Obligations to Recognize Governments in International Law: U.S. non-recognition of Hamas

Janna B Weinstein, San Francisco State University
Obligations to Recognize Governments in International Law:

U.S. non-recognition of Hamas in the Palestinian Legislative Council
On January 9, 2006, under increasing internal and external pressure, democratic elections took place within the Palestinian territories of the West Bank and Gaza, resulting in a majority-win for HAMAS (“Islamic Resistance Movement”) within the Palestinian Legislative Council (PLC). With the organization’s victory came unprecedented complexities for the international community in determining legal obligations of nation-states to recognize emerging governments. Since that time, Hamas has consolidated its sole control over the Gaza strip. Further, Palestinian President Mahmoud Abbas has said a new national unity government, including rival Hamas, must be in place and internationally recognized to manage humanitarian aid for Gaza and the West Bank. However, the United States government, including the administration appointed under President Barack Obama, has refused to recognize Hamas as a legitimate governing power in the PLC, and also rejects a coalition government that includes Hamas. This paper will seek to determine whether the United States has a legal duty under international law to recognize Hamas after the election of 2006. It examines the principles of national sovereignty rights, extension of recognition, popular sovereignty, and self-determination of peoples. While it concludes that the latter principles may support an obligation to recognize, the principle of national sovereignty rights is found to be applicable only within the context of an established and recognized nation-state. Because the Palestinian territories cannot be considered a nation-state, the rights under the latter principles are also not applicable and thus do not bestow an obligation to recognize the Hamas government.

**Background on case: PLO and Hamas**

Until the 2006 PLC elections, Fatah, the “big tent” party that includes nationalists, Islamists, secularists, and leftists, dominated the PLC and much of the political scene in the West Bank and Gaza.¹

Fatah served as Chairman Yassir Arafat’s power base within the sole Palestinian representative organization, the Palestine Liberation Organization (PLO). Founded in 1964 as a nationalist umbrella organization, the PLO was first granted *de facto* recognition by the U.S. in 1988, when Secretary of State

---

George Shultz (under President Reagan) stated on December 14 in Tunis, Tunisia, that the PLO had met certain conditions stipulated by the United States (recognition of Israel, acceptance of U.N. resolution 242 and 338 and renouncing of terrorism), and that the United States would open a dialogue. The PLO was officially granted *de jure* recognition by the United States under President Bill Clinton in 1993, following Chairman Arafat’s commitments to the aforementioned conditions in the Declaration of Principles, which outlined Israeli-PLO mutual recognition and accorded the PLO official recognition as the “sole leader of the Palestinian people” with provisional control over the newly established governing body, the Palestinian Authority (PA).

On the other hand, Hamas, a Sunni Islamist organization, was created in 1988 by the late Sheik Ahmad Yassin as an offshoot of the Muslim Brotherhood Society in Palestine and has traditionally operated outside of the PA. Hamas' charter (written in 1988 and still in effect) calls for the destruction of the State of Israel and its replacement with a Palestinian Islamic state in the area that is now Israel, the West Bank, and the Gaza Strip. A recent Congressional report has noted: “Through its militant wing, the Izz Eddine al-Qassam Brigades, Hamas has frequently claimed responsibility for attacking and killing scores of Israeli civilians and soldiers.” Hamas is currently listed as a Foreign Terrorist Organization (FTO) in United States, as well as Israel, Australia, Canada, the United Kingdom and the European Union.

In 2002, the PA announced its “100-Day Reform Plan” for institutional reform and elections in order to “rejuvenate PA leadership.” In January, 2006, democratic elections took place in the Palestinian territories and, despite U.S. objections, included Hamas participation. The elections were determined by U.N. observers to be free, fair, and competitive; the elections were further certified by the European Union Election Observation Mission, which maintained that the elections “saw impressive voter

---

2 Ibid, p. 3.
participation in an open and fairly-contested electoral process that was efficiently administered by a professional and independent Palestinian Central Elections Commission (CEC).”6 The EU Elections Observation Mission has further confirmed that election laws, adopted in June 2005 for the Presidential election within the PA, meet international standards for elections based on Article 21 of the U.N. Declaration of Human Rights and Article 25 of the International Covenant of Civil and Political Rights.7 Furthermore, the elections were held in accordance with agreements made in The Palestinian-Israeli Declaration of Principles (1993), in Article 3, paragraph 1, which states:

In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council under agreed supervision and international observation, while the Palestinian police will ensure public order.8

As a result, Hamas claimed 74 of the 132 seats in the Palestinian parliament, while Fatah attained 43. As with the PLO prior to 1988, the United States has refused to recognize or deal with Hamas as the legitimate leader of the PA. The United States has accordingly cut off international aid and diplomatic relations with the government, and closed its embassy in Washington, D.C. Former President Bush stated in regard to this policy: “Hamas has made it clear that they do not acknowledge the right of Israel to exist. And I've made it clear that so long as that's their policy, we'll have no contact with the leaders of Hamas.”9 Responses to this policy have varied, and some have claimed that U.S. actions in regards to the Hamas government are illegitimate violations of International Law, which obligates international acceptance and recognition of the peaceful transfer of powers between governments. The U.S. government, however, maintains that it is not legally compelled to recognize the Hamas regime.

Obligations of Recognition: An overview of International Law

---


Our first question – whether or not international law creates a binding obligation to recognize new governments and new states – has generated much controversy among international lawyers, writers, and jurists. According to Quincy Wright, recognition has been the “subject of state practice, decisions of national and international courts, treaties, and legal writers. It has played a great role in the League of Nations, in the inter-American system, and in the United Nations.”\(^\text{10}\) However, the issue of recognition has “neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial [because recognition] is a subject of enormous complexity, principally because it is an amalgam of political and legal elements in a degree which is unusual even for international law.”\(^\text{11}\) The following section, therefore, will seek to determine whether or not recognition of a new state or government is a political decision or legal obligation, by examining two main doctrines of recognition: declaratory and constitutive.

**Declaratory Doctrine of Recognition**

The varying U.S. practices on recognizing governments have been summarized as follows in Restatement (Third) 203, Reporters’ Note 1: “United States practice has long reflected the view that recognition of governments was not a matter of International obligation but could only be granted or withheld at will, to further national policy.”\(^\text{12}\) Under the declaratory discourse, recognition is not a requirement for the existence of statehood and government, but rather is statement of acceptance of the pre-ordained, factual existence of state or government, and an acknowledgement of willingness to enter into relations with these entities. The doctrine of declaratory recognition may be summarized as follows:

The existence of a state depends on the facts and on whether those facts meet the criteria of statehood laid down in international law [territory, people, and ability to enter into relations]. Accordingly, a state may exist without being recognized. Being recognized is merely declaratory. The primary function of recognition is to acknowledge the fact of a state’s political existence and


to declare the recognizing state’s willingness to treat the entity as an international legal person, with the rights and obligations of a state.\footnote{Ibid, p. 252}

Hans Kelsen notes that “existing states are only empowered, not obliged, to recognize” and “refusal to recognize is no violation of general international law.”\footnote{Hans Kelsen, “Pure theory of law,” Quoted in Joseph L. Kunz, “Critical Remarks on Lauterpacht’s ‘Recognition in International Law,” 44 (1950): p. 714.} Additionally, Phillip C. Jessup writes that “under positive international law states are free to accord or to withhold the recognition of new governments.”\footnote{Phillip C. Jessup, “A Modern Law of Nations,” (New York, 1948), p. 55, Quoted in Joseph L. Kunz, “Critical Remarks on Lauterpacht’s ‘Recognition in International Law,” 44 (1950): p. 714.} Statements made by U.N. representatives have further acknowledged that state practices have demonstrated distinctly political, rather than legal, motivations in their recognition policies. On March 8, 1950, the Secretary General of the U.N. sent a memo prepared by the Secretariat, to the President of the U.N. Security Council, concerning dilemmas of recognition raised by claim of the Communist government to recognize China in the U.N. The memo stated:

> It is true that some legal writers have argued forcibly that when a new government, which comes into power through revolutionary means, enjoys a reasonable prospect of permanency, the habitual obedience of the bulk of the population; other States are under legal duty to recognize it. However, while States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation.\footnote{Quincy Wright, “Editorial Comment: Some Thoughts About Recognition,” The American Journal of International Law 44 (1950): p. 548.}

If recognition may be considered and accepted as a political act, withholding recognition of Hamas by the U.S. would accordingly not signify a violation of international legal obligations, as it can be determined that the act of non-recognition does not violates rights of sovereignty or self-determination. However, a second doctrine of recognition, constitutive, does entail legal obligations which must be reconciled.

**Constitutive Doctrine of Recognition**

Past precedents have acknowledged that recognition carries legal characteristics which bestow binding obligations. For instance, as the Tinoco Arbitration demonstrates, the elimination of recognition does not
negate a state’s obligations incurred by *de facto* authorities.\textsuperscript{17} While such legal characteristics do not speak fully to obligations to initiate the process of recognition, the constitutive doctrine under international law may entail particular legal obligations to recognize due to its determination that recognition represents a necessary step in establishing a new state or government. Under the constitutive discourse, the “act of recognition by other states confers international legal personality on an entity purporting to be a new state” and furthermore, “an observer or a court need only look at acts of recognition (or lack thereof) to decide whether an entity is a state.”\textsuperscript{18} In his opinion on the recognition of governments, Chief Justice Taft reflects on the constitutive model in *Tinoco*:

\ldots it is argued that many leading powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly, recognition by other powers is an important evidential factor in establishing proof of the existence of a government in the society of nations...The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such.\textsuperscript{19}

Based on these definitions, the constitutive model can be construed as imparting legal obligations on nations to recognize emerging governments or states, for recognition “involves the assumption of a right to pass critically upon the legal capacity of foreign regimes.”\textsuperscript{20} Thus “legal” recognition involves “the establishment of the fact of statehood (or government) without which it would not exist in an international sense,” as opposed to “political” recognition which entails the “expression of a willingness to enter into political relations with the thus recognized state or government,” acts which are considered by writers such as Kelsen to be purely optional.\textsuperscript{21} Therefore, a refusal to confer international legal personality through recognition may comprise a violation of the rights to sovereignty and self-determination. As acknowledged, recognition as a public act of state may be optional and free of legal duty. However, Brownlie has written that “if an entity bears the marks of statehood, other states put themselves at risk

\textsuperscript{19} Quincy Wright, “Editorial Comment: Some Thoughts About Recognition,” p. 551.
legally if they ignore the basic obligation of state relations (such as use of force).”

Thus, there is a “legal duty to recognize for certain purposes.” Several items must be examined to determine whether the state or government can be said to otherwise exist.

**Violations of National Sovereignty - Status as “State”**

If the constitutive doctrine is upheld, U.S. withholding of recognition may constitute a violation of national rights of national sovereignty. According to Institut De Droit International, “…the independence and juridical equality of States demands respect for the right of nations to organize freely or to change their institutions.” Thus, the non-recognition of Hamas may violate sovereignty rights by refusing to acknowledge a freely-chosen change in government. However, Hamas is the government of a territory which may or may not exist as a recognized State, and therefore, the recognition of governments must be further differentiated from the recognition of states in order to determine the full extent of sovereignty rights. According to Kelsen, the first ascertainment of obligations to recognize is “the fact that an individual or a body of individuals is actually the government of a state.” In other words, the recognition of a government has always taken place within the context of a recognized, defined state. In addition, the Estrada Doctrine, which mandates unconditional and absolute recognition of new governments, does so under the assumption that the “State” has been previously afforded recognition. On the other hand, with the exception of the PLO, which shall be further examined, precedents demonstrating the obligatory nature to recognize a government within a non-state do not exist. Thus, if national sovereignty confers legal duties to recognize a government only within the context of a nation-state, the first question to examine is whether “Palestine” exists as a de facto (concerning fact) or de jure (concerning law) State. Under international law, the distinction between de facto and de jure recognition

---

23 Ibid, p. 263.
carries significant political and legal consequences, but both may entail a legal obligation to recognize. In 1988, a “State of Palestine” was unilaterally declared by Chairman Arafat and recognized by a series of Arab and Muslim countries. However, under the Constitutive approach, the act of recognition by existing states acknowledges that a new state has satisfied the criteria for statehood and confers upon it the legal status as a state. Due to the international community’s lack of recognition, therefore, the Palestinian territories lack de jure statehood. In order to determine whether the Palestinian Authority presides over a de facto state, the four criteria of statehood must be taken into consideration: permanent population, defined territory, effective government, and capacity to enter into relations with other states and conduct foreign affairs. Furthermore, we must answer whether de facto recognition of Palestinian statehood has been afforded, including by the most important nation in this particular case, the United States.

**Permanent Population**

The Palestinian territories indeed have established a permanent population within the Gaza Strip and West Bank, and a recognized international identity constituting a “Palestinian people” with the right to self-determination. The Palestinian National Covenant, revised by the PLO in 1968, states in Article 4: “The Palestinian identity is a genuine, essential, and inherent characteristic; it is transmitted from parents to children.” The Covenant further defines “Palestinians” as “those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father - whether inside Palestine or outside it - is also a Palestinian (Article 5).” Furthermore, Article 6 allows that “the Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians.” The U.N. and

---

29 Ibid.
30 Ibid.
other International Organizations, such as the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), have similarly acknowledged the existence of a Palestinian people. Finally, a majority of nation-states have recognized the existence of a Palestinian people, including the United States, and have entered into agreements with governing bodies on their behalf. Thus, the existence of a permanent population constituting a “Palestinian people” is indisputable.

**Defined Territory**

Second, it is necessary to determine whether a defined territory is present. It is essential to first provide a brief historical overview of land claims in order to distinguish political claims from legal realities. The name “Palestine” was revived after the fall of the Ottoman Empire in World War I, and applied to the territory within the Middle East region that was placed under the “British Mandate for Palestine” between the end of World War I and 1948. The Mandate was an international recognition of the League of Nations’s stated purpose of "establishing in Palestine a national home for the Jewish people." 31 After an intense debate, the United Nations General Assembly, on November 29, 1947, adopted resolution 181 (II) approving, with minor changes, the “Plan of Partition with Economic Union as proposed by the majority in the Special Committee on Palestine.” This “Partition Plan” served as a detailed four-part document attached to the resolution, which provided for “the termination of the Mandate, the progressive withdrawal of British Armed forces and the delineation of boundaries between the two States and Jerusalem. While this plan was accepted by the Jewish Agency, the plan was “not accepted by the Palestinian Arabs and Arab States on the ground that it violated the provisions of the United Nations Charter, which granted people the right to decide their own destiny.” 32 On May 14, 1948, the United Kingdom relinquished its Mandate over Palestine and disengaged its forces, while the Jewish Agency proclaimed the establishment of a State of Israel on its allotted territory, followed by *de facto* and later *de

---

jure recognition by the majority of U.N. members, including the United States under President Harry Truman. The State of Israel was officially recognized and admitted into the U.N. on May 11, 1949.\textsuperscript{33} Israel later acquired Gaza and the West bank from Egypt and Jordan as a result of the Six Days War in 1967. Thus, while Arab nations and Palestinian officials claim that a “State of Palestine” continues to exist due to illegalities surrounding the establishment of Israel, these arguments are not legally affirmed claims, but rather may be interpreted as political statements.

The “Israel-PLO Declaration of Principles on Interim Self-Government Arrangements” (the DOP), signed in Washington on September 13, 1993, provided for a transitional period not exceeding five years of Palestinian interim self-government in the Gaza Strip and the West Bank. Direct negotiations to determine the permanent status of Gaza and West Bank began in September, 1999, after a three-year hiatus, but were derailed by a second Palestinian \textit{intifada} that broke out in September 2000. In April 2003, the Quartet (U.S., E.U., U.N., and Russia) presented a “roadmap” to a final settlement of the conflict by 2005 based on reciprocal steps by the two parties leading to two states, Israel and a democratic Palestine. As negotiations for permanent status territories have yet to be finalized, the status of the Palestinian territory remains an “occupied territory” with final borders yet to be determined. Furthermore, in 2002, U.S. President George Bush “declared support for a democratic Palestinian state existing alongside a secure Israel to result from the Road Map, the only internationally accepted political framework for achieving a peaceful solution to the Israeli-Palestinian conflict.”\textsuperscript{34}

However, despite an unresolved agreement over final borders, the Palestinian Authority maintains specified semi-sovereign authority over the West Bank and Gaza, which have been defined since 1949 by an Armistice Line (“Green Line”). Furthermore, these areas are widely anticipated to encompass a future Palestinian State once peaceful negotiations occur, and at that time, a defined territory can be determined to exist. Nonetheless, the lack of \textit{de jure} recognition of statehood effectively prevents the existence of a “state” and nationality. The existence of a \textit{de facto} Palestinian state cannot yet be discerned. In order to

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{33} Ibid.
  \item \textsuperscript{34} Aaron D. Pina,“Palestinian Elections,” p. 1.
\end{itemize}
\end{footnotesize}
determine *de facto* existence, the next section will examine the standards of effective government and capacity to enter into relations with other states.

**Effective Government and Capacity to enter into Relations**

In order to define the existence of a *de facto* Palestinian state, the effective capacity of the PLO must be analyzed. In the “Resolutions Concerning the Recognition of New States and New Governments” adopted at Brussels in 1936, Institut De Droit International stated in Article 9: “Recognition *de facto* results either from express declaration or from an act implying this intention, such as an agreement or *modus vivendi* having a limited purpose or a provisional character.”

The *de facto* recognition of a Palestinian state must thereby take into account expressed declarations or implications through state actions.

The PLO was first granted U.N. Observer Status in 1974 under General Assembly resolution 3237 (XXIX). The resolution, *inter alia*, states that the U.N. General Assembly, “Invites the Palestine Liberation Organization to participate in the sessions and the work of the General Assembly in the capacity of observer” (Article 1); “Invites the Palestine Liberation Organization to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the capacity of observer” (Article 2); “Considers that the Palestine Liberation Organization is entitled to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations” (Article 3). Admission into the U.N. may act as a collective recognition of statehood according to Quincy Wright, who states:

> membership of a State in the United Nations and representation of a State in the organs is clearly determined by a collective act of the appropriate organ; in the case of membership, by vote of the General Assembly on recommendation of the Security Council, in the case of representation, by vote of each competent organ on the credentials of the purported representatives. Since, therefore, recognition of either State or government is an individual act, and either admission to membership or acceptance of representation in the Organization are collective acts, it would appear to be...

---

35 Institut De Droit International: Resolutions Concerning the Recognition of New States and New Governments,” p. 185.

legally inadmissible to condition later acts by a requirement that they be preceded by individual recognition.\textsuperscript{37}

However, the resolution on U.N. participation clearly articulates admittance of the \textit{PLO}, not the “State of Palestine.” Furthermore, PLO admission with “Observer Status,” rather than as a “non-member state,” indicates a recognition that the territories continue to exist as entities whose statehood is not, or has not yet been, defined. Thus, the admittance of the PLO into the U.N. does not indicate the existence of a Palestinian State.

The PLO was granted further ability to effectively govern and enter into relations with foreign states within the framework of the “Declaration of Principles of Interim Self-Government Arrangements,” which opened the way for limited Palestinian self-government in the Gaza Strip and the West Bank under the administration of an interim Palestinian National Authority (PA) headed by Arafat and staffed with PLO members. Under the DOP, Israel agreed to

\begin{quote}
transfer certain powers and responsibilities to the Palestinian Authority (PA) as part of the interim self-governing arrangements in the West Bank and Gaza Strip... The DOP provides that Israel will retain responsibility during the transitional period for external and internal security and for public order of settlements and Israeli citizens.\textsuperscript{38}
\end{quote}


\begin{quote}
The Government of the State of Israel and the Palestinian team representing the Palestinian people agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and
\end{quote}

\textsuperscript{37} Quincy Wright, “Editorial Comment: Some Thoughts About Recognition,” p. 549.
security to achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.  

Furthermore, the “Israel-Palestine Liberation Organization letters of recognition” (which serve as the Preamble to the Oslo Accords) include a letter from Chairman Arafat making explicit commitments that the “PLO recognizes the right of the State of Israel to exist in peace and security.” In turn, then-Israeli Prime Minister Yitzhak Rabin’s letter to Chairman Arafat responds: “I wish to confirm to you that, in light of the PLO commitments included in your letter, the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process.” The U.S. also conferred recognition upon the PLO in exchange for the organization’s renunciation of terror and recognition of Israel.

However, the Palestinian Authority does not have full effective control over its territory nor a full capacity to enter into foreign relations with other states. The Reut Institute notes that “The Interim Agreement and the Palestinian Constitutional Structure establish substantial restrictions on the PA’s effective control (such as control over the external border) and its capacity to conduct foreign relations.”

While the Palestinian Constitutional Structures establishes a judicial, executive, and legislative authority, the Interim Agreement restricts many of the Palestinian Authority’s civil powers. For instance, according to the Reut Institute:

governs only 17% of the West Bank and does not have control over the borders, airspace, water, and external security. Area A, in which both civil and security authority was transferred to the Palestinians, is almost completely under the PA's control; In Area B civil authority was transferred to the PA, but Israel maintains military control; Area C is under Israeli control.

Thus, due to these restrictions on effective control of its territory, the PA could not be in control of a de facto state. However, according to the criteria of defined territory, population, and significant elements of control, and an elected leadership, it appears that the Palestinian territories could indeed merit criteria in order to exist as a de facto state. In the Association of the Elon Moreh College v. State of Israel

---

proceedings in April 2006, a Jerusalem District Court ruled that “the PA meets the main requirements that constitute a ‘state’ and is ‘semi-sovereign’ in the territory it controls.”42 However, two things can be ascertained from this analysis of a de facto Palestinian state. First, it is affirmed that while a territory may attain the criteria for statehood, this does not imply that a state has been afforded de facto recognition by the majority of the international community, which negates its existence as a de facto state. In the case of Rhodesia, the U.N. Security Council adopted “Resolution Concerning Southern Rhodesia” which proclaimed the declared independence of Southern Rhodesia “illegal” despite the fact that “at the time…Rhodesia would have met the traditional criteria of statehood (because) its government was clearly the effective authority and had capacity to enter into foreign relations.”43 Nonetheless, the Security Council “resolution and previous General Assembly resolutions were accepted as definitive: Rhodesia was not recognized as a state by any government or treated as a state by any international organization.”44 The specificity of the language used in the resolutions and treaties noted above indicates not only a lack of de jure recognition, but also that the international legal status granted to the PLO cannot be extended to denote a de facto recognition of a Palestinian state. Therefore, the Palestinian territories, without de jure or de facto recognition, cannot be interpreted as a legally-existing, recognized state.

**Conclusion:** Based on the determination that the Palestinian territories have not attained “statehood” or “nationality,” it is reaffirmed that national sovereignty rights do not exist which would place legal obligations upon the U.S. to recognize the Hamas government under the constitutive doctrine.

**Government recognition and the Status of Hamas**

Although legal obligations to recognize Hamas are rejected due to lack of sufficient evidence demonstrating the existence of a de jure or de facto state, the PLO has been granted recognition after

---


44 Ibid.
fulfilling specified obligations. The following section will thereby answer whether or not there is a legal obligation on the part of the U.S. to transfer its recognition of the PLO to Hamas and furthermore, whether the U.S. has already conveyed a \textit{de facto} recognition of Hamas. Due to previous rulings that “the legal consequences of \textit{de facto} and \textit{de jure} recognition are essentially the same,” a finding of \textit{de facto} recognition may legally bind the U.S.\textsuperscript{45}

\textit{Extension of recognition to Hamas}

As previously determined, the PLO has been afforded \textit{de jure} recognition as the legitimate leader of the Palestinian people and PA. Hamas, as a non-member of the PLO, is thereby not extended \textit{de jure} recognition by virtue of PLO recognition. It remains to be determined whether or not the U.S. has afforded \textit{de facto} recognition to Hamas. This must be based on whether there is an acceptance of Hamas’ permanence and effective control. For instance, the Spanish Civil War of 1936-1939 gave similar occasion for a series of important decisions of the English Courts on the issue of \textit{de facto} recognition of insurgent groups. The rebellion or “insurgent” forces during the civil war, despite exercising effective authority over the majority of Spanish territory, were not recognized as a government until February, 1939, due to the potential for a breach of international law through “premature recognition” of a new government. However, H. Lauterpacht writes that “the actual exercise of power could not be properly ignored. The result was a measure of \textit{de facto} recognition of substantial scope.”\textsuperscript{46} Thus, an acknowledgement of effective control, power, and permanence may signal \textit{de facto} recognition.

The Institut De Droit International defines \textit{de facto} recognition in Article 14 of its “Resolutions Concerning the Recognition of New States and New Governments”:

\begin{quote}
Recognition ‘\textit{de facto}’ of a new government is manifested: (1) either by an express declaration, (2) by the signing of agreements having a limited purpose or a provisional character (3) or by the maintenance of relations with the new government for the express purposes of current affairs.\textsuperscript{47}
\end{quote}

\textsuperscript{47} Institut De Droit International: Resolutions Concerning the Recognition of New States and New Governments,” p. 187.
Lauterpacht writes: “On questions of recognition courts must, in the first instance, interpret…statement(s) …in order to determine what degree of recognition has been granted.”48  Furthermore, de facto recognition may have been established directly, through declarations, agreements, or maintenance of relations, or indirectly, whereby the effective authority and permanence of the new government remains undisputed. This indirect form of recognition has been presented in the Tinoco Arbitration, in which Justice Taft upheld that Great Britain was legally bound by its recognition of the Tinoco regime because it “did not dispute its de facto existence.”49

The following section will analyze various declarations, relations, or agreements made by the U.S. vis-à-vis the Hamas government, and shall seek to determine whether the Hamas government’s permanence and effective control of government have been accepted and undisputed. If de facto recognition legally exists, its binding consequences must be taken into account.

**Agreements or maintenance of relations**

This section will examine the U.S. relationship with Hamas to determine whether a state of permanence has been implied or declared through the entering of agreements or maintenance of relations with the new government.

Differences in policy within the post-elections PA have, to date, prevented the formation of a unity government, particularly on the issue of the recognition of Israel. Hamas political adviser, Ahmed Youssef, has made several declarations stating: “There will not be a national unity government if Hamas needs to recognize Israel.”50  This policy is clearly in sharp contrast to that of President Mahmoud Abbas of Fatah, who stated before the U.N. General Assembly: “I would like to reaffirm that any future Palestinian government will commit and abide with all agreements that the Palestinian Liberation Organization, the PLO and the Palestinian National Authority have committed to in the past, particularly

---

the letters of mutual recognition."\(^5^1\). The inability to form a unity government points to the precarious quality of Hamas’ position within the PLC, in light of its internal struggles for control with Fatah. The international community’s somewhat ambiguous relationship with Hamas has certainly contributed to the current instability of the PLC.

Moreover, the United States’ clear unwillingness to deal with Hamas officials through either diplomatic contact, entering into agreements, or lending financial assistance proves a particular unwillingness to recognize the permanence of a Hamas government, if not a direct contribution to its instability. First, the U.S. has demonstrated intent to circumvent any communication with Hamas, by appealing only to PA and Fatah-party President Mahmoud Abbas, thereby placing the capacity to enter into of foreign relations clearly in Fatah’s command. Second, although economic stagnation was a pressing concern prior to the PLC elections, the consensus was that openly contested, free elections, and ongoing reforms would have increased the likelihood of international aid to the Palestinians, particularly from the United States. Instead, the U.S. has cut its annual financial aid package. In 2004, the U.S. State Department estimated that the cumulative international aid package of $2 billion to the West Bank and Gaza Strip prevented the complete collapse of the economy and allowed some reforms in the government’s financial operations.\(^5^2\) Hamas’ victory in the PLC election has thus placed all international assistance in jeopardy, as most donors have refused to lend financial assistance to a terrorist group. Furthermore, efforts by international organizations like the World Bank to improve the Palestinian economy may also be hampered by the Hamas victory.\(^5^3\) Thus, the cut-off of foreign aid suffered as a result of the Hamas-led PLC has generated a cash crisis, with the PA “largely unable to pay the salaries of some 165,000 employees and causing widespread hardship in Gaza and the West Bank.”\(^5^4\)

\(^{51}\) Ibid.  
\(^{53}\) Aaron D. Pina, “Palestinian Elections,” p. 3.  
of financial aid to Hamas clearly indicates an unwillingness to engage in any type of relationship with Hamas, and moreover has detracted from the sustainability of the new government.

Thirdly, the U.S. Congressional establishment of domestic legislation, the Palestinian Anti-terrorism Act of 2006 (PATA) has codified U.S. opposition to Hamas’ permanence and effective control by instituting measures which effectively prevent the maintenance of diplomatic relations or financial support to Hamas as a current FTO-designated organization. PATA states in Section 2, Paragraph 4: “It shall be the policy of the United States to urge members of the international community to avoid contact with and refrain from supporting the terrorist organization Hamas until it agrees to recognize Israel, renounce violence, disarm, and accept prior agreements, including the Roadmap.” The bill further stipulates in Section 620K(b)(1):

A certification described in this subsection is a certification transmitted by the President to Congress that contains a determination of the President that no ministry, agency, or instrumentality of the Palestinian Authority is controlled by a foreign terrorist organization and no member of a foreign terrorist organization serves in a ministry, agency, or instrumentality of the Palestinian Authority.”

PATA sets prohibitions on U.S. contact with the Hamas-controlled PA, in the following sections: Section 620K, 3, 620L (Limited assistance to the PA); Section 6 (Denial of Visas for Officials of the PA); Section 7 (Travel Restrictions on officials and reps of the PA and PLO stationed in New York); and Section 10 (Diplomatic contacts with Palestinian terror organization). In sum, the U.S. has restrained from entering into agreements or initiating any form of relations with the new Hamas government, and has further codified its lack of engagement through domestic legislation. This confirms that a direct form of de facto recognition has not occurred.

Statements

Statements made by the U.S. government and international community must be examined in order to discern opposition or disputation to the de facto existence of the Hamas regime, hence negating any possibility of de facto recognition. While governments in Jordan and Pakistan have issued statements that

---

56 Ibid.
the “international community should accept the reality and verdict in the Palestinian elections,” general international reactions have not been in accord. The U.N. Security Council has stated that “any future Palestinian government must recognize Israel and commit itself to a negotiated settlement of the Mideast conflict. Furthermore, the “Quartet” has clearly articulated its rejection of de facto recognition of the new government by declaring that certain conditions must be met before aid and diplomatic contact can continue – specifically, renounce the use of terrorism, recognize Israel’s right to exist, and accept the validity of past Israeli-Palestinian agreements. Furthermore, former U.N. Secretary General Kofi Annan said of Hamas obligations: “I hope that, in the end, they will heed the Quartet statement urging them to honour all the obligations entered into by the Palestinian Authority, transform themselves into a political party, and accept the two-state solution.” United States officials have clearly articulated U.S. policies of not maintaining its relationship with the new Palestinian government. While the U.S. Bush Administration accepted the outcome of the Palestinian elections and praised their free, fair, and democratic proceedings, former President Bush repeatedly made clear the Administration’s stance towards Hamas, saying “a party that that articulates the destruction of Israel is a party which we will not deal.” Additionally, despite a clear victory in the Palestinian parliamentary election, it has been noted within U.S. Congressional case reports that “Hamas offered scant details on its intended political program beyond anti-corruption measures.” Furthermore, the CRS report noted that while Hamas “clearly profited from the untainted image enjoyed by all oppositional parties, it may not possess the technocratic, political, bureaucratic savvy to administer Palestinian affairs.” Scott McClellan, former White House press secretary under the Bush Administration has stated: “[W]e do not and we will not fund a terrorist organization. We will not fund an organization that advocates the destruction of Israel. We will not fund

60 Ibid., p. 11.
an organization that engages in terror. Hamas has choices to make. They need to renounce their platform calling for the destruction of Israel. They need to reject terror.”62 Chief national security spokeswoman for the new Obama administration, Brooke Anderson, has stated: “President-elect Barack Obama ”has repeatedly stated that he believes that Hamas is a terrorist organization dedicated to Israel’s destruction, and that we should not deal with them until they recognize Israel, renounce violence, and abide by past agreements.”63 Furthermore, Secretary of State Hillary Clinton recently told PLC Prime Minister Mahmoud Abbas that Congress will not approve funding of a Palestinian government that does not recognize Israel’s right to exist and renounce violence.64

Conclusion: This clear disengagement of diplomatic and financial relations on the part of both the Obama and former Bush administrations amounts to an effective denial of the Hamas government’s permanence and effective control. Therefore, the U.S. may claim it has not afforded de facto recognition to the Hamas government and has countered Hamas existence as a de facto government via statements, disengagement of financial and diplomatic contact, and legislation which legally prohibits such contact. Thus, the U.S. and bodies of the main organ representing the international community, the U.N., have indicated that Hamas cannot lay claims to de jure or de facto recognition, due to the lack of expressed declarations, signing of agreements, and engagement in relations with the new government. Furthermore, the Quartet, Security Council, U.N., and U.S. statements have clearly disputed de facto recognition of Hamas as a legitimate government within the PLC. Finally, because a State of Palestine is not recognized, and because Hamas has not inherited the PLO’s recognized status, the U.S. is under no legal obligation to recognize the Hamas government or a unity government which includes Hamas.

Popular Sovereignty and Self-Determination of Peoples

---

The last argument which may denote legal requirements on the part of the U.S. to recognize Hamas is the Right to Self-Determination of all peoples. In 2006, approximately 77% of registered voters in the West Bank and Gaza cast their ballots in the Palestinian legislative elections, resulting in a victory for Hamas with 44% of the popular vote and 54% of the seats in the Palestinian legislative elections.\(^{65}\) Furthermore, Hamas has been determined to have “risen to prominence in part due to a well-organized social service network that provided services and charitable programs to the Palestinians.”\(^{66}\) Because Hamas was democratically elected in competitive elections, and the Palestinian people, as a constitutive people, are endowed with the right to their government of choice, it is argued that there exists a legal duty to recognize Hamas as the legitimate leader of the Palestinian Authority under *jus cogens*, and furthermore, that withholding recognition may be deemed unlawful intervention in popular sovereignty.

Indeed, two essential legal aspects pertaining to obligations of state and government recognition are the rights to popular sovereignty and self-determination, as embodied in the U.N. Charter, U.N. General Assembly Resolution 2625 (XXV) on Principles of International Law Concerning Friendly Relations and Cooperation Among States (October 24, 1970), and subsequent GA Resolutions. Article 1(2) of the U.N. Charter provides that one of the purposes of the U.N. is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”\(^{67}\) Article 55 provides that the U.N. shall promote a number of goals with a view “to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”\(^{68}\)

Furthermore, the U.N. Declaration of Principles of International Law Concerning Friendly Relations Among States asserts:

---


\(^{68}\) Ibid.
By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.  

The Self-Determination principle continues:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination of people [emphasis added].

Based upon this definition of self-determination, we must first find that Self-Determination applies to the Palestinian people. The application of the self-determination principle depends on various interpretations of “peoples.” The principle may thus be applied to “the population of a State, the population of a colony and to groups of individuals linked by a common language, ethnicity or race whether or not they comprise the entire population of a State or colony.” The term “peoples” has three general interpretations. The first, most widely accepted interpretation is that self-determination refers to states, in which case “the principle of self-determination means sovereign equality” due to the critical requirement in the international community for friendly relations between nations. Because “the overriding principle governing inter-State relations is the principle of sovereign equality, the reference to equal rights and self-determination may be a reformulation of the principle of sovereign equality of States.” In the case of such an interpretation, the principle of self-determination would not apply to the Palestinian territories under its current status as a non-State.

The second interpretation is that the principle of self-determination “refers to the inhabitants of NSGTs (Non-Self-Governing Territories),” or “territories whose peoples have not yet attained a full measure of self-government” as referred to in Chapter XI, Article 73 of the U.N. Charter. Self-determination in this context means the “right to self-government.” Finally, the third interpretation

---

70 Ibid.
72 Ibid, p.541.
73 Ibid.
74 Ibid, p. 540.
75 Ibid, p. 541.
outlined in Chapter XII interprets “peoples” as those inhabitants of “Trust Territories,” which entails the right to “self-government or independence.” Furthermore, although self-determination was originally designed both to promote friendly relations and cooperation and to “bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned,” the term has also generally been extended to “all peoples” whether within a “colony,” a “non-self-governing territory,” or a territory under military occupation with the exercise of varying degrees of sovereignty. Therefore, principles of self-determination are not limited to states, or peoples within states, and therefore may apply to currently occupied territories. Moreover, there has been widespread acceptance the Palestinian people, as those with a distinct language, culture, religion, and history, are possessed of a right to self-determination provided under international law in determining their own political status free of domination or interference. The ICJ, in its Advisory Opinion on the legal consequences arising from Israel's construction of a barrier between the West Bank and Israel, “affirmed the right of peoples in non-self-governing territories to self-determination” in particular reference to the Palestinian people. It may be concluded, therefore, that the right of self-determination legally applies to the Palestinian people.

Secondly, in order to determine whether principles of “Self Determination” exist, we must decipher two additional factors: does Hamas truly uphold the will of the Palestinian people, and, central to this argument, do principles of self-determination maintain that states must recognize new governments within non-states?

**Does Hamas represent the will of the Palestinian People?**

In order to determine whether Hamas represents the will of the Palestinian people, this section will examine the election results as well as current polls on Hamas policies.

76 Ibid.
While Hamas won 54% of the seats in the Legislative Council, the actual percentage of the popular vote was only 44%. However, although Hamas did not technically win a majority of the popular vote, Parliamentary elections rarely result in a popular majority for one party. In Great Britain, for instance, the Labour party, which holds a majority in the House of Commons, won only 35.2% of the popular vote\(^80\) and yet it is not argued that the Labour party does not represent the will of the people within Great Britain, or that it violates rights to self-determination. Indeed, based on the existence of Hamas’ internationally-recognized democratic election to the PLC, one can conclude that a Hamas-majority within the PLC does in fact represent the will and right to self-determination of the Palestinian people.

In regards to Hamas’ current charter, which demands a non-recognition of Israel and a stated goal of creating an Islamic state covering all of the West Bank, Gaza, and the current state of Israel, new polls have indicated that “two-thirds of Palestinians believe Hamas should change its policy of rejecting Israel’s right to exist” while “most also support a two-state solution to the Israeli-Palestinian conflict.”\(^81\) Post-election polls further indicate that “Hamas’ victory is due largely to Palestinians’ desire to end corruption in government rather than support for the organization’s political platform.”\(^82\) However, it cannot be conclusively determined whether or not Hamas represents the “will of the people” simply because certain policies are not clearly endorsed by the majority of the Palestinian people. As in any parliamentary system, the formation of a unity government will entail compromises in policy that may further characterize the collective will of the Palestinian people. Thus, the Palestinian people can be determined to have self-determination, embodied by the new Hamas-led PLC.

Based on the determination that the Palestinian peoples have the right to self-determination, and taking into consideration the free, fair and competitive nature of the elections, it must be concluded that


\(^{82}\) Ibid.
the new Hamas government serves as an embodiment of principles of self-determination. The final question to be answered is whether U.S. non-recognition of this government constitutes a violation of *jus cogens*.

**Violation of Self-Determination**

When a new government emerges within an existing state, and promises continuity, there exists a legal right to recognition, and any failure to recognize constitutes a legal breach of sovereignty and self-determination, as well as a politically hostile act. It can be argued that the U.S. has violated *jus cogens*, therefore, both in its refusal to recognize Hamas and in its initial protestation of Hamas participation. The Self-Determination principle (GA Resolution 2625) declares:

> Every State has the duty to refrain from any *forcible action* [emphasis added] which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

The interpretation of “forcible action” must be evaluated in order to determine if U.S. actions have constituted such infringements upon this principle of customary law. On November 18, 2005, the U.S. Congress passed H.Res. 575, which provides that: “Hamas and other terrorist organizations should not participate in elections held by the Palestinian Authority.” The bill further warns that the inclusion of Hamas or other terrorist groups in the Palestinian government could “undermine the ability of the United States to have a constructive relationship with, or provide further assistance to, the Palestinian Authority.” While this resolution can be said to constitute a “forcible action” in democratic elections, a clear interference in self-determination principles, the resolution does not effectively speak to the issue of recognition once Hamas attained power despite U.S. objections, and thus is not an applicable argument in

---

86 Ibid.
this particular case. Rather, we must discover whether self-determination may be interpreted to mandate recognition.

Does the right to self-determination mandate an obligation to recognize?

We must seek to answer whether the right of self-determination mandates that states must recognize the governments of non-states. To reiterate, the Principle of Self-Determination states: “Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence.” While the lack of recognition may, in certain cases, amount to “forcible action” under the constitutive discourse, it also has been previously determined that the U.S. remains under no legal obligation to recognize the new government, because said government serves as the leadership of a non-state. In other words, while self-determination does apply to peoples of non-states, nation-states continue to remain under no obligation to recognize if the government in question is not part of a pre-existing, recognized state, and therefore it cannot be considered a “forcible action” if recognition is withheld. If a Palestinian state were to gain either de jure or de facto recognition, perhaps valid legal obligations would exist. However, so long as the State has not been afforded recognition, the government need not be afforded recognition in turn. Therefore, non-recognition cannot be construed as a “forcible action” taken against the Hamas government.

Conclusion: Although the Palestinian people are determined to possess rights to self-determination, we must reject the possibility that U.S. withholding of recognition violates jus cogens, as the application of recognition of government as an expression of State obligations to uphold this principle does not, as noted above, apply in the case of non-States.

Final Conclusion and Extent of Recognition

In conclusion, there appears to be no international legal obligation on part of United States to recognize Hamas as a legitimate government, as the recognition of the PLO does not transfer to Hamas automatically, and there is no obligation to recognize the government of a non-State entity. However, if
Hamas were to accept their international obligations, and were to gain the same *de jure* recognition as the PLO, or if the State of Palestine were to be accorded recognition, the U.S. may be under international duress to recognize a Hamas-led government, although the question of diplomatic contacts would remain a political, rather than a legal, issue. An important distinction in the Constitutive model is that the legal duty to recognize is distinctly separate from the political establishment of diplomatic relations.

According to Philip Jessup, when a change of government occurs within an existing state, it is considered a “wise policy for states under the traditional system of unilateral recognition…to recognize that a regime in *de facto* control of a state is the government of that state, and at the same time to assert that, because of some disagreement with the government, diplomatic relations will not be established until there has been satisfactory adjustment of outstanding differences.”

Thus, states may be obligated legally to recognize, but remain politically free to enter into diplomatic relations with a government.

**References**


---


http://www.eueomwbg.org/default.asp?id=1&show=35&m=0.


