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Why Europe Should Stand Up for Taiwan:

A Question of International
Law, Interests, and Values

Abstract:

In recent years, China has become increasingly impatient with the status quo in Taiwan. Chinese President Xi Jinping stressed that the Taiwan issue cannot be passed down from generation to generation. This concerns the EU, as the growing tensions between China and Taiwan coincide with the new lows of the relationship between the West and China. Many experts agree that the risk of the Taiwan question sparking a major great-power conflict in the next decade has increased dramatically. It remains to be seen whether and to which extent Russia's invasion into Ukraine will influence China dealings with Taiwan, also considering the close ties between Moscow and Beijing. EU should strive to maintain the status quo, since a military conflict over Taiwan would have strong negative effects on European security, economy, and prosperity, as well as signaling that authoritarianism has an 'upper-hand' on democracy and rule of law – foundational principles which the EU vowed to promote and safeguard.



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Historical roots of the Taiwan issue

The current Republic of China (ROC) is a territorial entity that exercises power over Taiwan in a broad sense, that is, Taiwan, Penghu, Kinmen, Matsu, and a number of other insular territories. These territories – totalling 36,197 sq. km – are located in the Pacific Ocean between Japan and the Philippines, and are home to approximately 23.5 million people. The island of Taiwan (Formosa), whose capital is Taipei, is located about 153 km (95 miles) from the south-eastern coast of Mainland China, from which it is separated by the Taiwan Strait.

The current (Taipei-based) ROC should not be confused with the historical ROC, which was founded on 1 January 1912 after the fall of the Chinese Empire. From 1927 onwards, the ruling Kuomintang (KMT) and the Chinese Communist Party (CCP) were involved in a civil war, which was interrupted only by the Second Sino-Japanese War (1937–45). The Chinese Civil War ended with the CCP gaining control over the entire Chinese mainland and the proclamation of the People's Republic of China (PRC) on 1 October 1949. Chiang Kai-shek, the leader of the KMT, fled with the remnants of his armed forces and the party elite to Taiwan. The seat of the 'Nationalist' government was thus moved to Taipei. Of the territories belonging to China at the time of the proclamation of the ROC in 1912, the Nationalist government controlled only the mini-archipelagos of Kinmen and Matsu, located near the Chinese mainland. It lost the island of Hainan in the South China Sea in May 1950.

Taiwan and the archipelago of Penghu (Pescadores), located about 45 km south-west of Taiwan, had been Japanese territory since the Treaty of Shimonoseki came into force in 1895, after the First Sino-Japanese War. Only after the Japanese defeat in World War II did they come under Chinese rule again. On 25 October 1945, the Japanese surrender in Taiwan was accepted on behalf of the ROC. Shortly thereafter, the island was proclaimed a Chinese province, although the ROC was allowed to exercise its power over Taiwan only as an agent of the four Allied Powers mentioned in General Order No. One, issued by the Supreme Commander for the Allied Powers, Douglas MacArthur, after the Japanese Instrument of Surrender was signed on 2 September 1945.¹

1 Supreme Commander for the Allied Powers (1945), 'General Order No. One', 2 September, www.taiwandocuments.org/surrender05.htm, para. 1(a). The order read that the Japanese forces had to surrender to 'commanders acting on behalf of the United States, the Republic of China, the United Kingdom and the British Empire, and the Union of Soviet Socialist Republics, as indicated hereafter or as may be further directed by the Supreme Commander for the Allied Powers', and that '[t]he senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria) [and] Formosa [...] shall surrender to Generalissimo Chiang Kai-shek'.

The international community assumed that it was only a matter of time before Taiwan would be conquered by the communists.² The United States too seemed to be resigned to Taiwan being incorporated into the state of China – embodied by the PRC – in accordance with the Cairo Declaration made during World War II.³ The outbreak of the Korean War in June 1950 changed the whole picture. US President Harry S. Truman called an occupation of Taiwan by communist forces a direct threat to the Pacific and to the United States.⁴ This also explains why the Treaty of San Francisco – the peace treaty between Japan and most of the Allies, signed on 8 September 1951 – only provided that ‘Japan renounces all right, title and claim to Formosa and the Pescadores’,⁵ thus ending Japanese sovereignty over Taiwan and Penghu without assigning these territories to another state.

Before and after the entry into force of that treaty on 28 April 1952, the KMT-led Taipei regime continued to call itself the ‘Republic of China’. It still claimed to be the legitimate government of China and regarded Taiwan as a base for the reconquest of Mainland China.⁶ Even after the loss of its seat in the United Nations to the PRC in 1971, the Taipei regime adhered to its claim of being the government of China. However, its expulsion from the UN resulted in more and more countries recognising the PRC and breaking off diplomatic relations with the ROC. The credibility of the Nationalist government’s claim to represent China was dealt a final blow in 1979, when the United States also recognised the PRC as the sole legitimate government of China. Today, the ROC is only recognised by fourteen states, mainly microstates and economically weak countries.

Growing concerns about peace and stability in the Taiwan Strait

Whereas the ROC admitted in the 1990s that it did not have jurisdiction over Mainland China and announced that it would no longer compete with the PRC to represent China internationally, the latter still holds that there is only one China and that Taiwan is an integral part of it. Moreover, Beijing has never ruled out the use of force to ‘reunite’ the ‘renegade province’ with the motherland, although it continues to assert that it prefers peaceful unification under the ‘one country, two systems’ formula, which means that Taiwan would become

2 M. Neukirchen (2004), *Die Vertretung Chinas und der Status Taiwans im Völkerrecht: Unter besonderer Berücksichtigung der historischen Entwicklung und der Haltung der Vereinten Nationen* (Baden-Baden: Nomos), p. 77.

3 The Cairo Declaration, announced on 1 December 1943 by British Prime Minister Winston Churchill, US President Franklin Delano Roosevelt, and Generalissimo Chiang Kai-shek, stipulated that it was their purpose that ‘all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China’. See www.taiwandocuments.org/cairo.htm.

4 J. Manthorpe (2009), *Forbidden Nation: A History of Taiwan* (New York: Palgrave Macmillan), p. 195.

5 Treaty of Peace with Japan, September 8, 1951 (1952), United Nations Treaty Series, 136(1832): 46, <https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf>.

6 Neukirchen, *Die Vertretung Chinas*, p. 308.

a special administrative region of the PRC. In recent years, China has become increasingly impatient with the status quo. Chinese President Xi Jinping stressed that the Taiwan issue cannot be passed down from generation to generation.⁷

In addition to the arsenal of approximately 1,500 ballistic missiles aimed at Taiwan and the exercises regularly held by the People's Liberation Army (PLA) to simulate an invasion, the PLA has bombers circling the island at regular intervals and Chinese military planes make incursions into Taiwan's Air Defense Identification Zone on an almost daily basis. The PLA's incremental grey-zone operations have raised concerns about peace and stability in the Taiwan Strait. Over the past two decades, the military balance of power in the strait has unmistakably tilted in

favour of the PRC as a result of the large-scale modernisation of the PLA.

The growing tensions between China and Taiwan coincide with the relationship between the US and the PRC reaching a new low.

Although it may seem an exaggeration to call Taiwan '[t]he most dangerous place on earth', as The Economist's cover did in May 2021,⁸ many observers agree that the risk of the Taiwan question sparking a major great-power conflict has increased dramatically. For instance, Admiral Phil Davidson, commander of the United States Indo-Pacific Command between 2018 and 2021, warned the US

Senate Armed Services Committee in 2021 of the likelihood of a Chinese attempt to seize Taiwan during this decade, in fact in the next six years.⁹ It remains to be seen whether and to which extent the course of events regarding the Russian invasion of Ukraine will have an impact on how China deals with Taiwan, also in light of closer ties between Russia and the PRC.

The following sections explain why the EU and its member states should stand up for the preservation of the status quo in the Taiwan Strait. International law, European interests, and European values all require this.

7 R. C. Bush (2019), 'Order from chaos. 8 key things to notice from Xi Jinping's New Year speech on Taiwan', Brookings, January 7, www.brookings.edu/blog/order-from-chaos/2019/01/07/8-key-things-to-notice-from-xi-jinpings-new-year-speech-on-taiwan/.

8 'The Most Dangerous Place on Earth', (2021), The Economist, 1 May, <https://www.economist.com/leaders/2021/05/01/the-most-dangerous-place-on-earth>.

9 M. Shelbourne (2021), 'Davidson: China Could Try to Take Control of Taiwan in "Next Six Years"', USNI News, 9 March, <https://news.usni.org/2021/03/09/davidson-china-could-try-to-take-control-of-taiwan-in-next-six-years>.

International law is on Taiwan's side

My PhD thesis dealt with the international legal status of Taiwan.¹⁰ It found that the Treaty of Shimonoseki (1895) was legally valid, and therefore effected the cession of Taiwan and Penghu to Japan. China never regained sovereignty over these territories after the entry into force of that treaty. When the Treaty of San Francisco came into force on 28 April 1952, Japanese sovereignty over Taiwan and Penghu ended definitively through *derelictio*, without their being ceded to China or becoming a condominium of the Allied States parties to that treaty. The *derelictio* by Japan resulted in Taiwan and Penghu becoming *terrae nullius*, without these territories automatically reverting to China as the previous sovereign authority. China did not regain them through occupation either. In this regard, it is important to stress that, since the proclamation of the PRC on 1 October 1949, the state of China was continued and represented only by the PRC, which exercised effective control over virtually all the territory that belonged to China when the ROC was founded on 1 January 1912. Therefore, the effective control that the ROC had exercised over Taiwan and Penghu since October 1945 could no longer be attributed to the state of China when the Treaty of San Francisco entered into force.

My dissertation concluded that the Taipei-based ROC qualifies as a state, distinct from the state of China, with Taiwan in a broad sense as its territory. Here, I used the following definition of a state as a subject of international law:

An entity may be regarded as a state if it possesses its own institutional system that is not subject to any other institutional system and that exercises sustainable, effective control over a population living permanently within a defined geographical space, on the basis of its own legal order that is subordinate only to international law and otherwise is the exclusive source of all law applicable within that space, save where that entity has been established as a direct result of the unlawful use of force or has been specifically established to enable the systematic violation of peremptory norms of international law (*ius cogens*).¹¹

It would go beyond the scope of this article to discuss in detail the different components of this definition. I will only comment on a criterion that is not included in it and which is mentioned almost exclusively in conjunction with the international legal status of Taiwan: the so-called will to statehood, meaning that an entity can only be considered a state if it wants to be a state and claims statehood. Although the ROC has acknowledged since the 1990s that it does not exercise jurisdiction over Mainland China, it still does not consider itself

10 W. Somers (2020), *De staat van Taiwan. Een volkenrechtelijke analyse* (Oisterwijk: Wolf Legal Publishers). An updated, revised, and expanded English version of this book will be published later this year with Brill Academic Publishers as part of the series *Geopolitics and International Relations*.

11 Somers, *De staat van Taiwan*, p. 446.

unequivocally as a state distinct from the state of China, whose territory includes only Taiwan in a broad sense. For example, the so-called Additional Articles of the ROC constitution show that the Taipei-based ROC formally also includes the PRC-controlled mainland in its territory.

However, the will to statehood is not usable as a criterion that entities should satisfy in order to qualify as a state. Entities do not have a 'will' in a real, psychological sense, since they do not possess a brain and therefore consciousness. Nor can the will to statehood be identified with the 'state will' in the sense of a legal construct that allows certain acts to be attributed to the state. If the will to statehood were equated with the state will thus understood, an entity could never become a state, since it cannot possess a state will before it is a state. Since the will to statehood is not a useful criterion for statehood, no significance comes from the fact that the Taipei-based ROC still does not unambiguously conceive of itself as a Taiwanese state distinct from China. Moreover, to the extent that it would nevertheless be assumed that the will to statehood is a criterion that entities must meet in order to qualify as a state, it is important to note that since the proclamation of the PRC in 1949, the Taipei-based ROC has always stressed that it is a sovereign state and has never submitted to the PRC. It can therefore be considered to demonstrate the general 'will to statehood', understood as the expression of the fact that the entity in question claims sovereignty and recognises no superior above it.

To require the Taipei-based ROC to also express the specific will to be a state distinct from the state of China by means of a formal declaration of independence would be to misunderstand the fact that China lost sovereignty over Taiwan and Penghu upon the entry into force of the Treaty of Shimonoseki, and that it has never regained sovereignty over those territories since then. A declaration of independence would not only be superfluous, but would also lend legitimacy to the PRC's claim to Taiwan and Penghu by implying that sovereignty over those territories hitherto rested with China.

Thus, even if the will to statehood was a criterion that an entity would have to meet in order to qualify as a state, it would not preclude the qualification of the Taipei-based ROC as a state. Since the island of Taiwan represents more than 99% of the total area of the territories controlled by this state, it is essentially an independent

Taiwanese state. After the Nationalist retreat to Taiwan in 1949, the ROC had no territory of its own since Taiwan and Penghu were still *de iure* Japanese territory, while Kinmen and Matsu were *de iure* part of the state of China. It was only

Moreover, a very likely consequence of a declaration of independence would be that the PRC would attempt to undo the 'secession' of Taiwan militarily.

bestowed with a territory of its own when Japanese sovereignty over Taiwan and Penghu ended through derelictio as a result of the entry into force of the Treaty of San Francisco in 1952.

As the current ROC is a sovereign state, international law prohibits a unilateral change of the status quo by the PRC. Annexation has not been a valid means of acquiring territory since, at the very latest, the entry into force of the Charter of the United Nations on 24 October 1945. Article 2(4) of the UN Charter provides that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'. The prohibition on the use of force is also part of customary international law,¹² and it even has the status of *ius cogens*. The prohibition on annexation is but a corollary of the prohibition on the use of force against the territorial integrity or political independence of states. It doesn't matter that the ROC (Taiwan) is not recognised by the vast majority of states and is not a member state of the UN, since neither recognition by third states nor UN membership is a prerequisite for statehood.

Preserving the status quo is in Europe's best interest

For Europe, the ideal course would be to stand up for the preservation of the status quo: Taiwan as a sovereign state distinct from the PRC. As the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy point out, the region 'is home to three-fifths of the world's population, produces 60% of global GDP, contributed two-thirds of pre-pandemic global economic growth and is at the forefront of the digital economy'.¹³ Trade exchanges between the Indo-Pacific and Europe reached EUR 1.5 trillion in 2019.¹⁴ The Indo-Pacific includes waterways that are crucial to EU trade and is the second-largest destination for exports from the EU.¹⁵ Therefore, the maintenance of regional peace and stability is of paramount importance for Europe.

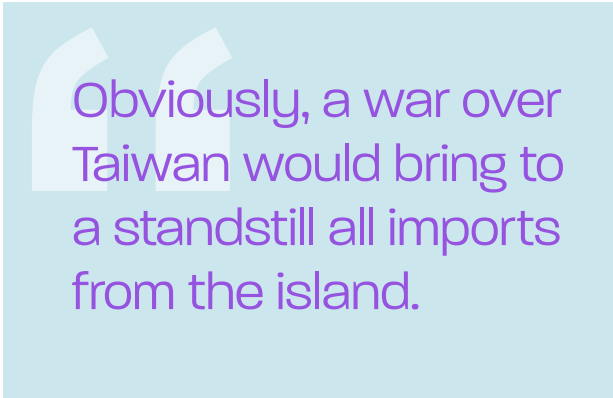
12 See International Court of Justice (1986), 'Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)', judgment of 27 June, ICJ Reports, <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>, para. 190, p.100.

13 European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (2021), 'The EU Strategy for Cooperation in the Indo-Pacific,' Joint Communication to the European Parliament and the Council, 16 September, https://ec.europa.eu/info/sites/default/files/jointcommunication_indo_pacific_en.pdf, p.1.

14 Ibid., p. 1.

15 Ibid., pp. 1–2.

A military conflict over Taiwan would have strong negative effects on European security and prosperity. Such a conflict would not be confined to China and Taiwan, but would almost certainly involve the United States, Japan, and perhaps other allies in the region that are important economic partners of the EU.¹⁶ Moreover, a great-power war between China and the US, resulting from an attempted invasion of Taiwan, could be protracted. Thus, it would be wrong for Europe to assume that a Taiwan contingency is some faraway story. It is not hard to imagine that a war over Taiwan would precipitate a global recession or even depression. In a large part, international trade would come to a halt and global supply chains would break down for a long time. After the end of the war, it could take several years for the world economy to recover.



Obviously, a war over Taiwan would bring to a standstill all imports from the island.

In particular, this would have detrimental consequences for the European economy because of the crucial role Taiwan plays in the global semiconductor supply chain. Taiwan's contract manufacturers account for more than 60% of total global foundry revenue. Much of this dominance is due to the Taiwan Semiconductor Manufacturing Company (TSMC),

the largest contract chipmaker in the world. It produces nearly 90% of the world's most advanced chips, which are of vital importance for the development of cutting-edge technologies such as artificial intelligence and autonomous vehicles. Insufficient manufacturing capacities have given rise to a global shortage of semiconductors. Sectors hit by this microchip shortage include the automotive and consumer electronics industries.

Not only would a prolonged interruption of the supply of microchips from TSMC and other Taiwanese foundries as a result of war have dramatic consequences for EU industries, but there is also the risk of Taiwan's semiconductor manufacturing facilities being destroyed by acts of war. On the other hand, if the island's semiconductor industry were to emerge unscathed from war and fall into the hands of the PRC, the EU would become strategically dependent on Chinese semiconductor production, which would give the CCP the ability to threaten the EU with chip shortages and to increase prices.

16 See A. Bondaz and B. Tertrais (2021), 'Europe Can Play a Role in a Conflict Over Taiwan. Will It?', *World Politics Review*, 23 March, www.worldpoliticsreview.com/articles/29515/europe-can-help-prevent-a-taiwan-war.

Litmus test of Europe's commitment to peace and democracy

The EU's core values would also require it to discourage the PRC from seizing Taiwan by force. Pursuant to Article 2 of the Treaty on European Union (TEU), the EU is founded on values such as freedom, democracy, and the rule of law. According to Article 3(1) of the TEU, its aim is to promote peace and its values, among other things. Moreover, Article 21(1) of the TEU provides that the Union's action on the international scene shall be guided by 'the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world', including democracy, the rule of law, human rights and fundamental freedoms, and respect for the principles of the United Nations Charter and international law. Any unilateral change of the status quo in the Taiwan Strait by the PRC would be at variance with those values and principles.

Taiwan is a thriving democracy that fully respects the rule of law, human rights, and fundamental freedoms. In the 2021 edition of its Democracy Index, the Economist Intelligence Unit lists Taiwan as one of the twenty-one full democracies in the world and ranked it the eighth most democratic out of 167 countries surveyed.¹⁷ In turn, Freedom House lists Taiwan as 'free' with an overall score of 94/100.¹⁸ The Taiwanese political miracle – the transition of the ROC from an authoritarian one-party state under the absolute rule of the KMT to a full-fledged democracy – shows that democracy can also flourish in a predominantly Chinese society.

Surrendering Taiwan would have implications well beyond the Taiwan Strait and would indicate that democracy is not considered something worth fighting for. Therefore, the preservation of Taiwan's sovereignty and democracy can arguably be considered a common interest and shared responsibility of all democratic states. As incumbent ROC President Tsai Ing-wen puts it, Taiwan is on the frontline between democracies and autocracies.¹⁹ She emphasises that 'if Taiwan were to fall, [it] would signal that in today's global contest of values, authoritarianism has the upper hand over democracy'.²⁰ Europe's commitment to peace and democracy would turn out to be empty if it failed to stand up for the survival of the island's sovereignty and democracy.

17 The Economist Intelligence Unit, Democracy Index 2021. The China Challenge, February 2022, p. 12, Table 2.

18 Freedom House (2021), 'Freedom in the World 2021: Countries & Regions', <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege/countries-and-regions>.

19 I. Tsai (2021), 'Taiwan and the Fight for Democracy: A Force for Good in the Changing International Order', *Foreign Affairs*, 100(6): 82.

20 Ibid., p. 75.

Recommendations

Endorsing a 'one China, one Taiwan' policy

The present policy of strategic ambiguity should gradually be replaced with a policy of strategic clarity. As a first step, the EU and its member states must refrain from making statements implying that Taiwan is *de iure* part of the PRC. The next step is the issuance of a statement that Taiwan is not a part of that state, which means clearly rejecting the Chinese claim to sovereignty over the island and endorsing a policy of 'one China, one Taiwan'. This statement should reiterate the recognition of the PRC as the sole legitimate government of China, which means upholding the One China policy.

Increasing the price the PRC would have to pay for seizing Taiwan by force

The EU and its member states should use every opportunity to make it plain that Taiwan's fate can only be determined by peaceful means. The best way to preserve Taiwan's sovereignty and democracy while at the same time preventing war is to increase to an unacceptable level the price the PRC would have to pay for attempting to unilaterally change the status quo. The domestic legitimacy of the CCP hinges on its economic performance and its ability to improve its citizens' standard of living. As China's largest trading partner, the EU has considerable economic leverage over the PRC. EU member states should agree on and announce a set of substantial economic sanctions to be imposed on China if it were to invade Taiwan, blockade the island or otherwise use force against it. Because the EU would also suffer from an interruption of trade with China, efforts to make supply chains more resilient and reduce strategic dependencies on China must be accelerated.

Expanding contacts with Taiwan and supporting its international participation

The EU and its member states should expand contacts with the Taiwanese authorities and people. For example, the member states should agree to lift the *de facto* ban on private visits to Europe by high-ranking Taiwanese politicians such as the president, prime minister, and foreign minister. In addition, specific programmes should be set up to promote people-to-people interactions in the fields of education, science, culture, and so on. Economic ties should be deepened by negotiating an EU–Taiwan bilateral investment agreement. Finally, the EU and its member states must vehemently support Taiwan's participation in international organisations such as the World Health Organization or the

International Civil Aviation Organization. Another way in which the EU and its member states can expand the international space available to Taiwan is by participating or increasing their participation in the Global Cooperation and Training Framework, a multilateral platform established in order to utilise Taiwan's strengths and expertise to address global issues of mutual concern. ■

Author bio

Werner Somers earned a PhD in international law through the completion of a thesis on the international legal status of the Republic of China (Taiwan), defended successfully at the Open University (Netherlands) in November 2020. He also holds a LLM from the same university and a MA (Germanic philology) from Ghent University (Flanders). Since October 2014, he has been working as a lawyer-linguist at the Court of Justice of the European Union, where he also acts as the quality advisor of the Dutch-language Translation Unit. An updated, revised, and expanded English version of his PhD thesis, which was written in Dutch (*De staat van Taiwan. Een volkenrechtelijke analyse*, www.wolfpublishers.eu/de-staat-van-taiwan), will be published later this year with Brill Academic Publishers as part of the series *Geopolitics and International Relations*.

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