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## Territorial Status Triggering a Functional Approach to Statehood

William Thomas Worster

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**TERRITORIAL STATUS TRIGGERING A  
FUNCTIONAL APPROACH TO  
STATEHOOD**

*William Thomas Worster\**

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## I. INTRODUCTION

International law has evolved to the point that territorial entities, not generally considered states, can nonetheless trigger functional treatment as a state depending on their status. It is time to accept this practice as an emerging rule and not merely as case-by-case *sui generis* situations, so that we can build a legal regime to govern this practice and bring predictability to these entities. Many areas of the world operate as *de facto* states due to their status, yet for reasons of international law, such as the rule *ex injuria jus non oritur*, the international community cannot fully treat the territory as a state. However, this result can lead to an unjust outcome for the inhabitants of the territory because it may prevent the territory from participating in, and excuse the territory from complying with, important rules of international law. Aside from statehood, there is no other form of international legal personality that would permit a territorial entity to participate in international law in a satisfactory way. The territory must enjoy statehood under law, even if only on an *ad hoc* basis, in order to act within international law and engage in international relationships. Fortunately, international law is quite flexible and states can find a practical solution, which is to deny the territory full statehood, yet—because of its status—treat the territory as if it were a state for the issue at hand.

However, treating a territorial entity as if it were a state for some purposes means that the international community is now tolerating a relative statehood regime alongside the objective statehood regime currently in place. Many scholars have argued that it is illogical, insensible or unreasonable to view statehood as a relative phenomenon.<sup>1</sup> Statehood must either be or not be. The problem is that relevant state practice shows a wide variety of situations where territorial entities in different statuses are treated as if they were states, but only for limited purposes. At some point, the *sui generis* description can no longer effectively describe widespread phenomena. This view

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<sup>1</sup> See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 34, 67, 78 (1947); JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 138 (Humphrey Waldock ed., 6th ed. 1963); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 20–2 (2d ed. 2007).

does find some support from other scholars, though only a minority at this point.<sup>2</sup> Based on this sustained and extensive practice, we must bring quasi-states into the statehood regime and find a place for them in international law. This article will argue that we must accept that statehood can be applied relatively and that a functional analysis is the method for determining when an entity in a particular status will be treated as if it were a state. Currently, there is no clear rule to determine which status or issue results in treatment as if the entity were a state. This article will focus on the question of territorial status only, and will begin to build a more coherent and predictable test for whether an entity that is not a state will be treated as if it were a state.

## II. FUNCTIONAL STATEHOOD BASED ON STATUS

### A. Functional personality

This article proposes that certain statuses of territorial entities can trigger a functional, case-by-case treatment of the territory as if it were a state. First, it will examine non-territorial entities in order to establish that relative personality is an acceptable and widespread practice in international law. Second, this article will examine state practice to determine that statehood, as a form of international personality, is also applied functionally in many cases. The status of a territorial entity, as a colony, trust territory, occupied area, international administration, transitional entities, secession movements and competing governments, is one such situation that can prompt the application of functional statehood.

Before focusing on this specific practice of functional statehood, this article will look at comparable practices of functional personality for background. This practice has considerable pedigree in providing for relative and personality for various entities.<sup>3</sup>

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<sup>2</sup> See e.g. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 609 (1941).

<sup>3</sup> See William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT'L L. 207 (2017).

International organizations,<sup>4</sup> self-determination “peoples”,<sup>5</sup> National Liberation Movements (“NLMs”),<sup>6</sup> indigenous peoples,<sup>7</sup> belligerents,<sup>8</sup>

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<sup>4</sup> See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 30 (2d ed. 2007) (distinguishing between entities with objective legal personality, which exists “wherever the rights and obligations of an entity are conferred by general international law,” and those cases where an entity is created “by particular States for special purposes,” and only those states are bound); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 59 (6th ed., 2003); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* §§44, 386–7 (4th ed. 2003); ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49 (1994).

<sup>5</sup> See *E. Timor (Port. v. Aust’lia)*, Judgment, 1995 I.C.J. Reps. 90, 102 (June 30); *W. Sahara, Advisory Opinion* 1975 I.C.J. Reps. 12, 32–3 (Oct. 16); *Legal Conseq. for Sts. of the Cont. Presence of S-Afr. in Namib. (SW Afr.)* notwithst. S. C. Res. 276 (1970), *Advisory Opinion*, 1971 I.C.J. Reps. 16, 31 (June 21); *Reference re Secession of Quebec*, [1998] 2 SCR 217, ¶¶ 119–23 (Sup. Ct., Can., 1998); *Conference on Yugoslavia Arbitration Commission, Op. No. 2*, 31 INT’L L. MATS. 1497 (1992).

<sup>6</sup> See ANTONIO CASSESE, *INTERNATIONAL LAW* 75 et seq. (2005); M. N. Shaw, *The International Status of National Liberation Movements*, 5 LIVERPOOL L. REV. 19 (1983); William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine*, 26 AM. UNIV. INT’L L. REV. 1153 (2011); Worster, *Relative Personality of Non-State Actors*, *supra*.

<sup>7</sup> See *W. Sahara, Adv. Op.*, 1975 I.C.J. Reps. 12, 75–84 (Oct. 16); *Land & Marit. Boundary Betw. Cameroon & Nigeria (Cam. v. Nigeria; Eq. Guinea intervening)*, Judgment, 2002 I.C.J. Reps. 303 ¶¶ 205–7 (Oct. 10); ANNA MEIJKNECHT, *TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 25, 55 (2001); Tom Bennion, *Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi*, 35 VICT. UNIV. WELLINGTON L. REV. 165, 180 (2004); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 18, n.106 (1999) (noting treaties between several European countries and African chiefs); Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOS. L. REV. 567, 569–71 & nn.12–13, 574, 583 (1995).

<sup>8</sup> See *Pros. v. Kony, et al.*, Case No.: ICC-02/04-01/05, Situation in Uganda, Dec. on the admss. of the case under art. 19(1) of the Statute (Int’l Crim. Ct., Pre-Tr. Ch. II, Mar. 10, 2009); *Oriental Navigation Co. (US) v. Mex.*, IV UNRIAA 323, 341, 346 (Oct. 3, 1928, Mex.-US Gen. Cl. Comm’n) (Nielsen, dissenting); MALCOLM SHAW, *INTERNATIONAL LAW* 219–20, 1040–41 (6th ed., 2008) (observing that the concepts of insurgency and belligerency are not easily distinguishable); ANTONIO CASSESE, *INTERNATIONAL LAW* 124–7, 140–2 (2005); BROWNLIE, *PRINCIPLES*, *supra* note 4, at 62–3, 609; BRIERLY, *LAW OF NATIONS*, *supra* note 1, at 133–5; 2 H LAUTERPACHT, *OPPENHEIM’S INTERNATIONAL LAW* 165 (7TH ED., 1952); Steven Ratner, *The Cambodian Settlement Agreements*, 87 AM. J. INT’L L. 1 (1993); I.I. Lukashuk,

*de facto* entities,<sup>9</sup> private entities,<sup>10</sup> religious organizations,<sup>11</sup> and even individuals<sup>12</sup> have, from time-to-time, been treated as having international legal personality on a functional *ad hoc* basis rather than on an objective basis. For example, there have been cases of certain

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*Parties to Treaties--The Right of Participation*, 135 REC. DES COURS HAGUE ACAD. INT'L L. 231, 280–81 (1972–I).

<sup>9</sup> See Prosecutor v Tadić, Case No. IT-94-1, Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Pros. v Nikolic, Case No. IT-94-2-R61, Judgment, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995); O. CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 160 (2010); MALCOLM SHAW, INTERNATIONAL LAW 1123 (6th ed, 2008).

<sup>10</sup> For the Bank for International Settlements, see *Reineccius, et al. v. Bank for Int'l Settlements, Partial Award on the Lawfulness of the Recall of the Privately Held Shares . . .*, (Arb. Panel, Nov. 22, 2002) reprinted at INTERNATIONAL COURTS OF GENERAL JURISDICTION 375 (PCA 2002); BROWNLIE, PRINCIPLES, *supra* note 4, at 66–7. For the Global Alliance (“GAVI”), see Accord entre le Conseil fédéral suisse et GAVI Alliance (Global Alliance for Vaccines and Immunization) en vue de déterminer le statut juridique, June 23, 2009, available at <http://www.admin.ch/ch/f/rs/i1/0.192.122.818.12.fr.pdf>. For the IATA, see Jenni et al. v. Conseil d'État of the Canton of Geneva, ATF 104 Ia, p. 350; 1979 Ann. Suisse de droit int'l 151 (Fed. Trib. (Publ. L. Ch.), Switz., Oct. 4, 1978), translated at 75 INT'L L. REPS. 99; Accord du 20 décembre 1976 entre le Conseil fédéral suisse et l'Association du Transport aérien international (“IATA”) pour régler le statut fiscal des services et du personnel de cette organisation en Suisse, Dec. 20, 1976, Switz.-IATA, available at <http://www.admin.ch/ch/f/rs/i1/0.192.122.748.fr.pdf>. For the International Committee of the Red Cross, see Pros. v. Simić, et al. (“Bosanski Šamac”), Case No. IT-95, *Ex parte Confidential* Dec. on the Pros. Mtn under Rule 73 for a Ruling Concerning the Testimony of a Witness (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999).

<sup>11</sup> See Treaty Between the Holy See and Italy (“Lateran Accords”), Feb. 11, 1929, 130 Br. St. Papers Ser. 791.

<sup>12</sup> See Treaty of Fontainebleau, Apr. 11, 1814 reprinted in 1(Bk. 9) ALPHONSE MARIE LOUIS DE LAMARTINE, THE HISTORY OF THE RESTORATION OF MONARCHY IN FRANCE 201-206 (Michael Rafter trans., 1854); U.S., et al., v. Goering, et al., Judgment (Int'l Mil. Trib. For the Trial of Germ. Major War Crimes., Sept. 30–Oct. 1, 1946), reprinted at 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 466 (1947); S.C. Res. 2178 ¶ 1 (Sept. 24, 2014) (“demands that all foreign terrorist fighters disarm and cease all terrorist acts and participation in the conflict”).

organizations being considered international organizations for certain purposes and not for others.<sup>13</sup>

Moving away from non-territorial entities to territorial entities and the application of functional statehood, certain issues often lead to an *ad hoc* application of this form of personality. Historically whether an entity qualified as a state for purposes of particular treaty regime often took a functional approach.<sup>14</sup> In contemporary practice, some treaties may still create unique understandings of which actors are states for purposes of adherence.<sup>15</sup> Similarly, functionalism can be

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<sup>13</sup> See Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 625, 631–43, 655, 658 (2000); Int'l L. Assoc., Comm. on Accountability of Int'l Orgs., *First report*, at 5 (Feb. 1998) (treaty regimes are “incomplete international organizations”); William Thomas Worster, *The Arms Trade Treaty Regime in International Institutional Law*, 36 UNIV. PENN. J. INT'L L. 995 (2015).

<sup>14</sup> See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Nov. 29 – Dec. 11, 1868 *reprinted in* D. SCHINDLER AND J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 102 (1988) (including as participants Austria-Hungary (Dec. 11, 1868), Baden (Jan. 11, 1869), Bavaria (Dec. 11, 1868), Wurtemberg (Dec. 11, 1868) and the joint member of Prussia and the North German Confederation (Dec. 11, 1868)); Anne Peters, *Treaty-Making Power*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW paras. 61–2 (Rüdiger Wolfrum ed., 2009).

<sup>15</sup> See *e.g.* Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), Dec. 18, 1979, 1249 U.N.T.S. 13 (The Byelorussian SSR signed on July 17, 1980, ratified on Feb. 4, 1981, and withdrew its reservation on Apr. 19, 1989, and Ukrainian SSR signed on July 17, 1980, ratified on Mar. 12, 1981, and withdrew its reservation on Apr. 20, 1989, when neither was considered a state under international law, but were permitted to do so under the terms of the CEDAW); Montreal Protocol on Substances That Deplete the Ozone Layer art. 11, Sept. 16, 1987, 1522 U.N.T.S. 3, *as adjusted and amended*; MoP to the Montreal Protocol on Substances that deplete the Ozone Layer, 15th mtg., Dec. XV/3. *Obligations of Parties to the Beijing Amendment under Article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons* (Nairobi, Kenya, Nov. 10–14, 2003), Doc. UNEP/OzL.Pro.15/9 (Nov. 11, 2003); Convention on the Rights of Persons with Disabilities art. 44(1)-(2), Dec. 13, 2006, 2515 U.N.T.S. 3; Convention on International Liability for Damage Caused by Space Objects art. XXII, Mar. 29, 1972, 961 U.N.T.S. 187; Pales. v Isr., Inter-st. comm. submit. By the St. of Pales. ag. Isr., UN Doc. CERD/C/100/5 (Comm. Elim. Racial Discrim., Dec. 12, 2019) (concluding that Palestine, despite a wide degree of non-recognition, can be treated

applied for membership in an international organization<sup>16</sup> or recognition as a state separate from the question of membership in the organization.<sup>17</sup> In addition, quasi-state entities are sometimes protected under the law prohibiting aggression as stated in the UN Charter.<sup>18</sup>

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as a state party to the Racial Discrimination Convention for purposes of an interstate complaint against Israel).

<sup>16</sup> See Convention of the World Meteorological Organization, Oct. 11, 1947, *as amended*; Constitution of the Universal Postal Union, 1964, *as amended*; Press Release, Int'l Crim. Police Org. (ICPO–INTERPOL), *The State of Palestine and the Solomon Islands become INTERPOL member countries* (Sept. 27, 2017) (*available at* <https://www.interpol.int/News-and-media/News/2017/N2017-121>). See generally Situ. in the St. of Palestine, No. ICC-01/18-11, Prosec. Req. purs. to art. 19(3) for a ruling on the Ct's terr. juris. in Palest. (Int'l Crim. Ct, Pre-Tr. Ch., Dec. 20, 2019), *withdrawn and refiled as* Situ. in the St. of Palestine, No. ICC-01/18-12, Prosec. Req. purs. to art. 19(3) for a ruling on the Ct's terr. juris. in Palest. (Int'l Crim. Ct, Pre-Tr. Ch., Jan. 22, 2019) (arguing that Palestine can be treated as a state party to the Rome Statute of the International Criminal Court for purposes of the Court's jurisdiction).

<sup>17</sup> See UNSCOR 357th mtg. at 109 (Sept. 16, 1948); UNSCOR 184th mtg. at 1984-5 (Aug. 14, 1947); UNSCOR 357th mtg. at 10–1 (Sept. 18, 1948); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 42–3 (1969).

<sup>18</sup> See Appl. of the Conv. on the Prevention & Punishment of the Crime of Genocide (Bosnia & Herz. v Serb & Monten.), Judgment, 2007 I.C.J. Rep. 397 (June 1); Armed Acts. on the Terr. of the Congo (DR Congo v Uganda), Judgement, 2005 I.C.J. Reps. 168, ¶¶ 146–7 (Dec. 17); Mil. & Paramil. Acts. in & ag. Nicar. (Nicar. v U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 154–60 (June 27); S.C. Res. 262 (XXIII) ¶ 1 (Dec. 31, 1968); UN Dept. Pol & Security Council Affrs, *Repertoire of the Practice of the Security Council, Suppl. 1966-1968*, UN Doc ST/PSCA/1/Add.5, 146, 163–64 (1971); U.N. Doc. A/RES/2625 (1970) (“Every State [ . . . ] has the duty to refrain from the threat or use of force to violate international lines of demarcation.”); CHRISTIAN J. TAMS & ANTONIOS TZANAKOPOULOS, *Contemporary Positivism and the Jus Ad Bellum*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 10 (Jean d’Aspremont & Jörg Kammerhofer, eds., 2013); O. CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 160 (2010); J. Frowein, *De Facto Regime*, paras. 4–5, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW paras. 61–2 (Rüdiger Wolfrum, ed., 2009); Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross Strait Relations between China and Taiwan*, 94 AM. J. INT’L L. 453, 469 (2000); N. N. Petro, *The Legal Case for Russian Intervention in Georgia*, 32 FORDHAM INT’L L.J. 1524, 1526–28 (2009); Stefan Talmon, *The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?*, 75 BRIT. YB INT’L L. 101, 104 (2004); 1 Council of the Eur. Union, Indep. Int’l Fact-Finding Mission on the Conflict in Georgia, *The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia* (hereinafter “IIFMCG Report”) 39–43 (Dec. 30, 2009) *available at*



Also, quasi-state territorial entities that may remain unrecognized due to *ex injuria jus non oritur* might nonetheless still have their public acts recognized under the “*Namibia* exception.”<sup>19</sup> At a minimum, the inhabitants of a territorial entity should enjoy some kind of status akin to nationality, so as not to become stateless,<sup>20</sup> although that nationality might be limited to certain purposes.<sup>21</sup> Similarly, entities that do not qualify as states either due to lack of recognition or lack of jurisdiction, may still be held to human rights obligations and international

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<http://www.ceiig.ch/Report.html>; *Id.* at 229–42; Nicholas Tsagourias, *Non-state Actors in International Peace and Security: Non-state Actors and the Use of Force*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 326 (Jean d’Aspremont ed., 2011).

<sup>19</sup> See Legal Conseq. for Sts. of the Cont. Presence of S-Afr. in Namib. (SW Afr.) notwithst. S.C. Res. 276 (1970), Adv. Op., 1971 I.C.J. Repts. 16, 55-6 (June 21); Cyprus v. Turk. Judgment (Merits), Vol. No. Eur. Ct. H. R. (ser. A) at (2001); Hopkins v. Mex., 4 U.N. REP. INT’L ARB. AWARDS 41 (1926); R. (on the application of Kibris Turk Hava Yollari) v Secretary of State for Transport, Case No: CO/3512/2007 [2009] EWHC 1918 (Admin); [2010] 1 All E.R. (Comm) 253 (QB, Engl., Admin. Ct., July 28, 2009); Emin v Yeldag [2002] 1 F.L.R. 956; B v B (Divorce: N. Cyprus) [2000] 2 F.L.R. 707 [2001] 3 F.C.R. 331; Somalia v Woodhouse Drake & Carey (Suisse) SA (The Mary) (QB, Engl., Commercial Ct., Mar. 13, 1992); Reel v Holder, Court of Appeal (Civil Division) 30 June 1981 [1981] 1 W.L.R. 1226; [1981] 3 All E.R. 321; (1981) 125 S.J. 585; (interpreting the meaning of “country” under International Amateur Athletic Federation rules as territory over which there is authority, not necessarily the same as the meaning of state or nation); Hesperides Hotels Limited v Aegean Turkish Holidays Limited [1978] 1 QB 205; In re Al-Fin Corporation’s Patent, [1970] Ch. 160, 177–81 (Apr. 2, 1969); Luigi Monta of Genoa v Cechofracht Co [1956] 2 QB 552; [1956] 3 WLR 480 (QB Div., June 14, 1956) (Sellers, J.); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 205(3) (1987).

<sup>20</sup> See 9 US DEP’T ST., FOR. AFF’RS MAN. 41.104, 41.113 (regarding passports from ROC Taiwan and Turkish Republic of Northern Cyprus); Caglar v Billingham (Insp. of Taxes) [1996] STC (SCD) 150, [1996] 1 LRC 526 (Spec. Comm’rs, Mar. 7, 1996); Hansard, Lords, col. WA205, HL162 (Jan. 15, 1998), Hansard, Commons, col. 277 (Jan. 15, 1998); CRAWFORD, CREATION OF STATES, *supra* note 3, at 31 (regarding “A” Mandated Territories).

<sup>21</sup> See INT’L OLYMPIC COMM., *National Olympic committees: Palestine*, available at <http://www.olympic.org/palestine>; UN Comp. Comm’n, Governing Council, S/AC.26/1992/10, art. 5.2 (June 26, 1992) (permitting claims by an appointed body or authority on behalf of individuals where the state of nationality will not or cannot claim); L.A. Taylor, *The United Nations Compensation Commission*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 202 (C. Ferstman, M. Goetz, & A. Stephens eds., 2009).

humanitarian law so long as they exercise some form of effective control and/or engage in hostilities,<sup>22</sup> most notably the Republic of China on Taiwan (“ROC”).<sup>23</sup> Expanding on these obligations, while those officials from quasi-states might be able to generally claim immunities,<sup>24</sup> certain officials of a quasi-state could be held responsible for international criminal law violations that take a flexible view on

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<sup>22</sup> For human rights, see Philip Alston, *The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3-4 (Philip Alston ed., 2005); Colin Warbrick, *States and Recognition in International Law*, in INTERNATIONAL LAW 205, 213 (Malcolm Evans ed., 2003); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 291-4 (2006); See generally *Sokolow v. Palestine Liberation Org.*, 60 F. Supp. 3d 509 (S.D.N.Y. 2014). For international humanitarian law, see Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 1; *Prosecutor v Tadić*, Case No. IT-94-1, Judgment, ¶ 115-46 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet gen. ed., 1952); Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 YB INT’L HUMANIT. L. 3 (1998); LASSA OPPENHEIM, INTERNATIONAL LAW 203-4 (H. Lauterpacht ed., 1955).

<sup>23</sup> See ROC, OFF. PRES., *President Ma Attends Press Conference Unveiling English Version of Taiwan’s First National Human Rights Report under the ICCPR and ICESCR* (Dec. 18, 2012) available at <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=28855&rmid=2355>; ROC, OFF. PRES., *President Ma Holds Press Conference on the Release of Taiwan’s First Human Rights Report* (Apr. 20, 2012) available at <http://english.president.gov.tw/Default.aspx?tabid=491&rmid=2355&itemid=27092>.

<sup>24</sup> See Canadian State Immunity Act 1982, §14(1); State Immunity Act, 1978 (U.K.); House of Commons (Canada), Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 60, at 24-30 (Feb. 4, 1982) (“There could be situations in which, for policy reasons, the Secretary of State for External Affairs might wish to issue a certificate stating that country x, although not recognized, is a foreign state for the purposes of the act”); Inst. Int’l L., *Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, art. 12 (2001) reprinted at 69 ANN. INST. DROIT INT’L 750 (2000-01); *Limbin Hteik Tin Lat v. Burma*, Shō 28 (yo) no. 9952, 5 *Kakuyō saibansho minji saiban reishū* [Kaminshū] 836 (Japan) (Tōkyō Chihō Saibansho [Dist. Ct., Tokyo], June 9, 1954) translated at 32 INT’L L. REPS. 124.

statehood.<sup>25</sup> Lastly, quasi-states can potentially contribute their practice to the formation of customary international law, when they are operating as a *de facto* state, even without international recognition.<sup>26</sup> Thus, while a given territory might be universally, or almost universally, considered not to be a state, the international community might overlook that formal legal conclusion and create an exception in these situations where the formal approach would harm individuals or permit quasi-state actors to evade international responsibility.

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<sup>25</sup> See Int'l Crim. Ct., Assembly of Sts. Parties, Review Conference, Res. 6: *The Crime of Aggression*, ICC Doc. RC/Res.6 (June 11, 2010); G.A. Res. 3314 (XXIX) (Dec. 14, 1974); Worster, *Exercise of Jurisdiction*, *supra* note 50; ICC, *Assembly of States Parties, States Parties, Asian States, Cook Islands*, <http://www.icc-cpi.int/Menu/ASP/states+parties/Asian+States/Cook+Islands.htm>; UN FACT FINDING MISSION ON THE GAZA CONFLICT, Report ("Goldstone Report"), U.N. Doc. A/HRC/12/48, 509, ¶ 1633 (Sept. 15, 2009) (any entity in the Gaza Strip that functions as a government is responsible for enforcing international humanitarian law and human rights law on armed groups in Gaza).

<sup>26</sup> See Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 REC. DES COURS HAGUE ACAD. INT'L L. 243, 267 (2006); Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 28–9 (Rüdiger Wolfrum & Volker Röben eds., 2005); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 117–18 (2012); Alain Pellet, Spec. Rapp., Int'l L. Comm'n, *Third Report on Reservations to Treaties*, U.N. Doc. A/CN.4/491, ¶ 6 (Apr. 30, 1998). For citations to the practice of the Saar as if it were a state, see Int'l L. Comm'n, Roberto Cordova, Spec.Rapp., *Report on the elimination or reduction of statelessness*, U.N. Doc. A/CN.4/64, II, YB INT'L L. COMM'N 170 (1953), U.N. Doc. A/CN.4/8ER.A/1953/Add.1; Int'l L. Comm'n, Roberto Ago, Spec.Rapp., *Fourth report on State responsibility*, U.N. Doc. A/CN.4/264 & ADD.1, II YB INT'L L. COMM'N 111 (1972), U.N. Doc. A/CN.4/SER.A/1972/Add.1; Int'l L. Comm'n, Ivan S. Kerno (Expert), *Nationality, including Statelessness – Analysis of Changes in Nationality Legislation of States since 1930*, U.N. Doc. A/CN.4/67, 2, 4, 5 (Apr. 6, 1953). For citations to the practice of the Free City of Danzig as if it were a state, see U.N. Secretariat, *Digest of Decisions of National Courts Relating to Succession of States and Governments*, U.N. Doc. A/CN.4/157, II YB INT'L L. COMM'N 97 (1963), U. N. Doc. A/CN.4/Ser.A/1963/ADD.1; Int'l L. Comm'n, Ivan S. Kerno (Expert), *Nationality, including Statelessness – Analysis of Changes in Nationality Legislation of States since 1930*, U. N. Doc. A/CN.4/67, 2 (Apr. 6, 1953); Int'l L. Comm'n, *Report of the International Law Commission on the work of its twenty-fifth session, 7 May -13 July 1973*, UNGAOR 28th sess., Suppl. No. 10, U. N. Doc. A/9010/Rev.1, II YB INT'L L. COMM'N (1973).

## B. Functional statehood based on status

However, it is not only those situations mentioned above that can lead to functional treatment of an entity as if it were a state; it is also the particular status of the territory that can trigger the functional application of statehood. This article will examine various types of status, and identify the functional analysis being applied.

### 1. Colonial Empires/Mandates/Protected States

Colonial empires, mandates and protected states present a challenge from statehood theory. Were these entities simply part of the state that administered the territory or were they separate persons? The approach has been functional for imperial territories such as the British Raj and Kenya,<sup>27</sup> but less clear for protectorates and protected states

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<sup>27</sup> See British Settlements Act 1887 (esp. art. 12, reserving the right to legislate for the colony); Order in Council, June 11, 1920 [Kenya (Annexation) Order] (Creating the colony of Kenya); Letters Patent of 11 September 1920 (establishing a government by act of British law); Kenya Independence Act 1963 (granting Kenya independence by act of British law); Kenya Independence Order in Council 1963 (providing for a constitution for Kenya); Gov't India, For. Dep't, Proceedings, Judicial, IOR P/752, No. 9, p. 14. (Sep. 1873) (advising against more precise definition of sovereign relationships because "To do so would, in our opinion, reduce the right which we claim to exercise as the Paramount Power in India to a matter of negotiation between us and those over whom we assert the right."); *Mutua et al, v. For. & Commonwealth Ofc.*, Case No: HQ09X02666, [2011] EWHC 1913 (High Ct., QB, UK, July 21, 2011) (McCombe, J); CRAWFORD, CREATION OF STATES, *supra* note 3, at 320–23 (describing Great Britain's relationship with the Indian Native States prior to 1947 and explaining that, while Britain considered those areas "as extraterritorial . . . [and afforded them] the general right to internal self-government," it also claimed the rights to "conduct international relations, exercise . . . jurisdiction over Europeans and Americans, . . . and [regulate their militaries]."); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 81 (2004); NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW (2003); IAN COPLAND, THE PRINCES OF INDIA IN THE ENDGAME OF EMPIRE, 1917-1947 (2002); MICHAEL FISHER, INDIRECT RULE IN INDIA: RESIDENTS AND THE RESIDENCY SYSTEM, 1764-1858 (1993); KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 339 (1966); K. M. PANIKKAR, THE INDIAN PRINCES IN COUNCIL: A RECORD OF THE CHANCELLORSHIP OF HIS HIGHNESS THE MAHARAJA OF PATIALA, 1926-1931 AND 1933-36 (1936); JOHN WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE 88–9, 182, 198, 220–3 (L. Oppenheim ed., 1914); WILLIAM LEE-WARNER, THE

such as Bhutan and San Marino,<sup>28</sup> as well as associated states like Puerto Rico.<sup>29</sup> The international legal system often has had to determine whether these entities were simply part of the state that administered the territory or were separate persons, and the approach taken was functional, inquiring whether the entity was acting as a state for purposes of the question asked.<sup>30</sup>

This section will now consider the situation where the a territory was considered to have some form of separate international personality from the personality of its colonial state. This analysis is distinct from the functional treatment of indigenous peoples as having a degree of international personality, as already mentioned above in the brief overview of other forms of functional personality. In the discussion here, it is not critical that the people are indigenous, in the special meaning of that term, but rather that they are simply the permanent residents of a colonized territory. In many cases a metropolitan state and its local colonial government acted on behalf of a colonial territory as if it did not have any distinct personality, such as

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PROTECTED PRINCES OF INDIA 376–82 (1894); Lauren Benton, *From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900*, 26 *LAW & HIST. REV.* 595 (Fall 2008) (citing H. S. Maine, Minutes, *Kattywar States; Sovereignty*, IOR V/27/100/3, 35–8 (Mar. 22, 1864)); Lauren Benton, *Constitutions and Empires*, 31 *L. & SOC. INQ.* 177 (2006).

<sup>28</sup> See Nat'lty Decrees Issued in Tunis & Mor., Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 27 (Feb. 7); CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 288–9.

<sup>29</sup> See generally CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 20; Lani E. Medina, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 *FORDHAM INT'L L. J.* 1048 (2010) (examining the meaning of “self-determination” in international law, and arguing that “the people of Puerto Rico have yet to fully exercise their right to self-determination”).

<sup>30</sup> See *Mavrommatis Jerusalem Concessions (Gr. v. UK)*, 1925 P.C.I.J. (ser. A) No. 5, at 50 (Mar. 26) (determining that the “state” at issue was “Palestine”, a separate legal person from the mandatory power); CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 320.

Australia,<sup>31</sup> Belgium,<sup>32</sup> France,<sup>33</sup> Italy,<sup>34</sup> Japan,<sup>35</sup> Netherlands,<sup>36</sup> Portugal,<sup>37</sup> Russia,<sup>38</sup> Spain,<sup>39</sup> and the UK.<sup>40</sup> The preceding colonial

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<sup>31</sup> See e.g. Convention on Certain Questions relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (“[i]ncluding the territories of Papua and Norfolk Island”); Special Protocol concerning Statelessness, Apr. 12, 1930, 2252 L.N.T.S. 435 (“[i]ncluding the territories of Papua and Norfolk Island and the mandated territories of New Guinea and Nauru.”).

<sup>32</sup> See e.g. International Radiotelegraph Convention, July 5, 1912, 216 C.T.S. 244 (Belgium on behalf of the Belgian Congo); Convention on Certain Questions relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (“Subject to accession later for the Colony of the Congo and the Mandated Territories.”); Special Protocol concerning Statelessness, Apr. 12, 1930, 2252 L.N.T.S. 435 (“With the reservation that the application of this Protocol will not be extended to the Colony of the Belgian Congo or to the Territories under mandate.”).

<sup>33</sup> For France acting on behalf of Algeria, French West Africa, French Equatorial Africa, French Indo-China, French Madagascar, and Tunis, see International Radiotelegraph Convention, July 5, 1912, 216 C.T.S. 244; Regulations annexed to the Revised International Telegraph Convention, July 10, 1903, 193 C.T.S. 327; Revision of the International Service Regulations annexed to the International Telegraph Convention of St. Petersburg of 22 July 1875, July 22, 1875, 183 C.T.S. 159; Service Règlement annexed to the International Telegraph Convention, June 11, 1908, 207 C.T.S. 89.

<sup>34</sup> For Italy acting on behalf of Eritrea and Italian Colonies, see Int’l Telegraph Convention Service Règlement, *supra* note 33; International Radiotelegraph Convention, *supra* note 33.

<sup>35</sup> For Japan acting on behalf of Korea, Formosa (Taiwan), Sakhalin, and Kwantung Leased Territory see International Radiotelegraph Convention, *supra* note 33.

<sup>36</sup> For Netherlands acting on behalf of the Dutch East Indies, Netherlands New Guinea, Suriname, Curacao and Netherlands Antilles see Int’l Telegraph Convention Service Règlement, *supra* note 33; Basic Agreement concerning assistance from the World Food Programme, Aug. 13, 1971, UN/Food & Agri. Org (World Food Prog.) – Neths. (Neths. Antilles) No. 11684; International Radiotelegraph Convention, *supra* note 33; Int’l Telegraph Convention Regulations, *supra* note 33; Int’l Telegraph Convention Revised Regulations, *supra* note 33; Protocol on Road signs and signals, Sept. 19, 1949, 182 U.N.T.S. 229; 514 U.N.T.S. 254 (amendment); Convention on Certain Questions relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (Apr. 2, 1937) (“[i]ncluding the Netherlands Indies, Surinam and Curaçao.”).

<sup>37</sup> See Portugal acting on behalf of Portuguese Colonies, Macau, Portuguese India, and Portuguese Overseas Provinces of Angola and Mozambique, see Int’l Telegraph Convention Regulations, *supra* note 33; Int’l Telegraph Convention Revised Regulations, *supra* note 33; Int’l Telegraph Convention Service Règlement, *supra* note 33; International Radiotelegraph Convention, *supra* note 33; Int’l

Telegraph Convention Service Règlement, *supra* note 33; Constitution of the Asia – Pacific Telecommunity, Mar. 27, 1976, 1129 U.N.T.S. 3 (Macau as associate member); Agreement for the Exchange of Value payable Articles between the Post Offices of British (Great Britain) and Portuguese India (Portugal), Jan. 28, Feb. 11, 1907, 203 C.T.S. 312; Protocol on Road signs and signals, Sept. 19, 1949, 182 U.N.T.S. 229; 514 U.N.T.S. 254 (amendment).

<sup>38</sup> For Russia acting on behalf of Russian Possessions or Protectorates, *see* International Radiotelegraph Convention, *supra* note 33.

<sup>39</sup> For Spain acting on behalf of Spanish Colonies, and “African localities and provinces”, *see* Int’l Telegraph Convention Revised Regulations, *supra* note 33; Protocol on Road Signs and Signals, Sept. 19, 1949, 182 U.N.T.S. 229; 514 U.N.T.S. 254 (amendment).

<sup>40</sup> For the UK acting on behalf of Australia, Bermuda, Burma, Canada, Cape Colony, Cayman Islands, Ceylon (Sri Lanka), Crete, Falkland Islands (Malvinas), Gibraltar, Guernsey, Hong Kong, India, Isle of Man, Jersey, Natal, New Zealand and South Africa, *see* Arrangement for the Exchange of Money Orders, Germ.-India (by Gr. Brit.), Jan. 18, 22 1875, 148 C.T.S. 323; Convention Regarding the Conversion into an Annual Payment of the Rights in connection with the Opium Trade reserved by the Convention of 7 March 1815, Fr.-India (by Gr. Brit.), July 16, 1884, 164 C.T.S. 217; Money Order Agreement, India (by Gr. Brit.)-Norw., May 24, August 8, 1910, 211 C.T.S. 159; Money Order Arrangement, Den.- India (by Gr. Brit.), June 21, July 19, 1880, 156 C.T.S. 94; Money Order Arrangement, Den.- India (by Gr. Brit.), Nov. 29, 1875, Jan. 4, 1876, 150 C.T.S. 101; Money Order Arrangement, Germ.- India (by Gr. Brit.), May 20, June 22, 1880, 156 C.T.S. 72; Money Order Arrangement, India (by Gr. Brit.)-Ital., June 18, July 13, 1880, 156 C.T.S. 90; Money Order Arrangement, India (by Gr. Brit.)-Switz., Sept. 13, Oct. 9, 1880, 156 C.T.S. 118; Money Order Arrangement, India (by Gr. Brit.)-Switz., June 1, 17, 1875, 148 C.T.S. 374; Money Order Agreement between Cape Colony (Great Britain) and Norway, Nov. 16, Dec. 20, 1904, 197 C.T.S. 182; Agreement for the Exchange of Value payable Articles between the Post Offices of British (Great Britain) and Portuguese India (Portugal), Jan. 28, Feb. 11, 1907, 203 C.T.S. 31; International Radiotelegraph Convention, *supra* note 33; Int’l Telegraph Convention Regulations, *supra* note 33; Int’l Telegraph Convention Revised Regulations, *supra* note 33; Int’l Telegraph Convention Service Règlement, *supra* note 33; Convention on Certain Questions relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (“[including] all parts of the British Empire which are not separate members of the League of Nations.”) (regarding Burma, “His Majesty the King does not assume any obligation in respect of the Karenni States, which are under His Majesty’s suzerainty, or the population of the said States”), (“In accordance with the provisions of Article 29, His Britannic Majesty does not assume any obligation in respect of the territories in India of any Prince or Chief under his suzerainty or the population of the said territories.”); Special Protocol concerning Statelessness, Apr. 12, 1930, 2252 L.N.T.S. 435 (“[including] all parts of the British Empire which are not separate Members of the League of Nations”), (“His Majesty the King does not assume any obligation in respect of the Karenni States, which are under His Majesty’s suzerainty, or the

practice, however, overlapped with other colonies that were able to sometimes act independently, even while remaining within their relevant empire, as if they did have distinct international personality. Entities falling in this category include Australia,<sup>41</sup> Canada,<sup>42</sup> New South Wales,<sup>43</sup> New Zealand,<sup>44</sup> Queensland,<sup>45</sup> South Australia,<sup>46</sup> Victoria,<sup>47</sup> and West Australia,<sup>48</sup> while still within the British Empire. It is tempting to dismiss these aberrations because the treaties were on “technical” topics (*e.g.* international telecommunications) but the subject matter of the treaties does not diminish the legal authority necessary to undertake them. What is even stranger is that in some cases, these colonial entities entered into treaties with other colonial entities within the same empire.<sup>49</sup> This functionally independent personality could even be recognized in the relations between the colony and the metropolitan state itself. For example, in South Africa, the UK treated the Boer settlers as having their own international legal

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population of the said States”), (“In accordance with the provisions of Article 13 of this Protocol, His Britannic Majesty does not assume any obligation in respect of the territories in India of any Prince or Chief under His suzerainty or the population of the said territories”); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (Kyoto Protocol); Exchange of notes Constituting an Agreement on the Reciprocal Recognition of Driving Licenses, Dec. 11, 1986, Belg.-UK (Channel Isls.), 673 U.N.T.S. 55.

<sup>41</sup> See Int’l Telegraph Convention Service Règlement, *supra* note 33.

<sup>42</sup> See Additional Act to the Universal Postal Convention of 1 June 1878, with Final Protocol and modification of Regulations, Mar. 21, 1885, 165 C.T.S. 110.

<sup>43</sup> See Int’l Telegraph Convention Revised Regulations, *supra* note 33.

<sup>44</sup> See Int’l Telegraph Convention Regulations, *supra* note 33; Int’l Telegraph Convention Revised Regulations, *supra* note 33; Int’l Telegraph Convention Service Règlement, *supra* note 33; Int’l Telegraph Convention Regulations, *supra* note 33.

<sup>45</sup> See Int’l Telegraph Convention Revised Regulations, *supra* note 33.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *e.g.* Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, June 5, 1946, 27 U.N.T.S. 207 Can.-UK; Exchange of Notes Constituting an Agreement Extending the Above-Mentioned Agreement to Kenya, Tanganyika, Uganda and Zanzibar, Aug. 2, 1956, Can.-UK, U.N.T.S. 336.



personality during the time when they were attempting to break away from the British Empire.<sup>50</sup>

It is tempting to consider this practice as only historically relevant, but this is not just historical practice and continues to the present day. Some states continue to view territories for which they are internationally responsible as having a form of distinct personality that must be exercised as such, separately and distinctly from the personality of the metropolitan state, even though the (colonial) territory is not a state. These situations would include, *inter alia*, the People's Republic of China ("PR China") when acting for Hong

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<sup>50</sup> See Int'l Telegraph Convention Service Règlement, *supra* note 33; Agreement as to Terms of Surrender of the Boer Forces in the Field, May 31, 1902, Gr. Brit.-Orange Free St.-S. Afr. Rep. [Transvaal], 191 C.T.S. 232; Additional Protocol to the Extradition Convention of 1/7 September 1887, Aug. 2, 6, 1895, Gr. Brit.-Orange Free St., 182 C.T.S. 27; Extradition Convention, Gr. Brit.-Orange Free St., June 20, 25, 1890, 173 C.T.S. 255; Railway Convention, 1890, Gr. Brit.-Orange Free St., 173 C.T.S. 57; Convention, Aug. 3, 1881, Gr. Brit.-Transvaal Burghers, 159 C.T.S. 57; Frontier Agreement, July 13, 1876, Gr. Brit.-Orange Free St., 150 C.T.S. 483-1; Railway Agreement, July 13, 1876, Gr. Brit.-Orange Free St., 150 C.T.S. 483-2; Convention Respecting Basutoland, Feb. 12, 1869, Gr. Brit.-Orange Free St., 139 C.T.S. 79; Convention, Feb. 23, 1854, Gr. Brit.-Orange River Terr., 111 C.T.S. 313; Convention of Peace, Commerce, Slave Trade etc., Jan. 17, 1852, Gr. Brit.-Transvaal Boers, 107 C.T.S. 299. *Also see* Extradition Convention, Nov. 27, 1894, Belg.-Orange Free St., 180 C.T.S. 417; Convention for the Extradition of Criminals, Apr. 24, 1893, Neths.-Orange Free St., 178 C.T.S. 383; Treaty of Friendship, Commerce and Establishment, Feb. 3, 1876, Belg.-Transvaal Rep., 150 C.T.S. 233; Treaty of Friendship and Commerce, Dec. 11, 1875, Port.-Transvaal Rep., 150 C.T.S. 43; Treaty of Friendship, Commerce and Boundaries, July 29, 1869, Port.-Transvaal Rep., 139 C.T.S. 415; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field [Geneva Convention], Aug. 22, 1864 (entry into force June 22, 1865, no longer in force) *reprinted in* D. SCHINDLER AND J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 280-1 (1988) (including as participants the Orange Free State (Sept. 28, 1897))

Kong<sup>51</sup> or Macau;<sup>52</sup> Denmark when acting for the Faroe Islands;<sup>53</sup> and the UK<sup>54</sup> when acting for its various overseas territories and dependencies.<sup>55</sup> If these territories held no international personality,

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<sup>51</sup> See Kyoto Protocol.

<sup>52</sup> See *id.*; Gov't UK, Letter of notification to the Secretary-General of the United Nations of treaties applicable to Hong Kong after 1 July 1997 (June 20, 1997) reprinted at 26 INT'L L. MATS. 1675; Gov't PR China, Letter of notification to the Secretary-General of the United Nations of treaties applicable to Hong Kong after 1 July 1997, *id.*

<sup>53</sup> See Agreement concerning mutual fishery relations, May 1, 1992, Est.-Gov't Den. & Nat'l Exec. (Landsstyre) Faroe Isls., 1774 UNTS \_\_\_\_, U.N. Reg. No. 30891.

<sup>54</sup> Cf. Convention on Certain Questions relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 ([including] *all parts of the British Empire which are not separate members of the League of Nations*"); Special Protocol Concerning Statelessness, Apr. 12, 1930, 2252 L.N.T.S. 435 ("[including] *all parts of the British Empire which are not separate Members of the League of Nations*") with Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 ("His Majesty the King does not assume any obligation in respect of the Karenni States, which are under His Majesty's suzerainty, or the population of the said States." "In accordance with the provisions of Article 29, His Britannic Majesty does not assume any obligation in respect of the territories in India of any Prince or Chief under his suzerainty or the population of the said territories."); Special Protocol concerning Statelessness, Apr. 12, 1930, 2252 L.N.T.S. 435 ("His Majesty the King does not assume any obligation in respect of the Karenni States, which are under His Majesty's suzerainty, or the population of the said States." "In accordance with the provisions of Article 13 of this Protocol, His Britannic Majesty does not assume any obligation in respect of the territories in India of any Prince or Chief under His suzerainty or the population of the said territories.").

<sup>55</sup> For Anguilla, see Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211; Agreement establishing the Caribbean Development Bank ("CDB Agreement"), Oct. 18, 1969, 712 U.N.T.S. 217; 1021 U.N.T.S. 417 (amendment); 1401 U.N.T.S. 265 (amendment). For Bermuda, see Kyoto Protocol, *supra* note 199; Mine Ban Convention, *supra* note 45. For the British Antarctic Territory, see Mine Ban Convention, *supra*. For the British Indian Ocean Territory, see *id.* For the British Virgin Islands, see *id.*; CDB Agreement, *supra*. For the Cayman Islands, see Kyoto Protocol, *supra*; Mine Ban Convention, *supra*; CDB Agreement, *supra*. For the Falkland (Malvinas) Islands, see Kyoto Protocol, *supra*; Mine Ban Convention, *supra*. For Guernsey, see Mine Ban Convention, *supra*; Kyoto Protocol, *supra*. For Gibraltar, see Exchange of Notes constituting an agreement concerning Gibraltar, in connection with the signature and subsequent ratification of the Treaty relating to the accession of Spain to the European Communities, June 13, 1985, Sp.-UK, 1422 U.N.T.S. \_\_\_\_, U.N. Reg. No. 24018; Kyoto Protocol, *supra*. For Hong

then there would be no need to invoke a distinct personality when acting on their behalf. Instead, the metropolitan state would simply enter into the treaty and observe that its terms only applied to a portion of its territory that lies overseas. And yet, in all of these cases, the metropolitan state acts as if the colonial territory has a distinct personality that the metropolitan state is charged with administering.

Paradoxically, some of these same states with responsibility for overseas territories then take a contrary approach. They may make specific efforts to exclude those overseas territories when they adhere to certain other treaties, as if the overseas territories did not have a personality distinct from the metropolitan state.<sup>56</sup> Apparently, there is a risk that by adhering to the treaty, the metropolitan state would necessarily include the colonial territory. This practice thus reveals a kind of schizophrenia. If these territories had a distinct personality, then the colonial government would need to exercise that power, and we would not assume that the territory was included when the metropolitan state acted. But then, metropolitan states must be assuming their colonies would be included, or else they would not act to exclude them. To some degree, this question could be answered by

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Kong, *see* Exchange of Notes Constituting an Agreement Concerning the Status and Privileges and Immunities of the Office and Staff of the Commission of the European Communities in Hong Kong, Oct. 9, 25, 1993, Hong Kong (“under and entrustment of authority from the UK Government”)-EU, 1765 U.N.T.S., U.N. Reg. No. 30691. For Jersey, *see* Mine Ban Convention, *supra*; Exchange of Notes Constituting an Agreement Concerning the Avoidance of Double Taxation on Income Derived from Sea and Air Transport, Nov. 5, 1963, UK (in respect of Jersey) – Fr., 539 U.N.T.S. 278. For the Isle of Man, *see* Mine Ban Convention, *supra*; Kyoto Protocol, *supra*. For Montserrat, *see* Mine Ban Convention, *supra*; CDB Agreement, *supra*. For the Pitcairn, Henderson, Ducie and Oeno Islands, *see* Mine Ban Convention, *supra*. For St. Helena and Dependencies, *see id.* For South Georgia and the South Sandwich Islands, *see id.* For the Sovereign Base Areas of Akrotiri and Dhekelia, *see* Mine Ban Convention, *supra* note 45. For Turks and Caicos Islands, *see id.*, CDB Agreement, *supra*.

<sup>56</sup> *See id.*; Kyoto Protocol, *supra* note 199; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, ECOSOC Doc. E/CONF.82/15, Corr.1 & Corr.2, \_\_ U.N.T.S. \_\_, U.N. Reg. No. 27627 (Illicit Drug Traffic Convention); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S.13; Constitution of the Asia – Pacific Telecommunity, Mar. 27, 1976, 1129 U.N.T.S. 3.

consulting each state's unique constitutional arrangements, though international law does not usually regard constitutional law as having any role in international law. Even if we did adopt this approach, we would still find a degree of incoherence.<sup>57</sup>

When empires were converted to mandates, the approach to personality was once again functional, recognizing that the personality of the local territory existed, but was suspended.<sup>58</sup> Today several non-self-governing territories are treated as if they were states by permitting them to enter into treaties, join international organizations and conduct foreign relations on functional matters.<sup>59</sup> New Caledonia, as an example, is sometimes described as a *sui generis* entity with unclear international legal personality pending its independence referendum.<sup>60</sup> However, the claim of this entity in particular may be better classified as a restored sovereignty.<sup>61</sup> The Human Rights Committee held that

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<sup>57</sup> See e.g. the practice of the UK in the British Imperial system regarding certain entities of equivalent constitutional status, *supra*.

<sup>58</sup> See CRAWFORD, CREATION OF STATES, *supra* note 3, at 31; Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, 13 EUR. J. INT'L L. 1037 (2002).

<sup>59</sup> See Agreement establishing the Caribbean Development Bank, Oct. 18, 1969, 712 U.N.T.S. 217, 1021 U.N.T.S. 437 (amendment), 1401 U.N.T.S. 265 (amendment) (membership including Anguilla (as of May 4, 1982), British Virgin Islands (Jan. 30, 1970), Cayman Islands (Jan. 27, 1970), Montserrat (Jan. 28, 1970) and the Turks and Caicos Islands (Jan. 5, 1970)); *McGonnell v UK*, Appl. No. 28488/95, Eur. Ct. Hum. Rts. (2000); CRAWFORD, CREATION OF STATES, *supra* note 3, at 739–40 (including Palestine on the list of “Territorial Entities Proximate to State”); US DEP'T OF ST., OFF. OF THE HISTORIAN, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Cayman Islands available at* <http://history.state.gov/countries/cayman-islands>, (“Although the United Kingdom is responsible for the Cayman Islands' defense and external affairs, important bilateral issues are often resolved by negotiations between the Cayman Government and foreign governments, including the United States.”).

<sup>60</sup> Accord sur la Nouvelle-Caédonie [Agreement on New Caledonia] [“Noumea Accord”], May 5, 1998, J.O. Rep. Fr. No. 121, p. 8039 (May 27, 1998); Constitution Act of New Caledonia, Loi No. 98–610 (July 20, 1998); Loi organique No. 99–209 (Mar. 19, 1999); Dec. No. 99–410 DC, J.O. Rep. Fr., p.4234 (Const. Ct., Fr., Mar. 15, 1999).

<sup>61</sup> See Int'l Telegraph Convention Regulations, *supra* note 33; Int'l Telegraph Convention Revised Regulations, *supra* note 33; Int'l Telegraph Convention Service Règlement, *supra* note 33; Treaty for the Cession of their Domains, Jan. 1, 1844, Fr.-Kings & Chiefs of New Caledonia, 96 C.T.S. 7.

the measures to distinguish a qualifying electorate for the New Caledonian referenda was not ethnic discrimination,<sup>62</sup> implying that qualification based on residency status was a valid means for establishing the people for purposes of self-determination. In the meantime, New Caledonia operates a “shared sovereignty” system,<sup>63</sup> blurring its personality with that of France, and with a functional approach to its international relations.<sup>64</sup>

But New Caledonia’s shared sovereignty system is not completely unique. The Cook Islands, Niue and Tokelau are considered territories of New Zealand, and their people are all New Zealand nationals, although these distinct territories are increasingly exercising their own international capacity. For example, while it was initially considered that they did not have independent treaty making powers, that view has evolved, so that the three territories have now entered into treaties,<sup>65</sup> including treaties of serious international gravity,

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<sup>62</sup> See *Gillot et al. v Fr.*, Comm. No. 932/2000, Views of the Hum. Rts. Comm., U.N. Doc. No. CCPR/C/75/D/932/2000 (Hum. Rts. Comm., July 21, 2002) (finding that the differentiations between residents of New Caledonia for purposes of forming a qualifying electorate pursuant to the Noumea Accord referenda was not discrimination based on ethnicity or national extraction).

<sup>63</sup> See NEW CALEDONIA, NOUVELLE-CALEDONIE: RAPPORT ANNUEL 2012, INST. D’EMISSION D’OUTRE-MER (2013) *available at* <http://www.la-nouvelle-caledonie.com/app/download/5793071486/IEOM+RAPPORT+ANNUEL+2013+NOUVELLE-CALEDONIE.pdf>; Government of France, Front de Libération Nationale Kanak et Socialiste and the Rassemblement Pour la Calédonie dans la République (“RPCR”) (unofficial English trans. *available at* 7(1) AUSTRLIA INDIG. L. REP. 17 (2002)); Constitution [Fr.], Title XIII, arts. 76-77, *as amended* July 6, 1998).

<sup>64</sup> See *e.g.*, joining Pacific Islands Forum in 1999.

<sup>65</sup> See UN Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209, U.N. Doc. A/55/383 (adopted by G.A. Res. A/RES/55/25 (Nov. 15, 2000) (Cook Islands adhered on Mar. 4, 2004); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (Cook Islands adhered on July 18, 2008); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (Cook Islands signed on Sept. 16, 1998 and adhered on Aug. 27, 2001); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (Cook Islands signed on Dec. 3, 1997 and adhered on Mar. 15, 2006); Basic Agreement for the Establishment of Technical Advisory Cooperation Relations, Sept. 21, 1994, WHO-Niue, 1884 U.N.T.S. 440; Agreement Concerning Air Services, July 12, 1990, N.

even though their status is still subject to disagreement depending on the issue at hand.<sup>66</sup> In fact, Niue has even entered into a treaty with New Zealand.<sup>67</sup>

In addition to questioning treaty practice, we might also consider whether colonial or trust entities contribute to customary international law. The ICJ has relied on the practice of colonial powers over their territories overseas as evidence of customary international law,<sup>68</sup> presumably considering such actions to qualify as state practice. The International Law Commission has also relied on colonial practice as contributing to customary international law.<sup>69</sup> This view has been

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Zealand-Niue, 1865 U.N.T.S. 333; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Constitution of the Asia-Pacific Telecommunity, Mar. 27, 1976, 1129 U.N.T.S. 3 (including participation of the Cook Islands (July 21, 1987), New Zealand (with a declaration of nonapplication to Niue and Tokelau) (Jan. 13, 1983), Niue (Nov. 14, 1994)); Convention on the Privileges and Immunities of the U.N., Feb. 13, 1946, 1 UNTS 15; 90 U.N.T.S. 327 (corr.).

<sup>66</sup> Cf. *Brannigan v. Davison* (“Winebox Case”) [1996] 3 WLR 859, 863; 108 ILR 622 (PC, NZ, Oct. 14, 1996) (as per Nicholls of Birkenhead, L.) (arguing that “The Cook Islands is a fully sovereign independent state.”); *with* UN Secretariat, Office L. Affrs, Memorandum addressed to the Chief of Division One, Regional Bureau for Asia and the Pacific of the United Nations Development Programme, *Question whether the Cook Islands are eligible to receive a United Nations development programme indicative planning figure (“IPF”) independence bonus – Distinction between self-governing territories and independent states under international law*, para. 6 (June 8, 1979) reprinted at 1979 UN JURID. YB 172-3 (“In view of the essential characteristics of independent States as described above, it follows that the status of the Cook Islands is not sovereign independence in the juridical sense.”).

<sup>67</sup> See Agreement Concerning Air Services, July 12, 1990, Gov’t NZ-Gov’t Niue, 1865 U.N.T.S. \_\_\_\_, as amended, 320 U.N.T.S. 209, 217; 418 U.N.T.S. 161; 514 U.N.T.S. 209; 740 U.N.T.S. 21; 893 U.N.T.S. 117; 958 U.N.T.S. 217; 1008 U.N.T.S. 213; 1175 U.N.T.S. 297.

<sup>68</sup> See *Land & Marit. Boundary* (Cameroon v Nigeria: Eq. Guinea, interv.) Judgment, 2002 I.C.J. Reps. 303, ¶ 33 (Oct. 10); *W. Sahara*, Advisory Opinion, 1975 I.C.J. Reps. 12 (May 22); *Frontier Disp. (B. Faso / Mali)*, Judgment, 1986 I.C.J. Reps. 554 (Dec. 22); *Temple of Preah Vihear (Cambodia v Thai.)*, Merits, Judgment, 1962 I.C.J. Reps. 6 (June 15); *Rt of Passage Over Ind. Terr. (Port. v. Ind.)*, Merits, Judgment, 1960 I.C.J. Reps 6 (Apr. 12).

<sup>69</sup> See Int’l L. Comm’n, Mohammed Bedjaoui, Spec. Rapp., *Third report on succession in respect of matters other than treaties*, Draft articles with commentaries on succession to public property, U.N. Doc. A/CN.4/226 (Mar. 24, 1970); Int’l L. Comm’n, Humphrey Waldock, Spec. Rapp., *Third report on succession in respect of treaties*, U.N. Doc.

supported by states citing to colonial practice both in domestic practice<sup>70</sup> and comments on drafts of the International Law Commission.<sup>71</sup>

The conclusion from this section must be that non-independent territories under imperial, colonial, mandated, or similar administration remained (or were *ex post* reincorporated as) separate legal persons, though without the status of statehood. The approach to their international participation as persons has been functional—sometimes they are treated as persons vis-à-vis the colonial power, sometimes they can enter into agreements with third states, and sometimes they are considered parts of the metropolitan state.

## 2. Occupied and Annexed States

States that are occupied and possibly annexed are in a similar situation to those that were colonized. Quite a few states operated independently prior to an annexation or absorption into another state, and for some of these states their treaties continued to remain in force and might continue to be regarded as sovereign, independent states

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A/CN.4/224 & ADD.I, II YB INT'L L. COMM'N (1970), U.N. Doc. A/CN.4/Ser.A/1970/Add.I; U.N. Secretariat, *Succession of States to multilateral treaties: seventh study prepared by the Secretariat*, U.N. Doc. A/CN.4/225 (Apr. 24, 1970); U.N. Secretariat, *Succession of States to bilateral treaties: study prepared by the Secretariat*, U.N. Doc. A/CN.4/229 (May 28, 1970); UN Secretariat, *Possibilities of participation by the United Nations in international agreements on behalf of a territory, Study prepared by the Secretariat*, U.N. Doc. A/CN.4/281 (June 10, 1974), II(2) YB INT'L L. COMM'N (1974), U.N. Doc. A/CN.4/Ser.A/1974/Add.I (Part 2).

<sup>70</sup> See e.g. *Nazar Mohammad & others v. The Crown*, I Pakistan L. Reps. 19 (1948), (High Ct. Lahore, Pakistan, 1948), reprinted at ANNUAL DIGEST Case 28 (1948).

<sup>71</sup> See Int'l L. Comm'n, 67th sess., *Reply by Austria*, U.N. Doc. A/69/10 (Mar. 10, 2015), *Statement by Ambassador Helmut Tichy, Legal Adviser, Austrian Ministry for European and International Affairs, New York, 29 October 2012 available at* [http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/icil\\_austria.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/icil_austria.pdf&lang=E) (citing *Dralle v Czechoslovakia*, Judgment, OGH 1 Ob 171/50, SZ 1950 No 23/143, p 304-332, 17 ILR 155, 157-61 (Sup. Ct., Aust., May 10, 1950) (citing to practice of the Imperial Economic Conference of the British Empire of 1923 as evidence of customary international law); Int'l L. Comm'n, Michael Wood, Spec. Rapp., *Second report on identification of customary international law*, U.N. Doc. A/CN.4/672 (May 22, 2014), ¶ 41.

despite their factual integration. For example, following its annexation by Germany and until 1955, Austria's statehood was uncertain.<sup>72</sup> Many authorities did not regard Austria as a state during this time, even though it retained some international capacity; for example, the capacity to negotiate the 1955 Austrian State Treaty.<sup>73</sup> Similarly, the personality of the German Reich—technically occupied from 1945 until the renunciation of allied powers in 1990—is unclear.<sup>74</sup> It was not annexed,<sup>75</sup> and the relationship is best characterized as one of agency.<sup>76</sup> Many authorities, including James Crawford, maintain that, in addition to the states of West and East Germany, some vestigial third Germany continued to exist in the form of the allied forces lingering rights over the conquered Reich.<sup>77</sup>

The obvious distinction between these two cases of occupation of Austria and later Germany is the lawful use of force. In the case of Austria, the state was occupied by Germany and annexed under threat of the unlawful use of force, contrary to sovereignty and self-determination. In the case of Germany at the end of World War II, the state was occupied due to the lawful use of force and was administered, not annexed. For the unlawful use of force, the rule of *ex injuria jus non oritur*<sup>78</sup> works to preclude recognition of a change in the legal status of

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<sup>72</sup> See Customs Régime betw. Germ. & Aust. (Protocol of March 19th, 1931), Adv. Op., 1931 P.C.I.J. (Ser. A/B) No. 41 (Sept. 5).

<sup>73</sup> See Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 CHINESE J. INT'L L. 19 (2013).

<sup>74</sup> See Agreement on the Settlement of Certain Matters Relating to Berlin, Sept. 25, 1990, Fr.-UK-US-USSR, reprinted at 30 INT'L L. MATS. 445; Exchange of Notes concerning the presence of allied troops in Berlin, Sep. 25, 1990, Fr.-UK-US-USSR, reprinted at 30 INT'L L. MATS. 450; Ryszard W. Piotrowicz, *The status of Germany in international law: Deutschland Uber Deutschland?*, 38 INT'L & COMP. L.Q. 609 (1989).

<sup>75</sup> See *Kunstsammlungen zu Weimar v. Elicofon*, reprinted at 94 INT'L L. REPS. 135; *Clark v. Allen*, 331 U.S. 503, 514 (1947); *R. v. Bottrill*, ex p Küchenmeister [1946] 1 All E.R. 635; CRAWFORD, CREATION OF STATES, *supra* note 3, at 523–26; F. A. MANN, STUDIES IN INTERNATIONAL LAW 634–59, 660–706 (1973); Jochen Abr. Frowein, *The Reunification of Germany*, 86 AM. J. INT'L L. 152 (1992).

<sup>76</sup> See BROWNLIE, PRINCIPLES, *supra* note 4, at 107; I. D. HENDRY & M.C. WOOD, THE LEGAL STATUS OF BERLIN (1987).

<sup>77</sup> See *R. v. Sec'y St. For. & Commonw. Aff'rs*, ex parte Trawnik & Reimelt, [1985] T.L.R. 250.

<sup>78</sup> See Accord. with Int'l L. of the Unilat. Decl. of Indep. in Resp. of Kosovo, Advisory Opinion, 2010 I.C.J. Reps. 141 ¶¶ 132–7 (July 22) (Cançado Trindade, J.,



the territory.<sup>79</sup> For the lawful use of force, the demands of self-determination may similarly preclude an occupying force from annexing the territory.<sup>80</sup> Yet despite these differences in legal status, in both cases, the factual situation is that the *de facto* independence of the

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separate opinion); Gabčíkovo-Nagymaros Proj. (Hung./Slovak.), 1997 I.C.J. Reps. 7, 54, 78 (Sept. 25); LAUTERPACHT, RECOGNITION, *supra* note 1, at 421. For *ex turpi causa non oritur actio*, see Mil. & Paramil. Acts. in & ag Nicar. (Nicar. v. US), 1986 I.C.J. Reps. 14, ¶ 270 (June 27) (Schwebel, J., dissenting); US Dipl. & Cons. Staff in Tehran (US v. Iran), 1980 I.C.J. Reps. 53–55, 62–63 (May 24) (Morozov & Tarazi, JJ., dissenting); Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser.A/B), No. 70 (June 28); Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. C) No. 81, ¶ 240 (June 28); Legal Status of E. Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 95 (Apr. 5) (Anzilotti, J., dissenting); Factory at Chorzów (Germ. v. Pol.) (Cl. for Indemnity) (Juris.), 1927 P.C.I.J. (ser. A) No. 9 at 31 (July 26); Mavrommatis Jerusalem Concessions (Gr. v. UK), 1925 P.C.I.J. (ser. A) No. 5 at 50 (Mar. 26). See generally William Thomas Worster, *The Effect of Leaked Information on International Legal Norms*, 28 AM. UNIV. INT'L L. REV. 443 (2013).

<sup>79</sup> See Legal Conseq. of the Constr. of a Wall in the Occup. Palestinian Terr., Advisory Opinion, 2004 I.C.J. Reps. 231 (Higgins, J., sep. op.); Legal Conseq. for Sts. of the Cont. Presence of S-Afr. in Namib. (SW Afr.) notwithst. S.C. Res. 276 (1970), Advisory Opinion, 1971 I.C.J. Reps. 16, 55–6 (June 21); E. Timor Case (Port. v. Aust'lia), Juris., Judgment, 1995 I.C.J. Reps. 103–4; Int'l L. Comm'n, James Crawford, Spec. Rapp., *Articles on State Responsibility, with Commentary*, arts. 40, 41, in 2001 REPORT OF THE INTERNATIONAL LAW COMMISSION FIFTY-THIRD SESSION, U.N. Doc. A/56/10 277–292, 289–290; LAUTERPACHT, RECOGNITION, *supra* note 1, at 421.; R. LANGER, SEIZURE OF TERRITORY 58 (1945); Enrico Milano, *The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question*, 1 QS OF INT'L L. 35 (2014); M. Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 683 (J. Crawford, A. Pellet, & S. Olleson eds, 2010); S. Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES OBLIGATIONS (C. Tomuschat & J.M. Thouvenin eds, 2006); D. Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHIN. J INT'L L 105 (2003); W Meng, *Stimson Doctrine*, in IV MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 690 (R. Bernhardt ed., 1982).

<sup>80</sup> See E. Timor Case (Port. v. Aust'lia), Juris., Judgment, 1995 I.C.J. Reps. 102; Legal Conseq. of the Constr. of a Wall in the Occup. Palestinian Terr., Advisory Opinion, 2004 I.C.J. Reps. 231 (Kooijmans, J., sep. op.); S.C. Res. 217, ¶ 3 (Nov. 20, 1965) (“no legal validity” for Southern Rhodesian declaration of independence); J. VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE 40 (2013).

territory ceases, though the territory continues to retain its sovereign independence *de jure*. The *de jure* rights connected to sovereign independence are also retained. For example, the UN Security Council<sup>81</sup> has received and considered submissions from annexed states on the unlawful use of force against them, despite the fact that were no longer *de facto* operating as independent states.<sup>82</sup>

But that *de jure* status is not absolute. There are a number of functional matters where the acts of the unlawfully occupying state are recognized as valid legal acts of authority in the occupied state, most notably the “*Namibia*” exception. In the *Namibia* advisory opinion, the ICJ concluded that because South Africa was unlawfully occupying and controlling Namibia (South West Africa) contrary to the mandate over the territory, its actions there could not have any legal effect;<sup>83</sup> however, an exception should be made for the acts of state that were necessary for the inhabitants of the occupied territory to enjoy their rights, such as registration of births and marriages.<sup>84</sup> These state acts would have *de jure* effect notwithstanding that the occupation generally

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<sup>81</sup> See U.N. Charter, arts. 11(2), 32, 35(2). UNSC Provisional Rules of Procedure, U.N. Doc. S/96/Rev.4 (1946), Rule 15 (only permitting states to participate in UNSC sessions). In addition, the Statute of the International Court of Justice permits non-UN members to submit their disputes to the ICJ even if they decide against membership in the UN by lodging a declaration to that effect with the Court. This method was used by several micro-states to join the Court without joining the UN, and in the case of Liechtenstein to actually lodge disputes with the Court. See *e.g.* Nottebohm Case (Liechtenstein v. Guatemala), 2d phase, 1955 I.C.J. Reps. 4 (Apr. 6). However, in these cases, the applicants were undoubtedly states when they sought to lodge their declarations with the Court. See *id.* at 20 (“It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality . . .”).

<sup>82</sup> See UNSCOR 181st mtg. at 1940 (Aug. 12, 1947) (re Indonesia); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 609, 612–3 (Bruno Simma, ed., 2d ed. 2002) (re Tunisia and Kuwait).

<sup>83</sup> See Legal Conseq. for Sts. of the Cont. Presence of S-Afr. in Namib. (SW Afr.) notwithst. S.C. Res. 276 (1970), Advisory Opinion, 1971 I.C.J. Reps. 16, 55–6 (June 21); Cyprus v. Turk. Judgment (Merits) (ser. A) No 4, 5 (Eur. Ct. Hum Rts., May 10, 2001).

<sup>84</sup> See Legal Conseq. for Sts. of the Cont. Presence of S-Afr. in Namib. (SW Afr.) notwithst. S.C. Res. 276 (1970), Advisory Opinion, 1971 I.C.J. Reps. 16, 55–6 (June 21).

did not.<sup>85</sup> The *Namibia* exception is applied to a variety of other unlawful regimes, and is not limited to only Namibia.<sup>86</sup>

### 3. Internationalized Territories

Some occupied territories were not meant to be annexed or colonized, but shifted to international governance, and here again we find the inconsistent application of functional statehood. In some cases, territories under international administration were treated as if they were states, and in others, they were treated as if they remained part of other states, though with their local governance administered by international authorities. While, we will might guess that this distinction would fall on whether the territory was a part of another state or was an independent state upon the creation of its international administration, this easy distinction does not appear to be the rule. For example, the Saarland was clearly an internationalized territory with mere autonomy within Germany,<sup>87</sup> yet it was authorized to join the Council of Europe (though it never took that step) even though only states may join the organization. This approach has also been applied

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<sup>85</sup> *See id.*

<sup>86</sup> *See id.*; *Hopkins v. Mex.*, 4 U.N. REP. INT'L ARB. AWARDS 41 (1926); *R. (on the application of Kibris Turk Hava Yolları) v Secretary of State for Transport*, Case No: CO/3512/2007 [2009] EWHC 1918 (Admin); [2010] 1 All E.R. (Comm) 253 (QB, Engl., Admin. Ct., July 28, 2009); *Emin v Yeldag* [2002] 1 F.L.R. 956; *B v B (Divorce: N. Cyprus)* [2000] 2 F.L.R. 707 [2001] 3 F.C.R. 331; *Somalia v Woodhouse Drake & Carey (Suisse) SA (The Mary)* (QB, Engl., Commercial Ct., Mar. 13, 1992); *Reel v Holder*, Court of Appeal (Civil Division) June 30, 1981 [1981] 1 W.L.R. 1226; [1981] 3 All E.R. 321; (1981) 125 S.J. 585; (interpreting the meaning of “country” under International Amateur Athletic Federation rules as territory over which there is authority, not necessarily the same as the meaning of state or nation); *Hesperides Hotels Limited v Aegean Turkish Holidays Limited* [1978] 1 QB 205; *In re Al-Fin Corporation's Patent*, [1970] Ch. 160, 177-81 (Apr. 2, 1969); *Luigi Monta of Genoa v Cechofracht Co* [1956] 2 QB 552; [1956] 3 WLR 480 (QB Div., Jun. 14, 1956) (Sellers, J.); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 205(3) (1987).

<sup>87</sup> *See* European Convention on Human Rights, art. 59(1)-(2) (Convention shall be open to the signature of the members of the Council of Europe); Statute of the Council of Europe, London, May 5, 1949, 87 U.N.T.S. 103 (1951), CETS No. 1, art. 4 (“[a]ny European State . . . may be invited to become a member of the Council of Europe by the Committee of Ministers”). The Saar was admitted as a member of the Council of Europe (as a European “state”), and thus eligible to be a member of the European Convention on Human Rights.

in the cases of Danzig<sup>88</sup> and Trieste,<sup>89</sup> as well as in Bosnia,<sup>90</sup> Kosovo<sup>91</sup> and East Timor, before those entities were fully accepted as states.<sup>92</sup>

However, even when the territorial entity was clearly a state prior to the internationalization, we still find a functional approach due to the unusual nature of its internationalized government. An example of this practice is the case of Cambodia.<sup>93</sup> What confuses the statehood issue is whether the international organization governing the territory, the UN, is acting as the government of the state and thus exercising statehood, or whether it is exercising the international organization's personality. The UN is not sovereign, although it can act on behalf of the territory, asserting the personality of the territory, distinct from that of the UN.<sup>94</sup> It is widely understood that, although the UN is not a

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<sup>88</sup> See Statute of the Permanent Court of International Justice, art. 71(2) (treating the City of Danzig as a state); CRAWFORD, CREATION OF STATES, *supra* note 3, at 31.

<sup>89</sup> See S.C. Res. 16, *Permanent Statute for the Free Territory of Trieste* (1947).

<sup>90</sup> See General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Agreement"), Dec. 14, 1995, Ann. 10, *reprinted at* 35 INT'L L. MATS. 75.

<sup>91</sup> See S.C. Res. 1244 (1999) (authorizing the UNSG to create the UN Mission in Kosovo "UNMIK"); KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT (C. Tomuschat ed., 2002); Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate*, 16 EUR. J. INT'L L. 637 (2005); Alexandros Yannis, *The UN as Government in Kosovo*, 10 GLOBAL GOV. 67 (2004); Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, 50 INT'L & COMP. L.Q. 613 (2001).

<sup>92</sup> See S.C. Res. 1272 (1999) (authorizing the UNSG to create the UN Transitional Administration in East Timor "UNTAET"). See also S.C. Res. 1292; S.C. Res. 1388 (2001); S.C. Res. 1410 (2002).

<sup>93</sup> See Steven R. Ratner, *The Cambodia Settlements Agreements*, 87 AM. J. INT'L L. 1, 12-25 (1993).

<sup>94</sup> See S.C. Res. 1244 (1999) (UNMIK will exercise "[a]ll legislative and executive authority with respect to Kosovo"); S.C. Res. 1272 (1999) (UNTAET will be "endowed with overall responsibility for the administration of East Timor and . . . empowered to exercise all legislative and executive authority, including administration of justice."); A. Yannis, *The UN as Government in Kosovo*, 10 GLOBAL GOV. 67 (2004); UNMIK, Press Rel., SRSG Soren Jessen-Petersen and Walter Schwimmer, Secretary-General of the Council of Europe, Sign Two Agreements (Aug. 23, 2004) (signing an agreement for an independent committee of experts from the Council of Europe to monitor treatment of detainees in conformity with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment). This kind of relationship is comparable to that of the

party to human rights treaties, it may incur those obligations where it exercises governmental administration.<sup>95</sup> Furthermore, it is not always clear whether those human rights obligations are binding because the UN is bound to them under customary international law, or because the territory it is administering as some sort of continuing legal person, remains bound.<sup>96</sup> In such cases it may be clear that the UN administers the government of an entity capable of having its own government,<sup>97</sup> although it may not be entirely clear whether the governmental powers come from the inherent, independent governmental authority of the entity or whether they come from the state that claims the entity.<sup>98</sup> Some of these territories under international administration have had their practice cited as “state practice” and thus evidence of customary

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Holy See governing the Vatican City State. Only the latter is a state; the former is a different kind of international legal person.

<sup>95</sup> See generally HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (Theodor Meron ed., 1989); Int'l L. Assoc., Hum. Rts. Comm., *Final report on the status of the universal declaration of human rights in national and international law*, Report of the 66th Int'l L. Assoc. Conf. 525-63 (1994); Mahnouch H. Arsanjani, *Claims Against International Organisations: quis custodiet ipsos custodiet*, 7 YALE J. WORLD PUBL. ORDER 131, 134 (1981) (“[b]ecause international organisations were created to promote public order, it would be perverse, even destructive, to postulate community expectation that international organisations need to conform to the principles of public order.”); Elihu Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law*, 9 INT'L & COMP. L.Q. 253 (1960). Regarding the League of Nations, see W.H. DAWSON, *THE SAAR TERRITORY: ITS HISTORY, POPULATION, INDUSTRY AND GOVERNMENT BY THE LEAGUE OF NATIONS* 18–20 (1934).

<sup>96</sup> See HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (Theodor Meron ed., 1989); Int'l L. Assoc., Hum. Rts. Comm., *Final report on the status of the universal declaration of human rights in national and international law*, Report of the 66th Int'l L. Assoc. Conf. 525–63 (1994).

<sup>97</sup> See S.C. Res. 1264 (1999); S.C. Res. 1272 (1999); Dayton Agreement, Dec. 14, 1995, Ann. 10, *reprinted at* 35 INT'L L. MATS. 75 (regarding the UN mission in Bosnia); Agreement on a Comprehensive Political Settlement in Cambodia, Oct. 23, 1991, *reprinted at* 31 INT'L L. MATS. 183 (regarding the UN transitional authority in Cambodia); Agreement concerning West New Guinea (West Irian), 1962, *Neths.-Indo.*, *reprinted at* 57 AM. J. INT'L L. 493 (1963).

<sup>98</sup> See S.C. Res. 1244 (1999); UNSG, *Report of the Secretary-General on United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/1999/779 (July 12, 1999); UNMIK Reg. No. 1999/1, § 1(1) (suggesting that there is a legislative, executive, and judicial power of Kosovo, as distinct from Serbia, to be administered).

international law.<sup>99</sup> It would seem that the very act of claiming administration by the UN presupposes an inherent and independent source of governmental authority in the entity at issue that could be vested in the international organization.<sup>100</sup> Thus, internationalized territories are often viewed as distinct international legal persons, at least for certain purposes.

#### 4. Entities in Transition

States in transition to independence are yet further examples of entities that are treated as if they are states prior to being widely considered as such.<sup>101</sup> Some quasi-states in transition to becoming states have joined as members of international organizations, before their statehood was widely accepted.<sup>102</sup> While they eventually received widespread recognition as states, at the time when they joined the organization, their statehood was still in doubt. Treating an entity that

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<sup>99</sup> See William Thomas Worster, *The Contribution to Customary International Law by Territories under International Administration*, in INTERNATIONAL ORGANISATIONS AND FORMATION OF CUSTOMARY INTERNATIONAL LAW (Jean d'Aspremont & Sufyan Droubi eds., forthcoming 2020).

<sup>100</sup> For a discussion on the similar case of the US relationship with Puerto Rico, cf. *Puerto Rico v Sanchez Valle et al.*, No. 15-108, \_\_\_ US \_\_\_, (2016) *with id. at* Breyer, J., dissenting op.

<sup>101</sup> See CRAWFORD, CREATION OF STATES, *supra* note 3, at 394; Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 141 (2005) (“such as the state of Poland, which the Allied Governments had recognized as a belligerent before the Armistice with Germany in the First World War, but which the Central Powers did not recognize as a state.”).

<sup>102</sup> See MALCOLM SHAW, INTERNATIONAL LAW 199–200 (6th ed., 2008) (arguing that Israel was admitted to the UN prematurely); JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 52–5 (1987) (discussing Byelorussia, India, Lebanon, Namibia, the Philippines, Syria, and the Ukraine); W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS 61–2 (1975) (arguing that Bhutan was not independent of India when it was admitted); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 16–7 (1963) ; Roger O’Keefe, *The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States*, 1 BALTIC Y.B. INT’L L. 167, 171–6 (2001); UNSG, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, U.N. Doc. ST/LEG/7/Rev. 1, ¶ 79 (1999) (“W]hen a treaty is open to ‘States’, how is the Secretary-General to determine which entities are States? If they are Members of the United Nations or Parties to the Statute of the International Court of Justice, there is no ambiguity.”).

is on the path to statehood, though not yet fully attained such status, as if it were already a state, is yet another example of treating a non-state territorial entity as if it were a state for a functional purpose.

Several examples of states undertaking a long birthing process that are commonly overlooked are the British Commonwealth states. Canada evolved from a dominion, only becoming fully responsible for its constitution in 1982,<sup>103</sup> though it was functionally treated as a state far earlier.<sup>104</sup> Australia also evolved from a part of the empire to an

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<sup>103</sup> See Canada Act, 1982, c. 11 pmb, ¶ 2 (U.K.) (renouncing any residual legislative authority of the United Kingdom's parliament to enact amendments to the Canadian Constitution and, thus, patriating the Canadian Constitution). See also British North America Act (No. 2), 1975, 23 & 24 Eliz. II, c. 53 (U.K.); British North America Act (No. 1), 1975, 23 & 24 Eliz. II, c. 28 (U.K.); British North America Act, 1974, 23 Eliz. II, c. 13 (U.K.); British North America Act, 1965, 14 Eliz. II, c. 4 (U.K.); British North America Act, R.S.C. 1952, c. 304 (Can.); British North America (No. 2) Act, 1949, 12, 13 & 14 Geo. 6, c. 81 (U.K.) (repealed); British North America Act, 1949, 12, 13 & 14 Geo. 6, c. 22 (U.K.); British North America Act, 1946, 9 & 10 Geo. VI, c. 63 (U.K.) (repealed); British North America Act, 1943, 6 & 7 Geo. VI, c. 30 (U.K.) (repealed); British North America Act, 1940, 3 & 4 Geo. VI, c. 36 (U.K.); Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4, arts. 2(2)-(4) (U.K.) (providing Canada (and other "Dominions") the power to legislate independently from England and extraterritorially); Constitution Act, 1930, 20 & 21 Geo. V, c. 26 (U.K.); British North America Act, 1915, 5 & 6 Geo. V, c. 45 (U.K.); British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.); British North America Act, 1886, 49 & 50 Vict. c. 35 (U.K.); British North America Act, 1871, 34 & 35 Vict. c. 28 (U.K.); Constitution Act, 1867, 30 & 31 Vict. c. 3 (U.K.); Constitution Act, 1791, 31 Geo. 3, c. 31 (U.K.) (establishing the Canadian government).

<sup>104</sup> See e.g. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, Can.-UK, 1980 Can. T.S. No. 25; Agreement on the Establishment of Direct Diplomatic Relations, Can.-USSR, 1942 Can. T.S. No. 12; Agreement Providing for the Exchange of Consuls, Ca.-USSR, 1942 Can. T.S. No. 9; *R. v. Sec'y St. For. & Commwlth Aff'rs, ex parte Ind. Assoc. of Alberta & others*, [1982] Q.B. 892 (Ct. Appeal, Engl., Jan. 28, 1982) *aff'd* (H. Lords, Mar. 11, 1982) *reprinted at* 78 INT'L L. REPS. 421; US DEP'T OF ST., OFF. OF THE HISTORIAN, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Canada*, available at <http://history.state.gov/countries/canada> ("The Dominion of Canada formed in 1867, but as an integral part of the British Empire its foreign relations remained under the control of London. Over the next six decades Canada gradually won greater control over its external affairs . . . American and Canadian government officials increasingly interacted through joint commissions and military cooperation, and the two governments even negotiated a bilateral fisheries treaty in 1923. It was

independent state. Even as late as 1906, there was no such thing as Australian nationality.<sup>105</sup> New Zealand similarly did not generally negotiate treaties independently from the UK until 1928,<sup>106</sup> yet it adhered to the Versailles Treaty as a separate person in 1918. Only in 1973 did New Zealand adopt its own constitution,<sup>107</sup> and in 1976 a New Zealand court ruled that New Zealand was not “part of Her Majesty’s dominions” or a “British possession,” at least for purposes of the Fugitive Offenders Act 1881 (UK). Finally, it was only in 1986 that the residual power of the British Parliament to legislate for New Zealand was abolished.<sup>108</sup> During the years of these emerging independences, some authorities thought that when the UK declared war, that decision was binding on all nations in the empire, but others thought that the nations should be consulted in the decision.<sup>109</sup> While

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not until 1926 [after the Balfour Declaration at the 1926 British Imperial Conference], however, that the United Kingdom acknowledged that Canada was fully autonomous in the conduct of its foreign affairs . . . [the Balfour Declaration stated that Dominions] “are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs.”)

<sup>105</sup> See *A.-G. (Cth) v Ah Sheung* [1906] HCA 44; (1906) 4 CLR 949 (High Ct., Aust’lia, June 29, 1906); *Nolan v Min. Immig. & Ethnic Aff’rs* [1988] HCA 45; (1988) 165 CLR 178, F.C. 88/041 (High Ct., Aust’lia, Sep. 13, 1988) (recognizing only in 1988 that Australian nationality was distinct from British nationality); Australian Citizenship (Amendment) Act 1984 (ending the status of “British subject”).

<sup>106</sup> See STEVE HOADLEY, *THE NEW ZEALAND FOREIGN AFFAIRS HANDBOOK* 17 (1992).

<sup>107</sup> See New Zealand Constitution Amendment Act 1973.

<sup>108</sup> See Constitution Act 1986; *Re Ashman & Best* [1985] 2 NZLR 224, 232 (SC); PHILIP A. JOSEPH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND* 459 (2001).

<sup>109</sup> See New Zealand Parliament 1923, Parliamentary Debates, 199 Hansard 23 (Sinclair) (“It goes without saying that, as before the signing of the [Versailles] treaty, so since, if the Mother-country were at war the dominions would be at war. But by acquiring a voice upon foreign policy the dominions are under a responsibility that they were not under before. Is this voice, about which so much has been written and spoken, a real voice? . . . I submit that it is inadequate—that it does not cover the ground; that the machinery for its exercise is defective.”); *Id.* at 33-34 (Bell) (“There is one Government of the Empire in its relation to foreign affairs, and that is the Government of England . . . The matter that concerns us is how far it is of any benefit to anyone that we should be consulted; and, if we were consulted, is there any man in New Zealand who thinks that we are really fit to judge? By “we” I mean



the Balfour Declaration of 1926 and Statute of Westminster of 1932 of the UK expressed an understanding that the various territories were “autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs,”<sup>110</sup> it took another 50 years to sever the remaining sovereign ties.

Andorra is yet another problematic transitional entity,<sup>111</sup> with its statehood not clearly established until 1993 when it adopted its first constitution and became a “modern” state.<sup>112</sup> Andorra was generally reluctant to adhere to treaties or join international organizations until after the confirmation of its statehood in 1993,<sup>113</sup> although it did enter

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Government. I am quite sure the Opposition would say that we are unfit. I am a member of the Government myself, and I have no sense of fitness to advise the Imperial Government in matters of foreign policy.”)

<sup>110</sup> See Peter Marshall, *The Balfour Formula and the Evolution of the Commonwealth*, App., 90 THE ROUND TABLE 541, 550. (2001); R. O. McGechan, *Legislative Inability, in NEW ZEALAND AND THE STATUTE OF WESTMINSTER: FIVE LECTURES* 78 (J. C. Beaglehole ed., 1944).

<sup>111</sup> See Michael Emerson, *Andorra and the European Union*, Report for the Centre for European Policy Studies 37–9 (2007) available at [http://aci.pitt.edu/32605/1/44.\\_Andorra\\_and\\_the\\_European\\_Union.pdf](http://aci.pitt.edu/32605/1/44._Andorra_and_the_European_Union.pdf).

<sup>112</sup> See Treaty of Good Neighbourliness, Friendship and Co-operation, 1993, And.-Fr.-Sp., 1872 U.N.T.S. 195 (recognizing Andorra as a sovereign state); Emerson, *Andorra and the EU*, *supra* note 272 (“The Constitution declares Andorra to be a legal, independent, democratic and social state, whose sovereignty resides in the Andorran people.”).

<sup>113</sup> For international organizations, see UN Conference on Trade and Development (UNCTAD) (July 23, 1993); UN (July 28, 1993); UNESCO (Oct. 20, 1993); International Telecommunications Union (Nov. 12, 1993); World Organisation for Intellectual Property (July 28, 1994); Council of Europe (Nov. 10, 1994); EUTELSAT (Dec. 2, 1994); World Tourist Organisation (Oct. 17, 1995); Organisation for European Security and Cooperation (OSCE) (Apr. 25, 1996); International Office for Animal Health (Jan. 3, 1997); World Health Organisation (WHO) (Jan. 15, 1997); World Trade Organisation (WTO) (observer) (Oct. 22, 1997); Organisation for International Civil Aviation (Feb. 25, 2001); International Criminal Court (Apr. 30, 2001); Organisation for Prohibition of Chemical Weapons (OPCW) (Mar. 29, 2003); International Organisation of the Francophonie (IOF) (associate member) (Nov. 26, 2004). Unlike the Saar, Andorra refrained from joining the Council of Europe until its statehood was settled, see Accession of Andorra, Nov. 10, 1994, 1862 U.N.T.S. 456. For treaties, see e.g. Mine Ban Convention, *supra* note 45; Illicit Drug Traffic Convention, *supra* note 232.

into treaties with Spain,<sup>114</sup> joined Interpol,<sup>115</sup> and adhered to the Universal Copyright Convention, the Convention for the Protection of Cultural Property in the Event of Armed Conflict,<sup>116</sup> and the Convention on the Rights of the Child<sup>117</sup> prior to then. During this awkward period spanning many centuries, the entity was not a part of Spain or France, but was also not foreign to them either, in that their relationship did not fall into the normal category of interstate relations. In 1992, the European Court of Human Rights (“ECtHR”) struggled to view the entity as a “European country,” rather than a “state.”<sup>118</sup> Since Andorra has now clearly established (or normalized) its statehood, we might forget that its status was questionable for so long, and during this time was treated as having a relative statehood permitting it to adhere to several treaty regimes on a case-by-case functional basis.<sup>119</sup>

The EU might be another *sui generis* entity in transition.<sup>120</sup> The EU entity and legal system is not adequately described using the

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<sup>114</sup> See Convention, June 16, 1841, And.–Sp., 91 C.T.S. 473; Exchange of Notes relative to the Importation of Cattle, July 13, 1867, And.–Sp., 135 CTS 201.

<sup>115</sup> See International Criminal Police Organisation (Interpol) (Nov. 27, 1987).

<sup>116</sup> See Drozd & Janousek v. Fr. & Sp., Appl. No. 12747/87, Judgment (Eur. Ct. Hum. Rts., Plenary, June 26, 1992).

<sup>117</sup> See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>118</sup> See Statute of the Council of Europe, London, May 5, 1949, 87 U.N.T.S. 103, C.E.T.S. No. 1, art. 4; Drozd & Janousek v. Fr. & Sp., Appl. No. 12747/87, Judgment (Eur. Ct. Hum. Rts., Plenary, June 26, 1992).

<sup>119</sup> But see Fred Halliday, *Andorra’s Model: Time for Change*, OPEN DEMOCRACY (Sept. 28, 2009) available at

<http://www.opendemocracy.net/countries/andorra> (expressing the view that that Nicholas Sarkozy used his position as co-Prince of Andorra to pursue a political objective of France, i.e. tax evasion by French citizens hiding money in Andorra, which resulted in Andorra legislation and a tax data sharing agreement with France, perhaps implying that the sovereign independence of Andorra might be simply be a cover for acting as a political tool of France).

<sup>120</sup> See Kyoto Protocol, *supra* note 199; Illicit Drug Traffic Convention, *supra* note 232; Bruno De Witte, *The European Union as an International Legal Experiment*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 20 (2012); Ramses A. Wessel, *Reconsidering the Relationship between International and EU Law: Towards a Content-based Approach?*, in INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 10 (Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel eds., 2011); Dominic McGoldrick, *The International Legal Personality of the European Community and the European Union*, in 50

language of statehood.<sup>121</sup> Some authorities see it as closer to an international organization,<sup>122</sup> being clearly founded on a treaty. However, other authorities, including the EU Court of Justice, appear to take a more constitutional view.<sup>123</sup> Quite simply, the EU has “differing levels of status . . . in multilateral fora.”<sup>124</sup> Its obligations can

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YEARS OF THE EUROPEAN TREATIES LOOKING BACK AND THINKING FORWARD (Michael Dougan & Samantha Currie eds., 2009); Frank Hoffmeister, *Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organisations and Treaty Bodies*, 44 COMM. MKT. L. REV. 41 (2007); Frank Hoffmeister & Piet Jan Kuiper, *The Status of the EU at the United Nations: Institutional Ambiguities and Political Realities*, in THE UN AND THE EU - AN EVER STRONGER PARTNERSHIP (Jan Wouters, Frank Hoffmeister & Tom Ruys eds., 2006); Michael Dougan, *Sources, Supremacy and Direct Effect of Community Law*, in EUROPEAN UNION LAW 132 (Derrick Wyatt & Alan Dashwood eds., 5th ed. 2004); J.H.H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order - Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 420 (1996).

<sup>121</sup> See C. Rumford, *Rethinking the state and polity-building in the European Union: the sociology of globalization and the rise of reflexive government*, 4 CENTR. EUR. POL. COMMS., WORKING PAPER SER. 3, 14 (2003).

<sup>122</sup> See Agreement on the free movement of persons, EU & EU MS – Switz., O.J. (L. 114), 6 (Apr. 2002); Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT'L L.J. 389, 403 et seq. (1996).

<sup>123</sup> See Op. 2/13, ¶ 158, 153–177 (Eur. Ct. Just., Dec. 18, 2014); Op. 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ¶¶ 34–5 (Eur. Ct. Just., Mar. 28, 1996). Op. 1/91 (Eur. Ct. Just., Dec. 14, 1991); Case 294/83, Parti Ecologiste ‘Les Verts’ v Eur. Parl., – 23 (Eur. Ct. Just., 1986) (the European Community/Union is a ‘legal community’ whose Treaty is a ‘constitutional charter’); Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 COMM. MKT. L. REV. 703 (1999); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); Willem Maas, *Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union*, 15 COLUMBIA J. EUR. L. 265, 279 (2009).

<sup>124</sup> See Treaty on European Union, art. 6(2), O.J.C. 326/13 (Oct. 26, 2012); Treaty on the Functioning of the European Union, arts. 189(3), 220(1), O.J.C. 326/47 (Oct. 26, 2012); Jan Wouters, Jed Odermatt, & Thomas Ramopoulos, *The Status of the European Union at the United Nations General Assembly*, in THE EUROPEAN UNION IN THE WORLD: LIBER AMICORUM PROFESSOR MARC MARESCHEAU (I. Govaere, P. Van Elsuweghe, E. Lannon, S. Adam eds., 2013); Jan Wouters, S. van Kerckhoven & Thomas Ramopoulos, *The EU and the Euro Area in International Economic Governance: The Case of the IMF*, in THE EUROPEAN UNION’S SHAPING OF THE INTERNATIONAL LEGAL ORDER (F. Amtenbrink & D. Kochenov eds, 2013).

have supremacy<sup>125</sup> or direct effect in member states.<sup>126</sup> EU law is a hybrid of international and constitutional legal order: sometimes the international law paradigm explains the system better,<sup>127</sup> but at others, the domestic, constitutional legal analogy is more appropriate.<sup>128</sup>

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<sup>125</sup> See Op. 2/13, ¶ 158; see further ¶¶ 153–77. (Eur. Ct. Just.); Case 11/70, *Int'l Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ¶ 3. (Eur. Ct. Just.); Case C-6/64, *Costa v ENEL* (Eur. Ct. Just.).

<sup>126</sup> See Case C-26/62, *Van Gend & Loos v Administratie der Belastingen*, 12. (Eur. Ct. Just., Feb. 5, 1963).

<sup>127</sup> See C-481/13 *Mohammad Ferooz Qurbani*, ¶¶ 23 et seq. (Eur. Ct. Just., July 17, 2014); Case C-366/10 *Air Trans. Assoc. Am. v Sec'y St. Energy & Climate Change*, ¶ 101 (Eur. Ct. Just.); Case C-364/10 *Hung. v Slovak.*, ¶ 44 (Eur. Ct. Just.); Case C-70/09 *Hengartner & Gassner v Landesregierung Vorarlberg*, ¶ 36 (Eur. Ct. Just.); Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen*, ¶ et seq (Eur. Ct. Just.); Case C-135/08 *Janko Rottmann v Freistaat Bayern*, ¶¶ 39, 48, 53 (Eur. Ct. Just.); Case C-308/06 *Intertanko et al. v Sec'y St. Trans.*, ¶ 49 (Eur. Ct. Just.); Case C-200/02 *Chen v Sec'y St. Home Dep't*, ¶ 37 (Eur. Ct. Just.); Case C-377/98 *Neths. v Eur. Parl. & Council EU (Directive on Biotechnological Inventions)* ¶ 55 (Eur. Ct. Just.); Case C-162/96 *Racke v Hauptzollamt Mainz*, ¶ 55 (Eur. Ct. Just.); Case T-115/94 *Opel Austria GmbH v Council* (Eur. Ct. Just.); Case C-286/90 *Ankagemyndigheden v Poulsen & Diva Navigation Corp*, ¶ (Eur. Ct. Just.); Joined Cases 89, 104, 114, 116, 117 & 125-129/85 *Ahlström Oy v Comm'n* (Eur. Ct. Just.); Case 104/81 *Kupferberg v Hauptzollamt Mainz*, ¶ (Eur. Ct. Just.); Case 42/74 *Van Duyn v Home Off.*, ¶ 22 (Eur. Ct. Just.); Case 181/73 *Haegeman v Belg.*, ¶ 5 (Eur. Ct. Just.); Joint Cases 21-24/72 *Int'l Fruit Co. NV v Produktschap Voor Groenten en Fruit*, ¶¶ 110 et seq (Eur. Ct. Just.).

<sup>128</sup> See Op. 2/13, ¶ 158 (Eur. Ct. Just., Dec. 18, 2014); Case C-118/07 *Comm'n v Fin.* (Eur. Ct. Just.); Case C-205/06 *Comm'n v Aust.*, ¶ 36 et seq (Eur. Ct. Just.); Case C-249/06 *Comm'n v Swed.* (Eur. Ct. Just.); Joined Cases C-402&415/05 *P Yassin Abdullah Kadi & Al Barakaat Int'l Fdn. v Council & Comm'n EU*, ¶ 317 (Eur. Ct. Just.); Case C-62/98 *Comm'n v Port.* (Eur. Ct. Just.); Case C-53/96 *Hermès Int'l v FHT Mktng Choice BV*, ¶ 28 (Eur. Ct. Just.); Case C-61/94 *Comm'n v Germ.* (“International Dairy Arrangement”), ¶ 52. (Eur. Ct. Just.); Case C-473/93 *Comm'n v Lux.* (Eur. Ct. Just.); Case C-6/64, *Costa v ENEL*, 587 at 593 (Eur. Ct. Just.); ANDREW WILLIAMS, *EU HUMAN RIGHTS POLICIES. A STUDY IN IRONY* 145-57 (2004); Ramses A. Wessel, *Reconsidering the Relationship between International and EU Law: Towards a Content-based Approach?*, in *INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION* 7, 10 (Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel eds., 2011); Katja S. Ziegler, *International Law and EU law: Between Asymmetric Constitutionalizations and Fragmentation*, in *RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW* 268 (Alexander Orakhelashvili ed., 2011); Nikolaos Lavranos, *Protecting European Law from International Law*, 15 *EUR. FOR. AFF'RS REV.* 265, 279 (2010); Bruno de Witte, *International Law as a Tool for the*

Increasingly the union is taking a lead in border control which makes “the EU behave like a territorial state.”<sup>129</sup> While in the past, its legal personality was subject to some debate, today that issue appears to be settled by the Lisbon treaty.<sup>130</sup> However, the quality of that personality fluctuates depending on a functional assessment of the issue at hand.

Here we shift from states that may be emerging through consensual processes to non-consensual processes, and where issues of adversarial self-determination become relevant. It would appear that where a local population, distinct from the majority of the state, can qualify as a people and accrue the right to self-determination, that population may acquire the additional right to external self-determination, potentially even secession, as a last resort.<sup>131</sup> However, even in the adversarial self-determination context, we still see a similar approach to functional statehood as we did in the consensual context.

Kosovo presents a good example. There were considerable diplomatic communications by the US urging states to recognize Kosovo,<sup>132</sup> to permit it to operate as a state (*e.g.* by joining the World

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*European Union*, 5 EUR. CONST. L. REV. 265 (2009); Koen Lenaerts & Eddy de Smijter, *The European Union as an Actor in International Law*, 19 YB EUR. L. 95 (1999).

<sup>129</sup> See CEC (2002) *Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union*, OJ C 142: 23–36; M. Foucault, *Questions of Method*, in *THE FOUCAULT EFFECT* (G. Burchell, C. Gordon & P. Miller eds., 1991); T. Snyder, *The wall around the west*, EUROZINE (Jan. 6, 2005) available at <http://www.eurozine.com/articles/2005-01-06-snyder-en.html>.

<sup>130</sup> See *e.g.* Agreement on Extradition, June 25, 2003, EU-US, T.I.A.S. 10–201; Agreement on mutual legal assistance, June 25, 2003, EU-US, T.I.A.S. 10–201.1.

<sup>131</sup> See Reference re Secession of Quebec, [1998] 2 S.C.R. 217; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (Dec. 14, 1960); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (Oct. 24, 1970); The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106 (1921); ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES - A LEGAL REAPPRAISAL* 119 (1995).

<sup>132</sup> See US DEP’T ST., Cable No. 07-BUCHAREST-978 (Aug. 27, 2007); US DEP’T ST., Cable No. 08-BEIJING-2610 (Jul. 2, 2008); US DEP’T ST., Cable No. 08-TOKYO-569 (Mar. 4, 2008); US DEP’T ST., Cable No. 09-NEWDELHI-1291 (Feb. 17, 2009); US DEP’T ST., Cable No. 09-STATE-63696 (June 19, 2009); US DEP’T ST., Cable No. 09-LUSAKA-105 (Feb. 18, 2009) (reporting on US lobbying Zambia to

Bank<sup>133</sup>) and to support independence during the ICJ advisory opinion proceedings.<sup>134</sup> The US recognized Kosovo as a state when its status was still unclear.<sup>135</sup> Kosovo's international relations have also been in transition. Initially the UN Mission in Kosovo ("UNMIK") conducted Kosovo's governance and international relations. This governance included signing international agreements<sup>136</sup> as well as representing the

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recognize Kosovo); US DEP'T ST., Cable No. 09-KUWAIT-736 (July 22, 2009) (reporting on meeting with Kuwaiti Foreign Minister regarding Kosovo and noting that Kuwait will "eventually" recognize Kosovo); US DEP'T ST., Cable No. 09-KUWAIT-376 (Apr. 16, 2009) (adding that this effort was supported by German, British, French and Italian embassies); Tatjana Papić, *Fighting for a Seat at the Table: International Representation of Kosovo*, 12 CHI. J. INT'L L. 543 (2013).

<sup>133</sup> See US DEP'T ST., Cable No. 09-HARARE-460 (June 2, 2009) (reporting on US lobbying Zimbabwe on behalf of Kosovo for membership in the World Bank); US DEP'T ST., Cable No. 09-SANJOSE-360 (Apr. 29, 2009) US DEP'T ST., Cable No. 09-SANJOSE-321 (Apr. 17, 2009) (reporting on US lobbying Costa Rica on behalf of Kosovo for membership in the World Bank); US DEP'T ST., Cable No. 09-STATE-39345 (Apr. 21, 2009) (stating US DOS position that Kosovo independence must be supported by countering opposition to membership in international organizations); INT'L MONETARY FUND, *Kosovo Becomes the International Monetary Fund's 186th Member*, Press Rel. No. 09/240 (June 29, 2009), available at <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>; Press Rel., WORLD BANK, *Kosovo Joins World Bank Group Institutions*, Press Rel. No. 2009/448/ECA (June 29, 2009), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22230081~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

<sup>134</sup> See US DEP'T ST., Cable No. 09-STATE-90199 (requiring posts to urge host states to intervene on behalf of Kosovo in ICJ advisory opinion proceedings); US DEP'T ST., Cable No. 08-NEWDELHI-2370 (Sept. 4, 2008).

<sup>135</sup> See US DEP'T OF ST., OF. OF THE HISTORIAN, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Kosovo*, available at <http://history.state.gov/countries/kosovo> ("The United States formally recognized Kosovo as a sovereign and independent state on February 18."). Also see JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 123 (3d ed., 2010) (noting that Bosnia remains divided between the Muslim-Croat federation and Republika Srpska, and that each of these has "separate government structures, schools, and economies"). However, the northern part of Kosovo largely continues to function as a *de facto* state, see *id.* at 298-9.

<sup>136</sup> See Free Trade Agreement, reprinted at U.N. Doc. S/2006/906 (Nov. 20, 2006); Investment Protection Agreement, reprinted at U.N. Doc. S/2006/361 (June 5, 2006); Agreement on Medical/Dental University Education Kosovo-Maced., reprinted at U.N. Doc. S/2005/335 (May 23, 2005); Agreement on Medical/Dental

territory at international organizations,<sup>137</sup> while the EU assisted with police, judiciary and customs operation.<sup>138</sup> Following the declaration of

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University Education, Alb.-Kosovo, *reprinted at* U.N. Doc. S/2005/335 (May 23, 2005); MOU, Nov. 16, 2004, Swed.-UNMIK, *reprinted at* S/2005: 29, *available at* [www.government.se/content/1/c6/06/54/92/3e4fbd17.pdf](http://www.government.se/content/1/c6/06/54/92/3e4fbd17.pdf); Agreement on technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Aug. 23, 2004, Council Eur.-UNMIK, *available at* [www.cpt.coe.int/documents/srb/2004-08-23-eng.pdf](http://www.cpt.coe.int/documents/srb/2004-08-23-eng.pdf); Agreement on technical arrangements related to the Framework Convention for the Protection of National Minorities, Aug. 23, 2004, Council Eur.-UNMIK, *available at* [www.coe.int/t/dghl/monitoring/minorities/6\\_Resources/PDF\\_Agreement\\_UNMIK\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_Agreement_UNMIK_en.pdf); Agreement on Elimination of Double Taxation, Alb.-Kosovo, *reprinted at* U.N. Doc. S/2004/907 (Jan. 17, 2004); Exchange of Letters addressing the Practical Modalities Associated with the Opening of Two Temporary Local Crossing Points Kosovo-Maced., *reprinted at* U.N. Doc. S/2003/675 (June 26, 2003); Memorandum of Understanding (“MOU”) on Economic Cooperation, Alb.-Kosovo, *reprinted at* U.N. Doc. S/2002/1126 (Oct. 9, 2002); MOU on Police Cooperation, Alb.-Kosovo, *reprinted at* U.N. Doc. S/2002/1126 (Oct. 9, 2002); MOU on Motor Vehicle Insurance, Alb.-Kosovo, *reprinted at* U.N. Doc. S/2002/1126 (Oct. 9, 2002); Exchange of Letters on International Panel of Judges in Kosovo for KLA Member Crimes Committed in FYROM, Kosovo-Maced., *reprinted at* U.N. Doc. S/2002/779 (July 17, 2002); MOU on Custom Cooperation, Kosovo-Maced., *reprinted at* U.N. Doc. S/2000/878 (Sept. 18, 2000).

<sup>137</sup> See Council Eur. ACFC, Report, Doc. ACFC(2008)001 (Dec. 10, 2008) *available at*

[www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_UNMIK\\_ProgressReport\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_UNMIK_ProgressReport_en.pdf); Council Eur. ACFC, Report, Doc. ACFC(2005)003 (June 2, 2005) *available at*

[www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_1st\\_Report\\_Kosovo\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_Report_Kosovo_en.pdf); Council Eur., CPT, Report, Doc. CPT/Inf (2011) (Oct. 6, 2009) *available at* [www.cpt.coe.int/documents/srb/2011-27-inf-en.pdf](http://www.cpt.coe.int/documents/srb/2011-27-inf-en.pdf); Council Eur., CPT, Report, Doc. CPT/Inf (2009) (Jan. 20, 2009) *available at* [www.cpt.coe.int/documents/srb/2009-04-inf-eng.pdf](http://www.cpt.coe.int/documents/srb/2009-04-inf-eng.pdf); Hum. Rts. Comm., Report, U.N. Doc. CCPR/C/UNK/1 (Mar. 13, 2006); UNSC, U.N. Doc. S/2006/906 (Nov. 20, 2006); UNSC, U.N. Doc. S/2006/45 (Jan. 25, 2006) (Meeting with UNESCO); U.N.S.C., U.N. Doc. S/2005/335 (May 23, 2005); U.N.S.C., U.N. Doc. S/2005/88 (Feb. 14, 2005); U.N.S.C., U.N. Doc. S/2004/907 (Jan. 17, 2004); U.N.S.C., U.N. Doc. S/2003/113 (Jan. 29, 2003) (Meetings with World Bank and European Commission); U.N.S.C., U.N. Doc. S/2001/565 (June 7, 2001) (Meeting with EU High Representative CFSP and Meeting with NATO Supreme Allied Commander/Europe).

<sup>138</sup> See Eur. Union, Ofc. in Kosovo / Eur. Union Spec. Rep. in Kosovo, Press Rel., *Statement by the EU Office in Kosovo/EU Special Representative in Kosovo on the*

independence, there was a gradual shift from UNMIK representatives to local Kosovar representatives taking the lead,<sup>139</sup> though they continued to operate in parallel throughout the transition.<sup>140</sup> Today, Kosovo is party to many treaties<sup>141</sup> and has partial recognition, though it appears that some states might now be reversing direction and withdrawing their recognition.<sup>142</sup> In late February 2012, Serbia and

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*EULEX renewed mandate* (June 17, 2016) available at [http://ceas.europa.eu/delegations/kosovo/press\\_corner/all\\_news/news/2016/20160617\\_en.htm](http://ceas.europa.eu/delegations/kosovo/press_corner/all_news/news/2016/20160617_en.htm); Eur. Union, Press Rel., *EULEX Kosovo: mandate extended, budget approved* (June 14, 2016) available at <http://avrupa.info.tr/resource-centre/ceas-news/ceas-single-view/article/eulex-kosovo-mandate-extended-budget-approved.html>.

<sup>139</sup> See INT'L MONETARY FUND, *Kosovo Becomes the International Monetary Fund's 186th Member*, Press Rel. No. 09/240 (June 29, 2009) available at [www.imf.org/external/np/sec/pr/2009/pr09240.htm](http://www.imf.org/external/np/sec/pr/2009/pr09240.htm); W. Bank, *Kosovo Joins World Bank Group Institutions*, Press Rel. No. 2009/448/ECA (June 29, 2009) available at [web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22230081~pagePK:34370~piPK:34424~theSitePK:4607,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22230081~pagePK:34370~piPK:34424~theSitePK:4607,00.html).

<sup>140</sup> See U.N.S.C., U.N. Doc. S/2013/72, ¶¶ 47–50 (Feb. 4, 2013); U.N.S.C., U.N. Doc. S/2012/818, ¶ 40 (Nov. 8, 2012); U.N.S.C., U.N. Doc. S/2012/275, ¶ 56–7 (Apr. 27, 2012); U.N.S.C., U.N. Doc. S/2012/72, ¶ 50 (Jan. 31, 2012); U.N.S.C., U.N. Doc. S/2011/675, ¶¶ 51–2 (Oct. 31, 2011); U.N.S.C., U.N. Doc. S/2011/514, ¶ 55 (Aug. 12, 2011); U.N.S.C., U.N. Doc. S/2011/281, ¶ 56 (May 3, 2011); UNSC, U.N. Doc. S/2011/43, ¶ 46 (Jan. 28, 2011); U.N.S.C., U.N. Doc. S/2010/562, ¶ 54 (Oct. 29, 2010); U.N.S.C., U.N. Doc. S/2010/401, ¶ 49 (July 29, 2010); U.N.S.C., U.N. Doc. S/2010/169, ¶ 37 (Apr. 6, 2010); U.N.S.C., U.N. Doc. S/2009/497, ¶ 45 (Sept. 30, 2009); U.N.S.C., U.N. Doc. S/2009/149, ¶ 28 (Mar. 17, 2009).

<sup>141</sup> See Agreement on the European Rule of Law Mission in Kosovo, Sept. 7, 2012, EU-Kosovo, Law No. 04/L-148, Decree No. DL-039-2012 (Sept. 7, 2012), reprinted at No. 25 Off. Gaz. Kosova (Sept. 7, 2012); Agreement concerning cooperation in the area of the prevention of proliferation of weapons of mass destruction, May 23, 2012, T.I.A.S. 12-628; Agreement for economic and technical cooperation, Mar. 29, 2012, Kosovo-US, T.I.A.S. 12-329; Agreement on the status of armed forces of the United States of America in the territory of the Republic of Kosovo, Feb. 18, 2012, Kosovo-US, T.I.A.S. 12-627; Agreement on the protection and preservation of certain cultural properties, Dec. 14, 2011, Kosovo-US, T.I.A.S. 11-1214; Investment incentive agreement, June 30, 2009, Kosovo-US, T.I.A.S. 09-1005; Agreement relating to the employment of dependents of official government employees, Apr. 3, 17, 2009, Kosovo-US, TIAS. See also Off. Gaz. Rep. Kosovo, *International Agreements*, available at <http://gazetazyrtare.rks-gov.net/MN.aspx>.

<sup>142</sup> See AFP, *Ghana reverses 'premature' recognition of Kosovo*, AFP (Nov. 12, 2019) available at [https://news.yahoo.com/ghana-reverses-premature-recognition-kosovo-004410324.html?soc\\_src=community&soc\\_trk=ma](https://news.yahoo.com/ghana-reverses-premature-recognition-kosovo-004410324.html?soc_src=community&soc_trk=ma).



Kosovo reached an agreement on how Kosovo could operate on the international plane.<sup>143</sup> The agreement includes provisions for participation of Kosovars on behalf of Kosovo in international fora, border controls between Serbia and Kosovo on the condition that Kosovo cannot use the word “Republic” in its name at international meetings.<sup>144</sup> In lieu of asserting statehood, the delegation will use a nameplate with the word “Kosovo” but with the awkward additional of a footnote.<sup>145</sup> Kosovo has asserted that “[t]his is a *de facto* recognition of the independence of Kosovo,” and that “[w]e are focusing on the

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<sup>143</sup> See Eur. Ext. Action, *Serbia and Kosovo reach landmark deal*, available at [http://ceas.europa.eu/top\\_stories/2013/190413\\_\\_eu-facilitated\\_dialogue\\_en.htm](http://ceas.europa.eu/top_stories/2013/190413__eu-facilitated_dialogue_en.htm); Aleksandar Vasovic & Matt Robinson, *EU wants Serbia accession talks to begin in earnest this year*, REUTERS (Mar. 27, 2015) available at <http://www.reuters.com/article/2015/03/27/us-serbia-eu-accession-idUSKBN0MN1V620150327> (“But since a first formal accession conference, none of the so-called negotiation chapters have been opened, because of failure to fully implement the Serbia-Kosovo deal.”). See also Dan Bilefsky, *Serbia and Kosovo Reach Agreement on Power-Sharing*, N. Y. TIMES (Apr. 19, 2013) available at [http://www.nytimes.com/2013/04/20/world/europe/serbia-and-kosovo-reach-milestone-deal.html?\\_r=0](http://www.nytimes.com/2013/04/20/world/europe/serbia-and-kosovo-reach-milestone-deal.html?_r=0); Matthew Brunwasser, *Kosovo and Serbia Reach Key Deal*, N.Y. TIMES (Feb. 24, 2012) available at <http://www.nytimes.com/2012/02/25/world/europe/25iht-kosovo25.html>.

Previously Kosovo, as some sort of entity, continued to be represented on the international plane by the United Nations Mission in Kosovo (“UNMIK”). This author has elsewhere reported on the unusual quasi-international status that Serbia has agreed for Kosovo, and the negotiations over such a decision. See Worster, *Effect of Leaked Information*, *supra* note 23, at 482-5 (reporting that US officials discussed “possible ways forward on Kosovo” and “discreet brainstorming” towards a “realistic, pragmatic, peaceful, win-win solution for Serbs and Albanians” showing a less absolutist position on the disputed territory) citing US DEP’T ST, Cable No. 10-BELGRADE-25, ¶ 15 (Feb. 5, 2010); US DEP’T ST, Cable No. 06-BELGRADE-1681, ¶ 1 (Oct. 17, 2006); US Sec’y St. John Kerry, Remarks, *reprinted at* US DEP’T OF STATE, OFC. LEGAL ADV.; DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (CarrieLyn D. Guymon ed., 2013) also available at [www.state.gov/secretary/remarks/2013/04/207782.htm](http://www.state.gov/secretary/remarks/2013/04/207782.htm).

<sup>144</sup> See Matthew Brunwasser, *Kosovo and Serbia Reach Key Deal*, N.Y. TIMES (Feb. 24, 2012) available at <http://www.nytimes.com/2012/02/25/world/europe/25iht-kosovo25.html> (explaining that, in exchange for allowing Kosovars to represent themselves in “international forums,” Kosovo’s name will not include the word “Republic”).

<sup>145</sup> See U.N.S.C. Res. 1244.

substance, rather than the formalities.”<sup>146</sup> However Serbia continues to insist that the representatives are not “ambassadors.”<sup>147</sup> So, for the foreseeable future, states that have recognized Kosovo as a state will engage with it as a state, and states that have not will engage with it through this unusual Serbian-Kosovar arrangement.

Palestine is a similar situation. It is controversial, to say the least, whether the entity is a state. The language used and intentions are often deliberately vague or contradictory, for obvious political reasons.<sup>148</sup> Notwithstanding this opaque formal status, it is widely

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<sup>146</sup> See *Serbia allocated calling code to Kosovo*, B92 (Sept. 9, 2013) available at [http://www.b92.net/eng/news/politics.php?yyyy=2013&mm=09&dd=09&nav\\_id=87597](http://www.b92.net/eng/news/politics.php?yyyy=2013&mm=09&dd=09&nav_id=87597).

<sup>147</sup> See Bojana Barlovac, *Kosovo, Serbia Liaison Officers to Start Work*, BALKAN INSIGHT (Balkan Investigative Reporting Network), (Feb. 13, 2013) available at <http://www.balkaninsight.com/en/article/kosovo-and-serbia-liaison-officers-ready-to-start> (“Since the agreement to appoint the liaison officers was made, Pristina has repeatedly described the officers as “ambassadors”, a term that Belgrade firmly rejects, as Serbia does not recognise Kosovo as a state.”); Bojana Barlovac, *Serbia Denies Kosovo Officers are ‘Ambassadors’*, BALKAN INSIGHT (Balkan Investigative Reporting Network), (Dec. 12, 2012) available at <http://www.balkaninsight.com/en/article/serbia-dismisses-kosovo-officials-claims-on-ambassadors>.

<sup>148</sup> See G.A. Res. 181 (II), *Future government of Palestine* (Nov. 29, 1947) (calling for the “establishment of an Arab State and a Jewish State in Palestine”); G.A. Res. 43/177, *Question of Palestine* (Dec. 15, 1988) (acknowledging “the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988”, affirming “the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967”, and deciding that “the designation ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organization’ in the United Nations system . . .”, but “Recalling its resolution 3237 (XXIX) of 22 November 1974 on the observer status for the Palestine Liberation Organization and subsequent relevant resolutions” and only granting the change in designation “without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice”); Application of Palestine for admission to membership in the United Nations, U.N. Doc. A/66/371 – S/2011/592 (Sept. 23, 2011) (wherein Abbas refers repeatedly to the already existing “State of Palestine” and signs the application in his purported capacity as “President of the State of Palestine”); US DEP’T ST., Cable No. 10-JERUSALEM-357 (Feb. 26, 2010) (announcing a Palestinian two-year plan for statehood which strangely comes after the declaration of statehood and UN observer upgrade); US DEP’T ST., Cable No. 10-JERUSALEM-292 (Feb. 17, 2010) (discussing upcoming Palestinian

treated as if it were a state for a number of functional purposes.<sup>149</sup> Palestine has adhered to a wide variety of treaties,<sup>150</sup> including one with

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municipal elections but using expressions like “national” elections, “PA [Palestinian Authority] President,” and Palestinian “law,” which could suggest an evolving position on Palestinian statehood); US DEP’T ST., Cable No. 10-JERUSALEM-148 (Jan. 25, 2010); US DEP’T ST., Cable No. 09-JERUSALEM-2050 (Nov. 16, 2009) (discussing the “mixed messages” about Palestinian statehood being substantive or a mere “formality”); US DEP’T ST., Cable No. 09-JERUSALEM-1501 (Aug. 25, 2009); Legal Memorandum in Opposition to the Palestinian Authority’s January 2009 Attempt to Accede to ICC Jurisdiction Over Alleged Acts Committed on Palestinian Territory Since 1 July 2001 from Grégor Puppincq et al. to Luis Moreno-Ocampo, Prosecutor, Int’l Crim. Court, 12–15 (Eur. Ctr. L. & Justice, Sept. 9, 2009), *available at*

<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281869/OTPlgalmemorandum1.pdf>.

<sup>149</sup> See US DEP’T ST., Cable No. 09-JERUSALEM-1764 (Oct. 2, 2009) (observing the Palestinian position that “colonial administrations on the way to independence” have been historically treated as if they were states, citing Ceylon and Rhodesia); US OFF. PERSONNEL MGMT, INVESTIG. SERV., CITIZENSHIP LAWS OF THE LAW, Doc. No. IS-01 155 (Mar. 2001) (entry for “Palestine, Palestine National Authority for the West Bank and Gaza” for purposes of documenting “citizenship” laws).

<sup>150</sup> See Agreement on international Railways in the Arab Masreq, Apr. 14, 2003, \_\_ U.N.T.S. \_\_, UN Reg. No. 41357; Agreement on international Roads in the Arab Mashreq, May 10, 2001, \_\_ U.N.T.S. \_\_, UN Reg. No. 39639; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; UN High Comm’r Hum. Rts. (Rupert Colville, Spokesperson), *Press briefing notes on Palestine*, item 4 (May 2, 2014) *available at* <http://unispal.un.org/UNISPAL.NSF/0/262AC5B8C25B364585257CCF006C010D>

“A month ago, on 2 April 2014, the State of Palestine deposited with the Secretary-General its instruments of accession to a number of international treaties. These include seven of the nine core human rights treaties plus one of the substantive protocols, as follows:

The International Covenant on Civil and Political Rights (“ICCPR”)

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)

The Convention on the Rights of Persons with Disabilities (“CRPD”)

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)

the US<sup>151</sup> and one with the EU.<sup>152</sup> Most recently Palestine went even further and adhered to a long list of international treaties governing the basic functions of international relations,<sup>153</sup> although some have used the personality of the PLO as the vehicle for acting on the international plane.<sup>154</sup> That being said, in the case of the Oslo accords between the PLO and Israel that established limited governance by the Palestine Authority in the West Bank, it appears that the parties did intend for those instruments to be legally binding.<sup>155</sup> Palestine has recently been

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The Convention on the Rights of the Child (“CRC”)

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict (“CRC-OPAC”)

Jodi Rudoren, *Palestinians said to seek redress in a World Court*, N.Y. TIMES (Dec. 31, 2014)

*available at* <http://www.nytimes.com/2015/01/01/world/middleeast/palestinians-to-join-international-criminal-court-defying-israeli-us-warnings.html>”.

<sup>151</sup> See Agreement on Encouragement of Investment, Aug. 11 & Sept. 12, 1994, U.S. – P.L.O., T.I.A.S.12,564.

<sup>152</sup> See Euro-Mediterranean Interim Association Agreement on Trade and Cooperation, Feb. 24, 1997, Eur. Comm. – P.L.O. (“for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip”), art. 33, Off. J. L 187 3-135 (July 16, 1997).

<sup>153</sup> See Memorandum of understanding on Maritime transport cooperation in the Arab Mashreq, May 9, 2005, \_\_ U.N.T.S. \_\_, U.N. Reg. No. 43044; Agreement on international Railways in the Arab Masreq, Apr. 14, 2003, \_\_ U.N.T.S. \_\_, U.N. Reg. No. 41357; Agreement on international Roads in the Arab Mashreq, May 10, 2001, \_\_ U.N.T.S. \_\_, UN Reg. No. 39639; Bilateral Investment Treaty, Apr. 28, 1998, Egypt – Palestine Auth. *reported in* U.N. CONF. ON TRADE & DEV., BILATERAL INVESTMENT TREATIES: 1959 – 1999 89 (2000), U.N. Doc. UNCTAD/ITE/IIA/2, *available at* <http://www.unctad.org/en/docs/poiteiad2.en.pdf>, *also reprinted at* U.N. Conf. on Trade & Dev., *Investment Instruments Online, Bilateral Investment Treaties, BIT between Egypt and Occupied Palestinian Territory*, *available at* [http://www.unctad.org/sections/dite/ia/docs/bits/egypt\\_plo\\_arb.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/egypt_plo_arb.pdf) [Arabic]; GAFTA, *adopted by the League of Arab States*, Econ. & Soc. Council Res. No. 1317-O.S.59, Concerning the Declaration on the Establishment of a Pan-Arab Free Trade Area (Feb. 19, 1997) (entered into force Jan. 1, 1998). Note that Palestine is regarded and treated as a state by the League, represented by the PLO.

<sup>154</sup> See Agreement on encouragement of investment, Aug. 11 & Sep. 12, 1994, PLO – US, T.I.A.S. 12564.

<sup>155</sup> See Declaration of Principles on Interim Self-Government Arrangements (“Oslo Accords”), Sep. 13, 1993, Isr.-PLO; Legal Conseq. of the Constr. of a Wall in the Occup. Palestinian Terr., Adv. Op., 2004 I.C.J. Reps. 231 (July 9); John Quigley, *The Israel PLO Agreements: Are They Treaties?*, 30 CORNELL INT’L L.J. 717, 722 (1997). At the time of this writing, it appears that Palestine may have withdrawn from

on a successful trend of securing recognition,<sup>156</sup> although many of these recognitions have not been by government branches charged with foreign affairs.<sup>157</sup> In fact, Palestine has been considered *de facto* as a state by the US as far back as 2001 at least for the purpose of issuing laws on nationality.<sup>158</sup> Palestine has also joined a number of international organizations<sup>159</sup> prior to, and following, its recent change

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the Oslo Accords, *see Palestine cancels 1995 Oslo Accords signed with Israel*, MIDDLE E. MONITOR (Jan. 31, 2020) available at <https://www.middleeastmonitor.com/20200131-palestine-cancels-1995-oslo-accords-signed-with-israel/>.

<sup>156</sup> See Steven Erlanger, *Sweden to Recognize Palestinian State*, N.Y. TIMES (Oct. 3, 2014) available at <http://www.nytimes.com/2014/10/04/world/europe/sweden-to-recognize-palestinian-state.html>. See also EU foreign chief calls for a Palestinian state, AL-JAZEERA (Nov. 8, 2014), available at <http://www.aljazeera.com/news/middleeast/2014/11/eu-foreign-chief-call>.

<sup>157</sup> See *Italian lawmakers urge recognition of Palestinian state*, Reuters (Feb. 27, 2015) available at <http://uk.reuters.com/article/2015/02/27/uk-italy-palestinians-vote-idUKKBN0LV1FW20150227>; Sylvie Corbet, *French parliament to vote on Palestinian state*, ASSOC. PRESS (Nov. 12, 2014); Stephen Castle & Jodi Rudoren, *A Symbolic Vote in Britain Recognizes a Palestinian State*, N.Y. TIMES (Oct. 13, 2014) available at [http://www.nytimes.com/2014/10/14/world/europe/british-parliament-palestinian-state.html?\\_r=0](http://www.nytimes.com/2014/10/14/world/europe/british-parliament-palestinian-state.html?_r=0).

<sup>158</sup> See e.g. US OFF. PERSONNEL MGMT, INVESTIG. SERV., CITIZENSHIP LAWS OF THE LAW, Doc. No. IS-01 155 (Mar. 2001) (entry for “Palestine, Palestine National Authority for the West Bank and Gaza” and observing that “Citizenship laws are being developed for the region governed by the Palestine National Authority. The Oslo Agreement of 1993 empowered the Palestine National Authority for the West Bank and Gaza to issue Palestinians passports for this region.”) In the same publication, the OPM also treated Taiwan (“ROC”) as a state with a nationality. *See id.*

<sup>159</sup> See ECOSOC Res. 2089 (LXIII) (July 22, 1977) (admitting Palestine to membership in the Eco. & Soc. Comm’n W. Asia (ESCWA)); Pact of the League of Arab States, Mar. 22, 1945, 70 U.N.T.S 237, U.N. Doc. A/C.6/L.111, Ann. on Palestine; *but see id.* art. 1 (“A League will be formed of the independent Arab States which consent to join the League”) (this author’s emphasis); Org. of the Islamic Conf., *Member States*, available at [http://www.oic-oci.org/member\\_states.asp](http://www.oic-oci.org/member_states.asp); See Arab League Ed. Cult. & Sci. Org., *The Member States*, available at [http://www.alecso.org.tn/lng/index.php?option=com\\_content&task=view&id=12&Itemid=13&lang=en](http://www.alecso.org.tn/lng/index.php?option=com_content&task=view&id=12&Itemid=13&lang=en); See also HENRY G. SCHERMERS & NILES M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY § 75 (4th ed. 2003); US DEP’T ST., Cable No. 09-JERUSALEM-1764 (Oct. 2, 2009); US DEP’T

to non-member state observer status at the UN; it has also gained new membership in or recognition by certain international organizations.<sup>160</sup> Even prior to the UN observer reclassification, the UN already granted Palestine unique enhanced observer participation rights.<sup>161</sup> In addition, the UN Secretary-General accepted Palestinian “treaties” for

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St., Cable No. 09-TELAVIV-2166 (Oct. 1, 2009); US DEP’T ST., Cable No. 09-JERUSALEM-1607 (Sept. 4, 2009); US DEP’T ST., Cable No. 10-JERUSALEM-357 (Feb. 26, 2010) (reporting on discussions on Palestinian WTO observer status); US DEP’T ST., Cable No. 09-STATE-99831 (Sept. 25, 2009) (noting that Palestinian WTO observer status “raises a number of complex political and legal issues, including questions about PA capacity and control over external commercial relations.”).

<sup>160</sup> See Resolution of 17 December 2014 on Recognition of Palestine Statehood, EUR. PARL. RES. (2014/2964(RSP)), E.U. Doc. P8\_TA(2014)0103 (Dec. 17, 2014) *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN> “– having regard to the conclusions of the Foreign Affairs Council on the Middle East Peace Process of 17 November 2014, – having regard to the statements of the High Representative/Vice-President on the attack in the Har Nof synagogue of 18 November 2014, on the terrorist attack in Jerusalem of 5 November 2014, and to the statement by the Spokesperson of the EU High Representative on the latest developments in the Middle East of 10 November 2014, – having regard to the announcement of the Swedish government on the recognition of the State of Palestine of 30 October 2014, as well as the earlier recognition by other Member States before joining the European Union, – having regard to the motions on the recognition of the State of Palestine approved in the House of Commons of the United Kingdom on 13 October 2014, the Irish Senate on 22 October 2014, the Spanish Parliament on 18 November 2014, the French National Assembly on 2 December 2014, and the Portuguese Assembly on 12 December 2014 . . . “

*Organization for Security and Co-operation in Europe Grants Palestinian Membership Status*, IMEMC (July 3, 2013) *available at* <http://www.imemc.org/article/65773>.

<sup>161</sup> See G.A. Res. 3237 (XXIX) (Nov. 22, 1974); G.A. Res. 43/160 (Dec. 9, 1988); G.A. Res. 43/177 (Dec. 15, 1988) (changing designation as observer from “P.L.O.” to “Palestine”); G.A. Res. 52/250 (July 1998) (granting right to participate in general debate of the General Assembly, the right of reply, the right to co-sponsor resolutions and the right to raise points of order on issues affecting Palestine or the Middle East generally; and granting seating in order immediately following non-member states but before other observers).

deposit,<sup>162</sup> the ICJ permitted the Palestinians to submit observations in the *Construction of Wall advisory opinion* proceedings,<sup>163</sup> and the UN Security Council permitted the PLO to participate in discussions regarding Palestinian territory,<sup>164</sup> all of which are privileges normally reserved for states. The European Court of Justice has also acknowledged that a treaty between the EU and Palestine had a territorial scope, *i.e.* the Palestinian territories, and normally holding a right to territory is a competence reserved for states.<sup>165</sup> Even Israel treats the Palestinian territory as if it were a state for certain limited purposes.<sup>166</sup> Perhaps most surprisingly, Israeli nationalist politicians even occasionally slip into language of statehood and citizenship when discussing Palestine,<sup>167</sup> probably for lack of a substitute vocabulary, while at the same time denying statehood.

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<sup>162</sup> See U.N. Charter art. 102 (1) (“Every treaty and every international agreement entered into by *any Member of the United Nations* after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it”) (emphasis added). However, note that treaties between Members and non-Members may be deposited and registered and that, on occasion, treaties between non-Members have been “filed and recorded”. See Int’l L. Comm’n, 1966-II YB INT’L L. COMM’N 273. In the case of the Palestinian treaties cited herein, the instruments appear to have been deposited, not merely “filed and recorded”.

<sup>163</sup> See Legal Conseq. of the Constr. of a Wall in the Occup. Palestinian Terr., Advisory Opinion, 2004 I.C.J. Repts. 231, ¶. 4 (July 9).

<sup>164</sup> See G.A. Res. 3210 (XXIX); G.A. Res. 3236 (XXIX); G.A. Res. 3237 (XXIX); G.A. Res. 52/250.

<sup>165</sup> See, *e.g.*, Case C-386/08, Brita GmbH v Hauptzollamt Hamburg-Hafen, Judgment, ¶¶ 44–53 (Eur. Ct. Just., 4th Ch., Feb. 25, 2010) (recognizing that the European Communities entered into trade agreements with Israel and the PLO separately, and noting that each agreement “has its own territorial scope” with the EC[EU]-PLO agreement applying to the West Bank and Gaza Strip).

<sup>166</sup> See *Israel: Prohibition Against Bribery of Foreign Public Officials*, LIBRARY OF CONG. (Mar. 8, 2010), available at [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205401855\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401855_text) (publicizing an amendment to an Israeli statute that “prohibits bribery of public officials of foreign countries, and of international and political entities, including the Palestinian Authority”).

<sup>167</sup> See *e.g.*, Dina Hadid, *Arab Alliance Rises as Force in Israeli Elections*, N.Y. TIMES (Mar. 15, 2015) available at [http://www.nytimes.com/2015/03/16/world/middleeast/ayman-odeh-arab-alliance-rises-as-force-in-israel-vote.html?\\_r=0](http://www.nytimes.com/2015/03/16/world/middleeast/ayman-odeh-arab-alliance-rises-as-force-in-israel-vote.html?_r=0) (quoting and translating Avigdor

## 5. Secession Movements

Occasionally, secession movements have been acknowledged as international legal persons from a functional perspective. For example, the US has documented the vigorous insistence by the secessionary “Moldavian Republic of Transdnistria” on being treated as if it were a state.<sup>168</sup> This demand has been honored by Russia. Russia maintains diplomatic contacts with Transdnistria<sup>169</sup> through the “Russian Special Negotiator for the Transdnistria conflict.”<sup>170</sup> Russia has even placed units of its armed forces under Transdnistrian jurisdiction.<sup>171</sup> In addition, the EU has opened a direct dialog with the Transdnistria authorities in the larger context of EU expansion. Transdnistria has participated in four party diplomatic negotiations over the conflict there.<sup>172</sup> And official documents issued by the Transdnistrian authorities are recognized in Moldova.<sup>173</sup> Even the ECtHR has recognized that, in line with the submissions of the Moldovan government, it had no jurisdiction over events in Transdnistria.<sup>174</sup>

In the Caucasus, several regions are relevant: Abkhazia, Chechnya, Nagorno-Karabakh, and South Ossetia. Russia has treated the Chechen Republic as a treaty partner for certain limited purposes, agreeing to limited autonomy of the region,<sup>175</sup> specifically invoking

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Lieberman, the Israeli Foreign Minister at the time, as declaring Ayman Odeh, the Arab Israeli politician, “a Palestinian citizen”).

<sup>168</sup> See US DEP’T ST., Cable No. 09-CHISINAU-425, ¶ 4 (June 3, 2009); US DEP’T ST., Cable No. 09-KYIV-596, ¶ 7 (Apr. 3, 2009); US DEP’T ST., Cable No. 08-MOSCOW-2653, ¶ 4 (Sept. 4, 2008).

<sup>169</sup> See *Ilaşcu et al v. Mold. & Russ.*, Appl. No. 48787/99, Judgment (Eur. Ct. Hum. Rts., July 8, 2004).

<sup>170</sup> See US DEP’T ST., Cable No. 08-MOSCOW-2653, ¶ 2 (Sept. 4, 2008).

<sup>171</sup> See *Ilaşcu et al v. Mold. & Russ.*, Appl. No. 48787/99, Judgment, ¶ 36 (Eur. Ct. Hum. Rts., July 8, 2004).

<sup>172</sup> See *id.* ¶¶ 98, 162-3.

<sup>173</sup> See *id.* ¶ 174.

<sup>174</sup> See *Catan et al. v. Mold. & Russia*, Appl. Nos. 43370/04 & 18454/06, Judgment, ¶ 89 (Eur. Ct. Hum. Rts., Gr. Ch., Oct. 19, 2012).

<sup>175</sup> See Principles for Determining the Bases of Mutual Relations between the Russian Federation and the Chechen Republic (“Khasavyurt Agreement”), available at <http://www.refworld.org/docid/3ac6a6e94.html>; Treaty on Peace and



“principles and norms of international law” to govern their relations,<sup>176</sup> and tolerating Chechnyan attempts to conduct limited foreign relations.<sup>177</sup> Georgia agreed with the Abkhazian authorities to an “interim protocol” that provided for a “shared state” but permitting each side to retain its own constitution, although it never entered into force.<sup>178</sup> Georgia takes steps to oppose even the appearance that the entities are quasi-states.<sup>179</sup> One of the unique aspects of Abkhazia is that it has existed, unrecognized, for so long.<sup>180</sup> Tuvalu has since renounced its recognition of Abkhazia and South Ossetia,<sup>181</sup> leaving only Russia, Nicaragua, Venezuela and Nauru as recognizing states.<sup>182</sup>

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the Principles of Mutual Relations between the Russian Federation and the Chechen Republic of Ichkeria, May 12, 1997.

<sup>176</sup> See Edward Walker, *No Peace, No War in Caucasus: Secessionist Conflicts in Chechnya, Abkhazia and Nagorno-Karabakh*, HARVARD KENNEDY BELFER CTR. SCI. & INT’L AFF. (Feb. 1998), [http://belfercenter.ksg.harvard.edu/publication/3042/no\\_peace\\_no\\_war\\_in\\_the\\_caucasus.html](http://belfercenter.ksg.harvard.edu/publication/3042/no_peace_no_war_in_the_caucasus.html); Rossiisko-Chechenskii Dogovor o prekrashenii voennykh deistvii, reprinted at DIANE CURRAN, FIONA HILL, & ELENA KOSTRITSYNA, *THE SEARCH FOR PEACE IN CHECHNYA: A SOURCEBOOK 1994-1996* (March 1997); Int’l Crisis Group (Nov. 9, 1998) available at <http://www.refworld.org/docid/3ae6a6e94.html>.

<sup>177</sup> See Int’l Crisis Group (Nov. 9, 1998) available at <http://www.refworld.org/docid/3ae6a6e94.html>; Otto Latsis, *Dogovor s Chechnei: Kto Pobedit, Kto Proigrat?*, IZVESTIA (May 14, 1997).

<sup>178</sup> See Int’l Crisis Group (Nov. 9, 1998) available at <http://www.refworld.org/docid/3ae6a6e94.html>; Elizabeth Fuller, *Solution to Abkhaz Conflict Continues to Prove Elusive*, 1(70) RFE/RL NEWSLINE (July 10, 1997).

<sup>179</sup> See US DEP’T ST., Cable No. 09-TBILISI-1765 (Sept. 25, 2009) (reporting on Georgia objection to EU office in Sukhumi due to risk of it being perceived as an “embassy”).

<sup>180</sup> See Wood, *Limbo World*, *supra* note 17.

<sup>181</sup> See Oliver Bullough, *This Tiny Pacific Island Nation Just Gave Russia a Big Bruise*, THE NEW REP. (Apr. 2, 2014) available at [http://www.newrepublic.com/article/117238/tuvalu-bruises-russia-establishing-diplomatic-ties-georgia?a&utm\\_campaign=tnr-daily-newsletter&utm\\_source=hs\\_email&utm\\_medium=email&utm\\_content=12398320](http://www.newrepublic.com/article/117238/tuvalu-bruises-russia-establishing-diplomatic-ties-georgia?a&utm_campaign=tnr-daily-newsletter&utm_source=hs_email&utm_medium=email&utm_content=12398320).

<sup>182</sup> See US DEP’T ST., Cable No. 09-TBILISI-1765 (Sept. 25, 2009) (communicating Georgia’s concern about Venezuela’s recognition of Abkhazia and South Ossetia); US DEP’T ST., Cable No. 08-MANAGUA-1124 (Sept. 4, 2008) (reporting that Nicaragua government decided to recognize South Ossetia and Abkhazia, following Russia intervention in the matter); *Chavez recognises Georgia regions: Venezuela’s president says he considers Abkhazia and South Ossetia as independent*, AL-JAZEERA (Sept. 10, 2009) available at

There has been talk of Turkey recognizing Abkhazia *de facto*.<sup>183</sup> Russia still actively promotes recognition of the breakaway regions.<sup>184</sup> As for Nagorno-Karabakh,<sup>185</sup> the Armenia Embassy in Russia hosts a diplomatic representative from the break-away region, although, the Russia position is that this is probably incorrect under the Vienna Convention.<sup>186</sup> Quasi-statehood has been proposed for the region.<sup>187</sup>

Somaliland and Puntland are additional examples.<sup>188</sup> These entities are largely independent of Somalia and conduct limited diplomatic relations, for example, the President of Puntland is permitted meetings with the US Ambassador.<sup>189</sup> That being said,

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<http://www.aljazeera.com/news/europe/2009/09/20099109538889507.html>. See also Oliver Bullough, *This Tiny Pacific Island Nation Just Gave Russia a Big Bruise*, THE NEW REP. (Apr. 2, 2014) available at

[http://www.newrepublic.com/article/117238/tuvalu-bruises-russia-establishing-diplomatic-ties-georgia?utm\\_campaign=tnr-daily-newsletter&utm\\_source=hs\\_email&utm\\_medium=email&utm\\_content=12398320](http://www.newrepublic.com/article/117238/tuvalu-bruises-russia-establishing-diplomatic-ties-georgia?utm_campaign=tnr-daily-newsletter&utm_source=hs_email&utm_medium=email&utm_content=12398320).

<sup>183</sup> See US DEP'T ST., Cable No. 10-MOSCOW-60 (Jan. 14, 2010) (discussing Turkish involvement in Abkhazia and possible support for statehood).

<sup>184</sup> See Wood, *Limbo World*, *supra* note 17; *Georgia regions mark 'independence': Russia calls for international recognition of Abkhazia and South Ossetia*, AL-JAZEERA (Aug. 27, 2009) available at

<http://www.aljazeera.com/news/europe/2009/08/200982682034876496.html>.

<sup>185</sup> See S.C. Res. 822; S.C. Res. 853; S.C. Res. 874; S.C. Res. 884; Council of Europe Parl. Assembly Res. 1416; Int'l Crisis Group, Report on Nagorno-Karabakh (Sept. 14, 2005); Int'l Crisis Group, Report on Nagorno-Karabakh (Oct. 11, 2005); Int'l Crisis Group, Report on Nagorno-Karabakh (Nov. 14, 2007).

<sup>186</sup> See Farid Akberov, *Sergei Lavrov comments on representation of Nagorno-Karabakh separatist regime functioning at Armenian Embassy in Russia*, AZERI-PRESS AGENCY (Jan. 21, 2014) available at <http://en.apa.az/news/205892> (“Russian Foreign Minister Sergei Lavrov has answered the question whether the operation of representation of Nagorno-Karabakh separatist regime at Armenian Embassy in Russia is legal or not . . . Lavrov said he is unaware of this issue . . . ‘Views are often voiced that the area of embassies are even rented by restaurants in violation of the Vienna Convention. I think we should observe the Vienna Convention’”)

<sup>187</sup> See Int'l Crisis Group (Nov. 9, 1998) available at <http://www.refworld.org/docid/3ae6a6e94.html> (President Ghukasian opined that he could accept “a sort of abridged statehood . . . something similar to a confederation” with Azerbaijan.); Agence France Press (Sept. 2, 1997).

<sup>188</sup> See CRAWFORD, CREATION OF STATES, *supra* note 3, at 412; Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. PEACE RES. 723 (2002).

<sup>189</sup> See US DEP'T ST., Cable No. 09-ADDISABABA-648, ¶¶ 1–2 (Mar. 17, 2009).

formal recognition is elusive and the US still continues to only recognize the central government of Somalia.<sup>190</sup> In distinction from Puntland, Somaliland has a history, albeit very limited, of previously being widely recognized as an independent state prior to unification into Somalia.<sup>191</sup> Today it maintains a quasi-embassy in Addis Ababa<sup>192</sup> that issues visas to would-be travelers.<sup>193</sup> These visas are recognized by some neighboring African states.<sup>194</sup> Yet it cannot receive foreign aid due to lack of recognition.<sup>195</sup> Looking to the future, the President of Puntland has lobbied against international recognition of Somaliland,<sup>196</sup> and in favor of creating a federal state structure within Somalia.<sup>197</sup>

Lastly, during the pre-independence preparations by South Sudan, ambassadors and diplomats were already meeting with individuals from the embryonic “Government of South Sudan,” even though the referendum on independence had not been completed and the new country had not been declared. What appeared to be critical in agreeing to these, perhaps premature, meetings, was the view of the US Department of State that the outcome of the referendum was “inevitable.”<sup>198</sup> The concern of the State Department was not whether

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<sup>190</sup> See *United States recognizes the government of Somalia for the first time since 1991*, reprinted at US DEP’T OF STATE, OFC. LEGAL ADV., DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (CarrieLyn D. Guymon ed., 2013), available at [www.state.gov/r/pa/prs/ps/2013/01/202997.htm](http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm); [www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm](http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm); [www.state.gov/s/1/c8183.htm](http://www.state.gov/s/1/c8183.htm).

<sup>191</sup> See Nora Y. S. Ali, *For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination*, 47 CORNELL INT’L L. J. 417 (2014).

<sup>192</sup> See Wood, *Limbo World*, *supra* note 17.

<sup>193</sup> See *id.*

<sup>194</sup> See *id.*

<sup>195</sup> See Nora YS Ali, *For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination*, 47 CORNELL INT’L L. J. 417 (2014).

<sup>196</sup> See US DEP’T ST., Cable No. 09-ADDISABABA-648, ¶¶ 1, 7 (Mar. 17, 2009).

<sup>197</sup> See US DEP’T ST., Cable No. 09-ADDISABABA-648, ¶ 1 (Mar. 17, 2009).

<sup>198</sup> See US DEP’T ST., Cable No. 10-USUNNEWYORK-109, ¶ 1 (Feb. 25, 2010).

legal criteria had been met but whether the new state was in fact functionally operating as a state.<sup>199</sup>

## 6. Competing Governments

While this article has largely avoided questions of entities that did not wish to be independent states, the next category of status implicates that problem. Generally, entities that do not wish to be states are not considered states.<sup>200</sup> Instead, these distinct territorial entities might be considered rival governments to territory. However, as a pragmatic way to manage the two competing governments, where both hold some of the territory under dispute, at least one of the two

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<sup>199</sup> See US DEP'T ST., Cable No. 10-USUNNEWYORK-109, ¶¶ 3–4 (Feb. 25, 2010).

<sup>200</sup> See CRAWFORD, CREATION OF STATES, *supra* note 3, at 206–21 (discussing the legal status of Taiwan under international law and concluding that Taiwan is “not a State because it has not unequivocally asserted its separation from China and is not recognized as a State distinct from China”). This conclusion is rather absolute, however, and overlooks the likelihood that Taiwan, like Palestine, used purposefully vague language regarding its intent in light of the very real risk that the People’s Republic of China would impose sanctions against it. See Case No. 5A\_329/2009, (Bundesgericht [BGer] [Fed. Sup. Ct.], Switz., Sept. 9, 2010) (evidencing that Taiwan regards itself as a state for the purposes of inclusion in the International Organization for Standardization country name list). See also CRAWFORD, CREATION OF STATES, *supra* note 3, at 216–18 (discussing Taiwan’s ambiguous statements in 1999 regarding a unitary China as signifying Taiwan’s hesitance to speak plainly regarding its desire for formal separation in light of threatened sanctions). See also 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 (2009); Daniel P O’Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT’L L. 405, 415; Thomas D. Grant, *Taiwan’s Status in International Law*, in UNLOCKING THE SECRET OF TAIWAN’S SOVEREIGNTY 75, 96-98 (Chia-lung Lin et al. eds, 2008) (suggesting that the declaration may implicitly advert to the UN Charter’s prohibition of threats and uses of force “in any other manner inconsistent with the purposes of the United Nations”); Cameron M. Otopalik, *Taiwan’s Quest for Independence: Progress on the Margins for Recognition of Statehood*, 14 ASIAN J. POL. SCI. 82 (2006) (discussing the creeping status of an independent state). For a more conventional approach, tying the legality of the use of force to the sovereignty question, see 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, 482–91 (2009).

entities might be treated as if it were a state, even though it might not wish to be one.

Taiwan is the obvious example. The origins of the PR China/ROC standstill begin when the ROC was established in 1912, overturning the imperial system. Fighting erupted between the ROC and the rival Chinese Communist Party until 1949 when the Communist Party drove the ROC Government to Taiwan Island and proclaimed the PR China. Some states immediately recognized the new government as the government of all of China,<sup>201</sup> but others waited until the ROC was expelled from the UN in 1971 and the PR China accredited instead as the representatives of China.<sup>202</sup> Today the PR China considers Taiwan Island part of China and the ROC a secessionary movement.<sup>203</sup>

While the usual articulation of the ROC position is that it is (or continues to be) the government of China, the real position is almost incoherent<sup>204</sup> and likely deliberately constructed as such to mask reality. The President of the ROC has referred to the ROC-PR China relationship as a “special relation,” not a relationship between two

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<sup>201</sup> See USSR (Oct 2, 1949); Bulgaria, Romania (Oct. 3, 1949); Poland, Hungary, Czechoslovakia (Oct. 4, 1949); Yugoslavia (Oct. 5, 1949); Albania (Nov. 23, 1949); East Germany, Mongolia, North Korea; Burma (Dec. 9, 1949); India (Dec. 30, 1949); Pakistan (Jan. 4, 1950); United Kingdom, Ceylon, Norway, Denmark, Finland, Sweden, Switzerland, Israel (Jan. 6, 1950); Afghanistan (Jan. 13, 1950).

<sup>202</sup> See G.A. Res. 2758 (XXVI) *Restoration of the Lawful Rights of the People's Republic of China in the United Nations* (Oct. 25, 1971).

<sup>203</sup> See Taiwan Aff'rs Off. of the St. Council of the PRC, *Anti-Secession Law adopted by NPC*, available at [http://www.gwytb.gov.cn/en/Special/OneChinaPrinciple/201103/t20110317\\_1790121.htm](http://www.gwytb.gov.cn/en/Special/OneChinaPrinciple/201103/t20110317_1790121.htm).

<sup>204</sup> See Mainland Aff'rs Council, Exec. Yuan (Cabinet), Rep. of China [Taiwan], *Explanation of Relations Across the Taiwan Strait* (July 5, 1994); Congr. Research Serv. (Shirley A. Kan), Report for Congress, *China/Taiwan: Evolution of the 'One China' Policy – Key Statements from Washington, Beijing, and Taipei*, No. RL303341, at 37 (Dec. 16, 2002) available at [www.csis.org/isp/taiwan/tw\\_uct\\_crs.pdf](http://www.csis.org/isp/taiwan/tw_uct_crs.pdf). Recently Kenya has extradited two Taiwanese citizens to mainland China for prosecution and there has been apparently no discussion over whether Taiwan is actually part of the PRC, with most authorities treating Taiwan as a separate country. See Dan Levin, *China to Prosecute Taiwanese in Fraud Case Despite Acquittals in Kenya*, N.Y. TIMES (Apr. 13, 2016).

nations.<sup>205</sup> Alternatively, but no less vaguely, referred to as “cross-straits” relations within one China.<sup>206</sup> There are also some efforts to recharacterize the entire legal regime between the PR China and ROC as neither international nor domestic, but distinctly “Chinese”.<sup>207</sup> In this approach, we might be reminded us of the now discarded idea of “imperial” law between UK and India, as a *lex specialis* legal regime distinct from international law. This careful positioning of PR China and ROC has not foreclosed the ROC’s sometimes articulated view that it could be either the lawful government of one China or a state independent from the PR China confined to Taiwan Island. Surely the ROC has some form of personality in that it can conclude contracts.<sup>208</sup>

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<sup>205</sup> See e.g. *Taiwan and China in ‘special relations’*: Ma, THE CHINA POST (Sept. 4, 2008) available at

<http://www.chinapost.com.tw/taiwan/china-taiwan%20relations/2008/09/04/173082/Taiwan-and.htm>. When asked to comment on the idea of “two Chinas” during the interview, Ma said that the PRC’s constitution does not allow the existence of another country in its territory, and neither does the ROC’s. “Therefore, we (Taiwan and China) have a special relationship, but not that between two countries”. This language sounds similar to the Great Britain-Irish relation of not being foreign, and the view of Alex Salmond during the Scottish independence debate that Scotland would not be foreign to England.

<sup>206</sup> See US DEP’T St., Cable 10-AI TAIPEI-157 (Feb. 10, 2010) (examining Taiwan-P.R. China cross-straits trade discussions for similar occasional terminology, suggesting a less than absolute position on Taiwan); Dimitri Bruyas, *Ma repeats ‘mutual non-denial’ policy*, THE CHINA POST (Mar. 24, 2008) available at <http://www.chinapost.com.tw/taiwan/national/presidential%20election/2008/03/24/148519/Ma-seeks.htm>.

<sup>207</sup> See Shirley A. Kan, *China/Taiwan: Evolution of the ‘One China’ Policy – Key Statements from Washington, Beijing, and Taipei*, CONGR. RESEARCH SERV., at 59 (Oct. 10, 2014).

<sup>208</sup> See Taiwan Relations Act of 1979, 22 U.S.C. §§ 3301–16 (2006); Michael Martina, J.R. Wu, Ben Blanchard & Clarence Fernandez, *China angered after U.S. fighter jets land in Taiwan*, REUTERS (Apr. 2, 2015) available at <http://www.reuters.com/article/2015/04/02/us-china-usa-taiwan-idUSKBN0MT0SA20150402>; Kerry Dumbaugh, *Taiwan-U.S. Relations: Recent Developments and Their Policy Implications*, CONGR. RESEARCH SERV. (Nov. 2, 2009) available at <http://fpc.state.gov/documents/organization/112057.pdf>; Shirley A. Kan, *Taiwan: Major U.S. Arms Sales Since 1990*, CONGR. RESEARCH SERV. (Aug. 29, 2014) available at <http://www.fas.org/sgp/crs/weapons/RL30957.pdf>; Lowell Dittmer, *The Evolution of China’s Policy Towards Taiwan*, in CHINA DIVIDE: EVOLVING RELATIONS BETWEEN TAIWAN AND MAINLAND CHINA 33, 40–1 (J.W. Wheeler ed., 1996).

In fact, following the 1992 Consensus, and despite that fact that it appears to still support the 1992 Consensus,<sup>209</sup> the ROC continues to assert its “sovereignty”<sup>210</sup> (distinct from right to exercise “authority”<sup>211</sup>) and expresses interest in UN membership.<sup>212</sup> Yet at the same time,

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<sup>209</sup> See Lee Teng-hui, *U.S. Can't Ignore Taiwan*, WALL ST. J. (Aug. 3, 1998) (“The path to a democratic China must begin with a recognition of the present reality by both sides of the Taiwan Strait. And that reality is that China is divided, just as Germany and Vietnam were in the past and as Korea is today. Hence, there is no ‘one China’ now.”) *But see Taiwan opposition candidate calls for return to one China formula*, REUTERS (Nov. 14, 2019), [https://news.yahoo.com/taiwan-opposition-candidate-calls-return-141215263.html?soc\\_src=community&soc\\_trk=ma](https://news.yahoo.com/taiwan-opposition-candidate-calls-return-141215263.html?soc_src=community&soc_trk=ma) (“Tsai [President Tsai Ing-wen] refuses to recognise an agreement reached between China’s Communists and Taiwan’s former ruling Kuomintang (KMT) that both sides belong to ‘one China’, with each having their own interpretation of what that means. KMT presidential candidate Han [Han Kuo-yu] said the consensus reached in 1992 had been the ‘magical’ tool to stability and communications across the Taiwan Strait. ‘With the ‘92 consensus’, many cross-strait issues could be resolved,’ Han told reporters in Taipei, vowing to restart dialogue with China if elected president.”).

<sup>210</sup> See MAINLAND AFF’RS COUNCIL, *President Ma’s New Year’s Day Celebratory Message* (Jan. 1, 2009), available at <http://www.mac.gov.tw/ct.asp?xItem=50076&ctNode=5909&mp=3> (“we must also preserve the sovereignty and dignity of the Republic of China on Taiwan.”); Richard Halloran, *Taiwan’s Ma Addresses Economy, Sovereignty*, THE HONOLULU ADVERTISER (Dec. 7, 2008), available at <http://the.honoluluadvertiser.com/article/2008/Dec/07/op/hawaii812070305.html> (“ROC is a sovereign country”); MAINLAND AFF’RS COUNCIL, *The Government’s Position Paper on Ma Ying-jeou’s Stance about ‘Taiwan’s Pledge of Not Seeking Independence in Exchange for China’s Commitment of Not Using Force against Taiwan’* (Nov. 3, 2006) available at <http://www.mac.gov.tw/ct.asp?xItem=50718&ctNode=5913&mp=3>; MAINLAND AFF’RS COUNCIL, Exec. Yuan (Cabinet), Rep. of China [Taiwan], *Taipei Speaks Up: Special State-to-State Relationship, Republic of China’s Policy Documents* (Chairman Su Chi at July 12, 1999 Press Conference) (Aug. 1999).

<sup>211</sup> See Pres. Ma Ying-jeou, Remarks at the 2011 ILA Asia-Pacific Regional Conference 6–7 (May 30, 2011) available at <http://www.cils.nccu.edu.tw/Opening%20Address%20of%20President%20Ma%20Ying-jeou.pdf>.

<sup>212</sup> See US DEP’T ST., Cable No. 09-STATE-105599 (Oct. 9, 2009) (not supporting ROC membership in international organizations); Congr. Research Serv. (Shirley A. Kan), Report for Congress, *Security Implications of Taiwan’s Presidential Election of March 2008*, No. RL104279, at 37 (2008) available at <http://fpc.state.gov/documents/organization/104279.pdf>; US DEP’T ST., Cable No. 08-AITTAIPEI-1762 (Dec. 22, 2008) (discussing plans of ROC to attend WHO World Health Assembly); US DEP’T ST., Cable No. 08-AITTAIPEI-1387 (Sept. 22,

paradoxically, the ROC denies an interest in independence from China in carefully nuanced statements.<sup>213</sup> Occasionally, officials have slipped into statehood language,<sup>214</sup> perhaps again for lack of an alternate

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2008) (reporting on news reports on UN support of ROC membership in UN agencies); US DEP'T ST., Cable No. 08-STATE-95091 (Sept. 5, 2008) (affirming that the US will support ROC membership in international organizations where "statehood" is not a criteria of membership, although the US supports "flexible arrangements" that permit the people on the island to engage the international community); MAINLAND AFF'RS COUNCIL, *Position Paper Regarding the Referendum on Joining the United Nations under the Name of Taiwan* (Sept. 7, 2007) available at <http://www.mac.gov.tw/public/Data/9111015321771.pdf>; US DEP'T ST., Cable No. 07-TOKYO-3360 (July 23, 2007); US DEP'T ST., Cable No. 07-AITTAIPEI-1381 (June 18, 2007); Reps. Steve Chabot, Shelley Berkley & Dana Rohrabacher, *Don't Abandon Taiwan*, WASH. TIMES (Sept. 17, 2007); Shirley A. Kan, *China/Taiwan: Evolution of the 'One China' Policy – Key Statements from Washington, Beijing, and Taipei*, CONGR. RESEARCH SERV. at 36 (Oct. 10, 2014) available at [www.csis.org/isp/taiwan/tw\\_uct\\_crs.pdf](http://www.csis.org/isp/taiwan/tw_uct_crs.pdf).

<sup>213</sup> See Sigrid Winkler, *Biding Time: The Challenge of Taiwan's International Status*, Brookings Inst. Paper (Nov. 2011) available at <http://www.brookings.edu/research/papers/2011/11/17-taiwan-international-status-winkler> ("Lee Teng-hui's government introduced the idea of "flexible" or "pragmatic diplomacy" which stipulated that, first, if formal relations with other countries were not possible, then Taiwan should make an effort to entertain substantial relations—meaning close relations without diplomatic recognition. Second, Taiwan should attempt to participate in international organizations while being flexible on name and membership status issues."); Keith Bradsher, *Taiwan Takes Step Forward at U.N. Health Agency*, N.Y. TIMES (Apr. 29, 2009) (quoting ROC President Ma: "We're not asking for recognition; we only want room to breathe.").

<sup>214</sup> See Tsungting Chung, *Regional organizations, individuals, and the mediation in Beijing-Taipei disputes after the cold war*, in CONFLICT MANAGEMENT, SECURITY AND INTERVENTION IN EAST ASIA 249 (Jacob Bercovitch, et al eds., 2008) (documenting that statement by Lee Teng-Hui in 1999 that the special relationship between sovereign states or a state to state relationship); CRAWFORD, CREATION OF STATES, *supra* note 3, at 151; SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 1999-2001 134 (2002) (observing the announcement that ROC-PR China relations would be treated as "state-to-state relations"); JOHN W. GARVER, FACE OFF: CHINA, THE UNITED STATES, AND TAIWAN'S DEMOCRATIZATION 29 (1997) (Taiwan is "an independent sovereign state"); Alan M. Wachman, *The State-to-State Flap: Tentative Conclusions about Risk and Restraint in Diplomacy Across the Taiwan Straits*, 4 HARV. ASIA Q. (2000).



vocabulary to describe reality.<sup>215</sup> The conclusion must be that its precise personality and nature is deliberately kept obscure.<sup>216</sup>

Because of this situation, the international community takes a functional approach to international legal rights and duties for the ROC.<sup>217</sup> Some states never stopped regarding it as a state,<sup>218</sup> and others did, though they may still often treat it as if it were a state.<sup>219</sup> Some

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<sup>215</sup> See e.g. Nationality Act (Jan. 27, 2006), art. 9 (ROC, Taiwan), *translation available at* <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx>. This law is currently in the process of being amended to provide for limited possibilities of dual nationality, see *Nationality Amendments Pass First Legislative Review*, TAIWAN TODAY (Dec. 18, 2014). See also Joe McDonald, *China rebukes Zara, Delta for calling Taiwan 'Country'*, ASSOC. PRESS (Jan. 12, 2018) *available at* <http://www.apnewsarchive.com/2018/China-rebukes-Zara-Delta-and-Medtronic-for-calling-Taiwan-a-country-on-their-websites-in-a-new-show-of-sensitivity-about-the-self-ruled-island/id-2075494b47674e1e9c35c2dc4c8518bd> (accusing certain corporations of listing Taiwan as if were a country, to which Delta replied “We apologize for hurting the feelings of the Chinese people!” and another company argued that it was only trying to help its customers by engaging in common usage).

<sup>216</sup> See CRAWFORD, CREATION OF STATES, *supra* note 3, at 219 (no clear statement of independence). 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, 100 (2009). However, sometimes true independence is distinguished from “formal” independence, see Tsungting Chung, *Regional organizations, individuals, and the mediation in Beijing-Taipei disputes after the cold war*, in CONFLICT MANAGEMENT, SECURITY AND INTERVENTION IN EAST ASIA 251 (Jacob Bercovitch, et al eds., 2008).

<sup>217</sup> See US DEP’T ST., Cable No. 09-TAIPEI-1420 (Dec. 3, 2009) (discussing Taiwan participation in fisheries organizations from a functional point of view, without comment on sovereignty); US DEP’T ST., Cable No. 09-STATE-105599 (Oct. 9, 2009) (one china policy, yet “unofficial”, de facto diplomatic relations with ROC); Phil C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 CHIN. J. INT’L L. 455 (1990); Edward Cody, *Taiwan Announces First National Security Policy / Plan Calls on China to Help Create Buffer Zone in the Strait*, WASH. POST (May 21, 2006) *available at* <http://www.sfgate.com/news/article/Taiwan-announces-first-national-security-policy-2496527.php>.

<sup>218</sup> See DEON GELDENHUYS, ISOLATED STATES: A COMPARATIVE ANALYSIS 148 (1990).

<sup>219</sup> See A Bill to Direct the Secretary of State to Develop a Strategy to Obtain Observer Status for Taiwan in the International Criminal Police Organization, and for Other Purposes, S. 2426, Publ. L. 114-139 (Mar. 18, 2016); An Act to direct the

states, while in principle agreeing to the one-China policy, do not always respect it in application.<sup>220</sup> This practice includes finding that

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Secretary of State to develop a strategy to obtain observer status for Taiwan at the triennial International Civil Aviation Organization's Assembly, 127 Stat. 480, Publ. L. 113-17 (July 12, 2013) (in both cases, whether they could treat Taiwan as if it were a state for purposes of *eligibility* to participate as an observer, was never discussed); Eur. Parl., *European Parliament resolution of 11 May 2011 on the annual report from the Council to the European Parliament on the main aspects and basic choices of the Common Foreign and Security Policy (CFSP) in 2009, presented to the European Parliament in application of Part II, Section G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006*, EU Doc. 2010/2124(INI), P7\_TA-PROV(2011)-227, art. 79 (May 11, 2011); US DEP'T ST., Cable No. 10-TAIPEI-1205 (Feb. 26, 2010) (referring to the Taipower corporation in Taiwan as "state-owned"); US DEP'T ST., Cable No. 10-AITTAIPEI-40 (Jan. 11, 2010) (arms sales to ROC); US DEP'T ST., Cable No. 09-AITTAIPEI-457 (Apr. 15, 2009) (noting the "dozens of cooperative agreements and other arrangements" with the ROC . . . cover[ing] a broad range of environmental, health, scientific, and technical fields, including civil nuclear cooperation, consumer product and food safety, environmental protection, public health, labor affairs, biomedical sciences, seismology and earthquake monitoring, and nanoscience and nanotechnology."); US DEP'T ST., Cable No. 08-TAIPEI-1728 (Dec. 15, 2008) (reporting that the executive would seek to ratify International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), despite not being a member of the UN); US DEP'T ST., Cable No. 06-AITTAIPEI-546 (Feb. 22, 2006) (requiring the US to pressure organizations to hold meetings where the hosts are not pressured by China to exclude the ROC); JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES* 138, 153-5 (3d ed. 2010); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209; Rachel Chan, *Taiwan thanks US Senate for backing ICAO bid*, TAIWAN TODAY (Sept. 23, 2011) available at <http://taiwantoday.tw/ct.asp?xItem=176714&CtNode=436>; ROC Min. For. Aff'rs, Ministry of Foreign Affairs, *Republic of China (Taiwan) Becomes the 37th Country to Be Included in the U.S. Visa Waiver Program* (Oct. 4, 2012) available at <http://www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/8a11921e-a419-4bc8-8e85-489276b417bc?arfid=7b3b4d7a-8ee7-43a9-97f8-7f3d313ad781>; William Lowther, *US, PRC discussing ways for Taiwan to join world bodies*, TAIPEI TIMES (Dec. 9, 2010) available at <http://www.taipetimes.com/News/front/print/2010/12/09/2003490463>; 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 (2007).

<sup>220</sup> See *Phils v. China*, Case No. 2013-19, Award on Juris. & Admiss, ¶ 22 (Arbitral Tribunal under Annex VII UNCLOS, Oct. 29, 2015) ("In addition, the Philippines has deliberately excluded from the category of the maritime features 'occupied or controlled by China' the largest island in the Nansha Islands, Taiping Dao, which is currently controlled by the Taiwan authorities of China. This is a grave

treaties with the ROC, when it was the recognized government of all of China, are still valid, though now only binding Taiwan Island.<sup>221</sup> In

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violation of the One-China Principle and an infringement of China's sovereignty and territorial integrity. This further shows that the second category of claims brought by the Philippines essentially pertains to the territorial sovereignty dispute between the two countries.”).

<sup>221</sup> See Agreement on Trade Matters, Dec. 29, 1978, US-ROC, 30 U.S.T. 6439, T.I.A.S. 9561, 1179 U.N.T.S. 313; International Express Mail Agreement, Sep. 11, Nov. 10, 1978, US-ROC, 30 U.S.T. 3277, T.I.A.S. 9392, 1179 U.N.T.S. 291; Memorandum of Agreement Relating to the Provision of Flight Inspection Services, Aug. 21, Oct. 1, 1978, US-ROC, 30 U.S.T. 273, T.I.A.S. 9197, 1150 U.N.T.S. 271; Exchange of Notes Constituting an Agreement Relating to Trade of Non-rubber Footwear June 14, 1977, US-ROC; Exchange of Letters Constituting an Agreement Amending the Agreement of 14 June 1977 Relating to Trade of Non-rubber Footwear, Aug. 4-5, 1977, US-ROC, 1118 U.N.T.S.; Agreement Relating to Trade in Textiles, Apr. 11, 1974, US-ROC, 25 U.S.T. 720, T.I.A.S. 7821; Agreement for Cooperation Concerning Civil Uses of Atomic Energy, Apr. 4, 1972, US-ROC, 23 U.S.T. 945, T.I.A.S. 7364, *amended* Mar. 15, 1974, 25 U.S.T. 913, T.I.A.S. 7834; Agreement on Technological Advancement in Connection with Water Resources, Land Utilization and Various Fields of Irrigated Agriculture, May 12, 1972, US-ROC, 23 U.S.T. 1135, T.I.A.S. 7374; Agreement on the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, US-ROC, 572 U.N.T.S. 3; Agreement for Financing Certain Educational and Cultural Exchange Programs, Apr. 23, 1964, US-ROC, 15 U.S.T. 408, T.I.A.S. 5572; 524 U.N.T.S. 141; Agricultural Commodities Agreement, with Exchange of Notes, Aug. 31, 1962, US-ROC, 13 U.S.T. 1930, T.I.A.S. 5151, 460 U.N.T.S. 247, *amended* Jan. 15, 1963, 14 U.S.T. 131, T.I.A.S. 5282, 473 U.N.T.S. 380, *amended* June 3, 1964, 15 U.S.T. 667, T.I.A.S. 5588, 526 U.N.T.S. 330; Agreement regarding the ownership and use of local currency repayments made by China to the Development Loan Fund, Dec. 24, 1958, US-ROC, 10 U.S.T. 16, T.I.A.S. 4162, 340 U.N.T.S. 251; Agreement for exchange of insured parcel post and regulations of execution, July 30, Aug. 19, 1957, US-ROC, 8 U.S.T. 2031, T.I.A.S. 3941, 300 U.N.T.S. 61; Agreement prescribing nonimmigrant visa fees and validity of nonimmigrant visas, Dec. 20, 1955, Feb. 20, 1965, US-ROC, 7 U.S.T. 585, T.I.A.S. 3539, 275 U.N.T.S. 73, *amended* July 11, Oct. 17 & Dec. 7, 1956, 18 U.S.T. 3167; T.I.A.S. 6410, 697 U.N.T.S. 256, *amended* May 8, June 9 & 15, 1970, 21 U.S.T. 2213, T.I.A.S. 6972, 776 U.N.T.S. 344; Exchange of notes constituting an agreement relating to the establishment of a United States Navy medical research Center at Taipei, Taiwan, Mar. 30, Apr. 26, Oct. 14, 1955, US-ROC, 268 U.N.T.S. 165; Exchange of notes constituting an agreement extending the above-mentioned agreement, as amended, October 14, 1975, US-ROC, 1113 U.N.T.S. \_\_\_ U.N. Reg. No 3857; Agreement relating to the loan of small naval craft to China, May 14, 1954, US-ROC, 5 U.S.T. 892, T.I.A.S. 2979, 231 U.N.T.S. 165 *amended* Mar. 22 and 31, 1955, 6 U.S.T. 750, T.I.A.S. 3215, 251 U.N.T.S. 399, *amended* June 18, 1955, 6 U.S.T. 2973, T.I.A.S. 3346, 265 U.N.T.S. 406, *amended* May 16, 1957, 8 U.S.T. 787, T.I.A.S.

one approach to avoiding the question of claims to governance, the ROC government is sometimes referred to simply as “Taipei”,<sup>222</sup> including in some treaties and Memoranda of Understanding with Taiwan.<sup>223</sup> Strangely even the PR China entered into a treaty with the ROC, although formally the agreement was adopted between the (Taiwan) Straits Exchange Foundation and the (PRC) Association for Relations Across the Taiwan Straits, and later “approved” by the respective legislatures and executives.<sup>224</sup> In addition, Taiwan has

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3837, 284 U.N.T.S. 380, *amended* Oct. 12, 1960, 11 U.S.T. 2233, T.I.A.S. 4597, 393 U.N.T.S. 320, *amended* Aug. 15, 1962, 13 U.S.T. 1924, T.I.A.S. 5150, 460 U.N.T.S. 237, *amended* Feb. 23, 1965, 16 U.S.T. 126, T.I.A.S. 5771, 542 U.N.T.S. 361, *amended* Dec. 16, 1970 - Jan. 14, 1971, 22 U.S.T. 12, T.I.A.S. 7037, 776 U.N.T.S. 334; Agreement relating to guaranties for projects in Taiwan proposed by nationals of the United States, June 25, 1952, US-ROC, 3 U.S.T. 4846, T.I.A.S. 2657, 136 U.N.T.S. 229, *amended* December 30, 1963 (14 U.S.T. 2222, T.I.A.S. 5509, 505 U.N.T.S. 308; Agreement relating to duty-free entry of relief goods and relief packages and to the defrayment of transportation charges on such shipments, Nov. 5, 18, 1948, US-ROC, 3 U.S.T. 5462, T.I.A.S. 2749, 198 U.N.T.S. 287, *amended* Oct. 20 & Dec. 12, 1952, 3 U.S.T. 5462, T.I.A.S. 2749, 198 U.N.T.S. 294, *amended* July 12 & Oct. 26, 1954, 5 U.S.T. 2930, T.I.A.S. 3151, 237 U.N.T.S. 337; Arrangement for the direct exchange of certain information regarding the traffic in narcotic drugs, Mar. 12, June 21, July 28, Aug. 30, 1947, US-ROC, 6 Bevans 797; Treaty of Friendship, Commerce, And Navigation, Nov. 4, 1946, US-ROC, 63 Stat. 1299; T.I.A.S. 1871; 6 Bevans 761; 25 U.N.T.S. 69; Agreement under section 3 (c) of the Lend-Lease Act, June 28, 1946, US-ROC, 61 Stat. 3895; T.I.A.S. 1746; 6 Bevans 758; 34 U.N.T.S. 121; Agreement on the disposition of lend-lease supplies in inventory or procurement in the United States, June 14, 1946, US-ROC, 60 Stat. 1760; T.I.A.S. 1533; 6 Bevans 753; 4 U.N.T.S. 253; Preliminary agreement regarding principles applying to mutual aid in the prosecution of the war against aggression, June 24, 1942, US-ROC, 56 Stat. 1494; EAS 251; 6 Bevans 735; 14 U.N.T.S. 343; Treaty of arbitration, June 27, 1930, US-ROC, 47 Stat. 2213; T.S. 857; 6 Bevans 724; 140 L.N.T.S. 183; Parcel post convention, May 29, 1916, US-ROC, 39 Stat. 1665; Treaty looking to the advancement of the cause of general peace, Sep. 15, 1914, US-ROC, 39 Stat. 1642; T.S. 619 & 619-A; 6 Bevans 711; N.Y. Chinese TV Programs Inc. v. U.E. Enter., 954 F.2d 847, 854 (2d Cir. 1992); Bank of China v. Wells Fargo Bank, 104 F. Supp. 59 (N.D. Cal. 1952).

<sup>222</sup> See Keith Bradsher, *Taiwan Takes Step Forward at U.N. Health Agency*, N.Y. TIMES (Apr. 29, 2009) (documenting that ROC agreed with the PRC to use the name “Chinese Taipei” at the WHO).

<sup>223</sup> See generally ROC (Taiwan) Treaty Database, available at <http://no06.mofa.gov.tw/mofatreatys/IndexE.aspx>.

<sup>224</sup> See Mo Yan-chih, *Cross-strait service trade pact signed*, TAIPEI TIMES (June 22, 2013) available at

entered into diplomatic relations as if it were a state.<sup>225</sup> Here, there is often the necessity of using unusual legal vehicles: the American Institute in Taiwan administers treaties and otherwise handles foreign affairs with the US,<sup>226</sup> and representatives to the Taipei Government are sometimes characterized as “on leave” from their respective foreign services though they retain privileges and immunities in Taiwan.<sup>227</sup> Yet everyone is plainly aware of the underlying substance of the arrangement, despite its formal structure. Taiwan has even joined many international organizations,<sup>228</sup> yet officially continuing to

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<http://www.taipetimes.com/News/front/archives/2013/06/22/2003565371>;  
Chris Hogg, *Taiwan and China sign landmark trade agreement*, BBC NEWS (June 29, 2010)  
available at <http://www.bbc.com/news/10442557>.

<sup>225</sup> See ROC, Min. For. Affrs, available at <http://www.mofa.gov.tw/webapp/ct.asp?xItem=32618&CtNode=1865&mp=6>;  
ROC, Gov't Info. Ofc, *Embassies, Consulates and Missions Abroad*, available at <http://www.taiwanembassy.org/dept.asp?mp=1&codemeta=locationIDE>; Edward I-hsin Chen, *The Role of the United States in cross-strait negotiations: A Taiwanese perspective*, in CONFLICT MANAGEMENT, SECURITY AND INTERVENTION IN EAST ASIA 200 (Jacob Bercovitch, et al eds., 2008); Lowell Dittmer, *The Evolution of China's Policy Towards Taiwan*, in CHINA DIVIDE: EVOLVING RELATIONS BETWEEN TAIWAN AND MAINLAND CHINA 33 (J.W. Wheeler ed., 1996).

<sup>226</sup> See Taiwan Relations Act, Publ. L. 96-8, 93 Stat. 14, 22 U.S.C. 3305, § 6; Exec. Order 12143, 44 Fed. Reg. 37191; Congr. Research Serv. (Shirley A. Kan), Report for Congress, *Taiwan: Major U.S. Arms Sales Since 1990*, No. RL30957 (2010) available at <http://fas.org/sgp/crs/weapons/RL30957.pdf>; Kerry Dumbaugh, *Taiwan's Political Status: Historical Background and Ongoing Implications*, CONGR. RESEARCH SERV. at 3 (Nov. 3, 2009) available at <http://www.policyarchive.org/handle/10207/bitstreams/4334.pdf>.

<sup>227</sup> See Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357, 364 (1995).

<sup>228</sup> See ROC, Min. For. Affrs, available at <http://www.mofa.gov.tw/webapp/ct.asp?xItem=51335&CtNode=2254&mp=6>.  
Afro-Asian Rural Development Organization, 1968, Agency for International Trade Information and Cooperation, May 21, 2009, Asian Development Bank, Aug. 22, 1966 (under name “Taipei, China.”), Asian Productivity Organization, May 11, 1961, Asian Vegetable Research and Development Center, May 22, 1971, Asian/Pacific Group on Money Laundering, Feb. 1997, Asia-Pacific Association of Agricultural Research Institutions, Apr. 7, 1999, Asia-Pacific Economic Cooperation, Nov. 1991, Asia-Pacific Legal Metrology Forum, Nov. 1994, Association for Science Cooperation in Asia, 1994, Association of Asian Election Authorities, Feb. 1998, Central American Bank for Economic Integration, Nov. 10, 1992, Egmont Group of Financial Intelligence Units Egmont Group, July 1998, Extended Commission for

maintain is nuanced position on statehood.<sup>229</sup> For example, the ROC government has been recognized as quasi-independent for purposes of international civil aviation, again a functionalist approach.<sup>230</sup> Other states play the same game: affirming their right to maintain some unofficial relations with the island government, yet continue to recognize the “One China” policy.<sup>231</sup> The best conclusion is that, from

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the Conservation of Southern Bluefin Tuna, 2002, Inter-American Tropical Tuna Commission, 2010, International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean, Jan. 30, 2002, International Association of Insurance Supervisors, 1994, International Competition Network, Oct. 2001, International Cotton Advisory Committee, 1963, International Council for Information Technology in Government Administration, 2010, International Organization of Securities Commissions, 1987, International Satellite System for Search and Rescue Cospas-Sarsat, June 4, 1992, International Seed Testing Association, 1962, Office International des Epizooties, Oct. 1, 1954, South-East Asia Central Banks, Jan. 24, 1992, South Pacific Regional Fisheries Management Organization, Sept. 23, 2012, Study Group on Asian Tax Administration and Research, Feb. 1996, Western and Central Pacific Fisheries Commission, June 19, 2004; World Customs Organization (Technical Committee on Customs Valuation), Jan. 2002, World Customs Organization (Technical Committee on Rules of Origin), Jan. 2002, World Trade Organization, Jan. 1, 2002 (although as separate customs territory).

<sup>229</sup> See US Dep’t St., Cable No. 08-STATE-95091 (Sept. 5, 2008) (affirming the US government officials posted to the “American Institute in Taiwan” are not diplomats, but consultants, and diplomatic passports may not be used, and arranging meetings between US and ROC officials to take place outside US or ROC offices to avoid appearance of diplomacy); US DEP’T ST., Cable No. 07-AITTAIPEI-1718 (Aug. 1, 2007) (reporting on claims for “Taiwan’s already independent status” and that “it is ‘inappropriate to acknowledge’ that Taiwan is an independent sovereign state”); Peter Ritter, *Taiwan’s Leader Keeps Low Profile Abroad*, TIME (Aug. 11, 2008) available at <http://content.time.com/time/world/article/0,8599,1831382,00.html> (“Ma will try to avoid antagonizing Beijing by slipping through the U.S. as quietly as possible, changing planes on the west coast and not attending public events. ‘We are keeping this simple and low-key,’ says Henry Chen, a spokesman for Taiwan’s Ministry of Foreign Affairs.”); 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 (2007).

<sup>230</sup> See Stefan Talmon, *The Recognition of the Chinese Government and the Convention on International Civil Aviation*, 8 CHIN. J. INT’L L. 135 (2009).

<sup>231</sup> See US INFO. SERV., Joint Communique of the United States of America and the People’s Republic of China (1979), available at <http://www.taiwandocuments.org/communique02.htm>; Joint Communiqué of the United States of America and the People’s Republic of China (1972) (“Shanghai

a functional perspective, the ROC is a *de facto* independent legal person<sup>232</sup> with a deliberately vague position on its relationship with PR China.

### III. CONCLUSION

In addition to the many states in the world that appear to enjoy their statehood objectively, there are a widespread and diverse number of entities that are denied statehood, yet are treated as if they were states for certain issues. International law provides for statehood as a status available for territorial entities and none other. There is no formal quasi-statehood regime with its own understandings on rights, obligations and codes of participation. Thus, when an entity is proximate to statehood, but for some reason denied statehood, international law needs a solution. One option is to hold fast to the argument that it is not a state and thus refuse any participation on the international plane, potentially to the detriment of the inhabitants. Instead, international law tolerates piecemeal allocation of participatory rights as if the entity were a state for individual issues.

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Communiqué”) available at <http://www.taiwandocuments.org/communiqu01.htm>; Pres. Ma Ying-jeou, *Remarks at the 2011 ILA Asia-Pacific Regional Conference, May 30, 2011*, at 6–7, available at

<http://www.cils.nccu.edu.tw/Opening%20Address%20of%20President%20Ma%20Ying-jeou.pdf> (“The special feature of this Treaty is that while it is a bilateral Treaty between two States, to which the rules of international law apply and which like any other international treaty possesses validity, it is between two States that are parts of a still existing, albeit incapable of action as not being reorganized, comprehensive State of the Whole of Germany with a single body politic, the borders of which there is no need to define precisely here.”); *Taiwan Favours German, EU Model to Solve Taiwan-China Conflict*, GERMAN PRESS AGENCY (Oct. 4, 2006), available at [http://rawstory.com/news/2006/Taiwan\\_favours\\_German\\_EU\\_model\\_to\\_s\\_10042006.html](http://rawstory.com/news/2006/Taiwan_favours_German_EU_model_to_s_10042006.html); Markus G. Puder, *The Grass Will Not Be Trampled Because the Tigers Need Not Fight: New Thoughts and Old Paradigms for Detente across the Taiwan Strait*, 34 VANDERBILT J. TRANSNAT’L L. 481 (2001); Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT’L L. & FOREIGN AFF. 351, 357–61 (1996).

<sup>232</sup> See *Bank of China v. Wells Fargo Bank*, 104 F. Supp. 59 (N.D. Cal. 1952); Tarcisio Gazzini, *Some International Legal Aspects of the Chinese Civil War (1927-1949)*, 1 J. ARMED CONFLICT L. 141, 141–9 (1996).

This paper has identified one basis for triggering this functional statehood regime: the status of the territorial entity. Other facts may also trigger the functional regime. For example, the particular question at issue. Not all international questions are amenable to functionality. What is emerging is that entities that exist in certain statuses—colonial entities, occupied or administered territories, transitional and seceding entities, and competing governments—are potentially able to participate in this functional way. Our next step will be to rationalize this approach and build a more predictable framework for determining when the functional approach is acceptable. For now, it is critical to recognize quasi-states as existing and potentially participating in a functional statehood, and describe them as such, to better adopt this phenomenon by international law.