China-Taiwan Threats of Force and the Paradox of the '*Nuclear Weapons* Principle'

Abstract

The People's Republic of China ('China') has adopted legislation threatening to invade the Republic of China ('Taiwan') if the latter declares independence. Threats of force are prohibited by the UN Charter Article 2(4) and equivalent customary international law. This article proceeds along two apparently contradictory strands. On the one hand, the prohibition probably does not apply to non-State entities such as the Republic of China. One the other hand, the ICJ stated in the *Nuclear Weapons* opinion that 'if the use of force itself in a given case is illegal [...] the threat to use such force will likewise be illegal'. If the Republic of China declares independence it will become a State, making a PRC invasion illegal. Therefore, the PRC's current threats should also be illegal. The best way to resolve this apparent paradox is to say that the ICJ's '*Nuclear Weapons* principle' must be nuanced.

Keywords

Taiwan; China; threats of force; nuclear weapons; ICJ

Contents

1. Introduction

This article concerns the prohibition of the threat of force in international law and how it applies to the relationship between the People's Republic of China (PRC) and the Republic of China (RoC), in light of the *Nuclear Weapons* advisory opinion from the International Court of Justice (ICJ).[1]

The main argument put forward here is that there is a legal paradox that needs resolving. On the one hand, the PRC's threats to use force against the RoC are *prima facie* contrary to the prohibition of the threat of force under international law, in light of the *Nuclear Weapons* advisory opinion from the International Court of Justice. On the other hand, that prohibition does not apply to the RoC because it is not currently a State. Thus, the PRC's threats seem to be both legal and illegal at the same time. That is a paradox, which must be resolved. This article argues that the most sensible resolution is to conclude that the ICJ's statement does not apply quite as generally as it is phrased, and that the PRC's threats are not contrary to the prohibition of the threat of force.

The following section (2) gives a historical overview of the PRC-RoC conflict, which is necessary in order to accurately assess the current legal situation. Section 3 presents the PRC's 2005 Anti-Secession Law and explains why it constitutes a continuous threat of force against the RoC. In Section 4 the prohibition against such threats is outlined, showing that it is significant whether the RoC is a State. That question is answered in the negative in Section 5. Section 6 then entertains the possibility that the prohibition of threats of force may apply to '*de facto* regimes' such as the RoC, but the conclusion is that it does not. In Section 7 the possibility that the prohibition of the threat of force applies to all 'border disputes' is examined, but the conclusion is that it is limited to border disputes between States. Two other relevant rules are discussed in Section 8, which shows that the RoC may be protected by a right of self-determination and the PRC's obligation to settle disputes peacefully, even if the prohibition of the threat of force does not apply. A preliminary conclusion is that the prohibition of the threat of force seems not to apply to the RoC, which is the first premise of the paradox that is explored in the article. In Section 9 the ICJ's '*Nuclear Weapons* principle' is presented, and its statement about the scope of the prohibition of the threat of force is interpreted. According to the ICJ's statement, the prohibition of the threat of force should

[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

apply to the RoC. Section 10 explains in detail how the foregoing discussions produce an apparent paradox. Section 11 is a conclusion, where the paradox is resolved.

2. Historical background

The relationship between the PRC and the RoC is unique in international law. An explanation of their peculiar legal relationship requires a brief explanation of the complicated history that led up to the present situation.

The RoC was established on the Chinese mainland in 1912, as a rival to and then replacement for the last Chinese empire, the Qing Dynasty. The original RoC government fought off a brief restoration of the Empire in 1917, but was soon toppled by an alliance between the Kuomintang (which is a major political party in today's RoC) and the Chinese Communist Party (which rules today's PRC). The Kuomintang, led by Chiang Kai-shek, took full control of the RoC in 1928. By then, however, the Kuomintang had fallen out with its former communist allies, who in 1927 began the Chinese Civil War in reaction to Kuomintang's anti-communist 'Shanghai Massacre'. The Civil War was suspended between 1936 and 1946, when the two parties fought as a united front (formally led by the Kuomintang) against the Empire of Japan, which had invaded Manchuria already in 1931, and continued to attack and occupy Chinese territory throughout World War Two. The civil war flared up again afterJapan's surrender in 1945, and the Communist Party could declare final victory over the Kuomintang in 1950. In 1949, the RoC government, led by the Kuomintang, went into exile on the island of Taiwan.

Taiwan was originally absorbed by the Chinese Qing Dynasty in 1683, but was ceded to Japan in 1895 as a result of the First Sino-Japanese War. This transfer was formalised by the Treaty of Shimonoseki.[2] Japan returned Taiwan to the RoC as part of the post-World War Two settlement. In the 1945 Potsdam Proclamation the Allies of World War Two intended to limit 'Japanese sovereignty […] to the islands of Honshu, Hokkaido, Kyushu, Shikuku, and such minor islands as we determine'.[3] Taiwan was thus excluded from the envisaged post-war Japanese territory. In the 1945 Instrument of Surrender Japan accepted the terms of the Potsdam Declaration,[4] thus confirming that it would no longer control Taiwan. The 1951

[2] Treaty of Shimonoseki (17 April 1895, 87 BFSP 799), Article 2(b) and (c).
[3] Potsdam Proclamation (26 July 1945, 13 DSB 137), paragraph 8.
[4] Japanese Instrument of Surrender, 2 September 1945.

Treaty of San Francisco between Japan and 48 allied States saw Japan renouncing all rights to Taiwan.[5] Neither the RoC nor the PRC were among those 48 States. Instead, Japan and the RoC (which had by then lost control of the mainland and retreated to Taiwan) concluded the separate 1951 Treaty of Taipei, in which Japan 'recognized' its loss of Taiwan.[6] The RoC thus occupied Taiwan without formal title between 1949 and 1951.[7]

From its new base on Taiwan, Kai-Shek's government maintained its claim to the entire Chinese territory,[8] and many States continued to recognise the RoC as the sole legitimate government of China. While the Communist Party established the PRC in 1949, and subsequently ruled the Chinese mainland, this was not recognised by the States that that still recognised the RoC. The weight of international recognition shifted gradually towards the PRC over the coming decades, culminating in the expulsion of the RoC from the United Nations (UN) in 1971 and its replacement by the PRC.[9] As of January 2020, of the 193 members of the UN, the PRC itself is one, while 178 others recognise the PRC, while the remaining 14 instead recognise the RoC.[10] Many of the States that recognise the PRC nonetheless maintain unofficial relations with the RoC.[11]

The PRC claims to be the sole government of China, and considers Taiwan to be a Chinese province. This is reflected in the Preamble to the PRC's Constitution, which says that 'Taiwan is part of the sacred territory of the People's Republic of China'.[12] The RoC's claim to be sole government of all of China became more equivocal with the 1991 adoption of the Additional Articles of the Constitution of the Republic of China, which define a 'Free Area' controlled by the RoC,[13] as distinct from the 'Mainland Area' controlled by the PRC. The subsequent 1992 Act Governing Relations between the People of the Taiwan Area and the Mainland Area

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[5] Treaty of San Francisco (8 September 1951, 136 UNTS 45), Article 2(b).
[6] Treaty of Taipei (28 April 1952, 138 UNTS 38).
[7] James Crawford, *The Creation of States in International Law* (2nd ed., 2006) p. 477.
[8] Crawford (note 7) 197.
[9] United Nations General Assembly Resolution, 25 October 1971, A/RES/2758(XXVI).
[10] Additionally, the RoC is recognised by the Vatican City State, which a Permanent Observer in the United Nations General Assembly.
[11] E.g. Björn Ahl, 'Taiwan', in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (updated 2008) para 9.
[12] People's Daily Online, 'Constitution of the People's Republic of China', 4 December 1982, <http://en.people.cn/constitution/constitution.html>.
[13] Office of the President, Republic of China (Taiwan), 'Constitution of the Republic of China (Taiwan), Additional Articles', undated, <https://english.president.gov.tw/Page/95>.

contains further details on the RoC's approach to the two areas.[14] The RoC's introduction of the distinction between the two areas means that the RoC recognises that a conquest of the Mainland is unrealistic in the foreseeable future, and may even be taken as a renunciation of its claim to the mainland.[15] Even so, the RoC has not formally declared itself to be a separate State, distinct from the PRC.

The PRC is often simply called 'China', while the RoC is referred to as 'Taiwan', hence the title of this article. These terms are not entirely precise, however, since the RoC governs some minor islands in addition to the island of 'Taiwan',[16] while, on the other hand, the PRC does not govern Taiwan, which both governments agree form part of 'China'. This article instead uses 'PRC' and 'RoC' to denote the two entities.

3. The People's Republic of China's Anti-Secession Law

The PRC has a standing policy of potentially invading Taiwan if the RoC declares independence. The policy was for a long time informal. For example, in a 1995 speech, the PRC's head of state[17] Jiang Zemin laid out eight points for dealing with the RoC. As part of the fourth point, he stated: 'Our not undertaking to give up the use of force is not directed against our compatriots in Taiwan but against the schemes of foreign forces to interfere with China's reunification and to bring about the "independence of Taiwan".'[18] A 2000 white paper issued by the PRC and titled 'The One-China Principle and the Taiwan Question' held that 'China will do its best to achieve peaceful reunification, but will not commit itself to rule out the use of force'.[19] The policy was incorporated into PRC domestic legislation with the 2005 'Anti-Secession Law'.[20] While the PRC's position is that the legislation merely preserves the status quo,[21] the law is significant, since while '[w]hite Papers, etc. are

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[14] Laws & Regulations Database of the Republic of China, 'Act Governing Relations between the People of the Taiwan Area and the Mainland Area', amended 24 April 2019, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=Q0010001>.
[15] Ahl (note 11) para 5.
[16] E.g. Ahl (note 11) para 2.
[17] Officially the General Secretary of the Chinese Communist Party and President of the People's Republic of China.
[18] Embassy of the People's Republic of China in the United States of America, The 8-Point Proposition Made by President Jiang Zemin on China's Reunification, 23 October 2003, <www.china-embassy.org/eng/zt/twwt/t36736.htm>.
[19] According to the translation published by the PRC embassy in the United States (US): Gov.cn Official Publications, The One-China Principle and the Taiwan Issue, February 2000, <www.gov.cn/english/official/2005-07/27/content_17613.htm>.
[20] E.g. Christine Gray, *International Law and the Use of Force* (4th ed., 2018) p. 74.
[21] Ahl (note 11) para 10.

declaratory [...], a law mandates action and is thus superior to other forms of policy statements'.[22] The Law's Article 2 and 8 read as follows:[23]

> *Article 2:*
> *[...] Taiwan is part of China. The state shall never allow the "Taiwan independence" secessionist forces to make Taiwan secede from China under any name or by any means.*
>
> *Article 8:*
> *In the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.*
>
> *The State Council and the Central Military Commission shall decide on and execute the non-peaceful means and other necessary measures as provided for in the preceding paragraph and shall promptly report to the Standing Committee of the National People's Congress.*

The phrase 'non-peaceful means and other necessary measures' connotes military force. Thus, there can be no doubt that the PRC is continuously threatening to use such force against the RoC if it declares independence from 'China'.

Conversely, the US has supported the RoC. The US switched its recognition from the RoC to PRC in 1979. Before that, the Sino-American Mutual Defense Treaty, which came into force in 1955, obliged the US to defend the RoC in the event of a military invasion of Taiwan.[24]

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[22] Ranjit Gupta, 'The Recent Anti-Secession Law of the PRC: A Comment', 41 China Report (2005) p. 289, 289.
[23] Embassy of the People's Republic of China in the United States of America, 'Anti-Secession Law (Full text)', 15 March 2005, <www.china-embassy.org/eng/zt/999999999/t187406.htm>.
[24] Mutual Defense Treaty between the United States of America and the Republic of China, 2 December 1954, 5 UST 2368. Its Article V stated that: 'Each Party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.'

The US terminated the treaty when withdrawing recognition, and replaced it with the Taiwan Relations Act.[25] The Act puts no military obligations on the US, but that does not mean that US would sit idly by in the event of an invasion of Taiwan. The US has formulated 'Six Assurances' towards the RoC, which have been confirmed repeatedly,[26] but these too do not include a military defence commitment in the event of invasion. This article does not try to determine the legality of a US military defence of the RoC, nor the legality of any specific military actions hitherto taken by the US, the PRC, or the RoC. This has already been discussed extensively by other writers.[27] While the legal status and consequences of these incidents are not discussed here, their legality will largely depend on questions that *are* discussed here, such as whether the RoC is a State or is currently protected by the prohibitions of the threat or use of force.

Unsurprisingly, the Republic of China is opposed to the Anti-Secession Law. An official statement called it a 'violation of international law', with reference to 'the principles sovereignty and self-determination' and the Republic of China being 'a sovereign and independent state'.[28] An official statement by the European Union reiterated its support of the one China policy, but also emphasised its 'opposition to any use of force' and its desire for 'a peaceful resolution of the Taiwan question'.[29] Similarly, an official statement by Japan's Ministry of Foreign Affairs expressed concern, and well as opposition to 'any means of solution other than a peaceful one'.[30] An official statement by Russia's Ministry of Foreign Affairs expressed understanding of the law, and reiterated its support for the one-China

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[25] Taiwan Relations Act, 22 U.S.C. ch. 48 § 3301 et seq., 10 April 1979.
[26] E.g. Frank Chiang, 'One-China Policy and Taiwan', 28 *Fordham International Law Journal* (2004) p. 1, 56-57.
[27] Lung-chu Chen, 'Taiwan, China, and the United Nations', in Jean-Marie Henckaerts (ed.), *The New World Order: Legal and Political Considerations* (1996) p. 189, 198; Nikolas Stürchler, *The Threat of Force in International Law* (2007) p. 220-225, 240-245, 312; 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 Journal of International Law* (2009) p. 455, 487.
[28] Main Affairs Council, 'The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law', 29 March 2005, <https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE>.
[29] Council of the European Union, 'Declaration by the Presidency on behalf of the European Union concerning the adoption of the "anti-secession law" by the National People's Congress of the People's Republic of China', 18 March 2005, <https://europa.eu/rapid/press-release_PESC-05-26_en.htm?locale=EN>.
[30] Ministry of Foreign Affairs of Japan, 'Statement by the Press Secretary/Director-General for Press and Public Relations, Ministry of Foreign Affairs, on the Anti-Secession Law', 14 March 2005, < https://www.mofa.go.jp/announce/announce/2005/3/0314.html>.

policy.[31] There was no official US statement on the Anti-Secession Law. At a 2007 press conference, the President's Press Secretary merely responded that '[t]he President's position on Taiwan and the one China policy is well-known' when asked about the Law.[32] A 2011 China-US Joint Statement did mention Taiwan, but not the Law.[33]

In short, the Anti-Secession Law constitutes a threat of using force against the RoC. Threats of force are prohibited under international law, as explained in the following chapter.

4. The prohibition of the threat of force applies to States

The UN Charter[34] Article 2(4) says that '[a]ll Members [of the UN] 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'. The provision covers not only the 'use' of force, it also covers 'the threat' of force.

The PRC is a member State of the UN, and is thus bound by the UN Charter, including Article 2(4). The RoC is no longer a UN member, and is *not* bound by the UN Charter. Even if the RoC were to declare independence and become a State, it is highly unlikely to become party to the UN Charter (again). Membership of the United Nations is governed by the UN Charter Article 4(2), and requires a two-thirds majority in the United Nations General Assembly under Article 18(2), as well as approval by the Security Council. In the Security Council the PRC would have a veto under Article 27(3) as one of the five Permanent Members, and could singlehandedly prevent the admission of the RoC to the UN.

Even so, Article 2(4) covers 'the threat or use of force against […] *any* state' (emphasis added). It thus prohibits the use force by UN members against UN member States and other States alike.[35] Additionally, the prohibitions of the threat or use of force is also found in

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[31] Ministry of Foreign Affairs of the People's Republic of China, 'The Russian Foreign Ministry Issues a Formal Statement on the Adoption of the Anti-Secession Law by China's National People's Congress', 14 March 2005, <https://www.fmprc.gov.cn/mfa_eng/topics_665678/AntiSecession_665876/t187554.shtml>.
[32] The White House, 'Press Briefing by Dana Perino', 1 October 2007, <https://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071001-2.html>
[33] The White House, 'U.S.-China Joint Statement', 19 Januar 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/19/us-china-joint-statement> para 6.
[34] Charter of the United Nations, 26 June 1945, 1 UNTS XVI.
[35] Oliver Dörr and Albrecht Randelzhofer, 'Article 2 (4)', in Bruno Simma and others (eds.), *The Charter of the United Nations: A Commentary, Volume* (3rd ed., 2012) p. 200, 213.

customary international law. This was confirmed, for example, by the ICJ in the *Nicaragua* judgment.[36] The prohibitions are therefore binding between all States, regardless of whether they are UN members. An important question is therefore whether the RoC is a State, which is discussed in the next chapter.

5. The Republic of China is not currently a State under international law

The conditions for Statehood in international law are part of customary international law. They are also largely codified in the Montevideo Convention[37] Article 1:

> *The state as a person of international law should possess the following qualifications:*
> *a. a permanent population;*
> *b. a defined territory;*
> *c. government; and*
> *d. capacity to enter into relations with the other states.*

The Montevideo Convention was concluded in 1933, and has 16 parties. Neither the PRC nor the RoC are parties, which means that the Convention does not apply to them as a matter of treaty law. The four conditions for statehood outlined in its Article 1 are generally assumed to reflect customary law.[38] That customary law determines the RoC's (and the PRC's) Statehood.

The Montevideo Convention Article 1 does not mention recognition by other States as a condition for Statehood. Recognition is instead mentioned in Article 3, which says that '[t]he political existence of the state is independent of recognition by the other states', and Article 6, according to which '[t]he recognition of a state merely signifies that the state which recognizes it accepts the personality of the other'. That recognition is not a condition is called the 'declaratory theory', as opposed to the 'constitutive theory'.[39] Most international lawyers adhere to the declaratory theory.[40]

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[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, para 188-192.
[37] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1993, 165 LNTS 19.
[38] E.g. Vaughan Lowe, *International Law* (2007) p. 153.
[39] E.g. James R. Crawford, *Brownlie's Principles of Public International Law* (8th ed 2012) 144-145.
[40] Eg. Crawford (note 39) 145.

The RoC generally fulfils the criteria for Statehood. It has a government that controls a population and a territory on Taiwan and nearby islands. It also has the capacity to enter into relations with other States. It has formal diplomatic relations with fourteen UN members, which shows it has a *capacity* for such relations.[41]

However, the RoC has not declared itself to be a separate State. The RoC accepts that there is only 'one China', and that the RoC is not a separate State from the PRC. The 'one China policy' is also acknowledged by and acquiesced in by the international community, since no State recognises *both* the PRC and the RoC.[42] The RoC is therefore claiming to the be legitimate government of the unified Chinese State.

This means that the PRC and RoC agree that only one of them can be a State under international law. Which one it is should be determined by looking at which government currently has effective control over the territory and population of the Chinese State. According to the United Nations, the PRC has a population of over 1.4 billion, and a territory 9.6 million km2 (not counting Macau and Hong Kong, which are part of the PRC under international law).[43] According to the BBC, the RoC has a population of 23.5 million and a territory of 36 000 km2. The PRC thus controls more than 98 % of the population and more than 99 % of the territory of China. The PRC must thus be considered *the* Chinese State under international law, which means that the RoC is currently not a State.[44]

Therefore, while recognition by other States is not necessary in order to become a State, effective control over a population and a territory is. In that sense, Statehood can be said to be 'objective'. However, *which* population and *which* territory that must be controlled is determined by the State's own claim about what territory and population it purports to represent. As long as the RoC purports to be represent all of China, it does not have the control necessary to be considered a State. If the RoC purported to only represent the territory

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[41] Mikaela L. Ediger, International Law and the Use of Force Against Contested States: The Case of Taiwan', 93 *New York University Law Review* (2018) 1668, 1680.
[42] E.g. Ahl (note 11) para 16.
[43] http://data.un.org/en/iso/cn.html
[44] Jianming Shen, 'Sovereignty, Statehood, Self-determination, and the Issue of Taiwan', 15 *American University International Law Review* (2000) 1101, 1140-1141 claims that 'it would be impossible to characterize Taiwan or the Taiwanese authorities as an independent and sovereign entity'. Chan (note 27) 459 notes that 'Taiwan has never existed as an independent State'. Chen (note 27) 198 and 205 disagrees.

of Taiwan, it would control 100 % of its population and territory, and would thereby become a State alongside the PRC.[45]

Accordingly, some RoC politicians have flirted with the idea of declaring independence from 'China', and thus establishing the RoC, or 'Taiwan', as a separate State, leaving behind the 'one China policy'. This position is particularly associated with the Democratic Progressive Party. The position is generally opposed by the Kuomintang, the traditional ruling party. The RoC held a referendum about the issue in 2008, where one question was: 'Do you agree that the government should apply for UN membership under the name "Taiwan"?'. Of the votes cast, 94 % were in favour, but turnout was just under 36 %, less than the 50 % required to make result valid.[46] An RoC declaration along these lines could, however, trigger an invasion by the PRC under the Anti-Secession Law.

The RoC fulfils the traditional criteria for statehood; all that is lacking is a formal declaration. If the RoC were to proclaim itself a separate State, with Taiwan as its territory, it would become a State if it continued to fulfil the criteria after the declaration. For the time being, the RoC is not a State under international law. While the prohibitions of the threat or use force apply to States, it could also apply to other entities. That is discussed in the next section.

6. The prohibition of the threat of force and 'de facto regimes'

The prohibitions of the threat or use of force may be apply to '*de facto* regimes',[47] i.e. 'entities [...] which controlled more or less clearly defined territories without being recognized'.[48] The RoC qualifies as a '*de facto* regime', by having for a long time controlled of the territory of Taiwan. It may thereby be protected by the prohibition, if the prohibition applies to such entities.[49]

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[45] E.g. Ahl (note 11) para 1, 18, and 20; Crawford (note 7) 211 and 219; Chiang (note 26) 78. Jonathan I. Charney and J. R. V. Prescott, 'Resolving Cross-Strait Relations between China and Taiwan', 94 *American Journal of International Law* (2000) p. 453, 465 are apparently unsure about whether the RoC is already a State.
[46] Taipei Times, 'Referendums fail to meet thresholds', 23 March 2008 <http://www.taipeitimes.com/News/taiwan/archives/2008/03/23/2003406756>.
[47] Dörr and Randelzhofer (note 35) 213.
[48] Jochen A. Frowein, 'De facto regime', in *Rüdiger Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law* (updated 2013) para 1.
[49]. Frowein (note 4048) para 4; Ahl (note 1011) para 22 both ascribe to this view; Ediger (note 41) 1699.

Similar reasoning may have been used in the Palmer Report on the 2010 Israeli raid on a flotilla bound for Gaza. Gaza is part of Palestine, which may be a 'de facto regime', if it is not a State.[50] Applying the prohibition of the use of force to the relationship between Israel and Palestine may rest on an assumption that the prohibition applies to '*de facto* regimes' such as Palestine. The report argued that 'Gaza and Israel are both distinct territorial and political areas'.[51] On the basis of this, the Report found that the right to self-defence (and thus implicitly also the prohibition of the use of force) applied between Israel and Gaza. While 'distinct territorial and political areas' sound similar to '*de facto* regimes', the Report explicitly states that '[t]he specific circumstances of Gaza are unique and are not replicated anywhere in the world'. This makes it difficult to infer general conclusions from it.

The question of whether the prohibition of the use of force applies to '*de facto* regimes' also arose in the 2009 Report of the EU's Independent International Fact-Finding Mission on the Conflict in Georgia. The Report discussed, among much else, the use of force by Georgia against Abkhazia and South Ossetia.[52] The report concluded that Abkhazia was 'a state-like entity',[53] and that '[t]he prohibition of the use of force is applicable'.[54] About South Ossetia the Report's reasoning was more specific, and relied on the wording of two agreements and a memorandum that Georgia had concluded, which led the Report to conclude that Georgia had voluntarily accepted and acknowledged the applicability of the prohibition of the use of force between itself and South Ossetia.[55]

However, it is by no means obvious that the prohibitions of the use and threat of force applies to '*de facto* regimes' under current international law.[56] The view that the prohibitions of the use and threat of force are limited to State-State relations finds support in the ICJ's advisory opinion in the *Wall* case. There the Court held that 'Article 51 of the Charter thus recognizes

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[50] As discussed by e.g. Crawford (note 67) 446-448.
[51] *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (September 2011) p. 41.
[52] Frowein (note 48) para 1 mention them in in the same context as Taiwan, as examples of '*de facto* regimes'.
[53] Independent International Fact-Finding Mission on the Conflict in Georgia, *Report, Volume II* (2009) 134.
[54] Independent International Fact-Finding Mission on the Conflict in Georgia (note 53) 291.
[55] Independent International Fact-Finding Mission on the Conflict in Georgia (note 53) 240-242.
[56] Christian Henderson and James A. Green, 'The *Jus Ad Bellum* and Entities Short of Statehood in the Report on the Conflict in Georgia', 59 *International and Comparative Law Quarterly* (2010) p. 129, 131, 133, and 138; Francois Dubuisson and Anne Lagerwall, 'Le conflict en Georgie de 2008 au regard du jus contra bellum et a la lumiere du rapport de la mission d'enquete internationale de 2009', 42 *Revue belge de droit international* (2009) p. 448, 455-464; Olivier Corten and Bruno Simma, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010) 159.

the existence of an inherent right of self-defence in the case of armed attack by one State against another State'.[57] The Court thus seemed to envisage the prohibition of the use of force and its exception (including the right to self-defence) to operate on a State-to-State level. A statement in the Court's *Kosovo* opinion points in the same direction, since it held that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'.[58]

The UN Charter mentions 'any *State*' (emphasis added). The same wording is used in the United Nations General Assembly resolutions on the *Definition of Aggression* and the *Declaration on Friendly Relations*.[59]

Article 1 of the *Definition of Aggression* says that '[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of *another State*' (emphasis added). Article 3 also focuses on the State-State relationship. It lists 'acts' which 'shall […] qualify as an act of aggression', and lists seven examples, all of which are limited to 'States'. All of these forms of 'aggression' focus on the actions of one State towards another State. The document defines 'State' as 'without prejudice to questions of recognition or to whether a State is a member of the United Nations'. That is sensible, but not relevant to the PRC-RoC situation. It is clear that that the RoC is not a UN member State. The important question is whether it is a State at all (as discussed in Section 5), not whether or not it is recognised by other States (which is touched on in Section 2).

The *Declaration on Friendly Relations* has as its first 'Principle' that 'States 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'. This is mirrors the wording of the UN Charter Article 2(4) and its use of 'States'.

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[57] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at para 139.
[58] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, 437.
[59] United Nations General Assembly Resolution, 14 December 1974, A/RES/29/3314; United Nations General Assembly Resolution, 24 October 1970, A/RES/25/2625.

The UN Charter Article 2(4) prohibits the threat or use of force 'in any other manner inconsistent with the Purposes of the United Nations'. Based on that wording it can be argued that one of the purposes of the UN system is to reduce amount of force used by States, and that this should lead to the conclusion that entities such as the RoC are protected by the Charter's prohibition.[60] While that is a relevant and intriguing argument, it is not obvious that that is what the Charter's phrasing should mean. States have consciously accepted a prohibition of the use of force between States, by acceding to the UN Charter which explicitly mentions the use of force against another 'state'. It is harder to argue that the UN member States have consciously accepted a prohibition on force between States on non-States, simply because that would be desirable in light of the purposes and design of the organization. It is a solid *lex ferenda* argument, but it is less clear that it says anything about States' obligations on the level of *lex lata*.

In conclusion, it is possible to argue that '*de facto* regimes' such as the RoC are protected by the prohibitions of the use and threat of force. On balance, however, the best available sources support the opposite conclusion, which is that the prohibition of the use of force currently applies only to States. For the RoC, this means that it is not currently protected by the prohibitions.

An entirely separate question is whether non-State entities can launch an 'armed attack' under the UN Charter Article 51 (and equivalent customary international law), and thus trigger a right to self-defence. This could permit the defending State to use of force in self-defence against the territory of another State, if the latter State is unable or unwilling to prevent a non-State actor from attacking the defending State. There is no clear State practice and opinio juris or judicial decision that could decide the question.[61] In any case, the important point for this article is that that debate is separate from the questions that are discussed here. When a State exercises self-defence against a non-State actor, it still attacks the territory of another State. It is thus a matter of applying the prohibition of the use of force between two States. In the case discussed in this article, a State uses force against a non-State entity, without the involvement of any other State. That is an important distinction. Whether a *State* can be subject to self-

[60] Charney and Prescott (note 45) 477 seem to make an argument along those lines.
[61] E.g. Gray (note 20) 139-147; James A. Green, *The International Court of Justice and Self-Defence in International Law* (2009) p. 44-51; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (2013) p. 368-510; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010).

defence when its territory used by a non-State actor is fundamentally different from the question of whether a *non-State actor as such* is protected by the prohibitions of the use and threat of force.

The conclusion is that the RoC is not protected by the prohibitions of the threat or use of force by virtue of being a '*de facto* regime'. Another possibility is that could serve to protect the RoC is that the prohibition applies generally to all 'border disputes', which is discussed in the next section.

7. The prohibitions of the threat of force and border disputes

The *Declaration on Friendly Relations* confirms that force cannot be used to resolve border disputes. It includes the following passage (in para 1):

> *Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.*

The same rule was applied by the Eritrea-Ethiopia Claims Commission. In its *Partial Award - Jus Ad Bellum*, it held as follows:[62]

> *[T]he practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes [...] border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.*

[62] Eritrea-Ethiopia Claims Commission, *Partial Award, Jus Ad Bellum, Ethiopia's Claims 1–8* (19 December 2005) para 10.

Applying this principle to the Eritrea-Ethiopia War, the Commission found 'that Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force to attack and occupy [territory] under peaceful administration by Ethiopia'.[63] The Commission's statement is sensible and constitutes a good rule.[64]

In short, using force against territory peacefully administrated by another state violates the prohibition of the use of force, regardless of whom that territory is later assigned to when the boundary dispute is eventually decided. This principle is, however, only relevant to the RoC-PRC dispute if the RoC is a state. Otherwise there is no 'border [dispute] between States', as per the Eritrea-Ethiopia Claims Commission. The rule could, in principle, be extended to territory controlled by '*de facto* regimes', but that is a separate debate, which is covered in Section 6 above.

Thus, the RoC is not covered by the prohibitions of the threat or use of force.[65] That is the first premise of the apparent paradox that this article seeks to resolve. The second premise comes from the ICJ's *Nuclear Weapons* advisory opinion, which is presented in Section 9. First, however, two other rules that may constrain the PRC's conduct towards the RoC are presented: The right to self-determination and the obligation to settle disputes peacefully.

8. The right to self-determination and the obligation to settle disputes peacefully

This chapter outlines the relevance of the right to self-determination and the obligation to settle disputes peacefully to the PRC-RoC conflict.

Under international law, every people has a right to self-determination. This follows from the

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[63] *Partial Award, Jus Ad Bellum, Ethiopia's Claims 1–8* (note 62) para 16.
[64] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) p. 187; Sean D. Murphy, 'The Eritrean-Ethiopian War-1998-2000', in Tom Ruys, Olivier Corten, and Alexandra Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (2018) p. 552, 569; Oscar Schachter, *International Law in Theory and Practice* (1991) p. 116.
[65] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2012) p. 194. Chan (note 27) 485 agrees. Crawford (note 7) 220-221; Charney and Prescott (note 45) 471 and 476; Anne Hsiu-An Hsiao, 'Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force in International Law?', 32 *New England Law Review* (1998) p. 715, 716, 732, and 742; Jean-Marie Henckaerts, 'Self-Determination in Action for the People of Taiwan', in *Jean-Marie Henckaerts* (ed.), *The New World Order: Legal and Political Considerations* (1996) p. 242, 254 disagree.

the UN Charter Article 1(2), the ICCPR[66] Article 1(1), and the ICESCR[67] Article 1(1). The PRC has ratified the ICESCR but not the ICCPR. In any case, the right of self-determination is part of customary international law, as affirmed by the ICJ on several occasions, including in the *Wall* opinion.[68]

The right of self-determination can be violated by the use of force. The *Definition of Aggression*'s Preamble mentions 'the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence'. The *Declaration on Friendly Relations* Principle 1 says that '[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence'.

If the right of self-determination is to be applicable to the RoC, the population of the RoC must constitute a separate 'people'. Both Taiwan and the mainland are dominated by the Han Chinese ethnic group. Both territories use the Mandarin language. The PRC and RoC agree that there is only one 'China'. That there is only one 'China' may be taken to imply that there is only one Chinese people, who are temporarily separated by the artificial political division between the mainland and Taiwan. There is nonetheless an argument to be made that the two territories are culturally different, since Taiwan has never been under communist rule and is today a democracy, and since Taiwan was controlled by Japan from 1895 to 1945 (although Japan also occupied parts of the Chinese mainland between 1931 and 1945).[69]

In short, it can be plausibly argued that there is a separate Taiwanese 'people' under international law. If so, the use of force by the PRC in violation of the wishes of the RoC's population, expressed through popular elections, including a referendum on independence, would violate the Taiwanese people's right to self-determination.[70]

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[66] International Covenant on Civil and Political Rights (16 December 1966, 999 UNTS 171).
[67] International Covenant on Economic, Social and Cultural Rights (16 December 1966, 993 UNTS 3).
[68] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 57) 171-172.
[69] Crawford (note 7) claims that '[w]hether or not there was such a people in 1947, the experience of half a century of separate self-government has tended to create one'220. Ahl (note 11) para 22 and Ediger (note 41) 1697 agree.
[70] Ahl (note 11) para 22; Charney and Prescott (note 45) 473 and 477; Henckaerts (note 65) 256; Ediger (note 41) 1698. Shen (note 38) 1158-1159; Phil C. W. Chan, 'China, State Sovereignty and International Legal Order' (2015) p. 215, and Chan (note 27) 473 disagree.

Moreover, UN member States have an obligation to settle dispute peacefully, according to the UN Charter Article 2(3). The ICJ has confirmed the legally binding nature of this obligation, in *Aerial Incident of 10 August 1999* and *Nicaragua*.[71] Non-UN member States are bound a customary rule with the same content.[72] The obligation has been elaborated on in declarations such as the 1982 Manila Declaration on the Peaceful Settlement of International Disputes and the Friendly Relations Declaration, both adopted by the UN General Assembly.[73]

The obligation to settle disputes peacefully is thus binding on all UN member States (per the UN Charter) and all States (as customary international law). This means that the PRC, as a State and a UN member, has an obligation to settle its disputes by peaceful means.

The obligation to settle disputes peacefully is in some sense a mirror image of the prohibition of the use of force.[74] The two rules are found in subsequent provisions in the UN Charter. The obligation of peaceful settlement includes an obligation not to use force to settle disputes, and such force is in itself prohibited by the prohibition of the use of force. Section 6 above concluded that the prohibition of the use of force does not protect non-State entities such as the RoC. If the obligation of peaceful settlement is a perfect mirror image of the prohibition of the use of force, the obligation will in the same way not apply to the PRC-RoC dispute.

However, the obligation of peaceful settlement could apply to a different set of situations than the prohibition of the use of force. It could apply not only to State-State disputes, but also extend to oblige States to settle disputes with certain non-State entities in a peaceful manner.[75] In support of this view, there are numerous examples of the UNSC calling upon States to peacefully resolve disputes with non-States.[76] If the obligation of peaceful settlement applies to disputes that involve non-State groups, it cannot apply to *all* such disputes (which could include, for example, law enforcement against criminal cartels). According to the UN Charter Article 2(3), the dispute must be 'international' in character, and the aim of the obligation is

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[71] *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 12, 33; Nicaragua (n 36) 145.
[72] E.g. Nicaragua (n 36) 145.
[73] Christian Tomuschat, 'Article 2(3)', in Bruno Simma and others (eds.), *The Charter of the United Nations: A Commentary, Volume I* (3rd ed 2012) 181, 186-187 discusses these and other relevant resolutions.
[74] E.g. Alain Pellet, 'Peaceful Settlement of International Disputes', in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (updated 2013) para 1-10; Tomuschat (note 73) 184 and 195.
[75] Pellet (note 74) para 26; Tomuschat (note 73) 193.
[76] Reported in Pellet (note 74) para 27.

to preserve 'international peace and security, and justice'. The PRC-RoC conflict can be said to be a dispute of an 'international' character, since it has drawn the attention and involvement of other States, in particular the US.

If the obligation of peaceful settlement applies to the PRC-RoC dispute, the PRC's Anti-Secession Law, with its explicit threat of settling the dispute by force, would seem to violate the obligation.[77]

The relevance of the obligation of peaceful settlement and the right to self-determination for the argument that is put forward in this article is twofold. Firstly, the two rules do not necessarily imply anything about the prohibitions of the threat and use of force. These are distinct rules, that may apply to different situations, and may be violated independently of each other. Therefore, the right to self-determination and obligation of peaceful settlement do not help resolve the paradox that is the subject of this article. Secondly, however, the fact that the PRC may violate other rules even though it may not currently be violating the prohibition of the threat of force, shows that it is bound by a broader set of international obligations in its treatment of the RoC. Regardless of the conclusion in this article, the PRC-RoC conflict is not a lawless space.

9. The Nuclear Weapons advisory opinion

The second premise of the paradox that this article deals with is based on a statement that the ICJ made in the *Nuclear Weapons* advisory opinion.[78] The opinion was handed down in 1996, after the UN General Assembly had requested the Court to give an advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'.[79]

The Court's response to the question was divided into six parts. It found, somewhat unhelpfully, no 'authorization of the threat or use of nuclear weapons', but also no 'comprehensive and universal prohibition of the threat or use of nuclear weapons'.[80] The first of those findings was unanimous, the second was made by 11 judges to 3. The Court also

[77] Gray (note 20) 74. Ediger (note 41) 1700 draws the same conclusion about an eventual armed attack by the PRC, that is a separate question from the legality of the Anti-Secession Law as such.
[78] *Legality of the Threat or Use of Nuclear Weapons* (note 1).
[79] *Legality of the Threat or Use of Nuclear Weapons* (note 1) 228.
[80] *Legality of the Threat or Use of Nuclear Weapons* (note 1) 266.

found, axiomatically (and unanimously), that '[a] threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful' and that '[a] threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict'.[81] The fifth finding was more controversial, as it was adopted only with the President's casting vote, by 7 judges against 7. That finding was that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law', but that 'the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.[82] The final finding, which was adopted unanimously, was the existence of an 'obligation [of] nuclear disarmament'.[83]

Although its main findings were controversial and somewhat inconclusive, the advisory opinion contains a variety of significant statements about different areas of international law, in particular on the use of force and humanitarian law.[84] One of the statements concerns the scope of the prohibition of the threat of force:[85]

> *Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.*

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[81] *Legality of the Threat or Use of Nuclear Weapons* (note 1) 266.
[82] *Legality of the Threat or Use of Nuclear Weapons* (note 1) 266.
[83] *Legality of the Threat or Use of Nuclear Weapons* (note 1) 267.
[84] Other aspects of the opinion is discussed in depth in e.g. Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999).
[85] *Legality of the Threat or Use of Nuclear Weapons* (note 1) para 47.

This statement has been quoted with approval by, among others, the arbitral tribunal in *Guyana v. Suriname*.[86]

The main topic of the advisory opinion, the legality of the use of nuclear weapons, has little significance to the PRC-RoC conflict, apart from the possibility that the conflict could trigger a nuclear war. The statement about the threat of force is, by contrast, at the heart of the subject of this article. When applied to the PRC's Anti-Secession Law, the statement gives rise to the paradox that this article aims to resolve. The statement is general enough to apply to the facts of the dispute covered in this article.

The ICJ's advisory opinions are not binding. The Court's regular judgments are binding, but only 'between the parties and in respect of that particular case', under the ICJ Statute[87] Article 59. Even then it is only the operative part of a judgment that it is binding. Incidental statements included in a judgment, of the kind that the ICJ made about threats of force in *Nuclear Weapons*, are not binding on anyone. Therefore, neither the PRC nor the RoC nor anyone else is bound by the ICJ's statements in the *Nuclear Weapons* opinion.

The ICJ's pronouncements about the substance of international law are nonetheless highly respected by international lawyers. While 'the Court cannot legislate',[88] 'the Court's pronouncement on the existence (and content) of a particular rule of customary law is [quite often] seen as the final proof for it'.[89] There is a case to be made for advisory opinions having less weight than judgments, but in practice neither the Court itself nor other international lawyers seem to make any sharp distinction between them.[90]

The Court's statement can also be questioned on its merits. The question is whether the prohibition of the threat of force in the UN Charter and customary international law has the content that the ICJ outlined in *Nuclear Weapons*. Some writers seem open to the view that there may not necessarily be a link between the prohibition of the threat of force and the

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[86] *Award of the Arbitral Tribunal constituted pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration Between Guyana and Suriname*, 2007, 144.
[87] Statute of the International Court of Justice (26 June 1945, 1 UNTS 993).
[88] *Legality of the Threat or Use of Nuclear Weapons* (note 1) 237.
[89] Alain Pellet, 'Article 38', in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd ed 2012) 731, 864.
[90] Pellet (note 89) 855.

prohibition of the use of force.[91] However, the ICJ's statement is clear, and was also presaged by the literature.[92] On balance, the most sensible view seems to be that the ICJ's statement was correct about the content of the prohibitions of the use and threat of force.

The essence of the Court's view is, for the present purposes, that 'if the use of force itself in a given case is illegal […] the threat to use such force will likewise be illegal'. The PRC is bound by the UN Charter Article 2(4) and its customary equivalent. When these are interpreted in light of the Court's statement, the result is that if it would be illegal for the PRC to *attack* the RoC, it will be illegal for the PRC to *threaten* to attack the RoC. The PRC threatens to do so through the Anti-Secession Law.

If the RoC were to declare independence, it could be significant whether it would instantly become a State, or whether there would be a delay before Statehood was achieved. If there is a delay, the PRC could have a chance to quickly launch a successful invasion and deprive the RoC government of control of Taiwan, and thus prevent the RoC from becoming a State. If the PRC wrests control of the island from the RoC, the RoC would no longer fulfil the third criterion for statehood mentioned previously, of being the effective 'government' of its territory. If the RoC never becomes a State, the PRC's invasion would not violate the prohibition of the use of force, since the prohibition would at no point have covered the RoC.

A related possibility is that if the RoC is quickly deprived of control of its territory, there may be considerably uncertainty over whether the RoC ever became a State prior to the invasion, and that uncertainty may be large enough to prevent any clear judgment of the legality of the PRC's actions.[93]

It could be argued that permanence should be a criterion for Statehood, in the sense that an entity must show that it fulfils the other criteria for statehood with some degree of

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[91] Stürchler (note 27) 43-51 and Romana Sadurska, 'Threats of Force', 82 *American Journal of International Law* (1988) p. 239, 268 seem open to the idea. Dörr and Randelzhofer (note 35) 218 find that 'State practice reveals a relatively high degree of tolerance towards mere threats of force'.

[92] It was presaged by e.g. Ian Brownlie, *International Law and the Use of Force by States* (1963) p. 364; and is supported by Marco Roscini, 'Threats of Armed Force and Contemporary International Law', 54 *Netherlands International Law Review* (2007) p. 229, 236.

[93] As Sir Michael Wood, 'Use of Force, Prohibition of Threat', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (updated 2013) para 10 puts it, '[t]here are practical difficulties with the approach of the ICJ in the *Nuclear Weapons* Advisory Opinion. For example, it is not always possible to assess, when the threat is made, that an eventual use of force will be itself unlawful'.

permanence before it can be considered a State.[94] However, the RoC already functions as a *de facto* State, and has done so for decades. It has all the trappings of Statehood. Barring a military invasion by the PRC, there can be no doubt that the RoC will fulfil the conditions for Statehood. In this case, it would be misguided to require permanence before acknowledging the RoC's Statehood.

Therefore, the RoC's Statehood will be virtually instant. This means that the RoC should achieve Statehood before a PRC invasion can be launched, and it will have existed as a State regardless of any subsequent loss of territorial control that results from an invasion. The prohibition of the use of force will thus apply to the RoC if it declares independence, and a PRC invasion will violate that prohibition. According to the ICJ's '*Nuclear Weapons* principle', since the PRC's invasion would be legal, its current threat of invasion must be equally illegal. This makes the RoC different from a regular secessionist movement. Such movements will generally not have control over all their claimed territory even before the secession is declared, and will not instantly become States. Otherwise, all States would be prohibited from forcibly resisting any moderately successful secessionist movement, a conclusion that is both unreasonable and without basis in State practice.

10. The paradox: The prohibition of the threat of force as 'Schroedinger's prohibition'

The foregoing conclusions lead to a paradox, which makes it unclear whether the PRC's standing threat to invade the RoC, codified in the Anti-Secession Law, is contrary to the prohibition of the threat of force.

The ICJ's *Nuclear Weapons* opinion held that 'if the use of force itself in a given case is illegal [...] the threat to use such force will likewise be illegal'.[95] Since a PRC invasion of the RoC after a declaration of independence would be illegal, the PRC's current threat should, according to the '*Nuclear Weapons* principle', also be illegal.

At the same time, the RoC is not currently protected by the prohibitions of the use and threat of force, since it is not yet a State.

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[94] Crawford (note 7) 90-91.
[95] *Legality of the Threat or Use of Nuclear Weapons* (note 1) para 47.

Thus, it seems that the PRC's threat is at the same time both illegal (because of the '*Nuclear Weapons* principle') and legal (because it is not directed towards another State). Just like in Erwin Schrödinger's famous thought experiment, where a cat could seemingly be both alive and dead at the same time,[96] the prohibition of the threat of force seems to both apply and not apply between the PRC and the RoC. That is a paradox.[97]

11. Conclusion: resolving the paradox

The foregoing sections have outlined a paradox that must be resolved. There are two ways of doing so. One approach is to say that the '*Nuclear Weapons* principle' must be applied according to the wording of the ICJ's opinion, which means that the PRC's threat will be illegal even though the RoC would not otherwise be protected by the prohibition of the threat of force. The alternative is to say that the prohibition of the threat of force does not apply to the RoC, and that the PRC's threats are therefore not covered by the prohibition, regardless of what the ICJ said in the *Nuclear Weapons* opinion.

When choosing between these options, it is notable that the second alternative seems less radical than the first. Making an exception from the fact that the prohibition of the use of force does not apply to non-State entities would be more drastic than to conclude that the ICJ's broad and generalised statement in the *Nuclear Weapons* opinion cannot apply without reservations to every imaginable scenario, including the highly unusual case of the PRC-RoC conflict. Therefore, the best solution is to say that the '*Nuclear Weapons* principle' does not apply to the PRC-RoC situation. Thus, the Anti-Secession Law in itself can be said to constitute a standing threat of using force, regardless of whether it is acted on. However, the threat is not contrary to the prohibition of threats of force, since that rule does not currently apply to the RoC.

This can be said to represent a nuancing of the Court's statement. The Court phrased its statement broadly. It appeared to pronounce on how, in its view, the prohibition of the threat of force applies in general. While the ICJ's statement is not 'binding', as noted in Section 9, it will in practice be taken as an authoritative pronouncement on the state of international law.

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[96] Erwin Schrödinger, 'Die gegenwärtige Situation in der Quantenmechanik', 48 *Naturwissenschaften* (1935) p. 807.

[97] Charney and Prescott (note 45) 476 comment on this question, but leave it open ('threats by the PRC to use force if Taiwan were to proclaim independence might also constitute violations of this article').

This article argues that the pronouncement cannot be understood quite as generally as it is phrased. There is at least one peculiar situation where it does not fit. The Court's statement will be correct in the vast majority of cases, but not in the unique case of the Taiwan Strait conflict. This conclusion is somewhat more complex and subtle, or 'nuanced', than what an initial reading the Court's statement may suggest.

The article has nonetheless also shown that the PRC's current threat and potential invasion may violate a Taiwanese people's right to self-determination and the PRC's obligation to settle international disputes peacefully. The potential invasion would also violate the prohibition of the use of force (even if the current threat to invade does not violate the prohibition of the *threat of force*). The PRC is thus bound by a broader set of international obligations, which constrain what it may legally do in its relationship with the RoC.