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ARTICLE: Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?

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SUMMARY:

... However, the conflict between the People's Republic of China (PRC) and Taiwan over the issues of the reunification of the state of China and the international legal status of Taiwan continues to show strain. ... Some writers have unequivocally argued that any threat or use of force by the PRC against Taiwan would constitute a violation of international law. ... Hence, this Article attempts to explore this question by reference to the international law governing the use of force and the current international legal status of Taiwan. It will be argued that the policy of the PRC to use force against Taiwan as an ultimate means to impose unification contravenes the principle of non-use of force in international law. This is because Taiwan constitutes a de facto entity that, like a state, is protected by the principles of international law regarding non-use of force. ... On the contrary, the international community has been known to tolerate use of force by a state against a de facto entity if such an action is based on the state's claim of territorial integrity which has been recognized by the international community as a whole. ... It is felt that an inquiry into the question of whether Taiwan constitutes a de facto entity for the purpose of the application of the principle non-use of force would suffice. ...

TEXT-1:

[*715] I. INTRODUCTION

The early years since the end of the Cold War were marked by a degree of optimism. n1 However, the conflict between the People's Republic of China (PRC) and Taiwan over the issues of the reunification of the state of China and the international legal status of Taiwan continues to show strain. The PRC has repeatedly reiterated that it reserves the right to take over Taiwan by force, and has taken action to demonstrate its determination on more than one occasion during the last two years. n2 That the PRC would resort to military measures to resolve the [*716] long-standing controversy across the Taiwan Strait has been considered as a likely event by the Taiwanese authorities and the inhabitants. The issue has also become one of the most immediate security concerns of other states in the Asian Pacific region. Some writers have unequivocally argued that any threat or use of force by the PRC against Taiwan would constitute a violation of international law. n3 But most international law jurists have remained silent about this issue. In fact, the whole question concerning the legality of the PRC's policy under international law has been left almost untackled. What are perceived as theoretical difficulties, resulting from the controversial international legal status of Taiwan at present, further deter any efforts at substantial discussion.

Despite that, it is believed that increased tensions in the Taiwan Strait and East Asia calls for consideration about whether it is justifiable under international law for China to maintain its policy to use force in order to achieve unification. Hence, this Article attempts to explore this question by reference to the international law governing the use of force and the current international legal status of Taiwan. n4 It will be argued that the policy of the PRC to use force against Taiwan as

an ultimate means to impose unification contravenes the principle of non-use of force in international law. This is because Taiwan constitutes a de facto entity that, like a state, is protected by the principles of international law regarding non-use of force.

[*717] II. THE PRC'S POLICY TO USE FORCE AGAINST TAIWAN

Since the Chinese communists gained the control of the Chinese mainland and proclaimed the PRC in 1949, relations between the PRC and Taiwan have passed through three different phases: the period of all-out war (1949-1958); the period of sporadic military threats (1958-1978); and the period of strategic peace/armed force (1979 to the present).ⁿ⁵ While tension between the two rival regimes seems to have eased from the surface after 1978, what has remained unchanged is that China has persisted in its policy to use armed force to regain Taiwan. A brief review of this policy follows.

The former Chinese leader, Deng Xiaoping, believed that any political negotiation must be backed by military capacity. China should not promise not to attack Taiwan lest negotiations might face indefinite resistance.ⁿ⁶ In 1985, the authority of the PRC admitted that the main reason that had prevented it from using armed forces against Taiwan was a lack of economic power. Pending the economic development and modernization, the PRC would enforce a blockade against Taiwan if it continued to resist reunification.ⁿ⁷ In 1993, the PRC published a White Paper entitled *The Taiwan Question and the Reunification of China*,ⁿ⁸ which remains to be the most comprehensive policy statement from the PRC on these issues to date.

In this document, the principal positions of the PRC have been underlined. First, Taiwan forms an integral part of China, although it has been separated from the Chinese mainland since 1949 as a result of the Chinese civil war.ⁿ⁹ Second, peaceful reunification should be achieved according to the "one country, two systems" formula, according to which, Taiwan would become a special administrative region of the PRC, with a high degree of autonomy.ⁿ¹⁰ It may have some international competence and enjoy some rights in foreign affairs.ⁿ¹¹ Nonetheless, [*718] the PRC forcefully opposes any other options which may imply Taiwan as a state.ⁿ¹² Third, the PRC reiterates that the Taiwan issue is purely an internal matter with which no third states should interfere.ⁿ¹³

Within this context, the policy to use force against Taiwan was upheld in 1993 in the White Paper, which states in part that:

Peaceful reunification is a set policy of the Chinese Government. However, any sovereign state is entitled to use any means it deems necessary, *including military ones*, to uphold its sovereignty and territorial integrity. The Chinese Government is under no obligation to undertake any commitment to any foreign power or people intending to split China as to what means it might use to handle its own domestic affairs.ⁿ¹⁴ In short, the PRC has rationalized such a policy by relying on the principle of territorial integrity under international law and political necessity.

It has been suggested that the situations in which the PRC might resort to armed force against Taiwan are as follows: (1) if Taiwan declared independence; (2) if there were large scale social instability in Taiwan; (3) in the event of an apparent decline in Taiwan's defense ability; (4) if there were foreign intervention; (5) if Taiwan persisted in refusing peaceful negotiations regarding unification; and (6) if Taiwan developed nuclear weapons.ⁿ¹⁵ The military maneuvers conducted by the PRC in 1996 can be regarded as its responses to Taiwan's attempts to assert independence and resistance to the "one country, two systems" formula of reunification.

III. THE PRINCIPLE OF NON-USE OF FORCE UNDER INTERNATIONAL LAW

A. *The Legal Nature and General Scope of the Principle*

International law relating to armed force in the conduct of international relations has been discussed at great length.ⁿ¹⁶ Under classic international [*719] law, a state was not prohibited from employing military force to pursue its objectives. Even though for many centuries the legality of war had been dominated by the concept of just war, it has been suggested that during the period between the eighteenth century and the outbreak of the First World War, going to war was regarded as an inherent and unlimited right of state sovereignty.ⁿ¹⁷ The idea of preventing states from resorting to war was revived after the catastrophic experience of the First World War. However, it was not until the advent of the United Nations (UN) that a general ban on the use of force was propounded.

Article 2(4) of the UN Charter provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."ⁿ¹⁸ In short, the provision imposes a general proscription on both the actual

use of force and the threat to use force. It is well established that non-use of force is a principle of customary international law. n19 Furthermore, it is regarded as a peremptory norm (*jus cogens*) from which no derogation is permitted. n20 A violation of this norm can constitute an international crime. n21 However, there are at least two issues [*720] for which the general principle prohibiting use of force does not provide direct guidance, namely, which acts constitute threat of force or use of force and thus are unlawful, and to which entities does this principle apply? Since these questions are of particular relevance to the present discussion, they deserve further observation.

B. *The Concept of "Force" Prohibited Under International Law*

The UN Charter does not specify whether the word "force," as stated in Article 2(4), refers only to military or armed force, or also includes other political or economic measures. n22 It has been noted that the "*travaux préparatoires*" for the Charter did not indicate that "force" meant only armed force. n23 On the other hand, it is clear that the Charter has given particular weight to armed force. In the Preamble of the UN Charter it is provided that "armed forces shall not be used, save in the common interest" of the international community. n24 The use of armed force is also distinguished from other measures under Chapter VII of the Charter (Articles 41, 42, and 43) and clearly meant in Articles 44-47. n25 Furthermore, Article 51 restricts the right of self-defense to the event of an armed attack. n26 Finally, the Definition of Aggression, which was adopted by the UN General Assembly in 1974 for the purpose of determining an act of aggression under Article 39, also concerns the use of armed force. n27 Juridical opinions also tend to favor [*721] the restrictive view that Article 2(4) only prohibits the use of "armed force," n28 thus, other forms of pressure such as political or economic coercion are excluded from the content of *use of force*.

The scope of the prohibition under Article 2(4) is comprehensive and all-embracing. n29 It leaves only a few exceptions where the use of armed force by states is permissible. These are: individual or collective self-defense (Article 51); enforcement actions authorized by the Security Council under Chapter VII of the Charter; actions taken against former enemy states during the Second World War (Articles 53 and 107); and actions taken by regional agencies under Article 52(1). Among others, the right to self-defense is most significant. However, Article 51 has greatly restricted the extent of the right of self-defense under traditional international law, by specifying that such a right may be exercised only if an "armed attack" occurs, and until the Security Council has taken measures necessary to maintain international peace and security. n30 The most authoritative interpretation to date of what acts amount to an armed attack has been made by the International Court of Justice in the case of *Nicaragua v. U.S.* in 1986. n31 The court stated that: an armed attack must be understood as including not merely actions by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State *of such gravity* as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein." n32

[*722] This statement suggests that armed attack can be direct or indirect. In considering an armed attack in the context of indirect attack, reference was made to Article 3(g) of the 1974 Definition of Aggression. n33 The elements of scale and the effects of an attack have also been stressed by the court in order to distinguish an armed attack from a use of force of a lesser form not amounting to an armed attack, such as the supply of arms or a frontier incident. n34 Accordingly, it can be said that the court has established a very high threshold for situations in which self-defense can be legally justified. In other words, no use of armed force will be permitted by law in response to threats of force or other direct or indirect uses of force which do not fall within the ambit of armed attacks or aggression.

In the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, n35 the threat or use of force to settle international issues is considered to be a violation of international law. n36 The Declaration also calls on states not to engage in threat or use of force to resolve "international disputes, including territorial disputes and problems concerning frontiers of States." n37 Furthermore, it declares that "no territorial acquisition resulting from threat or use of force shall be recognized as legal." n38 Although the Declaration was adopted by the UN General Assembly in the form of a resolution and thus was not legally binding, n39 it is important at least as an authoritative interpretation of the relevant Charter provisions. n40 The Declaration [*723] has been widely cited in international documents and it can be said that general international law specifically prohibits states from settling territorial disputes by means of force.

Article 2(4) not only concerns the prohibition of the "use" of force, but also the "threat" of force. n41 The most useful elucidation for the concept of "threat of force" to date has been provided by Professor Ian Brownlie: A threat of force consists in 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. n42

The same view has been further elucidated recently in an International Court of Justice advisory opinion on the question of the Legality of Threat or Use of Nuclear Weapons. n43 The court stated that: The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal — for whatever reason — the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. n44

It seems to be suggested that not all threats of force are illegal, so long as the "promise" to resort to force is based on a ground that can be justified under the principle regarding the use of force. n45 However, this does not enable a state to conduct its policies in relation to another state more freely than it is permitted regarding the use of force. In fact, the scope of the prohibition of "threat" of force establishes further limitation on the permissible acts of states in conducting their international relations. It is normal to imagine that a state will use either military or non-military measures to conduct a "threat." Military measures may be "implied by the massing of troops on the border or by other concrete military preparations or activities." n46 This may well include the holding of military maneuvers near the border of a target state.

In respect of other measures, the 1970 Declaration on Principles of International Law recalls in its preamble "the duty of States to refrain [*724] in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State." n47 It is argued that high degrees of political and economic pressures coupled with an intention to use force, which aims at compromising the territorial integrity or political independence of another state, should fall within the scope of "threats of force" under Article 2(4) of the UN Charter. n48

It is true that in practice relatively little attention has been paid to threats of force committed by states, even less if the acts which constituted the threat have not been carried out continually over a considerable period of time. However, the absence of a collective condemnation of or declaration against the unlawfulness of a threat of force does not in itself undermine the illegality of the act of threat of force. Such an omission may only be attributed to the fact that the international community is generally, and understandably, more concerned with the use of force rather than mere threat. Or, it may be that a threat of force does not give rise to the victim state a right to self-defense that is premised on a much more limited condition, namely, the occurrence of an armed attack, even though it is allowed to take countermeasures such as economic sanctions or is entitled to prepare for military defense. n49

C. *Entities to Which the Principle of Non-Use of Force Applies*

Article 2(4) of the UN Charter prohibits "threat or use of force against . . . any state." n50 On the other hand, what the meaning of a state is for the purpose of applying the non-use of force principle has not been entirely free from controversy. Clearly, this principle is applicable to all member states of the UN n51 and non-member states, either as the authors of the threat or use of force or as victims of acts of such kind. n52 States, such as the Vatican City (a *sui generis* entity [*725] which has acquired an international legal status similar to a state under customary international law), and arguably, states *in statu nascendi* are the normal categories of the term "states." n53

Nonetheless, it can be argued that the application of this principle has transcended the original context, and that the principle now applies to a wide range of entities. According to Brownlie, *de facto* entities have been treated as authors of aggression. n54 Entities such as "territories under special international regimes," "leased territories," "areas under suzerainty, protectorates, trust territories, condominiums," etcetera, should be generally protected from the threat or use of force from other states, or even from such conducts by their protecting powers "if force is used with the object of completely changing the legal status of such territories." n55 Since the development of the concept of right to self-determination, it is a well established principle that states are prohibited from resorting to force against "peoples" under colonial and foreign domination. n56 The inclusion of the category of "peoples" shows that the principle of non-use of force is equally applicable to certain entities [*726] which are clearly not states. Among others, the position of *de facto* entities bears the most relevance to the present investigation and will now be examined in greater detail.

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 a certain territory over a period of time, without being regarded as a state or government of a state. The most notable case since the creation of the UN in which the illegal use of force by such an entity had attracted the direct attention of the international community was during the Korean War. n57 After the defeat of Japan at the end of the Second World War, Korea was subjected to temporary occupation by the United States in the south, and the former Soviet Union in the north of the agreed thirty-eighth parallel. In 1947, after having failed to reach an agreement aimed at the unification of Korea, two separate Korean regimes were established respectively. In 1948, the South Korean government

was declared by the UN General Assembly as the lawful government and the only such government in Korea, and later recognized as a peace-loving state within the meaning of Article 4 of the UN Charter. n58 South Korea was widely recognized as a state. In contrast, North Korea was recognized by very few states and its legal status up until 1951 was very controversial. n59 North Korea invaded South Korea in June 1950. Notwithstanding the uncertain international legal position of North Korea, the UN Security Council appeared to have regarded the invasion as an armed attack, n60 and the North Korean entity as a belligerent.

The Chinese Communist regime, the PRC, later intervened and engaged in hostile contact with the UN forces in November 1950. The PRC had just won the civil war against the Kuomintang government of China which had withdrawn to Taiwan. The latter was then representing the state of China in the UN and was recognized by the majority of the member states. However, the PRC was condemned in 1951 by the General Assembly for aggression in Korea. n61

[*727] The view that a de facto entity is prohibited from the threat or use of force by the law is shared among writers. n62 Consequently, there is no doubt that a de facto entity is prohibited from using force against a state or another such entity.

Conversely, is such an entity also protected by this norm? The answer to this question seems to be less straightforward. Article 2(4) of the UN Charter makes specific reference to the territorial integrity of a state. n63 In other words, it may be understood that the law regulates the violation of international boundaries. A common corollary is that the principle which governs the resort to force internationally does not affect the right of a state to take forcible measures for internal purposes, such as maintaining law and order, quelling riots, or suppressing rebellion or insurrection. n64 Meanwhile, international practice also tends to support this. In particular, the response of the international community towards various secessionary movements further suggests that the territorial integrity of a state, both internally and externally, is well guarded by international law. n65

On the other hand, the meaning of international boundaries can be, and indeed has been, interpreted with certain degrees of flexibility. As mentioned before, the most important international document which provides interpretation for the principle provided in Article 2(4) is the 1970 Declaration on Principles of International Law. n66 In the relevant part, apart from direct reference to the language of Article 2(4), the term "international boundaries" is also included in the paragraph which declares:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. n67

[*728] During the early stage of formulating the Declaration, the concept of "international boundaries" came under scrutiny and there was dissonance among participant states as to the scope of the term. However, two points were painstakingly stressed in the meantime. n68 First, "the objective of the principle of non-use of force was to prohibit the violation of *all* boundaries, even those of a *de facto* character." n69 Second, in this connection, the issue concerning "the legal status of such boundaries and whether or not they are recognized as such by the parties concerned was considered as irrelevant to that application of that principle." n70 These were later reinforced by the UN Secretariat in a legal opinion in 1983, which stated:

the all-embracing nature of the non-use of force principle, and . . . the issue of the status of a particular boundary or the recognition thereof. . . . are separate issues and should be dealt with separately. Recognition of boundaries is a highly political and legally complex issue. . . . Expressions of this nature should be avoided if the value of the principle of inviolability of boundaries is to be preserved. n71

What can be regarded as "*de facto* boundaries not recognized by the parties concerned but are international"? In international law, a "boundary" means a line which determines the limit of the territorial sphere of—> jurisdiction of States or *other entities having an international status*." n72 The latter may refer to various types of territorial regimes, arguably including certain de facto entities. n73 Frontier lines, which separate two or more existing states, are often being disputed. Many states are constantly involved in boundary disputes with neighboring countries. For example, China with India, Russia and Vietnam, and various other cases which have been brought before the International Court of Justice. It can even involve a dispute where a state claims the entire territory of another state which is nevertheless recognized by the international community as such. Some interesting cases include the claims of Iran over Bahrain, n74 Guatemala over Belize, n75 Morocco over Mauritania, n76 and [*729] Iraq over Kuwait. n77

On the other hand, in a case where international lines of demarcation exist which divide a state from a de facto entity, and there is a territorial dispute between them, the issue which arises in relation to the applicability of the non-use of

force principle is more controversial. In the Korean situation, South Korea was generally recognized as a state, whereas North Korea's international legal status was very much in doubt, even though both were effective political communities. n78 The nature of the invasion by North Korea was a matter of some debate in the Security Council during 1950. n79 While many states regarded the attack as an act of aggression, the former Soviet Union argued that the conflict was not a war between two States, but merely an internal conflict between two rival Korean authorities. n80 The situation was finally treated by the UN Security Council "in terms of breach of the peace," rather than by reference to Article 2(4) of the Charter. n81

The thirty-eighth parallel of latitude demarcation line between the two Korean entities undoubtedly had an international character. It was agreed upon by the United States and the former Soviet Union after the Second World War. But it is difficult to speculate from the above whether the partition line in 1950 constituted the international boundary for the purpose of Article 2(4), based on which the "territorial integrity" of the de facto North Korea could be protected from armed forces used by South Korea during 1950. Certainly, the question of legality of use of force *initiated* by South Korea against the North was never a concern in the Korean situation in 1950, since the former was the victim of an armed attack by the latter. On the one hand, it seems that the international community represented by the UN might not have considered it illegal had South Korea resorted to force to achieve the unification of Korea. For example, the United States urged a UN enforcement action, arguing that it could be an opportunity to defeat [*730] North Korea and achieve the unification of the state of Korea. n82 This resulted in an authorization of the UN force to cross the thirty-eighth line into North Korea, despite the warning given by the PRC that if any UN force other than South Korean crossed the parallel, it would be compelled to intervene. n83 On the other hand, it is noteworthy that the earlier position of the UN was only to assist South Korea to defend its territory and to restore the status quo. n84 Several other states, including the UK and India, expressed concerns about the international repercussion which might result from further advance of the UN force across the thirty-eighth; though none was based on an argument in favor of the territorial integrity of North Korea. n85 The decision to cross the thirty-eighth parallel received criticism. Evan Luard, for example, contended that the UN action for such a purpose could not be justified by the Charter because "by it a defensive war, to preserve a nation under attack, would be converted into a war of conquest." n86

Subsequent practice suggests that the attitude of the international community in general had considerable effects on the international legal status of North Korea as well as the nature of the border between the rival Korean entities. The conflict formally ended in 1953 with the conclusion of an armistice agreement. n87 The thirty-eighth parallel was formally established, with some modification, as the cease-fire line. n88 A peace conference in early 1954 legitimized the partition of Korea. n89 In 1972, the two sides signed an agreement which laid down that unification (of the state of Korea) was to be effected by peaceful means and not the use of force. As a result, the border between these two Korean entities consolidated as an international boundary for the purpose, among others, under Article 2(4) of the Charter.

Based on the foregoing, it can be concluded that *not* every de facto entity is *ipso facto* protected by the international law governing use of force. On the contrary, the international community has been known to tolerate use of force by a state against a de facto entity if such an action is based on the state's claim of territorial integrity which has [*731] been recognized by the international community as a whole. The most notable proof of this is that the UN has repeatedly acquiesced in the use of force by the authority of a state to prevent secession. n90 Arguably the most significant exception to this in recent years is the position of the international community regarding the Yugoslav crisis in 1991. n91 Since late 1990, two of the former Yugoslav republics, Slovenia and Croatia, began the process of secession. n92 In June 1991, fighting broke out between the central authorities of Yugoslavia and the seceding republics. n93 At that time, the European Community had upheld a policy that supported the territorial integrity of Yugoslavia. n94 "On August 27, 1991, the European Community and its member states, acting through an EPC extraordinary ministerial meeting assembled in Brussels," determined, in relation to the continued fighting in Yugoslavia, that any changes of frontiers which have not been brought about by peaceful means and by agreement would not be recognized. n95

Similarly, the UN Security Council adopted Resolution 713 on September 25, 1991 by unanimity, which referred to the European position "that no territorial gains or changes within Yugoslavia brought about by violence would be acceptable." n96 The adoption of Resolution 713 was significant. In particular, the principle of non-use of force and the intangibility of borders was adopted, even within the context that the majority of delegations still regarded the Yugoslav crisis as an *internal conflict*. n97 Thus, the Yugoslav example appears to have been a departure from the general rule that non-use of force does not concern territorial changes within a state. On the other hand, if the example can be construed in light of the particular situation of Yugoslavia, which was in fact in the process of dissolution, then it can be argued that the republics were pertaining to states *in statu nascendi*.

It follows that as a general principle, so far as de facto entities are concerned, it may not be sufficient to base the existence of an international [*732] boundary for the purpose of the principle of non-use of force merely on the actual possession of the territory by the entity. The acceptance by other states that a de facto entity is a *distinct legal entity* under international law is of a determinative value, particularly if the state using force claims nothing more than the de facto entity forming part of its territory. In other words, the de facto entity should be regarded, at least to a certain extent, as having an international legal personality distinguishable from any other existing international legal persons including the claimant state. This means that the de facto entity has some distinct legal status n98 and separate rights and obligations in international law. n99 Consequently, the actual possession of a territory and the separate legal identity of the de facto entity suggest that a delicate balance between the underlying objective and purpose of the principle of non-use of force and the principle of territorial integrity of states is required.

III. THE CURRENT INTERNATIONAL LEGAL STATUS OF TAIWAN: A DE FACTO ENTITY

The international legal status of Taiwan has been a matter of much debate and great confusion. The views of international law jurists on this issue are at variance. By and large they fall into one of the following three categories: (1) Taiwan is an integral part of the PRC; (2) [*733] Taiwan is a separate state; and (3) Taiwan is a de facto entity close to being a state, but it does not enjoy the international legal status of the latter. However, a discussion amounting to a recital of all the relevant debates would seem superfluous. As mentioned in the preceding discussion, the principle of non-use of force is applicable not only in relation to states, but also to de facto entities in certain conditions. n100 It is felt that an inquiry into the question of whether Taiwan constitutes a de facto entity for the purpose of the application of the principle non-use of force would suffice. To answer this question, it is necessary to establish whether Taiwan satisfies the conditions of statehood as discussed earlier. Namely, whether it is an effective territorial community, having existed as such for a considerable period of time, and has asserted itself on the international plane as a distinct legal entity. n101

To begin with, since states are the prototype of territorial entities of international law, the case of Taiwan can be examined according to the generally accepted basic criteria for states. These criteria are: a defined territory, a permanent population, an effective government, and the ability to conduct international relations. n102 There is no doubt that Taiwan has been an effective political community for a considerable period of time. The current authority of Taiwan, the Kuomintang (KMT) has been in stable control over the island of "Taiwan, the Pescadores, Kinmen, and Matsu, as well as the archipelagoes in the South China Sea," and several other small islands off the Pacific Coast of Taiwan since 1949, when it was driven out of the Chinese mainland during the civil war. n103 Since 1991, these areas have been claimed by the Taiwan authorities to be the scope of their exclusive jurisdiction, as opposed to the Chinese mainland governed by the PRC. n104 This geographical separation has also been tacitly observed by the latter over the past few decades. n105 Thus, it can be argued that a de facto boundary exists between [*734] the PRC and Taiwan. The population of Taiwan is approximately twenty-one million. n106 The present political structure is based on the Constitution of the Republic of China promulgated by the KMT in 1947.

Furthermore, Taiwan appears to have the capacity to enter into international relations with other states. Between 1945 and 1971, the KMT government represented the state of China in the UN. Currently, Taiwan still maintains diplomatic relations with twenty-seven states, n107 and has recently signed treaties of mutual recognition with three countries: Papua New Guinea, Vanuatu, and Fiji. It has also established substantial economic and cultural ties with over 140 countries and regions that do not recognize Taiwan as a state. n108 Taiwan has concluded various treaties and other international agreements with foreign states. n109 In a few cases, Taiwan has even concluded treaties with countries which have formal relations with the PRC. n110 It is also a member of several inter-governmental organizations including Asian Development Bank and the Central American Bank for Economic Integration. Finally, since 1995, Taiwan has been granted observer status to the World Trade Organization. n111

[*735] Although the foregoing examples suggest that Taiwan does exercise international legal competence, it is not enough to conclude that it is indeed a *separate legal entity*. This is due to the fact that sometimes a territorial entity can carry out certain acts in relation to other states on the international plane, but the power to do so is merely *delegated and derived*, rather than an independent legal competence. In such a case, the entity concerned may not be an international legal person in its own name. n112 One writer suggests that the independent capacity to enter into international relations must have two elements. First, the entity must have all necessary powers under its internal law to enter into those relations. n113 Second, the exercise of those powers must not be wholly subject to external control by another international person, normally states. n114

In the case of Taiwan, the first of the two above-mentioned elements is undoubtedly satisfied. As a matter of fact, the

incumbent KMT authority has been administering the area of Taiwan and conducting its external relations in the capacity as a government based on the Constitution of the Republic of China promulgated in 1947. The PRC has never exercised jurisdiction in Taiwan since Japan relinquished its sovereignty over Taiwan in the end of the Second World War. n115 It is thus clear that internally, Taiwan does not derive its international legal capacity from the legal authority of the PRC.

[*736] By contrast, the second element deserves more careful consideration. It is apparent that internally, Taiwan's competence to conduct international relations is not subject to the legal authority of the PRC. On the other hand, Taiwan's international legal status has been deeply threatened since 1971 when the UN General Assembly adopted a resolution to replace the Chinese representation by the KMT with the communist government of the PRC. n116 Firstly, Taiwan lost its seats in all the major international organizations, inter alia, the UN, its subsidiary organs as well as the Specialized Agencies of the UN, International Atomic Energy Agency. n117 Moreover, countries which have recognized the PRC have subsequently suspended the treaties concerning diplomatic or consular relations as well as various other matters previously entered into with Taiwan, coupled with the break-off of formal relations. n118 None of the countries that have recognized the PRC as the sole legal government of China have established formal relations with Taiwan at the same time. n119

In addition, the informal relations, mainly of trade and cultural nature, established by those states with Taiwan do not imply recognition of the entity as a state or its authority as a government. Such relations seem to have been built upon some degree of acquiescence by the PRC. n120 Taiwan has also been prevented from participating in the international conferences of states and applying for membership of inter-governmental organizations including the UN, almost entirely due to the widespread de jure recognition of the PRC. In view of the nature of the relations between Taiwan and the majority of the countries in the world and the attitudes of many countries at the international level conducive to the PRC's claim, one may doubt whether other countries consider [*737] Taiwan's competence to conduct international relations as subject to the authority of the PRC and therefore, Taiwan is devoid of a separate international legal personality.

It is believed that an opposite view to such a doubt should be supported. Firstly, Taiwan continues to be regarded as a separate legal actor in some international arenas of multilateral character. For example, notwithstanding the general absence from the scenes of international governmental forums, Taiwan has maintained its membership in effect as a state in the Asian Development Bank (ADB). The KMT government had represented China as one of the ADB's original member states until 1983, when the PRC attempted to gain the Chinese representation. However, due to Taiwan's significant contribution in the organization, such an attempt failed to succeed. On the other hand, a political compromise was reached between the organization and the PRC, in that the ADB agreed to change the name of Taiwan's representation to "Taipei, China," while the PRC was admitted as the sole representation of China to the organization. The agreement was effected in 1986. Upon PRC's admission, the ADB unilaterally changed the title of Taiwan's representation. Although Taiwan protested, it continued to participate in the organization's annual meetings and to enjoy full status and equal rights as a member state. n121

Moreover, in 1990, Taiwan submitted an application under the name of "The Custom Territory of Taiwan, Penghu, Kinmen and Matsu" to the Secretariat of the General Agreements on Tariffs and Trade (GATT) to become a Contracting Party as an independent customs area under Article 33 of the GATT. n122 The PRC protested that as a province of China, Taiwan could not accede under the terms of Article 33; in practice only sovereign states had joined under this provision. It maintained that instead, Taiwan should apply under Article 26, which provides the legal basis for the accession of dependent territories under the sponsorship of states which are responsible internationally for the territories concerned. However, this objection was not accepted and, in 1992, a working party was established to examine Taiwan's application. Meanwhile, Taiwan was also granted the observer status. Under the GATT framework, a contracting party is defined in Article 32 as a "government which [is] applying the provisions of this Agreement under articles 26 or 33 or pursuant to the Protocol of Provisional Application." [*738] Thus, the acceptance of Taiwan's application can be construed as it being regarded as a separate territorial entity for the purpose of the GATT. In 1995, the GATT was formally replaced by the World Trade Organization (WTO), in which Taiwan also became an observer. Its application formerly submitted to the GATT was also transferred to form the basis for application to the WTO. As both China and Taiwan are applicants to the WTO, it can be said that some form of international recognition, that they are two distinct territorial entities with their own international personality, has been established.

Secondly, at the bilateral level, there is also evidence that Taiwan is regarded as an independent entity with its own legal personality. One of the most significant examples is its relationship with the United States after 1979. In that year, by a joint communique, the United States recognized the PRC as the sole, legitimate Government of China. n123 Although

all formal relations with Taiwan were severed as a result, the United States did not cease to treat Taiwan as an entity having international legal personality. For example, in no case has the United States recognized the claim of the PRC that Taiwan is a part of China which the PRC now represents. n124

Moreover, the United States enacted the Taiwan Relations Act (TRA), which came into effect on April 1979 and provided a comprehensive legal framework for the continuing relations with Taiwan. n125 Since the TRA is a domestic legislation of the United States, its significance in international law should not be overstated. However, it may well be regarded as evidence of state practice. The political intent behind the legislation gave a useful indication as to how the United States had conceived the international legal status of Taiwan after 1979. This [*739] point was elaborated by Professor Victor H. Li during a hearing in the United States Senate on Taiwan in 1979. He argued that to treat Taiwan as a "de facto entity with an international personality" would reflect the reality that, although Taiwan and its authority would cease to be a state or a government de jure, it possessed attributes of a state. n126 Further, this arrangement would be more viable to the interest of the United States. n127 He also mentioned that in a memorandum of the Carter government in 1978 concerning future relations with Taiwan, the view was taken that the United States recognized Taiwan as a de facto entity having the attributes of a state or government. n128 This view is particularly well reflected in the TRA provision governing the validity of treaties concluded prior to the United States recognition of the PRC. n129

Article 4(c) of the TRA provides the basis for the continuing force of treaties concluded by the recognized Chinese government on Taiwan before January 1, 1979 and the United States, unless or until terminated by law. n130 In 1979, there were 25 bilateral treaties and 108 multilateral treaties and agreements under this provision. n131 To date, those treaties still in force are regularly listed in the official *Treaties in Force* published by the State Department of the United States. This further confirms that even though the United States may not have considered Taiwan after 1979 as a state, it certainly continues to regard Taiwan as an entity similar to a state and with independent treaty-making capacity.

Other states which recognize the PRC as the government of China have also maintained extensive bilateral relations with Taiwan. Such relations are normally informal, predominately practical (such as trade and cultural), and non-political by nature. They do not carry any implication of recognition of statehood or government. However, the willingness of those countries to promote relations of such kind and the impressive number of such conduct reinforces the position of Taiwan as a competent international legal actor. One writer has quite fairly suggested that, in the absence of objections from the PRC, most of these countries might also recognize Taiwan as a state if it so declared. n132

[*740] As to those countries which have diplomatic relations with Taiwan, it is difficult to see how they can regard the PRC as legally non-existent at all, being themselves (apart from Nauru and the Vatican City) state members of the UN. Even if they do not enter into bilateral formal relations with the PRC, they are bound to conduct international relations with it according to international law. Thus, they must regard Taiwan and the PRC, at least de facto, as two separate entities.

Thirdly, although both Taiwan and the PRC submit that Taiwan is a part of the state of China, it is not conclusive as to whether it is a part of the PRC. More specifically, Taiwan claims that the state of China at present is still in a state of division. There exists two independent territorial entities, namely Taiwan and the PRC. n133 Also, there is no conclusive view within the international community on this issue either. It has been pointed out that the majority of states which recognize the PRC as the de jure government of China, have not clearly "recognized" the position that Taiwan is a part of China. n134

It may be suggested that some third world countries do regard Taiwan as a part of the China represented by the PRC. In September 1997, a proposal to include an item regarding "the need to review General Assembly resolution 2758 (XXVI) of 25 October 1971 owing to the coexistence of two Governments across the Taiwan Strait" to the agenda of the fifty-second session of UN General Assembly was defeated in the General Committee after a debate involving forty-seven speakers. n135 During the debate, the majority view, mostly held by the third world countries, n136 generally seemed to support that the question of representation of China had been settled since the adoption of General Assembly resolution 2758 of 1971 and Taiwan was part of China represented by the PRC. n137

[*741] On the other hand, the positions of the western states are different and more ambiguous. Apart from the United States, most European countries, including Canada, Britain, and Australia, only "acknowledge" or "take note of" the PRC's claim. n138

Like the United States, Britain has also adopted a more realistic approach to reflect the fact that Taiwan is in fact a separate political community from the PRC at the present time. In 1991, the Foreign Corporations Act was introduced, n139 with a view "to regulate the legal status in British court of bodies incorporated in territories not part of a State

recognised by the British Government." n140 One of the main reasons for the adoption of such legislation was the concern "about the legal status of commercial institutions incorporated in territories such as Taiwan and North Korea." n141 Although the Act deals purely with private law matters and clearly avoids the question of recognition of states or governments, the implication of the adoption of such an act is significant. n142 Particularly, it establishes Taiwan as a stable regime with settled laws as if it were a recognized state. n143

The position of the European Community is equally noteworthy. When the PRC threatened to conduct military action against Taiwan during early 1996, n144 the European Parliament adopted two resolutions. The first was adopted in February, urging the European Council to prevent the PRC from acts of aggression against Taiwan and to ensure that the PRC would refrain from interference with the presidential election of Taiwan. n145 The second, adopted in March, urged the PRC to refrain from the use of force against Taiwan and expressed its support for the people of Taiwan. The language used in these documents imply the acceptance of Taiwan as forming a separate territorial entity from the PRC. n146

The above discussion shows that Taiwan is a de facto entity for the purpose of international law. n147 It has existed as an independent and [*742] effective territorial community for a considerable period of time, and has been widely regarded as having a separate international legal identity from the PRC.

IV. CONCLUSION

For the purpose of non-use of force, it must be concluded that the de facto boundaries between the PRC and Taiwan are international boundaries n148 by virtue of the fact that Taiwan is a de facto entity with a distinct international legal identity from that of the PRC, and the lack of international consensus that Taiwan is a part of the PRC. Consequently, the PRC's policy to use force against Taiwan is a breach of international law.

Non-use of force is a fundamental principle of international law. The scope of prohibition not only includes all forms of use of armed force, but also covers threats, such as military manoeuvres, missile tests, and high degrees of political or economic coercion coupled with the "promise" to resort to armed force. Meanwhile, it outlaws use of force on any ground except in case of self-defense or under authorization by the UN Security Council in accordance with the UN Charter. The reasons that may trigger the PRC's military action are purely aimed at political gain and devoid of any lawful foundation.

Consequently, it is strongly believed that third states of the international community should, individually or collectively, endeavour to dissuade the PRC from further violations of law.

FOOTNOTES:

n1 As the former Secretary-General of the United Nations, Boutros Boutros-Ghali, stated in 1992: the immense ideological barrier that for decades gave rise to distrust and hostility — and the terrible tools of destruction that were their inseparable companions — has collapsed. Even as the issues between States north and south grow more acute, and call for attention at the highest levels of government, the improvement in relations between States east and west affords new possibilities, some already realized, to meet successfully threats to common security. BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE* 1995, at 41 (2d ed. 1995).

n2 In June 1995, Lee Teng-hui, the President of Taiwan, accepted a private invitation to his alma mater, the Cornell University in the United States, amid the protestations from the PRC. See Hungdah Chiu & June Teufel Dreyer, *Recent Relations Between China and Taiwan and Taiwan's Defence Capabilities*, 3 Occasional Papers/Reprints Series in Contemporary Asian Studies 4-7 (1996). The PRC conducted a military exercise in Zhejiang, a Chinese province north of Taiwan and missile tests in the East China Sea the following month. See *id.* at 5. These were declared a demonstration of the PRC's determination to maintain the national sovereignty and territorial integrity of China. See *id.* at 6-7. Then, between March 8 and March 25 in 1996, the People's Liberation Army of the PRC carried out military maneuvers in the vicinity of Taiwan, with a clear intention to influence the outcome of Taiwan's first direct presidential election. See Michael Sheng-ti Gau, *Recent Taiwan Presidential Election and the International Legal Status of Taiwan*, *ATLAS*, Apr. 1, 1996, at 2, 2; James Pringle et al., *Second US Carrier Sails for Taiwan*, *Times* (London), Mar. 12, 1996, available in LEXIS, News Library, Arcnws File.

n3 See, e.g., Jean-Marie Henckaerts, *Self-Determination in Action for the People of Taiwan*, in *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS* 241, 254-56 (Jean-Marie Henckaerts ed., 1996); Lung-chu Chen, *Taiwan, China, and the United Nations*, in *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS*, *supra*, at

189, 198–200.

n4 On the other hand, the question of whether it is legal for third states to get involved in the conflict is beyond the scope of this Article.

n5 See TAIPEI: THE EXECUTIVE YUAN, MAINLAND AFFAIRS COUNCIL, REFUSAL TO RULE OUT THE USE OF FORCE AGAINST TAIWAN: A CROSS-SECTION OF POSITION STATEMENTS FROM PEIKING 1–2 (1992) (on file with the *New England Law Review*).

n6 See Tsei Chung-gung hsuo-wei 'bu pai-chu she-yung wu-li fang-tai' ji yien-si [Some Analysis of the Chinese Communists' So-Called 'Use of Force against Taiwan Is Not Ruled Out' Policy] 2 (1992) (on file with author).

n7 See *id.* at 3.

n8 The Taiwan Question and the Reunification of China (1993), reprinted in JOHN F. COPPER, WORDS ACROSS THE TAIWAN STRAIT: A CRITIQUE OF BEIJING'S "WHITE PAPER" ON CHINA'S REUNIFICATION 73–92 (1995) [hereinafter WHITE PAPER].

n9 See *id.* at 74–78.

n10 See *id.* at 82–85.

n11 See *id.* at 84.

n12 See *id.*

n13 See *id.* at 85. The PRC has specifically blamed the United States for the prolonged confrontation between itself and Taiwan. See *id.* at 78–81. It also claims that states which have diplomatic relations with the PRC but engage in arms sales to Taiwan would amount to intervention in China's internal affairs. See *id.* at 88–92.

n14 WHITE PAPER, *supra* note 8, at 85 (emphasis added).

n15 See Chung-hwa Ming-kuo ba-shi-er dao ba-shi-san nien kuo-fang bao-kao shu [Defence Report of the Republic of China, 1993–94] 62 (1994), cited in Wen-cheng Lin, *Will Beijing Use Force on Taiwan?*, in THE CHINESE PLA'S PERCEPTION OF AN INVASION OF TAIWAN 163, 169–70 (Peter Kien-hong Yu ed., 1996).

n16 See, e.g., ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM (1993); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (2d ed. 1994); ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT ch. 14, 238–53 (1994) [hereinafter HIGGINS, PROBLEMS & PROCESS]; HILAIRE McCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT (1992); John F. Murphy, *Force and Arms*, in 1 UNITED NATIONS LEGAL ORDER 247, 247–317 (Oscar Schachter & Christopher C. Joyner eds., 1995).

n17 See MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 256–57 (6th ed. 1987); BROWNLIE, *supra* note 16, at 49; DINSTEIN, *supra* note 16, at 74.

n18 U.N. CHARTER art. 2, para. 4.

n19 See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 84–90 (June 27).

n20 See *id.* at 90–91; cf. LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS ch. 8, 323–56 (1988).

n21 Article 19, paragraph 3(a) of the Draft Articles on State Responsibility, provisionally adopted by the International Law Commission on the first reading, provides that "a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression" may result in an international crime. International Law Commission, Draft Articles on State Responsibility art. 19, para. 3(a), Report of the International Law Commission on the work of its forty-eighth session, U.N. GAOR, 51st Sess., Supp. No. 10, at 142, U.N. Doc. A/51/10 (1996). Similarly, principle one of the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations declares that "[a] war of aggression constitutes a crime against the peace, for which there is responsibility under international law." G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (1970) (adopted without a vote), reprinted in 9 *I.L.M.* 1292,

1294 (1970); *see also* BLACKSTONE'S INTERNATIONAL LAW DOCUMENTS 208 (Malcolm D. Evans ed., 3d ed. 1991).

n22 *See* BROWNLIE, *supra* note 16, at 362.

n23 *Id.*

n24 U.N. CHARTER preamble.

n25 *See id.* arts. 41–47.

n26 *See id.* art. 51.

n27 *See* G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg., Supp. No. 31, at 142, 143, U.N. Doc. A/9631 (1974); *reprinted in* *The Question of Defining Aggression*, 1974 U.N.Y.B. 840–46, U.N. Sales No. E.76.1.1 (adopted without a vote). Article 1 of the Definition of Aggression provides that "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." *Id.* at 143, *reprinted in* 1974 U.N.Y.B. at 842. Thus, the definition does not cover threat of force, nor does it include political, economic, cultural or ideological pressures, or interference which does not involve the use of armed force. *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 105–20 (1996). However, it should be noted that this definition is not an interpretation for the term of "force" under Article 2(4) of the Charter.

n28 *See, e.g.,* DINSTEIN, *supra* note 16, at 84; *see also* HIGGINS, PROBLEMS & PROCESS, *supra* note 16, at 248; Albrecht Randelzhofer, *Use of Force*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 265, 267–68 (1982). But Judge Rosalyn Higgins previously seemed to hold a broader view. *See* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 175–78, 189 (1963) [hereinafter HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW].

n29 Higgins rightly argues that no force that can be used outside the domain of self-defense without violating a state's territorial integrity. *See* HIGGINS, PROBLEMS & PROCESS, *supra* note 16, at 240. Dinstein suggests that the reference in Article 2(4) to the "phrase 'or in any other manner inconsistent with the Purposes of the United Nations'" creates "'a residual 'catch-all' provision'" as regards non-use of force. DINSTEIN, *supra* note 16, at 85 (footnote omitted) (quoting U.N. CHARTER art. 2, para. 4).

n30 U.N. CHARTER art. 51.

n31 Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 4 (June 27).

n32 *Id.* at 93 (emphasis added) (quoting G.A. Res. 3314, *supra* note 27, at 143, *reprinted in* 1974 U.N.Y.B. at 844). *Compare with id.* at 532–34 (dissenting opinion of Judge Sir Robert Jennings); *id.* at 337–40 (dissenting opinion of Judge Schwebel).

n33 *See id.* at 93.

n34 *See id.* at 93, 116–17; *see also id.* at 91; *cf. id.* at 100–01.

n35 G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d plen. mtg., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), *reprinted in* 9 I.L.M. 1292 (1970).

n36 *See id.* at 122, *reprinted in* 9 I.L.M. at 1294.

n37 *Id.*

n38 *Id.* at 123, *reprinted in* 9 I.L.M. at 1294.

n39 *See* MALCOLM M. SHAW, INTERNATIONAL LAW 544 (2d ed. 1986). However, in *Nicaragua v. U.S.*, the court considered the Declaration to have exhibited "*opinio juris*," namely the conviction by states that a certain form of conduct is required by international law. *Nicaragua*, 1986 I.C.J. at 89–90. It stated that, the effect of consent to the text of such resolutions cannot be understood as merely that of 'reiteration or elucidation' of the treaty commitment under-taken in the Charter. . . . It may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. *Id.* at 90.

n40 See SHAW, *supra* note 39, at 544.

n41 See *id.* at 545; see also U.N. CHARTER art. 2, para. 4.

n42 BROWNLIE, *supra* note 16, at 364 (footnote omitted).

n43 See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of July 8, 1996), reprinted in 35 *I.L.M.* 809 (1996).

n44 *Id.*, reprinted in 35 *I.L.M.* at 823.

n45 See McCoubrey & White, *supra* note 16, at 55-56.

n46 *Id.* at 56.

n47 G.A. Res. 2625, *supra* note 21, at 122, reprinted in 9 *I.L.M.* at 1293.

n48 SHAW, *supra* note 39, at 545.

n49 For a related discussion, see McCoubrey & White, *supra* note 16, at 55-62.

n50 U.N. CHARTER art. 2, para. 4.

n51 It is true that four of the original members of the UN were not states at the time they acquired membership: Ukraine, Byelorussia, Philippines, and India. See Higgins, *Development of International Law*, *supra* note 28, at 15-17. However, it was made clear that their memberships were acquired by right and as a result of political compromise between the founding Powers and were exceptions to the general practice of the UN. See *id.*; cf. James Crawford, *The Creation of States in International Law* 132-37 (1979). For a discussion of the meaning of statehood in the UN, see Higgins, *Development of International Law*, *supra* note 28, at 11-57. All of these entities are now states.

n52 Article 2(6) of the UN Charter provides that the UN shall ensure the compliance of non-member states with the principles set out in Article 2, so far as may be necessary for the maintenance of international peace and security. See U.N. CHARTER art. 2, para. 6. Moreover, Article 2(4) is now a norm of customary international law and as such it is applicable to non-member states. See Shaw, *supra* note 39, at 544.

n53 See Ian Brownlie, *Principles of International Law* 71-80 (4th ed. 1990) According to Professor Brownlie, a state *in statu nascendi* can be described as "[a] political community with considerable viability, controlling a certain area of territory and having statehood as its objective, may go through a period of travail before that objective has been achieved." *Id.* at 79. The same author referred to the cases of Israel in 1948, Poland in 1918, and Algeria in 1962 as examples. See Brownlie, *supra* note 16, at 380 n.7. These communities were in an advanced stage of achieving statehood, and thus, arguably, could be regarded as "states" for the purpose under Article 2(4) of the Charter.

n54 See Brownlie, *supra* note 16, at 379-80.

n55 *Id.* at 380-81 (footnote omitted).

n56 The prohibition of use of force by states against a "people" is mentioned in the 1970 Declaration on Principles of International Law, under a separate heading from the principle regarding non-use of force. See G.A. Res. 2625, *supra* note 35, at 123-24, reprinted in 9 *I.L.M.* at 1296. It has been stated that every state shall refrain from any forcible action which deprives peoples subject "to alien subjugation, domination and exploitation" of their right to self-determination and freedom and independence. *Id.* at 124, reprinted in 9 *I.L.M.* at 1296; see also Blackstone's International Law Documents 210 (Malcolm D. Evans ed., 3d ed. 1991). For a discussion of the effect of such a development on the international law concerning the use of force, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 180-85, 194-97 (1995).

n57 See generally 1 Evan Luard, *A History of the United Nations: The Years of Western Domination, 1945-1955*, at 229-74 (1982).

n58 See 1950 U.N.Y.B. 220, 221, U.N. Sales No. 1951.1.24.

n59 For a general discussion on the legal status of North Korea, see Crawford, *supra* note 51, at 281-84.

n60 See, e.g., S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., at 4-5, U.N. Doc. S/INF/5/Rev.1 (1950); S.C. Res. 83,

U.N. SCOR, 5th Sess., 474th mtg., at 5, U.N. Doc. S/INF/5/Rev.1 (1950); S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., at 5-6, U.N. Doc. S/INF/5/Rev.1 (1950).

n61 See G.A. Res. 498 (V), U.N. GAOR, 5th Sess., Supp. No. 20A, at 8, U.N. Doc. A/1779 (1951).

n62 See, e.g., CRAWFORD, *supra* note 51, at 107, 152. For a discussion regarding entities created in a divided state such as Korea, see MCCOUBREY & WHITE, *supra* note 17, at 166. Professor Antonio Cassese boldly suggests that "any international entity endowed with legal personality, must refrain from force." CASSESE, *supra* note 56, at 198.

n63 See U.N. CHARTER art. 2, para 4.

n64 See SHAW, *supra* note 39, at 545-46; cf. DINSTEIN, *supra* note 16, at 84-85; II GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 675 (1968).

n65 See SHAW, *supra* note 39, at 546-47.

n66 See G.A. Res. 2625, *supra* note 35, reprinted in 9 I.L.M. 1292.

n67 *Id.* at 122, reprinted in 9 I.L.M. at 1294.

n68 See 1983 U.N. Jurid. Y.B. 164-66, U.N. Doc. ST/LEG/SER.C/21.

n69 *Id.* at 165.

n70 *Id.*

n71 *Id.* at 166.

n72 Michael Bothe, *Boundaries*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 17, 17 (1987).

n73 See *id.* at 18.

n74 See Henry W. Dagenhardt, *Bahrain-Iran*, in BORDER AND TERRITORIAL DISPUTES 209-11 (Alan J. Day ed., 2d ed. 1987); Anthony Parsons, *The United Nations and the National Interests of States*, in UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS 47, 54-55 (Adam Roberts & Benedict Kingsbury eds., 1991).

n75 See Belize, 100 I.L.R. 305 (Guat. Const. Ct. 1992).

n76 See HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 28, at 18-20; MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES 196-97 (1986).

n77 HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 28, at 19-20.

n78 See LUARD, *supra* note 57, at 236-37.

n79 See *id.* at 239-51; see also HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 28, at 223-25.

n80 See *Yearbook of the United Nations*, *supra* note 59, at 232.

n81 HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 28, at 186; see also *id.* at 224.

n82 See LUARD, *supra* note 57, at 240-51.

n83 See ALEXANDROV, *supra* note 27, at 257-58; LUARD, *supra* note 57, at 246-51.

n84 See ALEXANDROV, *supra* note 27, at 256; LUARD, *supra* note 57, at 245.

n85 See ALEXANDROV, *supra* note 27, at 258-59.

n86 LUARD, *supra* note 57, at 246.

n87 See *id.* at 266.

n88 See *id.* at 266-67.

n89 See *id.* at 269-71.

n90 For example, during the 1960s regarding the secession of Biafra from Nigeria, and Katanga from Congo. More recently, Abkazia from Georgia in 1994, and Chechnya from Russia in 1991. In all these cases, the international community has upheld their support for the territorial integrity of the existing states.

n91 *See generally* Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *AM. J. INT'L L.* 569 (1992).

n92 *See id.* at 569.

n93 *See id.* at 570.

n94 *See id.* at 575.

n95 *Id.*

n96 *Id.* at 579 (footnote omitted).

n97 *See* Weller, *supra* note 91, at 580.

n98 Arguably, the most challenging example to the traditional state-centered normative framework of non-use of force has been the inclusion of certain "peoples" entitled to the right to self-determination according to international law. For instance, the 1970 Declaration on Principles of International Law declared that the territory of a colony or other non-self-governing territory has, under the UN Charter, a separate and distinct status. *See* G.A. Res. 2625, *supra* note 21, at 123, *reprinted in* 9 *I.L.M. at 1294*. The prohibition of use of force by states against such a territory was indirectly mentioned in the responsibilities of those states to provide assistance to the UN to bring a speedy end to colonization, and to bear in mind that subjection of people to alien subjugation, domination, and exploitation was contrary to the Charter. *See* BLACKSTONE'S INTERNATIONAL LAW DOCUMENTS 210 (Malcolm D. Evans ed., 3d ed. 1991); *cf.* G.A. Res. 3314, *supra* note 27, at 144, *reprinted in* 1974 *U.N.Y.B.* at 845. On various occasions, the Security Council has adopted resolutions referring to the territorial integrity of certain "peoples" recognized by the international community as a whole. *See, e.g.*, S.C. Res. 385, U.N. SCOR, 1885th mtg., U.N. Doc. S/RES/385 (1976) (concerning pre-independent Namibia, in which the illegal occupation by South Africa was condemned); S.C. Res. 384, U.N. SCOR, 1869th mtg., U.N. Doc. S/RES/384 (1975) (relating to East Timor); S.C. Res. 389, U.N. SCOR, 1914th mtg., U.N. Doc. S/RES/389 (1976) (relating to East Timor).

n99 It is now generally accepted that non-state entities can possess separate international legal personality.

n100 *See supra* notes 50-99 and accompanying text.

n101 *See infra* notes 102 and accompanying text.

n102 Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, T.S. No. 881; *see also* *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 201 (1987).

n103 TAIPEI: GOVERNMENT INFORMATION OFFICE, A BRIEF INTRODUCTION TO THE REPUBLIC OF CHINA 3 (1995) [hereinafter A BRIEF INTRODUCTION] (on file with the *New England Law Review*).

n104 *See* Jason C. Hu, Speech at the University of Chicago, Chicago, Illinois (Feb. 16, 1994).

n105 Direct and full scale military confrontations between the PRC and Taiwan ceased in 1958. Subsequently, the PRC conducted only symbolic shelling every other day against Kinmen and Matsu, the two front-line islands controlled by the KMT, until 1979 when all military actions by the PRC came to an end. This may be regarded as a critical point when the PRC accepted the de facto delimitation between areas controlled by the two rival regimes. For a brief historic account on these events, see Ying-jeou Ma, *The Republic of China's Policy Toward the Chinese Mainland*, 28 *ISSUES & STUDIES* 1, 1-2 (1992).

n106 *See* A BRIEF INTRODUCTION, *supra* note 103, at 11.

n107 These countries are: the Federation of St. Christopher and Nevis, Commonwealth of Dominica, St Vincent and the Grenadines, Grenada, Belize, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Panama, Paraguay, The Vatican City, Senegal, Gambia, Chad, Burkina Faso, The Central African Republic, Malawi, Sao Tome and Principe, Swaziland, Liberia, Tuvalu, The Kingdom of Tonga, Nauru, and Solomon Islands. None of these countries concurrently maintain diplomatic relations with the PRC.

n108 See A BRIEF INTRODUCTION, *supra* note 103, at 62.

n109 Between 1986 and 1992, Taiwan concluded 248 agreements with 59 states, regions and international organizations. See Tsei-wai kuan-hsi yu wai-chiao hsing-cheng [Foreign Affairs Reports: Foreign Relations and Diplomatic Administration] 262 (2d ed. 1993) [hereinafter Foreign Affairs Report] (on file with author). These agreements include bilateral agreements concerning aviation services and fishing co-operation, which are normally issues involving the question of sovereignty and agreements concluded between states.

n110 See Hungdah Chiu, *The International Legal Status of the Republic of China*, 5 Occasional Papers/Reprints Series in Contemporary Asian Studies 22 (1992).

n111 See Cung-hwa Ming-kuo ba-she-wu-nien wai-chiao nien-chien [1996 Diplomatic Yearbook of the Republic of China] 348, 348-49 (1996) (on file with author).

n112 For example, speaking about certain international organizations created by states without conferring upon them separate legal personality, Judge Rosalyn Higgins remarked that "this does not mean that they are not actors on the international plane, or that international law does not govern their status and attributes It means only that such an institution is, at the end of the day, indistinguishable from the states that created it." HIGGINS, PROBLEMS & PROCESS, *supra* note 16, at 46; see also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 2 n.2 (1953) (addressing the component members of a federal state).

n113 See J. E. S. FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW 93 (1963).

n114 See *id.*

n115 The view that Taiwan was effectively returned to China after the Second World War by acts of the KMT as the Government of China has been discussed in detail elsewhere. See, e.g., Hungdah Chiu, *The International Legal Status of Taiwan*, in THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS, *supra* note 3, at 3, 3-8; cf. MICHAEL SHENG-TI GAU, GOVERNMENTAL REPRESENTATION FOR TERRITORIES IN THE INTERNATIONAL CIVIL AVIATION ORGANISATION 34-68 (1997) (unpublished Ph.D. dissertation, Leiden University). But compare with HUANG CHIH CHIANG, THE INTERNATIONAL LEGAL STATUS OF TAIWAN 85-148 (1996) (unpublished Ph.D. dissertation, University of London).

n116 See G.A. Res. 2758, U.N. GAOR, 26th Sess., 1976th mtg., at 12, U.N. Doc. A/RES/2758.

n117 See Foreign Affairs Report, *supra* note 109, at 228-29.

n118 See *id.* at 262.

n119 One hundred seventy-five states have established formal relations with the PRC. See WHITE PAPER, *supra* note 8, at 88-92. On the other hand, some of them, such as Grenada, Liberia, Belize, Guinea-Bissau, the Central African Republic, Nicaragua, and Niger, had re-established diplomatic relations with Taiwan, which forced the PRC to suspend their existing official ties. See Chiu, *supra* note 110, at 16-18.

n120 The PRC claims that as a part of China which it represents, Taiwan has no right to represent the state in the international community, nor can it enter into diplomatic ties or any other relation of an official nature with foreign countries. See WHITE PAPER, *supra* note 8, at 83-85. However, on practical level, the PRC does not object to non-governmental economic or cultural dealings between Taiwan and foreign countries. See *id.* at 81-85.

n121 See Foreign Affairs Report, *supra* note 109, at 236-38.

n122 Article 33 provides the routine procedure for the accession of a government acting on behalf of a non-party state, or of a separate custom territory possessing full autonomy in the conduct of its external commercial relations.

n123 See Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, Dec. 15, 1978, U.S.-P.R.C., reprinted in 18 I.L.M. 272, 274 (1979). The position was reaffirmed in the Joint Communiqué of the United States of America and the People's Republic of China, Aug. 17, 1982, U.S.-P.R.C., reprinted in 21 I.L.M. 1147 (1982).

n124 In the 1978 Joint Communiqué, it was stated that "the Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China." 1978 Joint Communiqué, *supra* note 123,

reprinted in 18 *I.L.M.* at 274 (emphasis added). A similar statement appeared in the 1982 Joint Communiqué. In particular, it is interesting to note that in the latter document, a paragraph also appeared almost in the form of a unilateral declaration from the PRC that the question of Taiwan was an internal affair. See 1982 Joint Communiqué, *supra* note 123, reprinted in 21 *I.L.M.* at 1147. There was no reference to the U.S. position on this in that statement. *See id.*

n125 See Taiwan Relations Act, 22 *U.S.C.* §§ 3301–16 (1994).

n126 See *Taiwan, Hearing Before the Comm. on Foreign Relations*, 96th Cong. 144, 145 (1979) (statement of Professor Victor Li).

n127 *See id.* at 145–46.

n128 *See id.* at 147.

n129 See Taiwan Relations Act, 22 *U.S.C.* § 3303 (1994).

n130 *See id.*

n131 *See* Foreign Affairs Report, *supra* note 109, at 267.

n132 See Cheri L. Attix, Comment, *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, 381 (1995).

n133 Recently, this position has been consistently taken by Taiwan. *See, e.g.*, REPUBLIC OF CHINA: MINISTRY OF FOREIGN AFFAIRS, "WHY THE UN RESOLUTION NO. 2758 IN 1971 SHOULD BE REEXAMINED TODAY": THE FUNDAMENTAL RIGHTS OF THE PEOPLE AND GOVERNMENT OF THE ROC ON TAIWAN TO PARTICIPATE IN THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS 1–4 (1996).

n134 *See, e.g.*, GAU, *supra* note 115, at 82–84.

n135 *See* U.N. Press Release, GA/9299, Sept. 17, 1997. A similar proposal in the previous year also failed to be adopted. *See* U.N. Press Release, GA/9092, Sept. 18, 1996.

n136 *See* U.N. Press Release, GA/9299, *supra* note 135. Italy, Ireland, and Cyprus were not in the majority. *See id.*

n137 *See id.*

n138 GAU, *supra* note 115, at 82–83.

n139 Ilona Cheyne, *The Foreign Corporations Act*, 40 *INT'L & COMP. L.Q.* 983, 983–984 (1991) (citing H.L. Bill 51, 1990–1991). "The Act received the Royal Assent on 25 July 1991 and [came] into effect two months later." *Id.* at 983 *n.1*.

n140 *Id.* at 983.

n141 *Id.* (footnotes omitted).

n142 *See id.* at 983–84.

n143 *See id.* at 983.

n144 *See supra* note 2.

n145 *See* 1996 O.J. (C 65) 167.

n146 *See* 1996 O.J. (C 96) 302.

n147 Regardless of the controversy over the legal status of Taiwan, for a similar view on Taiwan as a de facto entity, see *INTERNATIONAL LAW: CASES AND MATERIALS* 300 (Louis Henkin et al. eds., 3d ed. 1993).

n148 This view has been espoused by Professor James Crawford. *See* CRAWFORD, *supra* note 51, at 152.

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