

# INTERNATIONAL LAW AND THE USE OF FORCE AGAINST CONTESTED STATES: THE CASE OF TAIWAN

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*Since the victory of Mao Zedong's Communist forces in 1949, the People's Republic of China (PRC) has laid claim to Taiwan. In 2005, the PRC adopted a law stating that China can use force against Taiwan, officially known as the Republic of China, if it undertakes to form an independent state. This law is an expression of the One-China policy: the idea that mainland China and Taiwan are part of the same country. However, present-day Taiwan is increasingly described as a de facto state with its own people, territory, government, and capacity for international relations. This Note asks whether international law on the use of force protects Taiwan from attack by China, given that Taiwan has many characteristics of a state but has not been formally recognized as such. Part I of the Note summarizes the debate over Taiwan's statehood. Part II lays out the argument that non-state entities have no protection under international law on the use of force. This argument relies on a Westphalian conception of the international system, positing that states are the only subjects of international law. The Note then poses three "post-Westphalian" challenges to that argument: first, that "peoples" in pursuit of self-determination have legal protection from attack by states; second, that the United Nations Charter has been interpreted to forbid changing non-state entities' legal status by force; and third, that states have an obligation under Article 33 to resolve their disputes without threatening international peace and security. Part III applies this legal framework to Taiwan. It finds that though the two sides of the debate are incommensurable because they are based on different understandings of international law, Taiwan's geopolitical situation shows that arguments based on the Westphalian conception of statehood create absurd results. The post-Westphalian view that allows Taiwan limited rights under international law on the use of force better comprehends the geopolitical reality of contested states.*

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## INTRODUCTION

The idea that the People’s Republic of China (PRC)<sup>1</sup> might use force against Taiwan is not a far-fetched hypothetical. Conquering Taiwan is the primary purpose of China’s People’s Liberation Army, and about a third of China’s defense budget is devoted to this task.<sup>2</sup> Interactions between China and Taiwan, termed “cross-Strait” relations, have always been tense. This state of simmering diplomatic tension escalated into military confrontation on three occasions: 1954, 1958, and 1995–96.<sup>3</sup> The 1995–96 crisis saw China conduct large-scale military exercises near the Taiwan Strait and fire missiles into the sea less than fifty miles from Taiwan’s ports, until the United States responded by sending two naval battle groups to the area.<sup>4</sup> Since 1996, China has accumulated an arsenal of over 1400 accurate missiles capable of targeting Taiwan’s airfields and cities.<sup>5</sup> Cross-Strait ten-

<sup>1</sup> For ease of reference, the People’s Republic of China is referred to as “China” when designating the contemporary state of China, and the PRC when making specific reference to the Communist regime. In this piece, China, unless otherwise designated, refers only to the territory currently governed by the Communist Party, or the Chinese mainland.

<sup>2</sup> Michael Beckley, *The Emerging Military Balance in East Asia: How China’s Neighbors Can Check Chinese Naval Expansion*, 42 INT’L SECURITY 78, 84–85 (2017).

<sup>3</sup> See Andrew Scobell, *Show of Force: Chinese Soldiers, Statesmen, and the 1995–1996 Taiwan Strait Crisis*, 115 POL. SCI. Q. 227, 244 (2000).

<sup>4</sup> The Chinese exercises involved 40 naval vessels, 260 aircraft, and approximately 150,000 troops. *Id.* at 232. The 1995–96 Taiwan Strait Crisis was sparked by Washington’s issuance of a visa to President Lee Teng-Hui to give a speech at Cornell. *Id.* at 231–32. For more on the significance of the 1995–96 Taiwan Strait Crisis within the trajectory of Chinese militarization, see generally *id.* at 243–46, which argues that the display of military might was a rare successful instance of coercive diplomacy for China.

<sup>5</sup> See ERIC HEGINBOTHAM ET AL., THE U.S.-CHINA MILITARY SCORECARD 28 (2015) (estimating that China’s arsenal includes at least 1200 short-range ballistic missiles, an “unknown number” of medium-range ballistic missiles, and 200 to 500 cruise missiles).

sions remain high. In January of 2018, China reneged on an agreement promising not to infringe on Taiwan's airspace,<sup>6</sup> and Congress responded by encouraging President Trump to take a firmer stance against Chinese assertiveness.<sup>7</sup> If, in the course of these tense interactions, China decided to use military force against Taiwan, China would have the capability to inflict substantial damage.

The PRC has laid claim to the island of Taiwan since 1949. The Republic of China Army was defeated by Mao Zedong's Communist forces and fled to Taiwan in 1949, setting up a provisional government. Until the early 1990s, both the Republic of China (ROC) leaders on Taiwan and the Communist Party of China on the mainland claimed that they were the rightful successors to the Chinese state. In the 1990s, the ROC government transitioned to a democracy. As the government of Taiwan navigates overlapping popular sentiments favoring rapprochement with China, on one hand, and increased Taiwanese autonomy, on the other, its relationship with China remains tense. While the ROC no longer claims to be the rightful government of all of China,<sup>8</sup> China continues to lay claim to Taiwan, and has met every move toward formal independence for Taiwan with resolute opposition.<sup>9</sup> China's willingness to use force against Taiwan is even encoded into its domestic law. China's Anti-Secession Law of 2005 states that in the event that "major incidents entailing Taiwan's secession from China should occur . . . the state shall employ non-peaceful means and

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<sup>6</sup> See *Taipei Protests as China Opens New Aviation Corridors over Taiwan Strait*, JAPAN TIMES (Jan. 5, 2018), <https://www.japantimes.co.jp/news/2018/01/05/asia-pacific/taipei-protests-china-opens-new-aviation-corridors-taiwan-strait>.

<sup>7</sup> See Patrick Temple-West, *GOP Pressures Trump on Taiwan as China Issues Threats*, POLITICO (Feb. 2, 2018, 5:49 PM), <https://www.politico.com/story/2018/02/02/china-taiwan-trump-republicans-386449>.

<sup>8</sup> In 1991, the ROC relinquished its claim to be the rightful government of all China, but did not specify the extent of the territory or political autonomy that it did claim. The ROC government committed to a peaceful process of reunification, but only on the condition that the resulting China was democratic and guaranteed human rights to its nationals. See Steve Allen, *Statehood, Self-Determination and the 'Taiwan Question'*, 9 ASIAN Y.B. INT'L L. 191, 194-95 & n.19 (2000) (describing the ROC's relinquishment of its claim to China in 1991 and the ambiguous policy that was adopted in its place).

<sup>9</sup> For example, in September 2017, Taiwan Premier William Lai made statements indicating that Taiwan was already an independent country in Taiwan's parliament. Ma Xiaoguang, a spokesman for China's Taiwan Affairs Office, responded that "[t]he mainland side resolutely opposes any form of 'Taiwan independence' words or action" and that "[t]he consequences will be reaped for engaging in Taiwan independence separatism." *China Says Taiwan Not a Country, Taiwan Says China Needs Reality Check*, REUTERS (Sept. 27, 2017, 5:19 AM), <https://www.reuters.com/article/idUSKCN1C20YF>.

other necessary measures to protect China's sovereignty and territorial integrity."<sup>10</sup>

The question of whether Taiwan has rights under international law on the use of force has rarely been addressed.<sup>11</sup> The issue may be unpopular among researchers because many believe it to be predicated on the question of whether or not Taiwan is a state.<sup>12</sup> The United Nations Charter forbids states from using force against other states, but Taiwan has not been widely recognized as a state by the international community. The assumption is that since Taiwan is not unquestionably a state, international law on the use of force does not apply.<sup>13</sup> This Note will show, however, that the question of Taiwan's legal status as a state, while relevant to the legality of a use of force, is not determinative.

This Note has two purposes. Its first purpose is to bring together, as a cohesive debate, the arguments for and against the legality of a use of force against Taiwan and highlight the different understandings of the international system that inform both sides' positions. Broadly, the argument that China can use force against Taiwan relies on a Westphalian understanding of international relations. The Westphalian model has two interrelated premises: First, states have absolute power (sovereignty) over everything that happens within their borders; second, public international law is confined to the regulation of the relations between states and cannot reach into states' domestic affairs.<sup>14</sup> According to this model, since Taiwan is not fully

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<sup>10</sup> Anti-Secession Law (promulgated by Presidential Decree No. 34, Mar. 14, 2005, effective Mar. 14, 2005), art. 8, [http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384099.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384099.htm).

<sup>11</sup> Two articles have been written in direct response to this question. In 1998, Anne Hsiu-An Hsiao made the case that as a de facto state, Taiwan should benefit from the international legal prohibition on the use of force. Anne Hsiu-An Hsiao, *Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?*, 32 *NEW ENG. L. REV.* 715, 730–32 (1998). In 2009, Phil C.W. Chan made the opposite case, arguing that Taiwan is part of China, and therefore should not have recourse to international legal prohibitions on the use of force. Phil C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 *CHINESE J. INT'L L.* 455, 482–85 (2009). However, since each scholar operates from a different premise on Taiwan's legal status, they do not confront each other's arguments. Others have opined on the issue in the context of other works, as will be discussed *infra*, but treatments of the topic on its own are rare.

<sup>12</sup> See, e.g., Glenn R. Butterson, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 *CATH. U. L. REV.* 51, 70 (1997) (arguing that the analysis of the legality of China's potential use of force is predicated on Taiwan's legal status). The question of Taiwan's legal status is debated extensively. See *infra* Part I.

<sup>13</sup> I summarize these arguments below as the Westphalian view, before presenting challenges from outside the state-centric model. See *infra* Part II.

<sup>14</sup> See, e.g., Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 *AM. J. INT'L L.* 20, 28–29 (1948) (discussing the historical, political, and social developments leading to the

recognized as a state, international law on the use of force is silent on the subject of Taiwan and grants Taiwan no rights or protections. Conversely, those who argue that China cannot use force against Taiwan rely on a post-Westphalian understanding of the international system. In this conception, international law has moved beyond regulating only the relations between states to embrace subjects such as terrorist groups, individuals, and international organizations.<sup>15</sup> As a self-governing territorial entity with a defined people, Taiwan can hold rights even without full recognition as a state.

The Note's second aim is to explore the implications of these arguments for Taiwan. Its analysis finds that in excluding Taiwan from subjecthood under international law on the use of force, the Westphalian argument creates absurd results and perverse incentives. The rigid Westphalian state/non-state binary forces China to disproportionately oppose even slight signs of movement toward independence in order to prevent Taiwan from gaining the rights of a state. The post-Westphalian view, while not without problems, is more capable of encompassing how Taiwan has changed since 1949. Upon summarizing the debate over the use of force, this Note finds that though the two sides of the debate are based on incommensurable views of the international system, the post-Westphalian perspective is a better fit for Taiwan's political reality.

It is important to summarize and evaluate the debate over the legality of a Chinese use of force against Taiwan because any potential altercation or threat of altercation will be justified on both sides through the discursive framework of international law.<sup>16</sup> Whether Taiwan falls under the protection of the United Nations Charter or under customary international law on the use of force will determine

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Peace of Westphalia, and its foundational elements); Claus Krefß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force*, 1 J. ON USE FORCE & INT'L L. 11, 11 (2014); Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006) (discussing the principles of Westphalian sovereignty and its conception of states' rights in an international setting).

<sup>15</sup> See generally Krefß, *supra* note 14, at 13–54.

<sup>16</sup> Tensions remain high in cross-Strait relations, and military altercation is an increasingly salient possibility now that China's military power is approaching that of the United States in areas close to China's Territory (such as the Taiwan Strait). See HEGINBOTHAM ET AL., *supra* note 5, at 342. President Trump took a call from the President of Taiwan on December 2, 2016. Tom Phillips et al., *Trump's Phone Call with Taiwan President Risks China's Wrath*, GUARDIAN (Dec. 3, 2016, 5:19 AM), <https://www.theguardian.com/us-news/2016/dec/03/trump-angers-beijing-with-provocative-phone-call-to-taiwan-president>. It was the first call between the United States and Taiwan since the United States severed diplomatic relations in 1979. *Id.* Evan Medeiros, Asia director at the White House National Security Council, predicted that China would see the call as “provocative action, of historic proportions.” *Id.*

the legality of any retaliation or defense measures.<sup>17</sup> While China's presence on the Security Council would make UN intervention unlikely, the legality of collective security measures would be important for the United States, which has shown a strong commitment to the defense of Taiwan through both political declarations and military commitments.<sup>18</sup> Though political realists will point out that international law on the use of force is unlikely to act as an *ex ante* restraint on states' actions, it nonetheless carries significant power because it forces states to rationalize their threats and uses of force *ex post*. According to regime theory, international law highlights when states defect from international norms, resulting in the weakening of those norms in future conflicts.<sup>19</sup> States may reconsider defecting if a

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<sup>17</sup> While the rights and obligations under Article 51 of the UN Charter, which do not apply directly to Taiwan because they are restricted to UN members, Article 51 does recognize an "inherent right of . . . self-defence" irrespective of UN membership. U.N. Charter art. 51. If Taiwan is a subject of international law on the use of force under Article 2(4), it may arguably hold this right in the event of an armed attack. A more detailed analysis of self-defense is beyond the scope of this paper.

<sup>18</sup> Under the Taiwan Relations Act, the United States will "consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States." 22 U.S.C. § 3301(b)(4) (2012). The United States also intervened in all three Taiwan Strait Crises. U.S. OFFICE OF THE HISTORIAN, THE TAIWAN STRAITS CRISES: 1954–55 AND 1958, <https://history.state.gov/milestones/1953-1960/taiwan-strait-crisis> (last visited Sept. 18, 2018) (describing the United States' diplomatic and military resistance to the PRC shelling of ROC islands in the Taiwan Strait during the first and second Taiwan Strait Crises); *supra* notes 3–4 and accompanying text (describing how the United States intervened in the third Taiwan Strait crisis in 1995–96 by sending two naval battle groups into the Strait).

<sup>19</sup> ANU BRADFORD, *Regime Theory*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 16–17 (Rüdiger Wolfrum ed.) (last updated Feb. 2007), <http://opil.ouplaw.com/home/epil>. The theory of international law as highlighting states' defections from international norms can be illustrated by contrasting the United States' behavior during the two Gulf Wars. During the First Gulf War in 1991, the United States adhered to international law proscribing the unilateral use of force, only intervening in the Iraq-Kuwait conflict once the Security Council Resolution had authorized an intervention. The United States' behavior served to reinforce the norm that states should not unilaterally use force against other states. During the Second Gulf War, the United States defected from the international norm against the use of force, and its attack on Iraq was widely considered to be illegal (including by Kofi Annan, then Secretary-General of the United Nations). *See, e.g.,* Ronli Sifris, *Operation Iraqi Freedom: United States v Iraq — The Legality of the War*, 4 MELBOURNE J. INT'L L. 521, 528 ("The [2003] use of force against Iraq was clearly not a response to a similar type of situation [to the invasion of Kuwait by Iraq]."); Patrick E. Tyler, *Annan Says Iraq War Was 'Illegal'*, N.Y. TIMES (Sept. 16, 2004), <https://www.nytimes.com/2004/09/16/international/annan-says-iraq-war-was-illegal.html>. The United States claimed that it would preemptively attack states that were in the process of acquiring weapons of mass destruction, which destabilized the international norm against the use of force and made it more likely that other states would act unilaterally. *Cf.* Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 635–36 (2003) (arguing that the United States' justification of the

weaker norm is against their long-term interests or their actions will cause them to lose international support.<sup>20</sup> In any altercation, China, Taiwan, and the United States would justify their actions through the discursive framework of international law. Jerome Cohen (the first and most authoritative American scholar of Chinese law) has emphasized that this mobilization of legal arguments—known as “legal warfare” or “lawfare”—will be influential in the resolution of the Taiwan issue.<sup>21</sup>

Part I of this Note summarizes the debate over whether Taiwan is a state to the extent that it is relevant to international law on the use of force. This Note does not aim to resolve this question; it adopts the position that international law does not provide a definitive answer.<sup>22</sup> Section II.A. lays out the Westphalian argument that only states can be subjects of international law. Section II.B. presents three challenges to this argument: first, that distinct “peoples” living within states have international legal protection against uses of force by states; second, that international law forbids states changing the legal status of *de facto* regimes by force; and third, that states have a responsibility under Article 33 of the UN Charter to resolve disputes without threatening international peace and security. Part III applies this legal framework to the Taiwan situation. It finds that the two sides’ arguments proceed from different understandings of international law and cannot be reconciled, but that the static Westphalian argument that Taiwan is not a subject of international law on the use of force leads to absurd results given that, with the exception of full recognition, Taiwan has all the characteristics of a state.

## I

### THE DEBATE OVER TAIWAN’S LEGAL STATUS

There has been debate over Taiwan’s legal status since 1952, when Japan formally relinquished colonial control over Taiwan without specifying to which state Taiwan would belong. This discussion is not a comprehensive summary of this debate. It aims to show how each side of the debate mobilizes historical evidence to support

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Iraq War disrupted the United Nations Charter’s normative framework on the use of force).

<sup>20</sup> See BRADFORD, *supra* note 19.

<sup>21</sup> Jerome A. Cohen, *Foreword to FRANK CHIANG, THE ONE-CHINA POLICY: STATE, SOVEREIGNTY, AND TAIWAN’S INTERNATIONAL LEGAL STATUS*, at ix, ix (2018).

<sup>22</sup> Given that Taiwan has now been self-governing for nearly seven decades and China’s position shows no signs of changing, scholars are increasingly operating from this premise. See, e.g., Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. INT’L L. 453, 453 (2000) (arguing that no conclusive answer is possible on the question of whether Taiwan rightfully belongs to the ROC or PRC).

its view, and why the issue of Taiwan's legal status is difficult to resolve under the international law of statehood. It is important to introduce the unresolved nature of Taiwan's legal status in order to understand the arguments on both sides of the debate over the legality of a use of force against Taiwan.

### A. *Two Historical Narratives*

Those who claim that Taiwan is part of China tend to emphasize historical evidence of contacts between China and Taiwan<sup>23</sup> and ancestral ties between residents of Taiwan and mainland China.<sup>24</sup> Claims to disputed territories are strengthened by evidence of the exercise of peaceful, uninterrupted possession over time.<sup>25</sup> Accordingly, this narrative characterizes China's contacts with Taiwan as frequent and significant enough to constitute sovereignty.<sup>26</sup> It emphasizes that China exercised contacts sufficient to constitute dominion over Taiwan from the mid-seventeenth century until 1895.<sup>27</sup> In the seventeenth century, the Qing Dynasty introduced a system of taxation, aboriginal land use regulations, restrictions on immigration, and a system of mediation of disputes.<sup>28</sup> Though there were frequent rebellions directed at Taiwan, this was not exceptional when com-

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<sup>23</sup> See, e.g., Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOREIGN AFF. 351, 353 (1996) (noting that China controlled Taiwan continuously from 1683 to 1895).

<sup>24</sup> See, e.g., Shelley Rigger, *Competing Conceptions of Taiwan's Identity: The Irresolvable Conflict in Cross-Strait Relations*, 6 J. CONTEMP. CHINA 307 (1997) (exploring the historical, ethnic, cultural, and anti-imperialist bases for arguments that Taiwan is part of China).

<sup>25</sup> See MALCOLM N. SHAW, INTERNATIONAL LAW 504–07 (6th ed. 2008).

<sup>26</sup> See Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 AM. U. INT'L L. REV. 1101, 1105–09 (2000) (summarizing the history of China's contact with Taiwan beginning with the Qin Dynasty in the 200s B.C.). The Chinese government has supported this view in a white paper. See Taiwan Affairs Office & Info. Office, *The Taiwan Question and Reunification of China*, 2 CHINESE J. INT'L L. 717, 718 (2003) (asserting that "Taiwan has belonged to China since ancient times").

<sup>27</sup> Taiwan was occupied by an aboriginal population, but was not of much interest to China or the European powers until the sixteenth century. In the early 1600s, Dutch and Spanish companies briefly occupied the island. In 1661, Cheng Cheng-kung of the Ming Dynasty fled to Taiwan with his army in order to use it as a base to recapture Taiwan from Manchurian invaders. Many Chinese immigrants came to Taiwan at that time; the inhabitants were subject to a tax system and Ming soldiers were stationed on the island. The island was later captured and administered by the Qing Dynasty, and was again subjected to taxes, food regulations, immigration rules, and laws delineating aboriginal land rights. See Charney & Prescott, *supra* note 22, at 454–56.

<sup>28</sup> See JOHN ROBERT SHEPHERD, STATECRAFT AND POLITICAL ECONOMY ON THE TAIWAN FRONTIER, 1600–1800, at 2–5 (1993) (describing the Qing Dynasty oversight of Taiwan settlers' relations with aborigines).



pared with the contested status of China's other borders at that time.<sup>29</sup> Therefore, even though Taiwan only formally became part of China when it was designated as a province by the Qing government in 1886, China had sovereignty over it for the previous two hundred years.<sup>30</sup>

In 1895, China lost the first Sino-Japanese War and ceded Taiwan to Japan in the Treaty of Shimonoseki "in perpetuity."<sup>31</sup> Some scholars argue that the cession of the island was invalid because the PRC would later repudiate the Treaty of Shimonoseki as having been unequal,<sup>32</sup> but there is little precedent for unequal conditions being sufficient grounds to invalidate an international treaty.<sup>33</sup> In the Cairo Declaration of 1943 and the Potsdam Declaration of 1945, the Allies expressed the intention to give Taiwan back to China.<sup>34</sup> When Japan was defeated in 1945, it ceded control of Taiwan to a representative of the ROC forces on behalf of the state of China, and Taiwan was incorporated back into China without protest from the international community.<sup>35</sup> President Truman reinforced this understanding in a speech in January of 1950, calling the island "Chinese territory"; Secretary of State Dean Acheson likewise emphasized that there was no need to wait for a treaty to determine Taiwan's status—Taiwan was part of China.<sup>36</sup> However, when the Korean War broke out in July of 1950, in a climate of rising Cold War tensions, Truman reversed his position.

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<sup>29</sup> Many of China's land borders, particularly in remote regions, were difficult to ascertain and changed frequently as Chinese forces skirmished with China's neighbors. *See, e.g., id.* at 405–06 (describing difficulties of controlling borders and territories in Manchuria).

<sup>30</sup> *See* Charney & Prescott, *supra* note 22, at 454–55 (describing "China's exercise of sovereignty over Taiwan" in the "212 years after 1683").

<sup>31</sup> Treaty of Peace, China-Japan, art. II, Apr. 17, 1895, *reprinted in* 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894–1919, at 18, 18–19 (John V.A. MacMurray ed., 1973).

<sup>32</sup> *See, e.g.,* Shen, *supra* note 26, at 1105–09.

<sup>33</sup> *See* Anthony Aust, *Unequal Treaties: A Response*, in INTERROGATING THE TREATY: ESSAYS IN THE CONTEMPORARY LAW OF TREATIES 81, 83 (Matthew Craven & Malgosia Fitzmaurice eds., 2005) (reasoning that invoking inequality as a ground for invalidating an international treaty would be "an uphill task"). The Vienna Convention on the Law of Treaties invalidates treaties agreed to under the unlawful use of military force, but the Convention does not apply to treaties concluded before 1921. Katherine A. Greenberg, *Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?*, 7 FORDHAM INT'L L.J. 534, 548–49 (1984).

<sup>34</sup> Some scholars argue that the Declarations had legal effect, but others acknowledge that as declarations of intent, they were only legally effective to the extent that they were encapsulated by the San Francisco Treaty. *See, e.g.,* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 207–09 (2d ed. 2006) (summarizing different scholars' views of the legal effect of the wartime declarations); *see also* LUNG-CHU CHEN, THE U.S.-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW AND POLICY 74–75 (2016) (same); Shen, *supra* note 26, at 1113 (same).

<sup>35</sup> *See* Jerome A. Cohen, *Recognizing China*, 50 FOREIGN AFF. 30, 34 (1971).

<sup>36</sup> *Id.*

He adopted the policy that Taiwan was still subject to Allied control and its status was undetermined.<sup>37</sup> The San Francisco Treaty of 1951 reflected this new policy: Japan renounced “all right, title and claim to Formosa and the Pescadores,”<sup>38</sup> but the treaty did not specify to which state the territory would now belong. Proponents of the view that Taiwan is part of present-day China read Japan’s renunciation as ceding Taiwan to the Chinese state, which aligns with the intentions of the Allies at the wartime conferences and the international acquiescence to Chinese control over Taiwan from 1945 to 1950.<sup>39</sup>

Though many nations, including the United States, supported the ROC government as the rightful government of “China” in the ensuing years, the Communist Party was eventually recognized as the rightful successor government of the state of China in 1972. If Taiwan was returned to China, the argument runs, the PRC should control it now.<sup>40</sup> The Chinese government also points to UN Resolution 2758, which expelled the ROC from the United Nations and named the PRC China’s sole representative, as evidence of international support for China’s claim to Taiwan.<sup>41</sup> However, the Resolution does not mention Taiwan or address the Taiwan issue.<sup>42</sup>

Proponents of the view that Taiwan is not part of China tend to deploy a different historical narrative. Their narrative emphasizes Taiwan’s weak contacts with China and the discontinuities in Chinese sovereignty over it.<sup>43</sup> Lung-chu Chen, for example, argues that China has never exerted meaningful control over Taiwan.<sup>44</sup> In contrast to the view expressed above, he and other scholars see China’s control over the island as weak and sporadic from 1661 to 1887.<sup>45</sup> Particularly during the Qing dynasty, frequent rebellions from both the aborigines and those who had immigrated to Taiwan caused gaps in Chinese con-

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<sup>37</sup> See *id.* at 35–36.

<sup>38</sup> San Francisco Treaty art. 2, Sept. 8, 1951, 136 U.N.T.S. 48, 3 U.S.T. 3170.

<sup>39</sup> See Cohen, *supra* note 35, at 33–34 (summarizing this reasoning).

<sup>40</sup> See Chan, *supra* note 11, at 462–65.

<sup>41</sup> CHEN, *supra* note 34, at 74.

<sup>42</sup> See *id.*

<sup>43</sup> See, e.g., *id.* at 3, 5–10; Christopher J. Carolan, Note, *The “Republic of Taiwan”: A Legal-Historical Justification for a Taiwanese Declaration of Independence*, 7 N.Y.U. L. REV. 429, 431–32 (2000).

<sup>44</sup> See CHEN, *supra* note 34, at 5 (“[T]he PRC’s territorial ambitions for Taiwan are not supported by historical facts and international law.”).

<sup>45</sup> See *id.* at 9 (providing a historical account). “[B]y the middle of the seventeenth century, the Chinese claim to Taiwan was unformulated. Taiwan was . . . in no way incorporated into the Chinese polity.” Even when under Ch’ing control from 1683 to 1850, “Taiwan did not become ‘part of China’ in the full sense . . . . It was a place where ‘there was a minor revolt every three years, and a major one every five years.’” SIMON LONG, *TAIWAN: CHINA’S LAST FRONTIER* 11–20 (1991).

trol of Taiwan.<sup>46</sup> Beijing claimed the island as a province in 1887, but ceded it to Japan a mere eight years later. There is evidence that Mao Zedong did not consider Taiwan to be part of China in 1936: When he spoke of regaining China's lost territory from Japan, he pointedly excluded both Korea and Taiwan from his calculus.<sup>47</sup>

This view that Taiwan is not a part of China perceives the San Francisco Treaty, in which Japan ceded the island after World War II, as having either deliberately left sovereignty of Taiwan undetermined, or having ceded it to the ROC. At the end of World War II, General MacArthur authorized Chiang Kai-shek and his forces to occupy Taiwan as a trustee on behalf of the Allies.<sup>48</sup> Though the Chinese controlled the island, in the absence of a treaty, there was no *de jure* retrocession of Taiwan to China. In this view, the Chinese Civil War essentially split China into two territories with two governing authorities. The drafters of the San Francisco Treaty decided not to retrocede the territory back to China because there were still two different entities claiming to be China's rightful government.<sup>49</sup> In this line of thought, which was espoused by the U.S. and U.K. governments throughout the 1950s, the *de jure* sovereignty of Taiwan was left undefined.<sup>50</sup> The ROC, joined by some scholars, argues that Japan's renunciation of Taiwan in the 1951 and 1952 peace treaties constituted implicit acquiescence to the claims of the *de facto* occupant, the ROC.<sup>51</sup> However, Crawford notes that the legal mechanism for this is unclear.<sup>52</sup>

This narrative also emphasizes that, irrespective of the legal situation after World War II, Taiwan has now been effectively self-governing for over seventy years.<sup>53</sup> This creates a significant discontinuity in China's exercise of power over the island. One popular perspective is summarized by Crawford: "Whether or not there was such a people [as the Taiwanese] in 1947, the experience of a half century

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<sup>46</sup> See, e.g., JOANNA M. MESKILL, *A CHINESE PIONEER FAMILY: THE LINS OF WUFENG, TAIWAN* 31 (1979) (describing the historical consensus that Qing oversight of Taiwan was weak).

<sup>47</sup> See CHEN, *supra* note 34, at 189.

<sup>48</sup> *Id.* at 78.

<sup>49</sup> See CRAWFORD, *supra* note 34, at 208.

<sup>50</sup> See, e.g., *id.*; Lung-Chu Chen & W.M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 *YALE L.J.* 599, 616 (1972) (arguing that the title over Taiwan was suspended).

<sup>51</sup> See Cohen, *supra* note 35, at 37.

<sup>52</sup> See CRAWFORD, *supra* note 34, at 209.

<sup>53</sup> See CHEN, *supra* note 34, at 87; Sigrid Winkler, *Biding Time: The Challenge of Taiwan's International Status*, BROOKINGS (Nov. 17, 2011), <https://www.brookings.edu/research/biding-time-the-challenge-of-taiwans-international-status>.

of separate self-government has tended to create one.”<sup>54</sup> This gives rise to a second locus of the statehood debate: whether the Taiwanese now have a right to self-determination, and whether that gives rise to a right to independent statehood. The right of self-determination has implications for the legality of the use of force, which will be discussed in Section II.B.

The above discussion shows that history does not give a clear answer to the question of whether Taiwan is part of China. While both sides argue that Taiwan’s history supports their legal claim, each selectively emphasizes a different part of Taiwan’s past.

### *B. Taiwan Under the International Law of Statehood*

This Section lays out the criteria for statehood under international law and summarizes the scholarly viewpoints on Taiwan’s legal status in relation to these criteria. It concludes that though there are arguments to be made on both sides, the international law of statehood does not delineate whether Taiwan is or is not a state.

The criteria for statehood are encoded in the 1933 Montevideo Convention on the Rights and Duties of States, and are accepted as customary international law.<sup>55</sup> The Convention states: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) [a] government; and (d) [the] capacity to enter into relations with other States.”<sup>56</sup>

The arguments over whether Taiwan is a state fracture roughly along the same lines as the declaratory and constitutive theories of statehood.<sup>57</sup> According to the declaratory theory, so long as states meet the Montevideo criteria, they are states and can exist without

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<sup>54</sup> CRAWFORD, *supra* note 34, at 220.

<sup>55</sup> Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT’L L. 467, 470 (2011).

<sup>56</sup> Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (Montevideo Convention).

<sup>57</sup> Though these differing conceptions provide a helpful analytical framework, neither theory is considered dispositive because neither completely explains modern practice. See CRAWFORD, *supra* note 34, at 4–5. Crawford explains that the declaratory theory equates fact with law and obscures the reality that the creation of states is a legal status attached to a state by virtue of certain rules or practices by other states. *Id.* The constitutive theory, however, does not completely remedy this defect because it completely identifies statehood with ad hoc recognition by other states and ignores the fact that identification of new states can be achieved through general rules and principles of international law. See *id.* The debate is unresolved because it depends on whether one perceives international law as a coherent or complete system of law, or as a decentralized regime based entirely on states’ decisions. See *id.* at 5. The irreconcilability of these two theories might be best perceived as an outgrowth of the fact that “the rules of state recognition, although legal

national recognition by other states.<sup>58</sup> The constitutive theory holds that states only exist when they meet the Montevideo criteria *and* are recognized by other states.<sup>59</sup>

Arguments for Taiwan's statehood emphasize that Taiwan meets all of the Montevideo criteria of a state. Taiwan has 23.6 million permanent residents, which meets the population requirement. Taiwan has a defined territory and a government. Although Taiwan's capacity to enter into relations with other states is circumscribed by Chinese influence, the government of Taiwan is recognized by a group of nineteen small states and the Holy See (the exact number has fluctuated depending on China's pressure on those states' governments).<sup>60</sup> Taiwan has embassies and missions in seventy-eight countries.<sup>61</sup> Taiwan is a member of international organizations, including the Asian Development Bank and the World Trade Organization. Taken together, these contacts suggest that Taiwan has competence to conduct international relations not subject to the legal authority of the PRC.<sup>62</sup> This means that Taiwan meets all four of the Montevideo criteria and, at least under the declaratory theory of statehood, is *de facto* a state.

Despite meeting the Montevideo criteria, Taiwan is not a state under the constitutive theory because it is not recognized by the international community as a whole.<sup>63</sup> Taiwan has not secured the recognition of the United States, Japan, or any European Union state. It has attempted to enter into the United Nations and other international organizations for which statehood is a prerequisite to entry but has

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rules, are legal vehicles for political choices." William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115, 116 (2009).

<sup>58</sup> The declaratory view is supported by the Montevideo Convention, which explicitly states that "[t]he political existence of the State is independent of recognition by the other States." Convention on Rights and Duties of States, *supra* note 56, art. 3.

<sup>59</sup> See CRAWFORD, *supra* note 34, at 4.

<sup>60</sup> These states are Belize, Burkina Faso, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Kiribati, Marshall Islands, Nauru, Nicaragua, Palau, Paraguay, Solomon Islands, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Swaziland, and Tuvalu. See *Diplomatic Allies*, MINISTRY FOREIGN AFF.: REPUBLIC CHINA (TAIWAN) (May 23, 2018), <https://www.mofa.gov.tw/en/AlliesIndex.aspx?n=DF6F8F246049F8D6&sms=A76B7230ADF29736>.

<sup>61</sup> For the most part, these connections are officially made with Taipei rather than Taiwan. The embassies and missions are called Taipei Economic and Cultural Representative Offices. See *ROC Embassies & Missions Abroad*, BUREAU CONSULAR AFF., MINISTRY OF FOREIGN AFF., REPUBLIC CHINA (TAIWAN), <https://www.boca.gov.tw/sp-foof-countrylp-01-2.html> (last visited Aug. 12, 2018).

<sup>62</sup> See Hsiao, *supra* note 11, at 737–38 (outlining the direct representation and autonomous filings by Taiwan within both agencies as a demonstration of their status as “a separate territorial entity”).

<sup>63</sup> Taiwan is recognized by around twenty states as the ROC. See *supra* note 60 and accompanying text.

been rejected because of Chinese opposition.<sup>64</sup> The constitutive theory of statehood, therefore, suggests that Taiwan is not a state because the recognition it has received from nineteen small states is not sufficient for it to enjoy the full rights of statehood.

Jianming Shen questions whether Taiwan truly meets the Montevideo criteria of statehood.<sup>65</sup> Shen argues that “the capacity to enter into foreign relations necessarily embodies the element of ‘sovereignty’ or ‘independence,’” which Taiwan, having never formally declared independence, does not possess.<sup>66</sup> However, this appears to conflate “the capacity to enter into relations with the other States”<sup>67</sup> with recognition from other states under the constitutive theory. Most other scholars construe the “capacity to enter into relations” as a practical measure of whether a state has the organizations and infrastructure to enter into international relations without these relations being wholly controlled by another state.<sup>68</sup> Many scholars argue further that the Montevideo requirements tend to be construed broadly and that Taiwan does meet them.<sup>69</sup>

Other scholars have gone beyond the declaratory and constitutive theories in their explanations for Taiwan’s legal status. James Crawford has argued that Taiwan cannot be a state, even though it meets the Montevideo requirements, because it has not declared the will to become an independent state.<sup>70</sup> However, Brad Roth chal-

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<sup>64</sup> See *UN Rejects Taiwan Application for Entry*, N.Y. TIMES (July 24, 2007), <https://www.nytimes.com/2007/07/24/world/asia/24iht-taiwan.1.6799766.html> (explaining that Taiwan’s application was rejected because of the United Nations’ “adherence to the ‘one China’ policy and its recognition of the Chinese government in Beijing”).

<sup>65</sup> Shen notes, for example, that the population of Taiwan is ninety-seven percent ethnic Han Chinese and indistinguishable from the Chinese mainland population. He argues that the Chinese mainland population also identifies with Taiwan as a territory, which breaks a synchronicity between population and territory that he claims the Montevideo criteria require. See Shen, *supra* note 26, at 1127; see also 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, 366 (1995) (noting that Taiwan has not formally claimed statehood status).

<sup>66</sup> Shen, *supra* note 26, at 1134. Taiwan has never formally declared independence.

<sup>67</sup> Convention on Rights and Duties of States, *supra* note 56.

<sup>68</sup> See, e.g., VAUGHAN LOWE, INTERNATIONAL LAW 157–58 (2007) (arguing that the fourth Montevideo criterion is not a question of whether the entity is recognized by other states such that they have established state to state relations, but whether the entity has the capacity to conduct relations on an international plane).

<sup>69</sup> CHEN, *supra* note 34, at 74 (explaining that the view that Taiwan meets the Montevideo criteria is “popular among many Western scholars”). Courts in the United States, Canada, and Switzerland share this view. Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT’L L. 765, 794–95 (2007). Despite arguing that Taiwan is part of China, Chan acknowledges that Taiwan meets the Montevideo criteria for statehood. See Chan, *supra* note 11, at 465.

<sup>70</sup> CRAWFORD, *supra* note 34, at 219.

lenges this assertion, pointing out that a self-declaration of independence is not a criterion of statehood,<sup>71</sup> and that Taiwan has made its aspirations to statehood clear enough.<sup>72</sup> Chen adds, pragmatically, that requiring a declaration of independence is questionable given China's ongoing threat to respond with military force to such a declaration.<sup>73</sup>

What becomes clear from this discussion is that the Montevideo criteria do not give a definitive ruling on the question of Taiwan's statehood. The declaratory and constitutive theories give opposite answers to the question. The best consensus among scholars appears to be that while Taiwan meets the Montevideo criteria, it is not recognized as such by most states (and, as a result, does not have all the rights of a state).<sup>74</sup>

### C. *Taiwan as a "Contested State"*

The two sides of the debate on Taiwan's legal status mobilize different interpretations of Taiwan's history and draw on different theories of statehood. International law does not give a clear answer to the question of Taiwan's legal status.<sup>75</sup> Rather, Taiwan is in legal limbo. It has the characteristics of a state, but it will not be recognized as a state by most other states so long as China claims it as Chinese territory. Though cross-Strait tensions are high and military conflict is always possible, an unprovoked assault on Taiwan is unlikely because it would be costly for the Chinese army at its current level of capability.<sup>76</sup> As long as China lays claim to Taiwan, Taiwan's legal status is likely to remain in limbo.

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<sup>71</sup> Brad R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91, 101–02 (2009) (“As a doctrinal matter, any assertion of sovereign rights by the ‘Republic of China’ that disavows the exercise of those rights on behalf of the Mainland necessarily implies an assertion of Taiwan’s independence.”).

<sup>72</sup> *Id.* at 101–03 (describing Taiwan’s leaders’ various statements explicitly or implicitly describing Taiwan as its own sovereign entity).

<sup>73</sup> CHEN, *supra* note 34, at 77.

<sup>74</sup> Hsiao, *supra* note 11, at 732–34 (arguing that Taiwan meets the Montevideo criteria but does not have full recognition); Jean C. Wen, *One China, Freely and Fairly Elected: A New Solution to the Issue of Taiwan*, 21 COLUM. J. ASIAN L. 87, 94–96 (2007) (same); Angeline G. Chen, *Taiwan’s International Personality: Crossing the River by Feeling the Stones*, 20 LOY. L.A. INT’L & COMP. L.J. 223, 236–37 (1998) (same); Carolan, *supra* note 43, at 450–57 (same).

<sup>75</sup> See Charney & Prescott, *supra* note 22, at 453 (stating that “no conclusive answers are possible”).

<sup>76</sup> See Beckley, *supra* note 2, at 81 (“For the foreseeable future . . . China has little prospect of developing a force capable of conquering Taiwan or enforcing its maritime claims in the East or South China Seas . . .”).

For the purposes of analyzing Taiwan's status under law on the use of force, the conflicting legal positions in Section I.B can be reconciled through concepts that Brad Roth and Christian Henderson have articulated. Roth points out that the "rights, powers, obligations, and immunities" of states are derived from their individual relations with every other state.<sup>77</sup> He defines a state as "essentially a territorial political community that existing states collectively decide *ought* to be self-governing."<sup>78</sup> In this conception, statehood is not an all-or-nothing delineation: Taiwan holds some of the legal rights of a state and is denied others. For example, Roth points out that a great many states carry on reciprocal interactions with Taiwan through a network of offices resembling embassies, which are accorded "privileges and immunities characteristic of those accorded to official diplomatic missions."<sup>79</sup> Taiwan is also accorded exclusive sovereignty over its airspace, which it controls independently of Beijing.<sup>80</sup> These are legal rights of states, though the states that accord Taiwan these rights would not describe them as such for fear of irritating China.<sup>81</sup> The question is whether the bundle of rights that Taiwan currently holds is sufficient to ensure that a use of force against Taiwan would be cognizable under international law. Given that it is not pragmatic to wait for a determination of Taiwan's status before discussing the legality of the use of force, this Note will refer to Taiwan as a "contested state," as described by Christian Henderson: an "entit[y] that, while having many of the characteristics of a fully-fledged state, ha[s] failed, for one reason or another, to attract widespread recognition as one."<sup>82</sup>

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<sup>77</sup> See Roth, *supra* note 71, at 105 (describing "the particular package of legal attributes . . . that affect the obligations of other states" that one might understand statehood to entail).

<sup>78</sup> *Id.* at 107.

<sup>79</sup> *Id.* at 110–11.

<sup>80</sup> *Id.* at 113–14 (pointing out that other states accord Taiwan complete and exclusive sovereignty over its airspace, without PRC approval and at times over its objections).

<sup>81</sup> China is incensed by any move by the international community toward recognition of Taiwan. For example, the international community must refer to Taiwan as Chinese Taipei at the WTO and other international organizations. See *supra* note 61. China was incensed when President Trump took a phone call from President Tsai, speaking to her as he would a fellow state leader. See *supra* note 16. It follows that a third state describing Taiwan's airspace as "sovereign airspace" or its relations with Taiwan as "international relations" would irritate China.

<sup>82</sup> Christian Henderson, *Contested States and the Rights and Obligations of the Jus ad Bellum*, 21 CARDOZO J. INT'L & COMP. L. 367, 369 (2013) (giving such examples as Taiwan, Palestine, Abkhazia, Ossetia, and North Cyprus).



## II

## LEGAL PERSPECTIVES ON THE USE OF FORCE

Part II presents the arguments for and against the legality of using force against contested states like Taiwan. The primary argument for the use of force is described as the Westphalian view because it relies on the traditional Westphalian model of statehood, which conceives the state as the only subject of international law.<sup>83</sup> State status, in this view, is binary: States alone receive rights under the UN Charter and are included within the prohibition on the use of force, while non-state entities have no such rights. Section II.B presents the post-Westphalian challenge to this view, premised on the idea that international law on the use of force can apply to Taiwan even if Taiwan is considered a non-state entity.

A. *The Westphalian View*

The argument that it is not illegal for China to use force against Taiwan relies on a literal reading of Article 2(4) of the UN Charter and an all-or-nothing conception of the rights conferred by state status.<sup>84</sup> Under Article 2(4), “[a]ll Members [of the United Nations] 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.”<sup>85</sup> Article 2(4) represented the culmination of a series of steps toward banning the use of force in interstate relations that began with World War I and the League of Nations.<sup>86</sup> Control over military forces is central to statehood—military power enables states to preserve their sovereignty and territorial integrity against

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<sup>83</sup> The Westphalian model has come to refer to a system whereby interstate relations are the only concern of international law and state sovereignty is paramount, but there is some question as to whether the “Westphalian System” established after 1648 actually operated that way. See Kreß, *supra* note 14, at 11–12.

<sup>84</sup> Phil Chan’s argument relies on the Westphalian premise. He argues that the United Nations Charter prohibits armed conflict in the conduct of international relations, but that it applies only to states as subjects. Chan, *supra* note 11, at 482. He argues that Taiwan is not a state, and therefore has no right of collective self-defense under Article 51. *Id.* He also argues that China has the right to resist secessionist attempts by Taiwan. *Id.* at 484. It also dovetails with the official position of the PRC. See TAIWAN AFFAIRS OFFICE AND THE INFO. OFFICE OF THE STATE COUNCIL, PRC WHITE PAPER, “THE ONE-CHINA PRINCIPLE AND THE TAIWAN ISSUE,” (Feb. 21, 2000), <https://archive.nytimes.com/www.nytimes.com/library/world/asia/022100china-taiwan-text.html> (stating that China will use “any necessary means,” including the use of force to resist Taiwan independence, because Taiwan’s independence threatens China’s sovereignty and territorial integrity).

<sup>85</sup> U.N. Charter art. 2, ¶ 4 (emphasis added).

<sup>86</sup> See generally IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 51–60 (1963) (providing an overview of the development of views on the use of force in interstate relations).

attack by other states.<sup>87</sup> States have proven loath to give up any of that power to the UN.<sup>88</sup> The prohibition on the use of force in the UN Charter was, therefore, understood to apply only to inter-state relations, while states preserved absolute sovereignty over their domestic affairs.<sup>89</sup>

Some scholars believe that there is no customary practice to support applicability of Article 2(4) beyond state-to-state interactions.<sup>90</sup> This argument is compounded by the non-intervention principle: Customary international law forbids states from interfering in each other's domestic affairs.<sup>91</sup> The non-intervention principle also supports states' rights to use force within their borders. For example, if a territorial entity attempts to withdraw from a state, or secede, the non-intervention principle would prevent other states from interfering either in support of the state's territorial integrity or in support of the secessionist movement.

While the international community espouses support for self-determination of peoples, it has acquiesced to the use of force by states in order to quell secession attempts.<sup>92</sup> For example, when Katanga attempted to secede from the Republic of the Congo, now the Democratic Republic of the Congo, in 1960, the UN Security Council strongly condemned its activities and acquiesced to the use of

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<sup>87</sup> E. H. CARR, *THE TWENTY YEARS' CRISIS, 1919–1939*, at 104 (2016 ed.) (arguing that military power is central to statehood); see also JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 31 (2001) (arguing that survival is the primary goal of states operating in the international system).

<sup>88</sup> The UN Security Council was supposed to pre-approve every instance of force used in self-defense, and the UN was originally supposed to have significant military power of its own from member states' militaries. Neither of these aspirations bore out during the Cold War. Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 155–56 (2013).

<sup>89</sup> See Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in 1 *THE CHARTER OF THE UNITED NATIONS, A COMMENTARY* ¶¶ 29, 32 (Bruno Simma et al. eds., 3d ed. 2012); Kreß, *supra* note 14, at 13–14 & n.12, n.14, n.15 (describing how initial interpreters of the term “international” in Article 2(4) believed it only applied to states); U.N. Charter art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”).

<sup>90</sup> See OLIVIER CORTEN & BRUNO SIMMA, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 159 (2010) (“At present, there is nothing to show that any general agreement has been observed in favour of the applicability of article 2(4) to situations that do not pertain to relations among States.”). *But see* Jonte van Essen, *De Facto Regimes in International Law*, 28 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 31, 37 (2012) (making the case that de facto regimes are also subject to Article 2(4)).

<sup>91</sup> Some scholars go so far as to call it a *jus cogens* norm: a fundamental, overriding norm of international law. See, e.g., Oscar Schachter, Editorial Comment, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 648 (1984) (explaining how this principle has increasingly been referred to as a *jus cogens* norm).

<sup>92</sup> CRAWFORD, *supra* note 34, at 389–90.

force.<sup>93</sup> The UN also stood by when Russia used force to put down Chechnya's secession attempt in the early 1990s.<sup>94</sup> The Secretary-General explained that the UN would respect the Charter's protections for its members' domestic sovereignty.<sup>95</sup> This underscores the idea that states have the authority to use force within their own borders.

### B. *Three Challenges to the Westphalian Argument*

The following challenges to the Westphalian argument are based on the idea that the Westphalian model of international relations is fading, and that non-state entities such as contested states and peoples can be rights holders under international law on the use of force.<sup>96</sup>

The first challenge draws on an emerging body of UN precedents rooted in the primacy of the human right of self-determination, which protects distinct "peoples" from uses of force by states. This challenge erodes the Westphalian model by taking away states' rights to repress or attack distinct peoples residing within them.

The second challenge is based on precedent supporting the applicability of Article 2(4)'s prohibition on the use of force to non-state entities that are long-term, stable *de facto* regimes. This suggests that international law on the use of force applies not only to states, but also to borders and disputed territories.

The third challenge derives from states' obligations to peacefully resolve any disputes likely to constitute threats to the international peace and security under Article 33. This suggests that a claim to a particular contested territory does not license a use of force against that territory if that action would disturb international peace and security, even if the state believes it has sovereignty over that territory.

All three arguments can be situated within a broader trend in international law away from the idea that states' authority within their own territories is absolute.<sup>97</sup> The UN has increasingly intervened in

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<sup>93</sup> See S.C. Res. 169, ¶¶ 1, 4 (Nov. 28, 1961).

<sup>94</sup> Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 INT'L SECURITY 5, 41-42 (1998) (describing UN inaction during the crisis).

<sup>95</sup> *Id.* (noting the Secretary-General's reference to Article 2(7), which excludes the UN from "matters which are essentially within the domestic jurisdiction of any state") (internal quotation omitted).

<sup>96</sup> See Charney & Prescott, *supra* note 22, at 465-66 (describing how considering "peoples" as having rights under international law has contributed to the erosion of the Westphalian model that accords rights only to states).

<sup>97</sup> The new focus on human rights and self-determination of peoples implies that states that repress their populations may be subject to humanitarian intervention from the international community. See generally Martti Koskenniemi, *The Future of Statehood*, 32

conflicts within states, not just between them,<sup>98</sup> and the rise of human rights has recentered international legal protections on individuals, not states.<sup>99</sup>

### 1. “Peoples” Are Protected by International Law

Developing “friendly relations among nations based on respect for the principle of self-determination of peoples” is one of the UN’s main purposes, as encoded in Article 1(2).<sup>100</sup> Self-determination operates less as a binding legal obligation than as a general principle behind international legal institutions’ structure and decisions.<sup>101</sup> The principle is also incorporated into both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 1(1) of both covenants states: “All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>102</sup> These covenants gave self-determination the character of a fundamental human right.<sup>103</sup> It is clear that self-determination is a general principle of modern international law, since after its inclusion in the UN Charter it has been confirmed, developed, and supported by state practice.<sup>104</sup>

As a general principle underlying the UN Charter and guiding its interpretation, it is possible to read a prohibition on using force against peoples into Article 2(4). Article 2(4) reads in full: “All Members shall refrain in their international relations from the threat

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HARV. INT’L L.J. 397, 397–401 (1991) (discussing the challenges that human rights and self-determination pose to the Westphalian conception of states as having absolute sovereignty within their borders); W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 867–68 (1990) (arguing that the inauguration of the Universal Declaration of Human Rights, which provides that the will of the people is the basis of the authority of government, changed the definition of sovereignty in international law from state sovereignty to people’s sovereignty).

<sup>98</sup> See *infra* notes 148–53 and accompanying text.

<sup>99</sup> See *infra* notes 148–53 and accompanying text

<sup>100</sup> U.N. Charter art. 1, ¶ 2.

<sup>101</sup> Daniel Thürer & Thomas Burri, *Self-Determination*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 8 (Rüdiger Wolfrum ed., 2012) (last updated Dec. 2008), <http://opil.ouplaw.com/home/epil> (“[I]t should not be assumed that the concept of self-determination became a legally binding principle of conventional international law by the mere fact of its incorporation into the UN Charter.”).

<sup>102</sup> International Covenant on Economic, Social and Cultural Rights, art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>103</sup> Thürer & Burri, *supra* note 101, ¶ 10. The International Court of Justice’s jurisprudence also supports this proposition. See Stefan Oeter, *Self-Determination*, in 1 THE CHARTER OF THE UNITED NATIONS, *supra* note 89, ¶ 1.

<sup>104</sup> See Thürer & Burri, *supra* note 101, ¶ 12.

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.*"<sup>105</sup> Since respecting self-determination is one of the United Nations' main purposes,<sup>106</sup> denying a people their political autonomy through the use of force would therefore contravene Article 2(4).

Scholars disagree on the extent to which the principle of respect for self-determination in Article 1(2) creates legal rights for peoples within states. The United Nations has specifically articulated protections for peoples against the use of force, which suggests that Article 1(2) does entail some protections for peoples within states. According to the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States (1970 Declaration), "[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence."<sup>107</sup> The 1970 Declaration was "adopted without vote—signaling that it represented a consensus" among UN members.<sup>108</sup> It was further supported by General Assembly Resolution 2160 (XXI) from 1966, which states that "[a]ny forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations."<sup>109</sup>

A third instance of support for this principle derives from the Additional Protocol I (1977) to the General Conventions on the law relating to the protection of victims of international armed conflicts. It expressly includes conflicts in which "peoples" are fighting "in the exercise of their right of self-determination."<sup>110</sup> There is also some state practice supporting humanitarian intervention when peoples are subject to armed attack by states.<sup>111</sup> Some scholars believe that this

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<sup>105</sup> U.N. Charter art. 2, ¶ 4 (emphasis added).

<sup>106</sup> U.N. Charter art. 1, ¶ 2 (affirming the importance of self-determination of peoples as a guiding principle of relations among UN members).

<sup>107</sup> G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970).

<sup>108</sup> Helen Keller, *Friendly Relations Declaration (1970)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Rüdiger Wolfrum ed.) (last updated June 2009), <http://opil.ouplaw.com/home/epil>.

<sup>109</sup> G.A. Res. 2160 (XXI), at 4 (Nov. 30, 1966).

<sup>110</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, ¶ 4, June 8, 1977, 1125 U.N.T.S. 7.

<sup>111</sup> This state practice has not created a norm of customary law, but it nonetheless supports an idea that it is illegal for states to attack peoples within them. See Christine Gray, *The Use of Force for Humanitarian Purposes*, in RESEARCH HANDBOOK ON

state practice, in combination with the various UN statements, is enough to constitute customary international law.<sup>112</sup>

An attack on a people within a state would represent a denial of internal self-determination, and some authorities have held that it may justify secession. Internal self-determination is a people's right to exercise their political, cultural, linguistic, and religious rights within a state.<sup>113</sup> The Aaland Islands case before the League of Nations held that peoples have a right to internal self-determination, that is, to self-governance within their state.<sup>114</sup> By contrast, external self-determination is a people's right to secede from the mother state, and arises only when internal self-determination is denied.<sup>115</sup> The Canadian Supreme Court, in its opinion on the legality of the secession of Quebec, held that all peoples are entitled to internal self-determination, *and* that peoples subject to conquest, colonization, or oppression may be entitled to external self-determination.<sup>116</sup> In either case, the use of force by a mother state aimed at subjugating peaceful, self-governing people within it would constitute a denial of self-determination since it would deny that people the exercise of its political will.

One weakness in the idea that peoples have protection through their right to self-determination is that while this right may be supported using textual referents in the UN Charter and with instances of state practice, "people" remains undefined. To Shen, the lack of a clear definition for this term means that a definite right or protection cannot arise.<sup>117</sup> A clear definition of "peoples" has explosive poten-

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INTERNATIONAL CONFLICT AND SECURITY LAW 229, 231–37 (Nigel D. White & Christian Henderson eds., 2013) (discussing state practices in claiming a right of humanitarian intervention). This is reinforced by the Responsibility to Protect (R2P) and its premise that states have a responsibility to protect populations residing within them. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) ("[The] primary *raison d'être* and duty [of a state] is to *protect* its population.") (emphasis added).

<sup>112</sup> See, e.g., CORTEN & SIMMA, *supra* note 90, at 135 ("[The law of self-determination] implies a duty for the State authorities concerned: that of not opposing by force a people's exercise of its right to self-determination."). Other scholars focus on the legality of uses of force by oppressed peoples, but those that support those peoples' right to retaliate using force by necessity must believe that the use of force by the claimant state is illegal. See, e.g., Glen Anderson, *Unilateral Non-Colonial Secession and the Use of Force: Effect on Claims to Statehood in International Law*, 28 CONN. J. INT'L L. 197, 239–40 (2013) (discussing the illegality of the use of force by oppressed peoples).

<sup>113</sup> MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW* 1 (2013).

<sup>114</sup> See *id.* at 30.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 31.

<sup>117</sup> Shen, *supra* note 26, at 1147.

tial. If “peoples” within states were granted additional rights and protections, it could provoke repressive measures by states to prevent groups within them from attaining the status of a “people” and attempting to secede. A second challenge to this argument is that the legal precedents for protecting “peoples” from a use of force might be limited to the context of decolonization in which the UN resolutions cited above were passed. While the UN has recognized rights to self-determination that postdate the decolonization period (for example, for the inhabitants of Palestine and South Africa),<sup>118</sup> some scholars argue that the state practice and textual support from the UN resolutions did not create a lasting international norm of self-determination outside that context.<sup>119</sup> These scholars argue that the declarations and practices detailed above are not enough to make protection of peoples against uses of force by states a principle of customary international law.<sup>120</sup>

## 2. *States Cannot Use Force to Change the Legal Status of a De Facto Regime*

The second challenge to the Westphalian argument is that if a non-state entity has had a stable government over a consistent territory for a period of time, it is a *de facto* regime.<sup>121</sup> Under this argument, Article 2(4) would therefore encompass that entity even though it is not fully recognized as a state. In the drafting of Article 2(4), several states proposed extending the text to all territorial entities, rather than just states.<sup>122</sup> They encountered strong opposition.<sup>123</sup> Some scholars argue, however, that state practice since the drafting of Article 2(4) has created a norm of international law that *de facto* regimes are included within its prohibition on the use of force.<sup>124</sup> The

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<sup>118</sup> Thüerer & Burri, *supra* note 101, ¶ 34.

<sup>119</sup> See T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 10 (Catherine Brolman et al. eds., 1993) (“It was not widely contemplated that the entitlement to self-determination would continue to empower ‘peoples’ after the decolonization task had been completed. Self-determination thus came to be interpreted almost as the right of peoples of color not to be ruled by whites.”); Shen, *supra* note 26, at 1144 (discussing the principle of self-determination after the completion of the decolonization process).

<sup>120</sup> See CORTEN & SIMMA, *supra* note 90, at 143 (arguing that there is no state practice opposing colonial states’ use of force against peoples and concluding that there is no principle of law to that effect).

<sup>121</sup> To the author’s knowledge, the requisite period of time has never been defined.

<sup>122</sup> van Essen, *supra* note 90, at 37.

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

<sup>124</sup> *Id.* (summarizing arguments that *de facto* regimes, including the Taliban regime in Afghanistan, enjoy the protection of Article 2(4)).

1970 Declaration provides textual support for this idea.<sup>125</sup> State practice suggests that states respect the borders of de facto regimes and that states consider it illegal to change the status of a de facto regime by force.<sup>126</sup> In the commentary on the UN Charter, Dorr and Randelzhofer write that “[i]t is almost generally accepted that de facto regimes exercising their authority in a stabilized manner are also bound and protected by Art. 2(4).”<sup>127</sup>

This challenge is complicated by the fact that there is no clear definition of “de facto regime” under international law.<sup>128</sup> This is most likely because, much like the definition of “peoples,” any definition of that legal category would serve to accord a regime rights under a formal international legal status, which states contesting that regime’s validity would strongly oppose. However, scholars generally agree that de facto regimes are territories over which a government has exercised stable control in opposition to another state’s claim for a certain (undefined) period of time.<sup>129</sup> Some examples are North Vietnam before reunification, the German Democratic Republic before 1972, North Cyprus, Abkhazia, and South Ossetia.<sup>130</sup>

There is also textual authority supporting the broadening of Article 2(4) to include de facto regimes. The 1970 Declaration holds that “[e]very 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

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<sup>125</sup> G.A. Res. 2625, *supra* note 107, at 124 (reaffirming the right of self-determination and defining the separate status of some territories).

<sup>126</sup> See Jochen A. Frowein, *De Facto Regime*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4 (Rüdiger Wolfrum ed.) (last updated Mar. 2013), <http://opil.ouplaw.com/home/epil> (illustrating how state practice and the United Nations prohibit the use of force irrespective of international recognition).

<sup>127</sup> Randelzhofer & Dörr, *supra* note 89, ¶¶ 29, 32.

<sup>128</sup> See Frowein, *supra* note 126, ¶ 2 (discussing situations in which “de facto regime” would be used).

<sup>129</sup> See *id.* ¶ 1 (“It has been a not infrequent occurrence in international law that for long periods entities have existed, frequently claiming to be States or governments, which controlled more or less clearly defined territories, without being recognized—at least by many states—as States or governments.”); van Essen, *supra* note 90, at 37 (arguing that it is generally agreed that a de facto regime is an entity which exercises at least some effective authority over a territory within a state); see also INTERNATIONAL LAW AND INSTITUTIONS 68 (Aaron Schwabach et al. eds., 2009) (“[D]e facto regimes are treated as states with respect to the provision when exercising their authority in a stabilized manner and the situation has been pacified for a while.”); Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations—The Twilight Zone of Public International Law?*, 6 AUSTRIAN REV. INT’L & EUR. L. 45, 50 (2001) (defining de facto regimes as “political regimes which exercise at least some effective political authority over a territory within a state”).

<sup>130</sup> Frowein, *supra* note 126, ¶ 1.



disputes and problems concerning frontiers of States.”<sup>131</sup> This language explicitly contemplates territorial disputes where boundaries are in question. Hsiao emphasizes that in the deliberations for the 1970 Declaration, participants stressed that the principle of the nonuse of force should apply to boundaries of a *de facto* character.<sup>132</sup> *De facto* boundaries, unlike *de jure* boundaries, are not delineated by treaty and have no legal force. They are either laid out by provisional agreement or simply fall along a line of control (which divides one contesting authority’s territory from the other).<sup>133</sup>

More support for including *de facto* regimes under Article 2(4) derives from the international community’s recognition of the legal status of non-state entities. Brownlie indicates that leased territories, leases in perpetuity, areas under suzerainty, protectorates, trust territories, condominiums, and unions and associations of states are protected from attack by third parties under international law.<sup>134</sup> If the protector or lessor country uses force with the aim of changing the legal status of the non-state entity, this would be, according to Brownlie “*prima facie* unlawful.”<sup>135</sup> Other state-like entities have been treated as states under international law. For example, states *in statu nascendi*, or on a path toward political independence, were treated as states under international law in the decolonization period.<sup>136</sup>

Though this has not been articulated in scholarship, one counterargument to the idea that *de facto* regimes fall under Article 2(4) might emphasize that when states have treated stable *de facto* regimes as falling under Article 2(4) in the past, those *de facto* regimes’ borders often have been set by international agreement. While states may recognize the obligation to respect borders that have been set by agreement, whether they participated in that agreement or not, some states would not consider this protection to extend to their own contested territories if no agreements exist. Since the drafters of Article 2(4) considered, and decided to exclude, territorial entities, its

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<sup>131</sup> G.A. Res. 2625, *supra* note 107, at 122.

<sup>132</sup> Hsiao, *supra* note 11, at 728.

<sup>133</sup> See Kenneth A. Schultz, *What’s in a Claim? De Jure Versus De Facto Borders in Interstate Territorial Disputes*, 58 J. CONFLICT RESOL. 1059, 1060–61 (discussing the difference between *de facto* and *de jure* borders).

<sup>134</sup> See BROWNLIE, *supra* note 86, at 380–81.

<sup>135</sup> *Id.* Brownlie gives the example of General Assembly Resolution 181 (II), which created a plan for a demilitarized Jerusalem in 1947 and proscribed any attempts to alter Jerusalem’s legal status by Israel. *Id.*

<sup>136</sup> *Id.* at 135–36 & n.44. A state *in statu nascendi* is “[a] political community with considerable viability, controlling a certain area of territory and having statehood as its objective [that] may go through a period of travail before that objective has been achieved.” *Id.* at 135.

application should be restricted to states and special entities designated as such by treaty.

### 3. *UN Member States Must Resolve Their Disputes Without Threatening International Peace and Security*

This final argument derives from Article 33 of the UN Charter. Article 33 operationalizes Article 2(3), which states that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>137</sup> Article 33 requires “[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security” to seek a solution by peaceful means, such as negotiation.<sup>138</sup> Unlike Article 2(4), Article 33 uses the term “parties,” not states.<sup>139</sup> This suggests that the Article could apply to disputes between a member state of the UN, which is bound by Article 33, and a contested state to which it laid claim.<sup>140</sup> The requirement of threat to the international peace and security must be interpreted in accordance with Article 24 and Article 39, which contain similar language.<sup>141</sup> Article 24(1) lays out the obligation of members to give the UN Security Council primary responsibility for the maintenance of “international peace and security.”<sup>142</sup> Article 39 enables the Security Council to determine the existence of any “threat to the peace, breach of the peace, or act of aggression” and decide what measures to take in order to “maintain or restore international peace and security.”<sup>143</sup> This means that the Security Council’s practice with regard to identifying threats to international peace and security for the purposes of all three of these articles is relevant to determining what kinds of conflicts would fall under Article 33.<sup>144</sup> If the Security Council considers intrastate conflicts to be “threat[s]” to the “international peace and security,”<sup>145</sup> then Article 33(1) should be construed

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<sup>137</sup> U.N. Charter art. 2, ¶ 3.

<sup>138</sup> *Id.* art. 33. The Article gives several examples of peaceful means of dispute resolution, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements. *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Christian Tomuschat, *The Pacific Settlement of Disputes, Article 33*, in 1 THE CHARTER OF THE UNITED NATIONS, *supra* note 89, ¶ 9 (explaining that while primarily applying to states, the obligation in Article 33 also applies to other entities such as “de facto regimes or national liberation movements”).

<sup>141</sup> See *id.* ¶ 13 (explaining the connection between Articles 24, 39 and 33, ¶ 1).

<sup>142</sup> U.N. Charter art. 24.

<sup>143</sup> *Id.* art. 39.

<sup>144</sup> See Tomuschat, *supra* note 140, ¶ 13 (“[T]he scope and meaning of Art. 33(1) depends to a great extent on the interpretation given to [Arts. 24 and 39] . . .”).

<sup>145</sup> U.N. Charter art. 39.

broadly, and could apply to conflicts between a state and a contested state.

There is a broad argument that resorting to force to resolve an international dispute would also contravene the second clause of Article 2(4), which forbids the use of force in any “manner inconsistent with the Purposes of the United Nations.”<sup>146</sup> Article 1 states that one purpose of the UN is to maintain international peace and security and to suppress breaches of the peace.<sup>147</sup> Trying to resolve disputes by force without first resorting to negotiation would disrupt international peace, and would therefore be inconsistent with the purposes of the United Nations and Article 2(4).

Further, there is state practice to support the idea that threats to international peace and security need not occur between states. The Security Council has intervened in response to Article 39 “threat[s] to . . . international peace and security” that have arisen within a single state.<sup>148</sup> One of the first Security Council decisions to authorize intervention was during the Korean War. North Korea attacked South Korea when North Korea was not a widely recognized state. The conflict could have been characterized as a civil war within Korea,<sup>149</sup> but the Security Council deemed it a breach of international peace and intervened in the conflict.<sup>150</sup> Since then, the UN has found threats to international peace and security arising from conflicts in Haiti, Somalia, Rwanda, and the former Yugoslavia, all of which were internal to those states.<sup>151</sup> Threats to international peace and security are not restricted to armed attack; after the 2004 coup d’état in Haiti, economic instability was deemed a threat to international peace and security.<sup>152</sup> Another recent example was the UN intervention into the civil war in Libya in 2011. The Security Council has consistently categorized the conflict between rival factions in Libya as a threat to the international peace and security despite it transpiring entirely within

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<sup>146</sup> *Id.* art. 2, ¶ 4.

<sup>147</sup> The first enumerated purpose of the United Nations under Article 1 is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . .” U.N. Charter art. 1, ¶ 1.

<sup>148</sup> See Henderson, *supra* note 82, at 382 & n.78 (noting that the UN has found a threat to international peace despite the threat “generally remain[ing] within the territorial confines of a single state”).

<sup>149</sup> See BRUCE CUMINGS, *THE KOREAN WAR: A HISTORY* 64–67 (2010) (arguing that the Korean War was a civil war).

<sup>150</sup> See S.C. Res. 83, pmb. (June 7, 1950) (calling the armed attack on the Republic of Korea a “breach of the peace”).

<sup>151</sup> See Charney & Prescott, *supra* note 22, at 453 n.123.

<sup>152</sup> See S.C. Res. 1542, pmb. (Apr. 30, 2004).

Libya's borders.<sup>153</sup> These Security Council interpretations of threats to international peace and security would suggest that Article 33 could be interpreted to impose an obligation on states to resolve intrastate conflicts, including conflicts with their own contested elements, peacefully.

State practice likewise supports the idea that Article 33 is considered a norm of customary international law. Kirgis's survey of state practice suggests that governments must consult others whenever they contemplate taking any unilateral action that might adversely affect the interests of the international community if "the risk of harm is significant."<sup>154</sup>

Because this argument has not been fully articulated in scholarship, its weaknesses have not been well explored. A potential rejoinder to this argument might emphasize that Article 33 operationalizes Article 2(3). Article 2(3) refers to the *international* disputes between UN members, all of which are states. Similar to the restrictive reading of Article 2(4) in Section II.A., this position would argue that the drafters of the UN Charter would not have intended Article 33 to refer to disputes between states and contested entities since it was drafted on the understanding that states are the only proper subjects of international law.<sup>155</sup>

### III

#### TAIWAN AND THE USE OF FORCE

The discussion above presented the arguments for and against the legality of a use of force against contested states and highlighted the different understandings of the international system that inform both sides' positions. This Section aims to present the implications of these arguments for Taiwan. This Note's analysis suggests that in excluding Taiwan from subjecthood under international law on the use of force, the Westphalian argument incentivizes China to prevent Taiwan from attaining statehood at all costs. The post-Westphalian view, on the other hand, allows international law to take into account how Taiwan has changed since 1949. Though the two sides of the debate are based on incommensurable views of the international system, the Westphalian argument creates a legal fiction that diverges from Taiwan's actual situation. In enabling international law to apply to

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<sup>153</sup> See S.C. Res. 2362, pmb. (June 29, 2017).

<sup>154</sup> FREDERIC L. KIRGIS, JR., *PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE* 359–60 (1983). Kirgis suggests a two-part framework for evaluating the risk of harm: the magnitude of the risk times the magnitude of the conceivable harm. *Id.*

<sup>155</sup> See *supra* Section II.A.

Taiwan's geopolitical reality, the post-Westphalian perspective presents a more satisfactory resolution to the question of the legality of a use of force against Taiwan.

#### A. *Can China Use Force Against Taiwan Under International Law?*

If China were to launch an armed attack on Taiwan, what rights and protections would Taiwan have under international law? If China were to justify a use or threat of force against Taiwan under the discursive framework of international law, China's strongest arguments would derive from the Westphalian premise, which conceives of statehood as an all-or-nothing binary. In this line of argument, China would justify its attack by first arguing that Taiwan is part of China, and then arguing that even if Taiwan were not part of China, it is not fully recognized as a state, and therefore does not fall under Article 2(4). Since Taiwan is not fully recognized as a state, it does not enjoy the full rights of a state under international law.<sup>156</sup> As such, the conflict would be governed only by China's own domestic law.<sup>157</sup> Given that this position denies Taiwan subjecthood under international law, Taiwan's best legal counterargument is to adopt a post-Westphalian stance and claim that even if it is not fully recognized as a state, its state-like characteristics nonetheless accord it certain rights. Evaluating Taiwan's rejoinders requires answering three questions. First, are the Taiwanese a people? Second, is Taiwan a stable de facto regime? Third, would a Chinese attack on Taiwan endanger international peace and security?

Though the term "people" remains undefined in international law, some scholars argue that the residents of Taiwan do qualify as a "people" for the purposes of self-determination and hence have protections against the use of force under international law.<sup>158</sup> Henderson points to a definition developed by the UN Education, Scientific & Cultural Organization.<sup>159</sup> A people is a group of individual human beings with a common historical tradition, racial or ethnic identity, culture, language, religion, territory, or economic life.<sup>160</sup> The group must have the "will to be identified as a people or the consciousness of being a people" and "institutions or other means of expressing its

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<sup>156</sup> See *supra* note 74 and accompanying text.

<sup>157</sup> See Chan, *supra* note 11, at 492.

<sup>158</sup> See Charney & Prescott, *supra* note 22, at 472–73 (“[T]he population of Taiwan may be considered a separate ‘people’ having the right of self-determination.”).

<sup>159</sup> Henderson, *supra* note 82, at 384 (citing U.N. Educ., Sci. & Cultural Org., *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, ¶ 22, U.N. Doc. SHS-89/CONF.602/7 (Feb. 22, 1990)).

<sup>160</sup> U.N. Educ., Sci. & Cultural Org., *supra* note 159, ¶ 22.

common characteristics and will for identity.”<sup>161</sup> The residents of Taiwan meet these indicators. Taiwan’s democratic governmental institutions serve as a means to express the common characteristics of its people, and Taiwan’s historical tradition diverged from China’s during the Japanese colonial period over a century ago, even before the ROC took over in 1945.<sup>162</sup> Scholars have described a process of “Taiwanization” whereby the residents of Taiwan are adopting a new Taiwanese identity.<sup>163</sup> Currently, around sixty percent of Taiwanese identify as Taiwanese (with about a third identifying as both Taiwanese and Chinese); only three percent identify as exclusively Chinese.<sup>164</sup>

Another definition of “people” requires association with a specific territory and territorial history.<sup>165</sup> Charney and Prescott note that the residents of Taiwan have inhabited a distinct territory since 1895, have their own democratic system of self-governance, and have a different culture from the mainland.<sup>166</sup> To the argument that the residents of Taiwan are ethnically identical to mainland Chinese, Charney and Prescott respond that the influx of mainland Chinese in 1949 increased the island’s population by only fifteen percent, and that the rest of the population had roots on the island dating back to at least 1895 or earlier.<sup>167</sup> Shen has responded, citing the fact that until the early 1990s, the ROC claimed to be the rightful government of all of China and emphasized the common Chinese heritage of residents of Taiwan and the mainland.<sup>168</sup> In other words, the Taiwanese government’s claim did not fully coincide with Taiwan’s territorial reality or,

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<sup>161</sup> *Id.*

<sup>162</sup> This constitutes a significant period of historical divergence even if one accepts that the seventeenth to eighteenth century period of peripheral contacts with the Chinese Empire constituted a common historical tradition between Taiwan and China. *See supra* Section I.A (describing the diverging historical views on China’s contacts with Taiwan prior to 1887).

<sup>163</sup> *See, e.g.,* Jou-Juo Chu, *Nationalism and Self-Determination: The Identity Politics in Taiwan*, 35 J. ASIAN & AFR. STUD. 303, 304 (2000) (describing the development of the Taiwanese national identity). Seventy-five percent of Taiwan’s residents believe that Taiwan and China are separate nations. *See Most Taiwanese Consider Taiwan and China Separate Countries, Poll Suggests*, S. CHINA MORNING POST (June 21, 2017), <https://www.scmp.com/news/china/policies-politics/article/2099286/most-taiwanese-consider-taiwan-china-separate-countries>.

<sup>164</sup> *See* Fang-Yu Chen et al., *The Taiwanese See Themselves as Taiwanese, Not as Chinese*, WASH. POST (Jan. 2, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/02/yes-taiwan-wants-one-china-but-which-china-does-it-want/>.

<sup>165</sup> *See* Oeter, *supra* note 103, ¶ 25 (arguing that the concept of “territoriality” is unavoidable).

<sup>166</sup> Charney & Prescott, *supra* note 22, at 473.

<sup>167</sup> *Id.*

<sup>168</sup> *See* Shen, *supra* note 26, at 1127, 1161.

necessarily, the self-perception of the Taiwanese people, for most of its history (even now, it is unclear where they stand). Yet, one could nonetheless argue that the existence of the Taiwanese people predates the martial ROC government and remained associated with the island irrespective of what the martial government claimed on its behalf.

Some scholars have argued that an unprovoked attack on Taiwan would be illegal based on the fact that the Taiwanese are a distinct people.<sup>169</sup> The fact that the Taiwanese already have their own government, the democratic nature of which makes it an expression of their political will, means that an attack by China would necessarily interfere with their right to self-determination if it aimed to bring Taiwan under autocratic control.<sup>170</sup> The PRC would be initiating force to recapture a territory that it had never governed and that had not been part of its territory for over a century.<sup>171</sup> While international law acquiesces in states resisting forcible attempts at secession,<sup>172</sup> there is no support for any right to preemptively attack a self-governing population within its territory.<sup>173</sup> There is, therefore, no international legal justification for China to contravene the various UN protections for “peoples,” and its armed attack would contravene the Taiwanese right to self-determination.

Second, is Taiwan a *de facto* regime? Many scholars argue that it is.<sup>174</sup> Though the time period of stable control required to form a *de facto* regime is undefined, the ROC government has exercised authority over the island of Taiwan for more than seventy years, and it is difficult to imagine that this would not be sufficient. The argument

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<sup>169</sup> See, e.g., Charney & Prescott, *supra* note 22, at 472–73 (discussing the possibility that the population of Taiwan is a “people” and that any forceful attempt by China to impose its governing authority over Taiwan would therefore be unauthorized); Henderson, *supra* note 82, at 383–85 (elaborating on the notion of a “people” and discussing the illegality of using force against a “people” who are peacefully exercising their right to self-determination).

<sup>170</sup> See Charney & Prescott, *supra* note 22, at 473 (arguing that the Taiwanese are a self-governing people with the right of self-determination and a forcible attempt to submit them to Chinese governance would interfere with that right).

<sup>171</sup> Charney and Prescott argue that even if international law may support a mother state’s use of force to resist a secessionist group, “after fifty or more years of independence the initiation of force by a state to recapture an area it claims to have been part of its territory a century ago would be impossible to justify.” *Id.*

<sup>172</sup> See CRAWFORD, *supra* note 34, at 389 (highlighting several Security Council resolutions condemning secessionist efforts).

<sup>173</sup> UN documents tend to express the opposite presumption that attacks on “peoples” within states are illegal. See *supra* notes 102–04 and accompanying text (articulating support for the self-determination of “peoples”); *supra* note 106 (articulating protections for “peoples” in international humanitarian law).

<sup>174</sup> See, e.g., Hsiao, *supra* note 11, at 732–42; Björn Ahl, *Taiwan*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 22 (Rüdiger Wolfrum ed.) (last updated June 2008), <http://opil.ouplaw.com/home/epil>; Frowein, *supra* note 126, ¶ 1.

that the residents of Taiwan are a “people” for the purposes of self-determination only reinforces the idea that Taiwan is a distinct self-governing regime.<sup>175</sup> Taiwan and China have exercised authority on two sides of the Strait—a de facto border—since 1949. Though China would deny that the Strait is a border since it was not set by agreement or treaty, there is support for international legal protection applying to de facto borders irrespective of whether they are set by agreement.<sup>176</sup> This combination of UN declarations and state practice protecting the borders and legal status of de facto regimes supports an argument that China, as a UN member state, is prohibited from using force against Taiwan under Article 2(4).

Third, would an armed attack on Taiwan flout China’s Article 33 obligation to resolve disputes peacefully? Kirgis suggests that states have an obligation to consult others before undertaking unilateral actions that present a “significant” risk of harm.<sup>177</sup> A preemptive armed attack by China against Taiwan, whether we consider Taiwan a renegade province or a de facto state, would create a significant risk of harm—indeed, this would arguably be the goal. Even if we contemplate a use of force wherein China aimed to intimidate Taiwan into abandoning its drive for independence by, for example, firing missiles into the ocean near its ports, there would be a significant risk of harm from a miscalculation. The conflict could well expand to implicate other regional powers, particularly the United States and Japan. The United States has explicitly declared that it would consider any use of force, including a blockade, a grave threat to the security of the region.<sup>178</sup> Japan has a strong security alliance with the United States.<sup>179</sup> Moreover, Taiwan is only a few hundred kilometers from the Japanese-controlled Senkaku/Diaoyu disputed islands, the site of previous clashes between Japanese and Chinese forces.<sup>180</sup> As such, Japan would likely see an attack on Taiwan as a threat to its

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<sup>175</sup> See *supra* Section II.B.1 (providing an overview of international law’s protection of distinct “peoples”).

<sup>176</sup> See *supra* notes 127–29 and accompanying text (making this argument).

<sup>177</sup> See KIRGIS, *supra* note 154, at 359–60.

<sup>178</sup> Under the Taiwan Relations Act, it is the United States’ policy to “consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States.” 22 U.S.C. § 3301(b)(4) (2012).

<sup>179</sup> See Beina Xu, *The U.S.-Japan Security Alliance*, COUNCIL ON FOREIGN REL. (July 1, 2014), <https://www.cfr.org/backgrounder/us-japan-security-alliance> (describing the U.S.-Japan alliance as “the cornerstone of Washington’s security policy in East Asia”).

<sup>180</sup> See Sheila A. Smith, *A Sino-Japanese Clash in the East China Sea*, COUNCIL ON FOREIGN REL. (Apr. 22, 2013), <https://www.cfr.org/report/sino-japanese-clash-east-china-sea> (chronicling military clashes between Japan and China over the Senkaku/Diaoyu dispute since 2010).



security.<sup>181</sup> Since an armed attack on Taiwan could, therefore, be considered a threat to international peace and security, China would be in contravention of Article 33.

The discussion above suggests that Taiwan does fit into three post-Westphalian categories that would accord it some rights under international law on the use of force. This is irrelevant, however, to someone who takes the position that statehood is a prerequisite to subjecthood under international law. Since the Westphalian and post-Westphalian perspectives operate from different premises about the functioning of the international legal system, the two sides of the debate are, in a sense, incommensurable. Still, from a pragmatic perspective, the Westphalian argument no longer reflects Taiwan's situation and creates perverse incentives for China. The following section discusses those incentives and argues that the post-Westphalian arguments represent a dynamic vision of international law that can better encompass the evolution of contested states over time.

### *B. Cross-Strait Relations and the Implications of Moving Beyond Westphalia*

After the Chinese Civil War, when Taiwan's legal status was arguably left undetermined, it was a territory emerging from Japanese colonial rule. Today, Taiwan is a self-governing democracy with twenty-three million residents and a thriving economy. China derives little strategic or economic benefit from Taiwan. It extracts no taxes,<sup>182</sup> and it conducts trade with Taiwan according to agreements as it would with any other state.<sup>183</sup> Nonetheless, under the Westphalian paradigm, China has strong incentives to freeze Taiwan into an indeterminate status through its political influence and military power, irrespective of the fact that Taiwan has all of the characteristics of a state except full international recognition. This Section explores how cross-Strait relations are shaped by the legal debate over Taiwan's status and argues that the rigid Westphalian binary creates perverse incentives. It then argues that the post-Westphalian perspective, in according Taiwan selective rights under international law on the use of force, provides a more satisfactory resolution to the question of the

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<sup>181</sup> For an overview of the Senkaku/Diaoyu dispute and its significance to Japan and China, see MIN GYO KOO, *ISLAND DISPUTES AND MARITIME REGIME BUILDING IN EAST ASIA: BETWEEN A ROCK AND A HARD PLACE* 103–06 (2009).

<sup>182</sup> See JEAN-MARIE HENCKAERTS, *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS* 16 (1996).

<sup>183</sup> One example is the Economic Cooperation Framework Agreement, concluded in 2010, which aims to reduce trade barriers and strengthen trade. *Cross-Straits Economic Cooperation Framework Agreement, China-Taiwan*, pmb.l., June 29, 2010, 50 I.L.M. 442.

legality of an attack on Taiwan because it accounts for Taiwan's state-like characteristics.

Under the Westphalian conception of statehood, China can only preserve its claim to sovereignty over Taiwan if it can prevent the international community from recognizing Taiwan as a state. If Taiwan declared independence and China could not prevent its recognition, Taiwan would emerge as a state with a powerful economy<sup>184</sup> and advanced military technology<sup>185</sup> less than two hundred kilometers from China. An independent Taiwan would have the right to conclude defense treaties,<sup>186</sup> so Taiwan would be free to forge formal alliances with fellow democracies, such as the United States and Japan, creating a line of potentially antagonistic military powers off of China's shores. Taiwan would also gain a voice in international organizations such as the UN, an unquestionable right to protection under Article 2(4), and rights of self-defense and collective security under Article 51. If Taiwan successfully achieved independence, the doctrine of estoppel would operate against China renewing its claim.<sup>187</sup> Further, seeing Taiwan achieve independent statehood might embolden other regions like Tibet to challenge China's control.

Because the stakes of Taiwan achieving recognition as a state are high, China has an interest in challenging any move toward Taiwanese independence, even to the point of threatening force in its domestic law. China has little direct influence over Taiwan, so it employs threats of military force to achieve that deterrence.<sup>188</sup> Any perceived move toward independence could lead to a showing of military might: In 1995, for example, President Lee Teng-Hui's invitation to Cornell University resulted in a large-scale military response. Even though it is unlikely that China would make good on its military threats, this deterrence strategy has kept cross-Strait relations unstable for

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<sup>184</sup> Taiwan's GDP per capita is three times that of China, and by some measures it is the sixth richest economy among the Asia-Pacific Economic Cooperation countries. Salvatore Babones, *Taiwan Is at the Center of Asia's Economy, but on the Margins of Its Meetings*, FORBES (Nov. 13, 2017), <https://www.forbes.com/sites/salvatorebabones/2017/11/13/taiwan-is-at-the-center-of-asias-economy-but-on-the-margins-of-its-meetings/#3f3b30f86589>.

<sup>185</sup> See Beckley, *supra* note 2, at 85–86 (detailing Taiwan's military capacities).

<sup>186</sup> The Vienna Convention on the Law of Treaties limits treaties to international agreements concluded between states. Vienna Convention on the Law of Treaties art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>187</sup> Cf. Chan, *supra* note 11, at 485 (arguing that, should China fail to act upon Taiwan's declaration of independence, the doctrine of estoppel would probably operate against China's sovereignty over Taiwan).

<sup>188</sup> See Yuan-kang Wang, *China's Growing Strength, Taiwan's Diminishing Options*, BROOKINGS INST. (Nov. 9, 2010), <https://www.brookings.edu/research/chinas-growing-strength-taiwans-diminishing-options/> (“[I]n Beijing's calculation, fear of war with the powerful mainland is the best deterrent against Taiwan independence.”).

decades. Tensions frequently escalate to shows of force in the Strait.<sup>189</sup> These tensions have also resulted in enormous military expenditure, as both China and Taiwan (supported by the United States) seek to balance the threat posed by the other.<sup>190</sup> Under international relations theory, this creates a high risk for armed conflict.<sup>191</sup> China has tried to prevent Taiwan's recognition through "dollar diplomacy": offering large sums of money to the small states that recognize the ROC rather than the PRC to tempt them to change their allegiances. For example, China built Costa Rica a \$100 million stadium in exchange for turning away from Taiwan.<sup>192</sup>

In order to prevent Taiwan from achieving statehood, China has also sought to ensure that Taiwan cannot join international organizations like the UN, for which statehood is a prerequisite for membership, or even subsidiary bodies of such organizations.<sup>193</sup> China cannot let Taiwan participate in these organizations because it would allow Taiwan to interface with other states as an equal, improving its prospects for recognition. Because of the "all-or-nothing" nature of the

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<sup>189</sup> During the period of high tensions that began in 2016 after Tsai Ing-wen was elected, a Chinese carrier group sailed through the Strait. See Fabian Hamacher & Jess Macy Yu, *Amid Tension, China Carrier Group Sails Through Taiwan Strait*, REUTERS (Jan. 16, 2018), <https://www.reuters.com/article/us-china-taiwan-flights/amid-tension-china-carrier-group-sails-through-taiwan-strait-idUSKBN1F60C3>. In early 2018, China also stepped up military drills around Taiwan. *Id.*

<sup>190</sup> The U.S. has sold more than thirteen billion dollars' worth of arms to Taiwan since 2010. See *State Department Approves \$1.4B Arms Sale to Taiwan*, CBSN (June 29, 2017), <https://www.cbsnews.com/news/arms-deal-taiwan-state-department-trump-administration/> (reporting on the U.S. approval of an additional \$1.4 billion in arms spending to Taiwan in 2017); *U.S. Announces \$1.8B Arms Sales for Taiwan*, CBSN (Dec. 16, 2015), <https://www.cbsnews.com/news/united-states-announces-1-8-billion-arms-sales-for-taiwan/> (noting that, as of 2015, the U.S. had announced more than \$12 billion in arms sales to Taiwan since 2010). Roughly a third of China's defense budget is concentrated on a campaign to conquer Taiwan. Beckley, *supra* note 2, at 83–84.

<sup>191</sup> See Robert Jervis, *War and Misperception*, 18 J. INTERDISC. HIST. 675, 676 (1988) (positing that military optimism and diplomatic pessimism can cause states to be more likely to misperceive the other's intentions).

<sup>192</sup> See Kevin Ponniah, *Taiwan: How China Is Poaching the Island's Diplomatic Allies*, BBC NEWS (June 14, 2017), <https://www.bbc.com/news/world-asia-40263581>.

<sup>193</sup> Taiwan has been able to join other organizations for which statehood is not a prerequisite, including the WTO and the Asian Development Bank, under the name "Chinese Taipei." See *supra* note 61. While the organizations that Taiwan has been able to join regulate predominantly economic activity, UN Security Council decisions can impinge on states' political activities or domestic territories, and the UN Charter restricts membership of its central organs to states. U.N. Charter art. 4, ¶ 1 (membership in the United Nations is open to "peace-loving states" that accept the obligations in the Charter). Given that letting Taiwan join the UN would be tantamount to the international community recognizing Taiwan as a state, China strongly opposes it. See *UN Rejects Taiwan Application for Entry*, *supra* note 64 (reporting that Chinese officials "roundly condemned" Taiwan's application for UN membership in 2007, calling it "a blatant move toward Taiwan independence").

rights associated with statehood, any step toward recognition is a threat to China's interests. Considering Taiwan's large population and economic power, this lack of access is concerning. The twenty-three million residents of Taiwan are effectively represented by the Communist Party of China at the United Nations, but the interests of Taiwan and the PRC are not always aligned. For those who would conceptualize international organizations as deriving legitimacy from their inclusiveness to all peoples who wish to participate, this is a problematic disjuncture.<sup>194</sup>

Even setting aside the legitimacy problem, there remain other problems with PRC representation of Taiwan. For example, when SARS broke out in Taiwan in 2003, researchers in Taiwan were denied information from the World Health Organization (WHO)'s global investigation into the disease.<sup>195</sup> WHO officials told Taiwanese researchers that they would have to go to Beijing to get the antibody tests used to identify the virus.<sup>196</sup> Researchers were shut out of meetings and forced to rely on the WHO's website for information, but by the time the information was published, it was already out of date.<sup>197</sup> Considering the potential severity of an epidemic in a population the size of Taiwan's, this is a reminder that membership in international organizations is not simply a mark of prestige; it has real implications for the management of international crises. The UN's ability to address nontraditional security threats that cross borders, including international crime, catastrophes related to climate change, and epidemics, will be significantly hampered if those living in Taiwan and other contested states can have access to those organizations only through the state that lays claim to their territory.<sup>198</sup>

The above discussion highlights some of the practical problems that the Westphalian conception of international law creates for

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<sup>194</sup> See Robert O. Keohane, *Global Governance and Legitimacy*, 18 REV. INT'L POL. ECON. 99, 101 (2011) (arguing that inclusiveness is one standard for the legitimacy of an institution of global governance).

<sup>195</sup> David Cyranoski, *Taiwan Left Isolated in Fight Against SARS*, 422 NATURE 652, 652 (2003).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Residents of contested states that may be cut off from WHO resources, as Taiwan was, include approximately 1.8 million people in Kosovo, see *Population Estimates, 2017*, KOS. AGENCY STAT. (June 28, 2018), <http://ask.rks-gov.net/en/kosovo-agency-of-statistics/add-news/population-estimates-2017>, 340,000 in North Cyprus, see *TURKISH REPUBLIC OF NORTH CYPRUS, ECONOMIC AND SOCIAL INDICATORS 2016* (2017), 250,000 in Abkhazia, *Abkhazia Profile*, BBC NEWS (May 28, 2018), <https://www.bbc.com/news/world-europe-18175030> (using data from the last census in 2011), and 50,000 in South Ossetia, Freedom House *South Ossetia*, Freedom in the World 2017, <https://freedomhouse.org/report/freedom-world/2017/south-ossetia>, among others. See also Henderson, *supra* note 82, at 369 (listing Kosovo, North Cyprus, Abkhazia, and Ossetia as contested states).

Taiwan. China's military deterrence strategy, dollar diplomacy, and exclusion of Taiwan from international fora are all necessary if statehood, including its attendant rights, is perceived as a Westphalian binary. Under the Westphalian model, China is incentivized to prevent Taiwanese statehood at all costs because denying Taiwan statehood means denying Taiwan all of statehood's attendant rights under international law. The result is that Taiwan, which has the economic, political, and social characteristics of a state, cannot have access to international organizations and must exercise careful diplomacy in order to avoid provoking a military crisis. The idea that contested states like Taiwan can be excluded from international law on the use of force also has perverse implications for international law's application to conflicts. Taiwan is a populous territory with significant military power, and despite China's claim over its territory, it is not under China's governance. To argue that international law on the use of force has nothing to say about Taiwan seems to necessarily accept that Taiwan can use force against other states with impunity.<sup>199</sup> The Westphalian premise, that China can use force against Taiwan because Taiwan is not fully recognized as a state, is out of step both with the context of international law and with Taiwan's reality.

The post-Westphalian perspective, on the other hand, allows for the possibility that peoples within states, or contested regimes that have experienced a stable status quo for a long period of time, are also entitled to protection under Article 2(4). These arguments better reflect the state-like entity that Taiwan has become. The argument that the Taiwanese are a people has become stronger as Taiwan's residents increasingly identify as Taiwanese, while each passing decade of self-governance lends credence to the argument that Taiwan is a stable *de facto* regime. These arguments acknowledge that even if a non-state entity cannot become a state without recognition, a polity's state-like elements may bring it within the ambit of international law on the use of force. This accords with a broader trend in international organizations and courts toward acknowledging post-Westphalian perspectives by applying international law on the use of force to non-state entities.<sup>200</sup>

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<sup>199</sup> See Henderson, *supra* note 82, at 372 (noting the necessity of this conclusion).

<sup>200</sup> For example, Palestine was allowed to become a party to the Rome Statute of the International Criminal Court. See *The States Parties to the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#P](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#P) (last visited Aug. 6, 2018) (listing the parties to the Rome Statute, including Palestine). This is an example of creating rights and obligations under international criminal law for a non-state entity whose territory is claimed by another state. The International Court of Justice has also recognized post-Westphalian perspectives. See, e.g., *Armed Activities on the Territory of the Congo*,

While the lack of concrete definitions for peoples or regimes makes this protection amorphous, this ambiguity also allows international law to demarcate protections without creating potentially explosive situations. Clear definitions might prompt states to use force to prevent peoples or territories within them from meeting the standards of statehood. They also comprehend the possibility that long-term separation from the claimant state might create a distinct people or regime with the characteristics of a state where one did not exist before. In Taiwan's case, this may become increasingly relevant if the regime continues to hold an indeterminate legal status in the long term. Moreover, a greater international recognition of this alternate view could obviate the idea that Article 2(4)'s protections must necessarily be the exclusive right of states. If contested states could enjoy some of those protections, it may give claimant states and third parties pause before resorting to force during a crisis.

### CONCLUSION

Taiwan's legal status is an enduring question under international law. It is unlikely that Taiwan's status will change absent a significant shift in the East Asian geopolitical landscape. However, leaders are unpredictable and misperceptions are common.<sup>201</sup> It is possible, therefore, that China might exercise its Anti-Secession Law and launch an armed attack against Taiwan. This Note posits that the question of whether China can use force against Taiwan is related to the question of Taiwan's legal status, but is a distinct inquiry. One side of the debate argues that Article 2(4) does not apply to Taiwan, based on China's claim that Taiwan is part of its territory. The other side challenges this view based on legal precedents showing that states may not use force against peoples pursuing self-determination, that *de facto* regimes can be included under Article 2(4), and that states must resolve disputes with non-states peacefully under Article 33.

Part III finds that all three arguments fit Taiwan's situation. Taiwan's decades of self-rule and distinct history have tended to

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Advisory Opinion, 2005 I.C.J. 170, ¶¶ 14–15. (Dec. 19) (separate opinion by Simma, J.) (determining that non-state actors fall under Article 2(4) and can commit aggression against states, giving rise to a right of self-defense under Article 51). Moreover, the concept of humanitarian intervention and the idea that “peoples” may have a right to external self-determination also chafes at the Westphalian state by suggesting that states can lose rights if they oppress peoples within them. *See supra* notes 107–09 and accompanying text.

<sup>201</sup> For example, in 1999, Lee Teng-hui called cross-Strait relations “state-to-state” relations in an interview and sparked a diplomatic crisis. *Taiwan's Unnerving President Does It Again*, *ECONOMIST* (July 15, 1999), <https://www.economist.com/asia/1999/07/15/taiwans-unnerving-president-does-it-again>.

create a self-governing population where the majority identifies as Taiwanese. The stability of the ROC's governance of Taiwan, coupled with the tendency of the Strait to act as a boundary line, make Taiwan a *de facto* regime. An attack on Taiwan would likely create a significant humanitarian crisis and would implicate other regional powers, suggesting that it would be an illegal threat to international peace and security under Article 33. China has an incentive to mobilize the Westphalian argument in justifying a use of force. If China were to allow Taiwan to hold rights under international law, this would bring Taiwan closer to statehood and weaken China's claim. However, the Westphalian model has troubling implications. The idea that an entity like Taiwan would not hold any rights under international law on the use of force, despite possessing nearly all of the characteristics of a state, creates a gap in international law's capacity to regulate the use of force. The post-Westphalian challenges to this argument fill this gap, creating the possibility that a contested entity like Taiwan could acquire limited rights that correspond with its state-like status. These rights would grant contested states legal arguments against manipulating their status through force and draw attention to the human rights violations and international instability that would likely result from an armed attack.