

**ONE CHINA, FREELY AND FAIRLY  
ELECTED: A NEW SOLUTION TO THE  
ISSUE OF TAIWAN**

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## I. INTRODUCTION

*An individual should not have too much freedom. A nation should have absolute freedom.*

—Sun Yat-Sen

On January 1, 2007, President Chen Shui-bian of Taiwan announced in his New Year Message, “The international community must forthrightly pay heed to the will of Taiwan’s people, and must respect their right of free choice...The sovereignty of Taiwan belongs to its 23 million people, not to the People’s Republic of China. Only the people of Taiwan have the right to decide Taiwan’s future.”<sup>1</sup> Predictably, the government of the People’s Republic of China (PRC) reacted angrily. The People’s Daily reported that an unnamed spokesman from Beijing’s Taiwan Affairs Office stated that China would never allow Taiwan to formally break away from the Mainland.<sup>2</sup> On March 15, 2007, the Chinese People’s Political Consultative Conference, China’s top legislative advisory committee, adopted a resolution that stated, “We shall firmly oppose the secessionist activities in any form to seek the de jure independence of Taiwan.”<sup>3</sup>

In the case of an armed conflict, the PRC’s obligations under international law will depend on Taiwan’s status as a state. This paper will first briefly discuss the history of Taiwan, and its political development since the Kuomintang’s (KMT)<sup>4</sup> loss of the civil war on Mainland China in 1949 to Taiwan’s current democracy. It will proceed with an examination of Taiwan’s status as a state and the implications of this status. Next this note will discuss the PRC’s violations of international law regarding the use of force and human rights with respect to Taiwan. Next, the PRC’s obligations under international law will be addressed, along with suggested responses by the international community in the event of an armed attack. Finally, this paper will assert

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<sup>1</sup> President Chen’s New Year Message, Taipei Economic and Cultural Representative Office in the U.S. (Jan. 1, 2007), *available at* <http://www.roc-taiwan.org/US/fp.asp?xItem=19245&ctNode=2301&mp=12>.

<sup>2</sup> *China says Taiwan’s Leader Trying to Ruin Ties*, AGENCE PRESSE FRANCE, Jan. 2, 2007, *available at* <http://taiwansecurity.org/AFP/2007/AFP-020107.htm>.

<sup>3</sup> Scott McDonald, *China Opposed to Taiwan Independence*, ASSOCIATED PRESS, Mar. 15, 2007, *available at* [http://news.yahoo.com/s/ap/20070315/ap\\_on\\_re\\_as/china\\_politics\\_taiwan](http://news.yahoo.com/s/ap/20070315/ap_on_re_as/china_politics_taiwan).

<sup>4</sup> The Kuomintang is a political party established in China in 1912, originally comprised of revolutionary groups, that successfully overthrew the Qing Dynasty in China. It constituted the government of China until it was defeated by the Chinese Communist Party in 1949. *See* STERLING SEAGRAVE, *THE SOONG DYNASTY* 123–129 (1985).

a new solution to the Taiwan issue: internationally monitored free and fair elections.

The status of Taiwan continues to become more precarious. In a 2000 opinion poll on national identity in Taiwan, 36.9% of respondents stated that they considered themselves Taiwanese, 13.1% Chinese, and 43.8% of respondents considered themselves both Taiwanese and Chinese.<sup>5</sup> By 2006, in a survey published by the Election Study Center of National Chengchi University, 60.1 % of respondents identified themselves as Taiwanese, only 4.8 % identified themselves as Chinese, and 33.4% identified themselves as both Taiwanese and Chinese.<sup>6</sup> With the Taiwanese leadership's increased push towards formally proclaiming independence and PRC opposition to independence for Taiwan, any military conflict involving China will most likely be over Taiwan.<sup>7</sup> Several key factors underlie the PRC's continued agitation over Taiwan and its increasingly adamant opposition to Taiwan independence: the PRC does not wish to appear internally weak on Taiwan issues; the PRC considers the international community's acceptance of its "one-China" policy as an issue of legitimacy and respect; China's historical legacy; and Taiwan's strategic military position along with the PRC's military aspirations.<sup>8</sup> How the international community addresses the issue of Taiwan will have an immense impact, not only on the people of Taiwan, but also on global security as a whole.

## II. BACKGROUND

China first occupied the island of Taiwan in 1661, but did not have effective sovereignty over the island until 1683.<sup>9</sup> For the following 212 years, Taiwan constituted a part of the Chinese Empire based in Beijing which exercised sovereignty over the island recognized by other

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<sup>5</sup> Chen, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> See Randall Peerenboom, *The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability*, 7 CHI. J. INT'L L. 17, 44 (2006).

<sup>8</sup> ROBERT G. SUTTER, CHINA'S RISE IN ASIA: PROMISES AND PERILS 225–226 (2005). See also Eric Ting-Lun Huang, *Taiwan's Status in a Changing World: United Nations Representation and Membership for Taiwan*, 9 ANN. SURV. INT'L & COMP. L. 55 (2003).

<sup>9</sup> W.G. GODDARD, FORMOSA: A STUDY IN CHINESE HISTORY 80-81 (1966); See also Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. INT'L L. 453, 454–455 (2000). It is argued that China exercised "effective sovereignty" because a system of orderliness and increased prosperity was introduced to the Chinese immigrants in Taiwan from the authorities in Beijing, a system of taxation was established on the island, and economic protectionist measures were implemented by Beijing to protect the Taiwan economy.

nations.<sup>10</sup> After the first Sino-Japanese war, China signed the Treaty of Shimonoseki in 1895 with Japan to put an end to hostilities, which transferred sovereignty of Taiwan to Japan “in perpetuity.”<sup>11</sup> The Empire of Japan ruled Taiwan until its defeat in the Second World War.<sup>12</sup> After Japan’s defeat in the Second World War, Taiwan came under the control of the Republic of China’s (ROC) Kuomintang (KMT) government under the Potsdam Proclamation of 1945.<sup>13</sup> After Communist victory on Mainland China in 1949, the PRC was established on the Mainland and the ROC government, along with almost two million Nationalist<sup>14</sup> supporters, fled to Taiwan.<sup>15</sup>

During the Cold War, there existed “two Chinas,”— Mainland China’s PRC government and Taiwan’s ROC government, which the majority of the international community recognized as the official representative of China.<sup>16</sup> However, in 1971, after an increasing number of United Nations (UN) Member States became convinced that the PRC was the government exercising effective control of the Chinese mainland

<sup>10</sup> GODDARD, *supra* note 9, at 80–81; JOHN ROBERT SHEPHERD, *STATECRAFT AND POLITICAL ECONOMY ON THE TAIWAN FRONTIER 1600–1800*, at 106 (1993).

<sup>11</sup> Treaty of Peace, Apr. 17, 1895, China-Japan, 181 Consol. TS 217, *available at* <http://www.onechinacommittee.org/shimonoseki.htm>.

<sup>12</sup> Jason X. Hamilton, *An Overview of the Legal and Security Questions Concerning Taiwanese Independence*, 1 LOY. U. CHI. INT’L L. REV. 91, 92 (2005).

<sup>13</sup> There has been much scholarly debate over legal title over Taiwan. It has been asserted that the Shimonoseki Treaty was invalid and that legal title over Taiwan has always vested with China. See Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 AM. U. INT’L L. REV. 1101, 1109–1125 (2000). It has also been argued that the 1943 Cairo Declaration and the 1945 Potsdam Proclamation, both of which stated the Japanese intent of relinquishment of sovereignty over the island, had no legal authority to dispose of the territory, and that Japan did not actually relinquish title over Taiwan until 1951, when it concluded the 1952 San Francisco Peace Treaty with the Allied Powers. See Y. Frank Chiang, *One-China Policy and Taiwan*, 28 FORDHAM INT’L L.J. 1 (2004); *see also* Eric Ting-Lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT’L L. REV. 167, 201 (2001) [hereinafter “Huang 2001”]; Eric Ting-Lun Huang, *The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan*, 16 N.Y. INT’L L. REV. 99, 156–160 (2003) [hereinafter “Huang 2003”]. It is further argued that after the San Francisco Peace Treaty, the ROC government was given agency to administer Taiwan on behalf of the Allied Powers, and that this agency relationship exists to this day. Chiang, *supra* note 13, at 42. However, it is undisputed that the ROC government has “possessed” or governed Taiwan since 1949, and it is generally undisputed that the ROC government currently “possesses” or maintains sovereignty over the island of Taiwan. See Hamilton, *supra* note 12 at 92; Charney & Prescott, *supra* note 9 at 460. Put differently, if the Allied Powers do in fact still maintain title over Taiwan, they have never asserted their claim to such title.

<sup>14</sup> The Kuomintang Party is also called the Nationalist Party in English.

<sup>15</sup> Central Intelligence Agency, *World FactBook: Taiwan*, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> (last visited Mar. 27, 2007) [hereinafter *FactBook Taiwan*].

<sup>16</sup> Hamilton, *supra* note 12, at 92.

and that the PRC should therefore represent China in the UN, the PRC replaced the ROC as the representative of China in the UN.<sup>17</sup> UN General Assembly Resolution 2758 stated, "The General Assembly... *Decides* to restore all its rights to the People's Republic of China and to recognize the representatives of its government as the only legitimate representatives of China to the United Nations."<sup>18</sup> Additionally, the United States' position on Taiwan changed dramatically with President Nixon's China policy as reflected in the Nixon administration's 1972 Shanghai Communiqué. In it, the Nixon administration acknowledged that all Chinese on either side of the Taiwan Strait maintain that there is but one China and that Taiwan is a part of China.<sup>19</sup>

On January 1, 1979, the U.S., under President Carter, formally recognized the PRC as the government of China and established diplomatic relations with the PRC.<sup>20</sup> However, the ROC continued to officially maintain that it was the sole, legitimate government of all of China until 1991, when it officially announced that it would no longer claim title to all of China but only Taiwan.<sup>21</sup>

Taiwan, under Kuomintang rule, was under martial law beginning in the 1940s.<sup>22</sup> The Kuomintang justified the need for martial law by citing national security reasons, although it has been contended that the imposition of martial law was due more to increasing Chinese Communist Party (CCP) control of the Mainland and the Kuomintang's anti-Communist policy rather than for "national security."<sup>23</sup> During this time, the Kuomintang made Taiwanese support of the CCP and Taiwanese independence criminal.<sup>24</sup> However, because of increased international and domestic pressure to democratize Taiwan, the KMT began to implement reforms in the 1980s that allowed the people in Taiwan to exercise the rights guaranteed them by the ROC Constitution.<sup>25</sup> In 1987, martial law was officially lifted.<sup>26</sup> In 1994, the National Assembly of

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<sup>17</sup> Huang, *supra* note 8, at 81.

<sup>18</sup> G.A. Res. 2758, 26 GAOR, Supp. No. 29, at 2, U.N. Doc. A/8429 (1971).

<sup>19</sup> Joint Communiqué of the United States of America and the People's Republic of China, US-PRC, Feb. 28, 1972, *available at* <http://www.fapa.org/generalinfo/shanghai1972.html>.

<sup>20</sup> Joint Communiqué of the United States of America and the People's Republic of China, U.S.-PRC, Jan. 1, 1979, *available at* <http://www.fapa.org/generalinfo/shanghai1979.htm>.

<sup>21</sup> United States Dept. of State, Bureau of East Asian and Pacific Affairs, Taiwan (Oct. 2006), <http://www.state.gov/r/pa/ei/bgn/35855.htm>, (last visited Mar. 31, 2007) [hereinafter US Department of State, Taiwan]

<sup>22</sup> *See Id.*

<sup>23</sup> *See* Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357, 361 (1995).

<sup>24</sup> *Id.*

<sup>25</sup> Huang 2001, *supra* note 13, at 207–209; US Department of State, Taiwan, *supra* note 21.

<sup>26</sup> US Department of State, Taiwan, *supra* note 21.

Taiwan amended the ROC Constitution to allow for the direct election of president and vice president beginning in 1996.<sup>27</sup> In 1996, the first direct presidential election was held, and in March of 2000, the people of Taiwan ended over 50 years of Kuomintang rule by electing opposition Democratic Progressive Party (DPP) candidate Chen Shui-bian, who was re-elected in 2004.<sup>28</sup>

The PRC government in China has viewed these developments in Taiwan with increasing concern and aggression. In its 1993 White Paper, Beijing stated in explicit terms that Taiwan was a rebellious or renegade province, and resolution of the Taiwan issue was a strictly internal matter.<sup>29</sup> The White Paper states, "Taiwan's status as an inalienable part of China has been determined and cannot be changed. 'Self-determination' for Taiwan is out of the question."<sup>30</sup> China's policy has not changed, and Beijing continues to assert that the "Taiwan separatists' attempt to change Taiwan's status as part of China by referendum on the pretext that 'sovereignty belongs to the people' is futile."<sup>31</sup> The PRC has further stated that it would "never tolerate, condone or remain indifferent to the realization of any scheme to divide China," and that if "Taiwan authorities refuse...the peaceful settlement of cross-Straits reunification through negotiations, then the Chinese Government will only be forced to adopt all drastic measures possible, including use of force, to safeguard China's sovereignty and territorial integrity and fulfill the great cause of reunification."<sup>32</sup>

In an effort to intimidate voters in Taiwan in 1996 and 2000 preceding the presidential elections, and to emphasize the gravity of its threats, the PRC conducted "military exercises" off the coast of Taiwan.<sup>33</sup> In 2005, the PRC adopted its Anti-Secession Law, Article 8 of which states:

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<sup>27</sup> Huang 2001, *supra* note 13, at 210.

<sup>28</sup> US Department of State, Taiwan, *supra* note 21; SUTTER, *supra* note 8, at 222.

<sup>29</sup> Taiwan Affairs Office & Information Office of the State Council, People's Republic of China, The Taiwan Question and the Reunification of China (1993), available at <http://www.china-embassy.org/eng/zt/twwt/White%20Papers/t36704.htm> [hereinafter "White Paper"]. Note: The above translation was issued in English by the PRC; the website is the site of the Embassy of the People's Republic of China in the United States of America.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Taiwan Affairs Office & Information Office of the State Council, People's Republic of China, The One-China Principle and the Taiwan Issue, available at <http://www.china-embassy.org/eng/zt/twwt/White%20Papers/t36704.htm>.

<sup>33</sup> *Taiwan's People Begin Historic Vote*, CNN ONLINE, Mar. 23, 1996, [http://www-cgi.cnn.com/WORLD/9603/taiwan\\_elex/23/index.html](http://www-cgi.cnn.com/WORLD/9603/taiwan_elex/23/index.html); *Report: China Holding Naval Exercises in Taiwan Strait*, REUTERS, July 28, 1999, <http://www.cnn.com/WORLD/asiapcf/9907/28/china.taiwan.01/>.

In the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.<sup>34</sup>

### III. ARGUMENTS FOR TAIWAN'S STATEHOOD

There have generally been three views among international jurists regarding the current international legal status of Taiwan: (1) Taiwan is a part of the PRC; (2) Taiwan is a distinct, independent state; and (3) Taiwan is a de facto entity or state that does not enjoy full international legal status as a state.<sup>35</sup> Arguments in favor of the first contention—that Taiwan is a part of the PRC—center around the assertion that legal title over Taiwan was transferred to China, and that the PRC government, as the official representative of Mainland China, therefore holds title to Taiwan.<sup>36</sup> However, this is an overly simplistic analysis of the status of Taiwan and does not reflect political and legal realities. Taiwan was returned to China at a time when leadership over China was still in contention. Moreover, Taiwan was handed over to the KMT government, which was recognized as the legitimate government of China for over two decades after it lost the Mainland and moved to Taiwan. Therefore, legal title over Taiwan cannot be said to indisputably vest with the PRC—the PRC, since its inception, has never controlled or governed any part of Taiwan.<sup>37</sup> This paper will examine the remaining two possibilities and

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<sup>34</sup> Anti-Secession Law, art. 8 (Nat'l People's Cong., Mar. 14, 2005, effective Mar. 14, 2005), available at <http://www.china.org.cn/english/2005lh/122724.htm>.

<sup>35</sup> 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, 732–733 (1998).

<sup>36</sup> See Shen, *supra* note 13; Su Wei, *Some Reflections on the One-China Principle*, 23 FORDHAM INT'L L.J. 1169 (2000).

<sup>37</sup> See Angeline G. Chen, *Taiwan's International Personality: Crossing the River by Feeling the Stones*, 20 LOY. L.A. INT'L & COMP. L.J. 223, 224 (1998) (stating, "The People's Republic of China (China, the PRC or mainland government) claims that Taiwan constitutes a part of its territory. The PRC asserts such a claim despite the fact that the PRC (the descendants of Mao Tse-Tung), even in its earlier incarnations, never controlled a single square inch of the land that is now Taiwan."); Hamilton, *supra* note 12, at 100 (stating, "There is no legal justification for denying Taiwan statehood, as it clearly cannot be considered a PRC province after fifty-five uninterrupted years of self-rule"). While few states in the international community

discuss why either characterization of Taiwan's current status is an accurate characterization, and why Taiwan should be recognized as either a state or a *de facto* entity or state with full international legal status.

A. *Montevideo Convention*

The 1933 Montevideo Convention codified requirements existing under customary international law for statehood: (1) control over a defined territory; (2) a permanent population; (3) maintenance of an effective government; and (4) the ability to conduct foreign relations with other states.<sup>38</sup> Although the Convention is "technically binding only upon its signatories, the formulation for statehood as set forth therein has been generally accepted throughout the international community."<sup>39</sup>

Taiwan has a permanent population of nearly twenty-three million ethnic Chinese and Taiwanese natives.<sup>40</sup> It currently has a greater population than seventy-five percent of UN Member States.<sup>41</sup> Its permanent defined territory over which it asserts effective control is comprised of almost 36,000 square miles that includes the island of Formosa (Taiwan) and the Pescadores, Matsu, and Quemoy islands.<sup>42</sup> Taiwan has its own independent democratic government, the ROC, which was established in 1912 based on the Chinese constitution of 1947 with its own executive branch, legislative branch, and judiciary.<sup>43</sup>

Taiwan is fully recognized by twenty-four states and is represented in 122 countries that do not officially recognize it.<sup>44</sup> Taiwan has established economic and cultural ties with over 140 of the countries and regions that do not officially recognize it and has concluded 248

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officially recognize Taiwan, and most "acknowledge" a "one-China" policy, the actions of governments such as the United States, reflect recognition that states recognize Taiwan as a separate entity from the PRC. See, e.g., The Taiwan Relations Act, 22 USC §3301-16 (1994).

<sup>38</sup> See Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 25 (signed at Montevideo, Uruguay) [hereinafter Montevideo Convention]; see also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987).

<sup>39</sup> Chen, *supra* note 37, at 236; see also Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, Nov. 29, 1991, 31 I.L.M. 1488, 1495 (Badinter Commission), available at <http://www.ejil.org/journal/Vol3/No1/art13.html>; Christopher J. Carolan, *The "Republic of Taiwan": A Legal-Historical Justification for a Taiwanese Declaration of Independence*, 75 N.Y.U.L. REV. 429, 450 (2000).

<sup>40</sup> FactBook Taiwan, *supra* note 15.

<sup>41</sup> Carolan, *supra* note 39, at 451.

<sup>42</sup> FactBook Taiwan, *supra* note 15.

<sup>43</sup> Taiwan, Government Information Office, Republic of China, Government Structure (Apr. 12, 2007), available at <http://www.gio.gov.tw/ct.asp?xItem=32643&ctNode=2584>.

<sup>44</sup> US Department of State, Taiwan, *supra* note 21.



agreements with 59 states and organizations.<sup>45</sup> Taiwan officially became a member of the World Trade Organization (WTO) in 2002 as its 144<sup>th</sup> member<sup>46</sup> and is a member of twenty-two other intergovernmental organizations including the Asia Pacific Economic Cooperation (APEC), the Asian Development Bank (ADB), and the Egmont Group of Financial Intelligence Units of the World.<sup>47</sup> Taiwan has observer status in an additional fourteen intergovernmental organizations that include the Competition Committee of the Organization for Economic Cooperation and Development (OECD), the Inter-American Development Bank (IDB), and the General Conference of Weights and Measures (CGPM).<sup>48</sup> Thus, Taiwan clearly conducts, and has the capacity to conduct, foreign relations with other states. Therefore, Taiwan meets all the criteria set forth in the Montevideo Convention which codified customary international law for statehood.

B. *Taiwan as a De Facto Entity or State*

In addition to meeting the requirements for statehood under customary international law, there is additional evidence that if not considered a state *de jure*, Taiwan is considered a *de facto* state by the international community. At the very least it can be described as a *de facto* entity.<sup>49</sup> The PRC has never exercised jurisdiction over Taiwan, nor has it ever effectively controlled Taiwan; therefore, it is clear that the government of Taiwan does not derive its legal authority to govern from the PRC.<sup>50</sup> However, since the UN's adoption of Resolution 2758 in 1971, Taiwan is no longer represented in most major international

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<sup>45</sup> Taiwan, Government Information Office, Republic of China, Foreign Relations (Apr. 12, 2007), <http://www.gio.gov.tw/ct.asp?xItem=32809&ctNode=2588>; Hsiao, *supra* note 35, at n.109 (citing Tsei-wai kuan-hsi yu wai-chiao hsing-cheng [Foreign Affairs Reports: Foreign Relations and Diplomatic Administration] 262 (2d ed. 1993) (on file with Hsiao)).

<sup>46</sup> President Chen's New Year Message, *supra* note 1.

<sup>47</sup> Taiwan, Government Information Office, Republic of China, Multilateral Relations (Apr. 12, 2007), *available at* <http://www.gio.gov.tw/ct.asp?xItem=32810&ctNode=2588>.

<sup>48</sup> *Id.*

<sup>49</sup> "A *de facto* entity may be described as a political formation which claims to be a state or a government, and has an authority in control of certain territory over a period of time, without being regarded as a state or government of a state." Hsiao, *supra* note 35, at 726. This term has been used to describe situations such as the status of North Korea up until 1951, which was not given all the rights that accompany statehood or recognition because the international community considered South Korea to be a state. North Korea was considered a "*de facto* entity" because the UN regarded its invasion of South Korea as an armed attack and North Korea as the belligerent despite its uncertain legal status. *Id. See, e.g.,* S.C. Res. 82 (V), U.N. Doc. S/1501 (June 25, 1950); S.C. Res. 83 (V), U.N. Doc. S/1511 (June 27, 1950); S.C. Res. 84 (V), U.N. Doc. S/1588 (July 7, 1950).

<sup>50</sup> Hsiao, *supra* note 35, at 735.

organizations or in any UN subsidiary organ and is officially recognized by only a few states.<sup>51</sup>

Although states can refuse to officially recognize Taiwan's government, entering into treaties and agreements with it amounts to states treating Taiwan as a *de facto* state. As noted, most states that do not formally recognize Taiwan as a state have concluded treaties and agreements with Taiwan and have implied recognition in various ways. For example, states have entered into airspace agreements with the government of Taiwan.<sup>52</sup> According to the Convention on International Civil Aviation, "every state has complete and exclusive sovereignty over that airspace above its territory."<sup>53</sup> By concluding airspace agreements with the government of Taiwan rather than the PRC, then, states imply their recognition of ROC sovereignty over its airspace.<sup>54</sup>

Additionally, with the enactment of the Taiwan Relations Act (TRA) in 1979, the United States provided for continuing relations with Taiwan despite its withdrawal of formal recognition. At its enactment, the Carter Administration's view was that the United States recognized Taiwan as a *de facto* entity with the attributes of a state.<sup>55</sup> It is important to note that the U.S. has consistently declined to endorse the contention that Taiwan is a part of China.<sup>56</sup> The U.S. merely "acknowledges" this claim,<sup>57</sup> though, as at least one scholar has pointed out, the PRC continues to "glibly" translate the English word for "acknowledge" to "recognize" in Chinese.<sup>58</sup> Particularly noteworthy is that the TRA provided that treaties concluded with the ROC government prior to PRC recognition would remain valid.<sup>59</sup> These treaties are still in force and are evidence that the U.S. considered and continues to consider Taiwan an entity similar to a state with the ability to independently enter into treaties.<sup>60</sup>

Moreover, when the PRC threatened to resort to military action against Taiwan in 1996, the European Parliament adopted a pair of resolutions that urged the European Council to prevent PRC aggression and use of force and ensure non-interference with the 1996 presidential

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<sup>51</sup> *Id.* at 736.

<sup>52</sup> Huang 2003, *supra* note 13, at 166.

<sup>53</sup> See Convention on International Civil Aviation, Dec. 7, 1944, art. 1, 61 Stat. 1180, 15 U.N.T.S. 295.

<sup>54</sup> Huang 2003, *supra* note 13, at 167.

<sup>55</sup> Hsiao, *supra* note 35, at 738-39.

<sup>56</sup> See Michael E. Mangelson, *Taiwan Re-Recognized: A Model For Taiwan's Future Global Status*, 1992 B.Y.U. L. REV. 231, 234-45.

<sup>57</sup> Carolan, *supra* note 39, at 438.

<sup>58</sup> *Id.*

<sup>59</sup> See Taiwan Relations Act, 22 U.S.C. §3303 (1994).

<sup>60</sup> Hsiao, *supra* note 35, at 739.

election.<sup>61</sup> It has been observed that the language employed in these two documents implies recognition of Taiwan as an independent entity from the PRC.<sup>62</sup> Several writers have suggested that absent PRC objection, most states would have long ago recognized Taiwan as a state.<sup>63</sup> As it stands, however, it is indisputable that most states have implied recognition of Taiwan as a *de facto* state through their actions. It is therefore clear that there remains no legal justification to not afford Taiwan all the legal entitlements that accompany statehood. Moreover, the principle of self-determination is another legal principle supporting Taiwan's entitlement to status as a state.

### C. Self-Determination

#### 1. Background of Self-Determination

The term self-determination was first brought to the attention of the international community by Woodrow Wilson and was originally only applied to Europeans after World War I.<sup>64</sup> The term evolved after the Second World War as a legal principle advocating the right of those subject to colonial rule to liberate themselves and create their own independent state.<sup>65</sup> "Self-determination of peoples" is listed as one of the fundamental purposes of the UN in the UN Charter.<sup>66</sup> UN General Assembly Resolution 1514 of 1960 titled, "The Declaration on the Granting of Independence to Colonial Countries and Peoples," greatly bolstered international recognition of and support for the right to self-determination and stated, "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>67</sup> However, Resolution 1514 contained a caveat in that it proclaimed, "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations,"<sup>68</sup> thus making clear that its support for the right to self-determination did not condone secession. UN Secretary-General U Thant reaffirmed this

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<sup>61</sup> See 1996 O.J. (C 65) 167; 1996 O.J. (C 96) 302.

<sup>62</sup> Hsiao, *supra* note 35, at 741.

<sup>63</sup> *Id.*; Huang 2001, *supra* note 13, at 185.

<sup>64</sup> Huang 2001, *supra* note 13, at 171; Carolan, *supra* note 39, at 459.

<sup>65</sup> Huang 2001, *supra* note 13, at 169.

<sup>66</sup> UN Charter art. 1, para. 2.

<sup>67</sup> The Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 13, U.N. Doc. A/4685 (Dec. 14, 1960) [hereinafter Resolution 1514].

<sup>68</sup> *Id.*

position in 1970 when he stated, "As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State."<sup>69</sup>

However, discussion began in the international community in 1966 that the concept of self-determination may extend beyond the colonial context with the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant of Civil and Political Rights (ICCPR).<sup>70</sup> Article I of both covenants states that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>71</sup> While recognizing the right to self-determination, actual international support for self-determination has been mixed.<sup>72</sup> International support in non-colonial self-determination contexts has fared worse and is often viewed as tantamount to secession, an unacceptable proposition for a state-centered international framework.<sup>73</sup>

To clarify what "peoples" were entitled to self-determination, a final report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) defined "peoplehood" as:

[A] group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life [...] [T]he group as a whole must have the will to be identified as a people or the consciousness of being a people. . .<sup>74</sup>

<sup>69</sup> U Thant, UN MONTHLY CHRON., Feb. 1970, at 36.

<sup>70</sup> Huang 2001, *supra* note 13, at 178-79.

<sup>71</sup> International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200A, ¶7, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 48, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A, ¶8 U.N. GAOR 21<sup>st</sup> Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 [hereinafter ICCPR]. Both state the recognition of the "inherent dignity of the human person."

<sup>72</sup> Huang 2001, *supra* note 13, at 187-188.

<sup>73</sup> See Valerie Epps, *Self-Determination in the Taiwan/China Context*, 32 NEW ENGL. L. REV. 685, 690 (1998).

<sup>74</sup> See UNESCO, International Meeting of Experts on Further Study of the Concept of Rights of Peoples, Nov. 27-30, 1989, *Final Report and Recommendations*, ¶22.1 and ¶22.3, UNESCO doc. SHS-89/CONF. 602.7 (Feb. 22, 1990), available at <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>.

UNESCO further considered representative institutions as a prerequisite to self-determination.<sup>75</sup> Finally, to qualify for self-determination and statehood, a people must, presumably, declare it or ask for it.<sup>76</sup> How Taiwan fits within this framework is a bit murky.

## 2. Taiwanese Non-Colonial Self-Determination

First, while Taiwan has not officially declared independence, it has taken many steps that imply that it considers itself independent. For example, Taiwan has repeatedly applied for admission to the UN,<sup>77</sup> and according to the UN Charter, only states may apply for membership.<sup>78</sup> Moreover, Taiwan “clearly looks, acts, and functions like a sovereign state.”<sup>79</sup> The main reason, therefore, that Taiwan has not officially declared independence or asked for self-determination is that doing so would be tantamount to inviting invasion by the PRC.<sup>80</sup>

Next, while it is true that the people of Taiwan share an ethnic and linguistic heritage with the Chinese of Mainland China, it has been noted that after over fifty years of Western liberalization coupled with Chinese traditions, a political and economic culture completely distinct from the PRC has emerged in Taiwan.<sup>81</sup> Taiwan has a representative government, and, moreover, Taiwan has spent long periods of separation from Mainland China throughout history. It was subject to Japanese occupation for many years, and, as a result, has a different cultural framework and background from that of Mainland China.<sup>82</sup> Most important, it seems that the people of Taiwan increasingly perceive themselves as a separate people from the Mainland Chinese.<sup>83</sup> Therefore, the people of Taiwan can likely be considered a “people” under international law. However, that the people of Taiwan may be considered a people does not address the problem of secession.

The main problem when addressing Taiwan’s right to self-determination is that many scholars today, and indeed the PRC, view Taiwanese self-determination as non-colonial self-determination, and thus tantamount to secession, which is discouraged in international law, and

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<sup>75</sup> *Id.*

<sup>76</sup> See Restatement (Third) of Foreign Relations Law §201 (1987); Chen, *supra* note 37, at 243.

<sup>77</sup> Chen, *supra* note 37, at 245-246.

<sup>78</sup> UN Charter arts. 3, 4.

<sup>79</sup> Chen, *supra* note 37, at 246-247.

<sup>80</sup> *Id.* at 244.

<sup>81</sup> Carolan, *supra* note 39, at 464.

<sup>82</sup> *Id.* at 464-465.

<sup>83</sup> Chen, *supra* note 1.

which, as stated above, has not fared well even within the doctrine of self-determination.<sup>84</sup> At least one scholar has asserted that because Taiwan is a *de facto* state, it cannot, by definition, secede from the PRC.<sup>85</sup> This argument ignores political reality.

Most of the world “acknowledges” China’s claim that there is but one China and that Taiwan is not distinct.<sup>86</sup> Whether or not this reflects reality, it is the official position taken by most of the international community. To ignore this and simply declare that Taiwan can “secede” is too simplistic. Others have asserted that Taiwan, due to its democratization, has already achieved internal self-determination and thus, presumably, only asks that the international community acknowledge and respect this fact.<sup>87</sup> Obviously, this hope has yet to come to fruition as most of the international community still views this as self-determination as a form of secession, though it would be ideal. This paper advances another idea for Taiwanese self-determination: Taiwan was a colony even after 1949 and is entitled to the widely accepted right to the anti-colonial form of self-determination.

### 3. Taiwanese Anti-Colonial Self-Determination

Taiwan has been subject to colonization, first by the Europeans and then by the Japanese, for much of its history.<sup>88</sup> Most of the people residing in Taiwan before 1949 had been on the island for many generations due to a great influx of migration primarily during the 18<sup>th</sup> and 19<sup>th</sup> centuries from the Fujian and Guandong provinces of China.<sup>89</sup> These are the people—those who have lived on Taiwan for many generations—that the CIA FactBook and scholars refer to as “Taiwanese” or as the “indigenous” people of Taiwan.<sup>90</sup> After the ROC’s loss of the civil war in 1949, the Kuomintang, with two million supporters that were mostly China’s intelligentsia, relocated to Taiwan, adding about two million people to the island’s then existing Taiwanese population of seven

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<sup>84</sup> Epps, *supra* note 73, at 692-693.

<sup>85</sup> Carolan, *supra* note 39, at 463.

<sup>86</sup> *See Id.* at 438.

<sup>87</sup> *See* Chen, *supra* note 37, at 243; Huang 2001, *supra* note 13, at 211.

<sup>88</sup> *See* Chen, *supra* note 37, at 228-231.

<sup>89</sup> U.S. Department of State, Taiwan, *supra* note 21.

<sup>90</sup> *See* FactBook Taiwan, *supra* note 15; Huang 2001, *supra* note 13. Note that when the author and other scholars refer to the “indigenous” population of Taiwan and the “Taiwanese” people, reference is being made to the people described here and not the indigenous minority population of the island, which has always constituted only a very small percentage of the total population of Taiwan, and today only constitutes about 2% of Taiwan’s total population, FactBook Taiwan, *supra* note 15.

million.<sup>91</sup> The Mainlanders, called *wai sheng ren* ("foreign-province people") by the Taiwanese, became Taiwan's economic and political elite.<sup>92</sup> Today, Taiwan consists of 84% Taiwanese and 14% Mainland Chinese.<sup>93</sup> Therefore, it is important to note that while the people of Taiwan are all ethnically Han Chinese,<sup>94</sup> a distinction exists between the Chinese that arrived in the late 1940s (Mainland Chinese) and the ethnically Chinese people that had resided on the island for several centuries (the Taiwanese).

Kuomintang occupation of the island was considered by the Taiwanese as just another colonial occupation, with sovereignty over the Taiwanese transferred from the Japanese to the Mainlanders.<sup>95</sup> In 1947, before official Kuomintang occupation of Taiwan, the Taiwanese revolted against KMT rule, and what resulted was what has become known as the "2-28 Incident."<sup>96</sup> On February 28, 1947, KMT soldiers massacred about twenty thousand protesting Taiwanese.<sup>97</sup> With the minority Mainland population running the government, the treatment of the Taiwanese, who constituted the vast majority of the population of Taiwan in the decades following 1949, has been likened to apartheid.<sup>98</sup>

The lack of international awareness of the repression of the Taiwanese people and their plight for independence meant that the Taiwanese missed the wave of anti-colonial self-determination after World War II.<sup>99</sup> Undeniably, the situation of the Taiwanese has improved with the advent of democracy in Taiwan, and today the Mainlanders and the Taiwanese are largely integrated, but the fact remains that before the first 1996 elections, the Taiwanese were never asked what *they* wanted—they were never afforded the right to self-determination. Therefore, an argument can be made that the 1996 elections constituted the Taiwanese people's exercise of their right to self-determination from *colonial* rule,

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<sup>91</sup> Carolan, *supra* note 39, at 435.

<sup>92</sup> *Id.*

<sup>93</sup> FactBook Taiwan, *supra* note 15.

<sup>94</sup> Including the Hakka people, and excluding the 2% of the population that are aboriginal and not Han Chinese. See *supra* note 90.

<sup>95</sup> See Department of State, United States Relations with China 309 (1949), cited in Parris Chang & Kok-wei Lim, *Taiwan's Case for United Nations Membership*, 1 UCLA J. INT'L L. & FOREIGN AFF. 393, 410. In 1949, a U.S. State Department's Report stated, "The [Taiwanese] people anticipated sincerely and enthusiastically deliverance from the Japanese yoke. . . . However, [the KMT] ruthlessly, corruptly and avariciously imposed their regime upon a happy and amenable population. . . . There were indications that Formosans would be receptive toward United States guardianship and United Nations trusteeship," *Id.*

<sup>96</sup> Huang 2001, *supra* note 13, at 202.

<sup>97</sup> See Frank Ching, *China, Don't Brand Taiwan's Changes as Independence*, BUSINESS TIMES (SINGAPORE), Mar. 9, 2007; see also Carolan, *supra* note 39, at 435.

<sup>98</sup> See Carolan, *supra* note 39, at 436.

<sup>99</sup> Huang 2001, *supra* note 13, at 202–203.

which, as stated above, has received widespread support from the international community and should therefore be respected.

#### IV. PRC VIOLATIONS OF INTERNATIONAL LAW

As discussed above, Taiwan fulfills the criteria for statehood and is treated as a *de facto* state by the international community and is therefore entitled to all the rights and obligations accompanying statehood. Applying this status to the below discussion, it is clear that the PRC's aggressive actions against Taiwan currently constitute violations of international law and human rights.

Article 2(4) of the U.N. Charter states, "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 United Nations."<sup>100</sup> Non-use of force is a well-established standard of customary international law and is regarded as *jus cogens* from which no derogation is permitted.<sup>101</sup> To use threat or use of force to settle international disputes is considered a violation of international law according to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.<sup>102</sup> This declaration asserts, "No territorial acquisition resulting from threat or use of force shall be recognized as legal."<sup>103</sup> Noted international law treatise author Ian Brownlie defines "threat of force" as "an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal."<sup>104</sup>

The PRC's declarations in its 1993 White Paper, its 2005 Anti-Secession Law, and the military exercises it conducted off the coast of Taiwan, in addition to its continued threats, may constitute "threat of force" under this definition. As Taiwan is entitled to statehood, or alternatively, on account of its status as a *de facto* state, the PRC's threats themselves may be construed to be illegal and in violation of Article 2(4)

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<sup>100</sup> U.N. Charter art. 2, para. 4.

<sup>101</sup> Hsiao, *supra* note 35, at 719. See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 84-90 (June 27).

<sup>102</sup> G.A. Res. 2625 (XXV), at 121, U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>103</sup> *Id.* at 123.

<sup>104</sup> IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 364 (1963). See also *Military and Paramilitary Activities*, 1986 I.C.J. 14, 118 (June 27) (stating that "a 'threat of force' [as with use of force], is equally forbidden by the principle of non-use of force").



of the U.N. Charter.<sup>105</sup> Furthermore, the PRC has persistently interfered with human rights to which the people of Taiwan are entitled as codified in the Universal Declaration of Human Rights (UDHR) and the ICCPR.<sup>106</sup>

Article 21(1) of the UDHR states, “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”<sup>107</sup> As noted above, the ICCPR declares that all people have the right to “self-determination” and to “freely determine their political status.”<sup>108</sup> While the UDHR was signed in 1948 by the ROC,<sup>109</sup> and not by the PRC, and while the PRC has signed the ICCPR,<sup>110</sup> but has consistently declined to ratify it, these human rights conventions, while not binding on the PRC, are evidence of customary international law with regard to human rights.<sup>111</sup>

The PRC blatantly attempted to interfere with the people of Taiwan’s UDHR Article 21(1) right when it conducted military exercises off the coast of Taiwan before the 1996 and 2000 presidential elections in Taiwan. Before the 2004 elections in Taiwan, one senior People’s Liberation Army (PLA) officer stated in firm terms that Beijing would not hesitate to launch a “short and strong” military attack that would

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<sup>105</sup> Even if not given recognition as a *de facto* state, Taiwan, undeniably, at the very least, constitutes a *de facto* entity protected against threat of force by international law, Hsiao, *supra* note 35, at 742.

<sup>106</sup> The PRC’s human rights violations against its own citizens are well documented and will not be addressed here. See generally Human Rights Watch: Asia: China and Tibet, available at <http://hrw.org/doc/?t=asia&c=china> (last visited Mar. 29, 2007); U.S. Dept. of State, *Country Reports on Human Rights Practices: China* (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>.

<sup>107</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), at 75, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

<sup>108</sup> See ICESCR, *supra* note 71, at 49; ICCPR, *supra* note 71, at 52.

<sup>109</sup> Taiwan Affairs Office & Information Office of the State Council, People’s Republic of China, Human Rights Policy White Paper (2002), available at <http://www.gio.gov.tw/taiwan-website/5-gp/2002hr/hr03.htm>.

<sup>110</sup> See United Nations Office of the High Comm’r for Human Rights, International Covenant on Civil and Political Rights (China), available at <http://www.unhcr.ch/tbs/doc.nsf/0/80256404004ff315c125638b005d694c?OpenDocument> (last visited Apr. 17, 2007). See also, Human Rights Watch, China: Nipped in the Bud—Summary and Recommendations, available at <http://www.hrw.org/reports/2000/china/china009.htm>, (last visited Apr. 17, 2007).

<sup>111</sup> See United Nations Ass’n in Canada, Questions and Answers About the Universal Declaration of Human Rights, available at <http://www.unac.org/rights/question.html> (stating that “the United Nations International Conference on Human Rights agreed that the Declaration ‘constitutes an obligation for the members of the international community’ to protect and preserve the rights of its citizenry.”) (last visited on Apr. 17, 2007). The United Nations Office of the High Commissioner for Human Rights reports that there are currently 160 state parties to the ICCPR. Office of the High Comm’r for Human Rights, International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Apr. 17, 2007).

“wake up” the Taiwan people to the consequences of their “pro-independence” actions.<sup>112</sup> Some voters in Taiwan, fearing Beijing’s “anger,” gave KMT candidates a surprise victory in the 2004 legislative elections for the primary reason that the KMT is viewed by Beijing as less antagonistic.<sup>113</sup> Obviously, then, Beijing succeeded, at least to some extent, in interfering with the Taiwan people’s free choice. These tactics used by Beijing during the elections, along with the PRC’s continued refusal to acknowledge any right of the Taiwan people to self-determination, are also clearly in violation of the ICCPR.

## V. INTERNATIONAL COMMUNITY RESPONSE IN THE EVENT OF ARMED ATTACK

Because of Taiwan’s status as a state or *de facto* state, if the PRC were to make good on its threats to use force against Taiwan, it would clearly be in violation of the UN Charter.<sup>114</sup> Moreover, armed attack on Taiwan would be characterized as an “international armed conflict,” and thus trigger the PRC’s obligations under the Geneva Conventions.<sup>115</sup> Because it is unlikely that the Security Council will invoke its Chapter VII powers due to China’s veto power, the General Assembly (GA) could review the situation immediately and make recommendations to GA members with regard to joining Taiwan in collective self-defense. In the landmark 1950 Uniting for Peace Resolution, the GA proclaims:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in case of a breach of the peace or act of aggression the use of armed

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<sup>112</sup> SUTTER, *supra* note 8, at 225-26 & 229 n.51.

<sup>113</sup> See Keith Bradsher & Chris Buckley, *In Taiwan Ballot, Ties With Beijing Seem to Be a Winner*, N.Y. TIMES, Dec. 12, 2004, at N20.

<sup>114</sup> U.N. Charter art. 2, para. 4.

<sup>115</sup> See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Convention (III) relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

force when necessary, to maintain or restore international peace and security.<sup>116</sup>

Use of armed force against Taiwan would entitle Taiwan to either individual or collective self-defense.<sup>117</sup> The international community should aid Taiwan through use of armed force, if necessary, to defend itself against PRC armed attack. It is authorized through the Uniting for Peace Resolution of 1950 to resolve to ask its members to use collective measures to restore peace in the event of Security Council inaction. At the very least, the international community should, through collective action, closely monitor the conflict to ensure that the PRC complies with its Geneva Convention obligations.

Although the U.S. has never stated whether it would come to Taiwan's defense in the event of an armed attack by the PRC, the TRA affirmed the U.S.'s intent to provide for Taiwan's security and defense.<sup>118</sup> In the event of an armed attack by the PRC, the U.S. should continue to provide for Taiwan's security and defense by sending military aid to Taiwan. Inaction on the part of the international community in reaction to an armed attack by the PRC on Taiwan would be unthinkable and unacceptable. However, as discussed below, armed conflict does not have to be inevitable.

## VI. FREE AND FAIR ELECTIONS

As the UDHR and the ICCPR both proclaim, a basic human right is the right of "everyone" to freely choose their representatives.<sup>119</sup> With this basic human right in mind, this paper suggests another solution to the Taiwan issue: The people and government of Taiwan should declare that they will reunite with the PRC, and concede that there is but one China under one condition—that the PRC agree to internationally monitored, free and fair elections to allow *all* the Chinese people to decide their government. If pursued, this solution would allow the Chinese Communist Party (CCP), if it won, to demonstrate to the international community that it is, in actuality, the legitimate government of all the Chinese people. Furthermore, this solution would still allow the people of Taiwan to retain their freedom of choice.

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<sup>116</sup> Uniting for Peace, G.A. Res. 377A (V), at 10, U.N. Doc. A/RES/377(V) (Nov. 3, 1950).

<sup>117</sup> U.N. Charter art. 51.

<sup>118</sup> Colin P.A. Jones, *United States Arms Exports to Taiwan Under the Taiwan Relations Act: The Failed Role of the Law in United States Foreign Relations*, 9 CONN. J. INT'L L. 51, 57 (1993).

<sup>119</sup> See UDHR, *supra* note 107, at art. 21; ICCPR, *supra* note 71, at art. 25.

Free and fair elections could be monitored by an organization such as the Carter Center. The Carter Center is a non-profit organization that states as its goals to “build politically capable states that respect international human rights obligations and to foster inclusive democratic societies, with governments and citizens that fulfill responsibilities and enjoy rights.”<sup>120</sup> The Center accomplishes these goals by observing elections, aiding countries in strengthening democracy, and disseminating models, lessons and best practices for democratic governance.<sup>121</sup> It worked with the UN Electoral Assistance Division and the National Democratic Institute to develop international standards for election monitoring.<sup>122</sup> The Carter Center has observed elections in a number of countries, including the PRC with its local township and village elections, as well as the self-determination referendum of East Timor in 1999.<sup>123</sup>

Internationally monitored, free and fair elections like those monitored by the Carter Center ensure impartiality and assure voters that they can safely and securely cast their ballots. The Carter Center has done this on a number of occasions.<sup>124</sup> With free and fair, internationally monitored elections, it is unlikely that either the PRC or the government of Taiwan will have cause to dispute the results. The result of such an election would truly be a united China. China would be the largest democracy in the world. Whatever rhetoric the PRC espouses about being “socialist with Chinese characteristics,” it has clearly abandoned communism—it is simply a totalitarian regime that has adopted capitalism.<sup>125</sup> Having already abandoned communism, it seems reasonable for the PRC to move towards democracy by allowing all the Chinese people, including those in Taiwan and Hong Kong, to exercise the rights guaranteed them under international human rights instruments. Agreeing to free and fair elections would increase the CCP’s and PRC’s international status and legitimacy. If the CCP refuses this, how can it truly claim to be the legitimate government of all the Chinese people?

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<sup>120</sup> The Carter Center, <http://www.cartercenter.org/peace/democracy/index.html> (last visited Apr. 4, 2007) [hereinafter Carter Center].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Carter Center, Election Reports, [http://www.cartercenter.org/news/publications/election\\_reports.html#china](http://www.cartercenter.org/news/publications/election_reports.html#china) (last visited Apr. 4, 2007).

<sup>124</sup> *Id.*

<sup>125</sup> Since 1979, China has implemented economic reforms aimed at a market economy. However, according to the U.S. Department of State, “[t]he 70.8 million member CCP, authoritarian in structure and ideology, continues to dominate government,” and “[t]he Chinese Government has always been subordinate to the Chinese Communist Party (CCP); its role is to implement party policies.” U.S. Dept. of State, Bureau of Asian and Pacific Affairs, China (Jan. 2007), available at <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

It should be noted that objection to this proposal would most understandingly come from the people of Taiwan. Even with Taiwan's population of approximately 23 million added to Hong Kong's population of 6.9 million,<sup>126</sup> and assuming that the aggregate population of both Taiwan and Hong Kong all vote for candidates from a party other than the CCP, their votes would be entirely drowned out by the CCP's 70.8 million members.<sup>127</sup> Most of the PRC's population of 1.3 billion live in rural areas,<sup>128</sup> and are probably less likely to vote than CCP members. Granting the Chinese that live in rural areas the right to vote does not ensure that they will vote. However, 70.8 million is small in comparison to the PRC's total voting-age population. Mobilization and education of the Chinese that live in rural areas, along with the mobilization and education of China's emerging middle class will be the key to quelling Taiwan's fears and ensuring a truly free and fair election in the eyes of the people of Taiwan. The Carter Center could, through their democracy education programs, work over the next several years to educate potential voters on the democratic process. After several years time, the PRC may have a voting population that does not only consist of proclaimed CCP members, and the time may then be right to conduct an election that is truly free and fair.

Finally, it should be emphasized that solving the Taiwan issue through internationally monitored, free and fair elections is in the interest of the international community not only because free and fair elections can prevent the use of force to achieve unification of Taiwan and the PRC, but because it will also immeasurably increase global security. As it stands, global peace and security is dictated, at least to a certain degree, by the whims of a totalitarian regime that does not seem to care about what the international community thinks of it.<sup>129</sup> If a free and fair election is instituted in the PRC and Taiwan, and a democracy established

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<sup>126</sup> See U.S. Department of State, Taiwan, *supra* note 21; United States Dept. of State, Bureau of East Asian and Pacific Affairs, Hong Kong, available at <http://www.state.gov/r/pa/ei/bgn/2747.htm> (last visited Mar. 31 2007).

<sup>127</sup> United States Dept. of State, Bureau of East Asian and Pacific Affairs, China, available at <http://www.state.gov/r/pa/ei/bgn/18902.htm> (last visited Mar. 31 2007). Note that the author does not assert that all CCP members would necessarily vote for the CCP in an election conducted by secret ballot. However, it seems highly probable that a substantial majority of CCP members would vote for CCP candidates, or at least this would be the fear of voters in Taiwan.

<sup>128</sup> *Id.*

<sup>129</sup> Examples as evidence of this include: The PRC's recent 2007 launch of missiles into space. See Joseph Kahn, *China Confirms Space Test; Denies Intent To Intimidate*, N.Y. TIMES, Jan. 24, 2007, at A8. The Tiananmen Square massacre of 1989. See Jesse Birnbaum & Howard G. Chua-Eoan, *Despair and Death In a Beijing Square*, TIME MAG., June 12, 1989, at 24.

in a united China, the world's fate will no longer be dictated by the whims of the CCP. Together, all the Chinese people would finally be able to hold the government of the PRC accountable to its people, and to the world. The Chinese people would decide, through elections, China's future course.

## VII. CONCLUSION

Taiwan fulfills all the criteria for statehood under international law. Even if denied official recognition by the majority of the international community, it cannot be denied that it is a *de facto* state. It is clear, therefore, that Taiwan is entitled to all the rights afforded states. The PRC currently is in violation of international law regarding threat of force and human rights that the people of Taiwan are entitled to under the UDHR and the ICCPR. If the PRC launches an armed attack against Taiwan, it will violate the principal purpose of the UN Charter—non-use of force. In the event of such an attack, the PRC will be subject to compliance with the Geneva Conventions and the international community must ensure its compliance with the Conventions. Taiwan will be entitled to collective self-defense and the international community or the U.S. should come to its aid. Finally, to prevent use of force on the part of the PRC, and as a new solution to the issue of Taiwan, Taiwan should agree to reunification with the PRC on one condition—that all the Chinese people vote in internationally monitored, free and fair elections to determine the government of a united China. This may be the only feasible solution to maintain global security and stability.

In 2005, a PLA general stated at a function for foreign journalists, "If the Americans draw their missiles and position-guided ammunition on to the target zone on China's territory, I think we will have to respond with nuclear weapons."<sup>130</sup> General Zhu Chenghu was commenting on the PLA's response to the U.S. in the event of a confrontation over Taiwan.<sup>131</sup> Whether reflecting majority opinion within the PLA or not, General Zhu Chenghu's words are outrageous and illustrate the PRC's indifference towards international opinion and the rule of law. They also illustrate the importance of resolving the Taiwan issue, both for the fate of the people of Taiwan and global security.

An armed attack on Taiwan would clearly be illegal. If international law is to mean anything in the 21<sup>st</sup> Century, it must stand for

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<sup>130</sup> Alexandra Harney, Demetri Sevastopulo & Edward Alden, *Top Chinese General Warns US Over Attack*, FINANCIAL TIMES, July 15, 2005, available at <http://www.ft.com/cms/s/28cfe55a-f4a7-11d9-9dd1-00000e2511c8.htmlz>.

<sup>131</sup> *Id.*

rule of law. Rule of law will cease to exist if the international community stands by and does nothing to stop use of force by the PRC against Taiwan. The international community must send a message to the PRC that flagrant violations of international law will not be tolerated. Taiwan is the first democracy that the Chinese people have ever had in their over two-thousand year history. As the recent scandals involving Chen Shui-bian have come to light, it is clear that Taiwan's system is not perfect.<sup>132</sup> However, it is a government of the people's choice, and until the PRC tries to crush it with its military might, Taiwan's fate and its government will remain in the hands of its people. It is the duty of the international community to encourage the growth and development of this fledgling democracy. If human rights are to mean anything, and if global security and stability are to be maintained, the international community cannot sell Taiwan down the river.

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<sup>132</sup> *Taiwan's Chen In Corruption Case*, BBC NEWS ONLINE, Nov. 3, 2006, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6112668.stm>.

