter imposes, with a fair amount of pragmatism, measures to maintain peace and to increase relationships on the two Strait's sides: confidence-building exercises (such as cultural exchanges), and a common policy regarding crime fighting. In addition, article 7

80. Constitution of the People's Republic of China, Preamble (December 4, 1982).

81. See Keyuan Zou, *Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti- Secession Law*, 4 Chinese Journal of International Law 455, 456 (2005).

82. Office of Policy, Law and Regulation, State Oceanic Administration, *Collection of the Sea Laws and Regulations of the People's Republic of China* (in Chinese and English) at 197-198 and 201 (Ocean Press 3rd ed 2001).

clarifies that Beijing and Taipei are equal partners, whose negotiations are enforced on equal terms. Even article 8, the one that prescribes the conditions under which the use of force is allowed, in the first chapter clarifies that before ordering the invasion "possibilities for a peaceful reunification should be completely exhausted"[83]. The word "possibilities" instead of "conditions" is a clear signal that authorities must run out of any diplomatic attempt (even those not specified by the law) before ordering the attack[84]. This provision supports the idea that the anti-secession law has not increased the conditions for an armed attack. As pointed out, article 8 is the keystone of the anti-secession law's architecture. Its major drawback, however, is how broadly the three allowing-force conditions are formulated. Firstly, "secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession". The condition, as described in the previous pages, refers to the DPP and its intention to declare a *de jure* independence, but of course, the statement and its interpretation can be bent in various ways: a democratic election won by secessionist parties, a non grata military exercise, or a constitutional reform. Secondly "major incidents entailing Taiwan's secession from China should occur" is such a broad sentence that every single episode of tension can potentially be considered a "major incident" (only on January 24th, thirty-nine Chinese warplanes flew over Taiwanese air space[85]), and lastly the aforementioned exhaustion of all peaceful possibilities. Thus far, such a wide range of chances would justify an accusation of warmongery, but as explained in the introduction, it is clear that these 15 years have demonstrated that the "talking tough and acting prudently" policy is far from being based just on military threats. The second chapter of article 8 raises another question: according to the Constitution, the parliament, called "the National People's Congress" (NPC), is entitled to decide on questions of war and peace, but the article allows the Central Military Commission and the State Council to have powers of war, with a mere duty to report their decisions to the

83. Anti-secession law, Art. 8 ch.1.

84. Bruce Klingner, *The Dragon Squeezes Taiwan* (Asia Times Online March 15, 2005).

85. *China flies 39 warplanes into Taiwan's air defense zone in a day*, CBS News (January 24, 2022), available at https://www.cbsnews.com/news/china-taiwan-warplanes-fly-incursions-air-defense-zone/ (last visited November 8, 2022).

Standing Committee of the NPC. Few scholars argued that constitutional provisions do not apply to the Taiwan issue, as it is considered a domestic matter, and not a dispute with a sovereign state, to which the Constitution refers. However, as a clear breach of constitutional provisions, this article raises concerns about the respect of the rule of law in the country[86].

The final problem with the anti-secession law is that it fails to take Taiwan's sovereignty into account. Article 7 affirms that peaceful reunification might be achieved through "... consultations and negotiations on an equal footing between the two sides of the Taiwan Strait ..." seeming to suggest that the middle empire considers the Taiwanese government as his equal, and no longer a rebel province: a full legitimate authority of an independent and third country. However, a serious weakness of this argument is that the law itself shows opposite principles in previous articles: article 2 "There is only one China in the world. Both the mainland and Taiwan belong to one China"; then article 4 "Accomplishing the great task of reunifying the motherland is the sacred duty of all Chinese people, the Taiwan compatriots included"; (the special reservation in the NPC for Taiwanese delegates is a good illustration of this point), and lastly, article 5 "Upholding the principle of one China is the basis of peaceful reunification of the country"[87]. The effectiveness of the one China principle has been exemplified in the name of the law itself: scholars in China proposed enacting a law of "unification", but "anti-secession" was deliberately chosen. The term "reunification" or "unification" has the connotation of recognizing that the two sides of the Taiwan Strait are separate, and such recognition will be inconsistent with the "one China" principle[88].

Overall, these confounding provisions support the view that the anti-secession law, and generally, the Chinese leadership is willing to keep the *status quo* in the region: Taiwan is a de-facto independent

86. Zou, *Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law* at 459 (cited in note 81).

87. See *ibid.*

88. Yu Yuanzhou, *National Unification Promotion Law of the People's Republic of Chin*a (November 1, 2002); *New Changes in one country, two systems, China opens a new model for Taiwan* (Boxun Press November 5, 2019), available at https://en.boxun.com/2019/11/05/new-changes-in-one-country-two-systems-china-opens-a-new-model-for-taiwan/ (last visited November 7, 2022).

island, but for the People's Republic of China is fundamental to demonstrate to its own public opinion that "the century of humiliation" is eventually over. Both Taipei and Beijing know in fact how a war in the Strait would badly affect their economies: SMIC, the biggest Chinese semiconductor foundry company, was founded by a group of Taiwanese investors[89]. Furthermore, although still ongoing quarrels among American, Chinese, and Taiwanese tech companies, China has definitely become Taiwan's largest import and export partner, since in 2021 Taipei's exports to the mainland grew by over 25% as compared with the previous year's[90]. The effectiveness of the pragmatic approach has been exemplified by the new guidelines approved by the president and party leader Hu Jintao when he took over the chairmanship of the Central Military Commission in 2004: "strive for negotiation, prepare for war, and have no fear of Taiwan's procrastination"[91]. Furthermore, in the case of reunification, article 5 grants Taiwan "a high degree of autonomy" perhaps inspired by the legal principle "one country two systems" that China applied in Hong Kong and Macau, a well-known example of self-government, (at least before the brutal repression that followed the passing of the national security law[92]).

To conclude this section, it is noteworthy that neither the Constitution nor the anti-secession law has a timetable for reunification. Since the end of the Cultural Revolution and the establishment of the modern Chinese legal system (the one mentioned in the previous paragraph as the pragmatic legislative approach), Chinese lawmakers

89. Cheng Ting Fang, *Taiwan bans recruitments for jobs in China to combat brain drain*, Nikkei Asian Review (April 30, 2021), available at https://asia.nikkei.com/Business/Tech/Semiconductors/Taiwan-bans-recruitment-for-jobs-in-China-to-combat-brain-drain#:~:text=TAIPEI%20%2D%2D%20Taiwan%20has%20told,tensions%20between%20Taipei%20and%20Beijing (last visited November 8, 2022).

90. Roy C. Lee, *Taiwan's China dependency is a double edged sword* (East Asia Forum, July 6, 2021), available at https://www.eastasiaforum.org/2021/07/06/taiwans-china-dependency-is-a-double-edged-sword/ (last visited November 8, 2022).

91. Personal interview given to Suisheng Zhao, held in Beijing October 2005, mentioned in Zhao, *Conflict prevention across the Taiwan strait and the making of China's anti-secession law* at 92 (cited in note 67).

92. See Hingchau Lam, *The ouster clause in the Hong Kong national security law: its effectiveness in the common law and its implications for the rule of law*, 76(5) Crime, Law and Social Change: An Interdisciplinary Journal 543 (2021).

have taken into account the chance to achieve national reunification, as Hu emphasized: "by winning over the hearts and minds of the Taiwanese people". Consequently, measures such as the proposal to facilitate direct flights, or to import agricultural goods from Taiwan were enacted[93]. As Sun Tzu, the author of The Art of War stated, "to win without fighting" is a real possibility that the anti-secession law takes into account since negotiating is no longer synonymous with weakness. But as explained in the first paragraph, a sense of fear and fierce resistance is growing among the Taiwanese people.

4. *Conclusion*

To outline this final paragraph, the case reported here illustrates how the principle of one China is applied by Chinese lawmakers with a high degree of pragmatism. Following the rediscovery of tradition, after the dark years of the Maoist cultural revolution, the Confucian value of loyalty has shaped what we could define as an aggressive law, but, as described in the previous pages, this provision has simply codified the route that the communist leadership has been following for more than forty years. To sum up, the Chinese legislator is not looking for a fight in the Strait, as it will cause the fall of the microchip market and presumably, an intervention of the Americans. Moreover, the *Nomenklatura* is aware of how the core of international law has moved from state-to-state relations to a more anthropocentric and "humanitarian" approach. Nowadays, in fact, under the UN Charter, States have a legal obligation to resolve conflicts (even) with their own contested elements, peacefully. To conclude, "the great task of reunifying the motherland" is far away from coming true, as the Chinese legislature is bound by internal and international provisions.

93. Corten and Simma, *The law against war: the prohibition on the use of force in contemporary international law* (cited in note 32); Essen, *De Facto Regimes in International Law* (cited in note 32).