



JERUSALEM
INSTITUTE OF JUSTICE
CORPORATION FOR THE BENEFIT OF THE PUBLIC

Hamas and the International Human Rights Law

What are the legal consequences of a designated terrorist organization becoming the governing entity of a recognized state?

April, 2015



Report presented by:

Jerusalem Institute of Justice
&
Regent Law Center for Global Justice, Human Rights
and the Rule of Law

P.O. Box 2708
Jerusalem, Israel 9102602

Phone: +972 (0)2 5375545

Fax: +972 (0)2 5370777

Email: contactus@jjj.org

Web: www.jjj.org

Acknowledgments

The Jerusalem Institute of Justice would like to thank S. Ernie Walton, Esq. Administrative Director and the students of Regent Law Center for Global Justice, Human Rights, and the Rule of Law, Regent University for contributing this research paper to our advocacy efforts.



TABLE OF CONTENTS

<i>Introduction</i>	4
<i>Is the International Human Rights Law Biding on Non-state Actors?</i>	5
<i>International human rights laws should apply to non-state actors</i>	5
<i>IHRL should apply to non-state actors such as Hamas</i>	6
<i>The Rights and Duties of States Whose Governing Authority Is a Designated Terrorist Organization</i>	13
<i>Establishing Statehood under International Law</i>	13
<i>The Rights and Duties of Recognized States</i>	14
<i>Potential Consequences of a Terrorist Organization as the Governing Authority in a Recognized State</i>	16
<i>Conclusion</i>	22

INTRODUCTION

This memorandum answers two legal questions:

(1) Whether the Islamic Resistance Movement (Hamas) is subject to international human rights law; and (2) what are the legal consequences if a designated terrorist organization becomes the governing entity of a recognized state?

IS INTERNATIONAL HUMAN RIGHTS LAW BINDING ON NON-STATE ACTORS?

Ideally, each state would address and resolve all human rights issues and violations within its own borders. Reality, however, is less than ideal. The international human rights system emerged to ensure the protection of the rights of all through the universal codification of human rights standards. Originally, states did not accept international regulation of private entities within their borders¹. States themselves were responsible for addressing human rights violations of non-state actors within their borders and subject to their control². But, as non-state and quasi-state actors³ increasingly extend their influence across state borders, and as domestic governments frequently lack the resources and capacity to hold non-state actors accountable for human rights violations, the international community increasingly views non-state actors as bound by international human rights norms in order to guarantee the protection of the inherent rights of all⁴.

Hamas is one such quasi-state actor that is accountable to and bound by international human rights law (IHRL). Quasi-state actors like Hamas are bound by IHRL for at least two reasons. First, IHRL protecting fundamental rights are expressly designed for the purpose of universal application and recognition. Second, the international community recognizes that IHRL applies to non-state actors.

I. International human rights law applies to non-state actors (such as Hamas) because non-delegable international human rights protections are, by definition, universally applicable safeguards of fundamental and inalienable rights.

The purpose of IHRL is to recognize that some rights are inherent or, as the Universal Declaration of Human Rights (UDHR) says, that “[a]ll human beings are born free and equal in dignity and rights”⁵. Though

¹ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 466, 469 (2001); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984) (per curiam) (holding that international law does not apply to non-state actors).

² See, e.g., *Ilascu and Others v. Moldova and Russia*, Application no. 48787/99 § 291–96 (judgement of 8 July 2004).

³ For purposes of this memorandum, “non-state actor” and “quasi-state actor” are used interchangeably. The difference between the two deals with the level of organization, structure, and territorial control possessed by the actor. A more organized, sophisticated, and politically-oriented actor would be considered a quasi-state actor, while a less organized, unsophisticated actor would be considered a non-state actor. Hamas possesses significant political influence in the Palestinian Authority, particularly concerning the governance of Gaza, and was voted into office by Palestinian citizens in 2006. See, e.g., Jerrold L. Sobel, *Israeli-‘Palestinian’ Insanity Must Stop*, AM. THINKER (9 June 2013), http://www.americanthinker.com/articles/2013/06/israel-palestine_insanity_must_stop.html. Hamas previously has unified with the Palestinian Authority under the Fatah-Hamas Gaza Agreement and became an official part of Palestinian government. Accordingly, Hamas is a sophisticated organization because of its infrastructure, funding, and political power within Palestine. See Jason B. Conn, *When Democracy Gives the Purple Finger: An Examination of the Proper International Legal Response When a Citizenry Elects a Terrorist Organization to Lead it Government and Seeks International Aid*, 23 J.L. & POL. 89, 108 (2007). Therefore, Hamas is a quasi-state actor. Because of their organization, power, and political status, quasi-state actors are more readily viewed as bound by IHRL. However, this analysis argues that even if Hamas were considered a non-state actor and not a quasi-state actor, it would nonetheless be bound by customary IHRL.

⁴ See Yael Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT’L L.J. 21, 23 (2013).

⁵ See Universal Declaration of Human Rights art. 1, G.A. Res. 217 (III), U.N. Doc. A/801 (10 Dec. 1948)

the UDHR is in theory only aspirational⁶, it recognizes that, globally, there are fundamental rights inherent in mankind, and that “everyone” is entitled to human dignity and rights⁷. Enshrining these basic principles, international charters and covenants provide broad protection to everyone within a respective region for both derogable and non-derogable rights⁸. Likewise, the ICCPR and ICESCR bind signatory countries to protect certain enumerated human rights, but also recognize that some rights are so fundamental to mankind that they cannot be proscribed and must be universally protected⁹.

The theory of IHRL hinges on the fundamental nature of certain rights and the duty of those in power to respect those rights. The principle that “[s]tates, as the governing power within a recognized set of geographic borders, are normally tasked with protecting these fundamental rights”, is well established¹⁰. But, limiting the applicability of such protections to entities that have been internationally recognized as states would unduly restrict the underlying concept that those with actual, functional power over people are bound to respect certain fundamental human rights¹¹. Functional control, power, or political influence over citizens of a territory involves the same power and influence that officially recognized states typically possess¹². Accordingly, the basic human rights principle that those in power have a duty to protect fundamental, inherent, non-derogable rights should apply to any group with territorial control or political power, regardless of international recognition of statehood (or the lack thereof)¹³.

When an organized group has power and control over people, it has a duty to respect their fundamental rights. Accordingly, “it is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights”¹⁴. As the United Nations Secretary-General’s Panel of Experts on Accountability in Sri Lanka expressed in 2011, “at a minimum, [non-state actors are] bound to respect the most basic human rights of persons within its power, including the rights to life and physical security and integrity of person . . . [when the non-state actor] is exercising de facto control over a part of a State’s territory”¹⁵.

- **IHRL applies to quasi-state actors such as Hamas because international law increasingly recognizes fundamental human rights protections as applying to non-state actors through customary international law.**

Increasingly, the international community is viewing powerful non-state actors as subject to some minimum international norms and law¹⁶. For three reasons Hamas should be deemed bound by such norms.

[hereinafter UDHR].

⁶ *But see Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (“Accordingly, it has been observed that the Universal Declaration of Human Rights “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.” (citing EGON SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY: THE ROOTS AND GROWTH OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 70 (1964)).

⁷ UDHR, *supra* note 5, art. 30.

⁸ *See, e.g.*, Arab Charter on Human Rights, League of Arab States, art. 3, 22 May 2004, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005).

⁹ *See, e.g.*, International Covenant on Civil and Political Rights, art. 4, 16 Dec. 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (listing non-derogable rights).

¹⁰ *See Al-Skeini v. U.K.*, Application no. 55721/07, § 74–80 (judgement of 7 Jul. 2011).

¹¹ *See id.* § 57–59.

¹² Human Rights Comm., *Montero v. Uruguay*, Comme’n No. 106/1981, at 7.1, 9.3–9.4, U.N. Doc. Supp. No. 40 (A/38/40) (1982).

¹³ *See* Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, at 76, U.N. Doc. E/CN.4/2005/7 (22 Dec. 2004).

¹⁴ Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, 12th Sess., Sept. 14–Oct. 2, 2009, PP 305–07, U.N. Doc. A/HRC/12/48 (25 Sept. 2009).

¹⁵ U.N. Secretary-General, Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, ¶ 188 (31 Mar. 2011) [hereinafter Sri Lanka Panel of Experts].

¹⁶ The European Union has recognized that non-state actors may be subject to economic and financial sanctions.

First, international actors recognize customary international law as binding on non-state actors. Second, American jurisprudence demonstrates effective and appropriately limited application of customary international law to non-state actors. Third, the Palestinian Authority's (PA) signatory status to human rights treaties such as the ICCPR binds Hamas to international human rights norms.

- **Customary international law requires non-state actors such as Hamas to respect fundamental human rights.**

Customary IHRL is made up of norms that bind international actors, and the international community is increasingly viewing these norms as binding on non-state actors¹⁷. In fact, the United Nations's Panel of Experts on Accountability in Sri Lanka noted that non-state actors possessing power and control over a political group or territory have a direct responsibility to uphold the most basic of human rights, such as life, physical security, and integrity of the person¹⁸. For example, in the context of torture and arrest, non-state actors are already viewed as customarily bound to human rights norms by several international organizations. The European Parliament noted that non-state actors have an obligation to respect human rights in the context of unlawful and arbitrary detentions¹⁹. Further, the U.N. Committee Against Torture recognized non-state actors in public roles as being bound by human rights obligations when acting in an "official" capacity in the state²⁰. Likewise, the European Court of Human Rights noted that human rights obligations against torture apply equally to "groups or persons who are not public officials" and that such groups are bound by human rights obligations²¹. The Court went so far as to refer to non-state actors as committing "human rights abuses"²².

The United Nations Security Council (UNSC) consistently has taken the position that non-state actors are responsible for violations of fundamental human rights, and has not hesitated to respond to such violations when necessary²³. For example, in the UNSC's resolution banning all forms of terrorism, the UNSC stated that causing terror, death, or serious bodily injury constitutes a violation of human rights conventions and protocols and, therefore, that groups and individuals are bound to uphold basic human rights²⁴. Security Council practice further demonstrates that the applicability of IHRL to non-state actors is particularly strong if the non-state actor exercises significant control over the population. A report on the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, issued by the UN Special Rapporteur, noted that "the Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to

See e.g., Yusuf & Al Barakaat, 2005 E.C.R. II-3533; *M'Bodj v. Belg.*, 2014 E.C.R. C-542/13.

¹⁷ See ANDREW CLAPHAM, THE RIGHTS AND RESPONSIBILITIES OF ARMED NON-STATE ACTORS: THE LEGAL LANDSCAPE & ISSUES SURROUNDING ENGAGEMENT 10–15 (2010).

¹⁸ Sri Lanka Panel of Experts, *supra* note 15, para. 188; see also Press Release, European Union, Declaration by the High Representative, Catherine Ashton, on Behalf of the European Union on the Report of the UN Secretary-General Panel of Experts on Accountability in Sri Lanka (10 May 2011) (endorsing the Panel of Experts' assessment and noting the applicability of basic human rights norms to all actors in a conflict, including non-state actors).

¹⁹ Resolution on Human Rights in Moldova and in Transnistria in Particular, 2006 O.J. (C 291 E) 414, 415 (2006).

²⁰ See, e.g., Comm. Against Torture, 22d Sess., *Elmi v Australia*, Comm'n No. 120/1998, P 4.8, U.N. Doc. CAT/C/22/D/120/1998 (25 May 1999).

²¹ *Sheekh v. Netherlands*, Application no. 1948/04, § 45 (judgement of 11 Jan. 2007).

²² *Id.*; see also *Sufi v. United Kingdom*, Application nos. 8319/07 & 11449/07, § 49–50 (judgement of 28 June 2011) (similarly noting that human rights obligations are applicable to non-state actors).

²³ Aristotle Constantinides, *Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council*, 4 HUM. RTS. & INT'L LEGAL DISCOURSE 89 (2010); see also, U.N.S.C. Res. 1894 (2009) (the Security Council recognized that states bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law; reaffirmed that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians; and demanded that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law).

²⁴ U.N.S.C. Res. 1566, para. 3 (2004).

formally *assume international obligations to respect human rights*²⁵. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure’²⁶. The application of human rights standards to non-state actors is particularly relevant in situations where they exercise some degree of control over a given territory and population.

The UNSC also, on a number of occasions, has called on all parties to a conflict, including non-state actors, to respect international humanitarian and human rights law²⁷. Furthermore, the UN practice of holding non-state actors accountable for human rights abuses is exemplified by the situation in Nepal when, in 2005, the Communist Party of Nepal-Maoist issued a statement welcoming the establishment of a United Nations human rights field operation in Nepal²⁸. It promised UN personnel full access to the areas it controlled and committed itself to respecting human rights standards²⁹. Notably, the Office of the United Nations High Commissioner for Human Rights (OHCHR) later determined that the Party had not respected human rights by refusing some UN personnel access³⁰. Another example of the international community applying IHRL to non-state actors is the Sri Lanka-LTTE conflict mentioned above. The European Union (when endorsing the expert report on Sri Lanka) referred to the applicability of human rights law to all parties to the conflict even if a non-state actor is involved³¹:

In 2009, the non-state LTTE in Sri Lanka began (among other offences) to use civilians as buffer zones to thwart Sri Lankan government advances. Further, the LTTE shot rockets

²⁵ INTERNATIONAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS 25, http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf (quoting A/HRC/2/7, para. 19) [hereinafter HUMAN RIGHTS IN ARMED CONFLICT]. The Liberation Tigers of Tamil Eelam (LTTE) is the only terrorist group which once possessed its own military, including an infantry, sea wing, and air wing, and began its armed campaign in 1983. *See id.*

²⁶ U.N. Doc. 27 A/HRC/2/7, 2 Oct. 2006, para. 19.

²⁷ For example, in resolution 1564 (2004), it stressed in the preamble that “the Sudanese rebel groups [...] must also take all necessary steps to respect international humanitarian law and human rights law.” With respect to Hezbollah, the UN stated:

Although Hezbollah, a non-State actor, cannot become party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights that every organ of society respect and promote human rights. The Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure.’ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, etc. UN Doc. A/HRC/2/7, 2 Oct. 2006, para. 19; *see also* Report on the Commission of Inquiry on Lebanon, A/HRC/3/2, 23 Nov 2006, para. 67.

And with respect to Hamas, the report of nine Special Rapporteurs on the situation in Gaza stated that non-State actors like Hamas “that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.” UN Doc. A/HRC/10/22, 20 Mar. 2009, para. 22. The 2009 Goldstone Report concluded the same thing. The Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc. A/HRC/12/48, 25 Sept. 2009.

²⁸ HUMAN RIGHTS IN ARMED CONFLICT, *supra* note 25, at 6, 26.

²⁹ *Id.*

³⁰ *Id.* at 27.

³¹ See Press Release, European Union, Declaration by the High Representative, Catherine Ashton, on Behalf of the European Union on the Report of the UN Secretary-General Panel of Experts on Accountability in Sri Lanka (10 May 2011). The U.S. State Department has written that any “credible accountability effort must be even-handed and hold both parties to account.” OFFICE OF GLOBAL CRIMINAL JUSTICE, DEP’T OF STATE, Measures Taken by the Government of Sri Lanka and International Bodies to Investigate and Hold Accountable Violators of International Humanitarian and Human Rights Law 5 (2012), *available at* <http://www.state.gov/documents/organization/187605.pdf>.

and mortars from protected places such as schools and hospitals. When the UN Panel of Experts assessed the situation, it found that the non-state LTTE had six areas of human rights violations during the conflict with the Sri Lankan government being: (1) using civilians as a human buffer; (2) killing civilians attempting to flee LTTE control, (3) using military equipment in the proximity of civilians, (4) forced recruitment of children, (5) forced labour, and (6) killing of civilians through suicide attacks³². As such the UN Panel ruled that accountability for violations of international human rights law is a duty under international law and those found responsible (whether civilians or non-state officials) will bear criminal liability for international crimes alleged above. The Special Rapporteur on extrajudicial, summary or arbitrary executions indicated in the context of his mission to Sri Lanka that “[a]s a non-state actor, the LTTE does not have legal obligations under [the International Covenant on Civil and Political Rights], but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights.” International human rights law explicitly protects a very wide range of rights . . . [that] apply to the State as a whole, independently from any internal institutional structure and division of responsibilities among different authorities³³.

Additionally, United Nations’s General Assembly resolutions have noted that non-signatory persons and groups are required to adhere to resolutions dealing with the protection of some fundamental human rights when the General Assembly noted, for example, that persons can be held in violation of international conventions on terrorist bombings as individuals³⁴. Finally, several multilateral treaties recognize that international human rights customs can bind non-signatory parties. For example, the Convention on Transnational Organized Crime states that organized criminal groups can violate the convention even though they are not treaty signatories³⁵. Similarly, international criminal tribunals rely on customary international law to hold both individuals and groups liable for carrying out organized, large scale criminal actions³⁶. Accordingly, there is increased international recognition that some fundamental, basic human rights are not to be violated by any group or individual, regardless of their classification with respect to statehood or treaty signatory status.

- **American jurisprudence increasingly recognizes non-state actors as bound by IHRL.**

The United States applies IHRL to individuals to hold them liable for human rights violations³⁷. Accordingly, such, application of IHRL in the United States does not focus on recognition of statehood, but rather on recognition of international norms of civilized conduct³⁸. Additionally, the United States recognizes a broader application of IHRL to non-state actors by applying IHRL to private commercial corporations³⁹.

³² Sri Lanka Panel of Experts, *supra* note 15.

³³ *Id.* at 22-23.

³⁴ International Convention for the Suppression of Terrorist Bombings, art. 2, para. 1(a)–(b), G.A. Res. 52/164_1, U.N. Doc A/RES/52/164 (15 Dec. 1997).

³⁵ Convention on Transnational Organized Crime, art. 2(a), 40 I.L.M. 335 (2001); U.N. Doc. A/55/383 at 25 (2000); U.N. Doc. A/RES/55/25 (2001).

³⁶ Prosecutor v. Rutaganda, Case No. 1CTR-96-3-T__ 69 (6 Dec. 1999).

³⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702; *Kadic v. Karadzic*, 70 F.3d 232, 239–40 (2d Cir. 1995).

³⁸ *Kadic*, 70 F.3d at 251 (“The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.”); see also *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 275–76 (E.D.N.Y. 2007) (applying the Genocide Convention and Rome Statute to hold individuals responsible for various human rights violations).

³⁹ Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT’L HUM. RTS. 222 (2008); Dana Weiss & Ronen Shamir, *Corporate Accountability to Human Rights: The Case of the Gaza Strip*, 24 HARV. HUM. RTS. J. 155, 183 (2011).

Indeed, some United States courts have endeavored to incorporate international human rights laws into domestic law to hold international corporations domestically accountable⁴⁰. For example, corporations have been found liable for international human rights violations through the Alien Tort Claims Act⁴¹. Accordingly, the American system increasingly recognizes that corporations, with the influence they have on employees, families, citizens, communities, and whole countries, cannot disregard “social and environmental responsibilities”⁴².

When corporations are considered to be accountable to human rights law, two justifications are given for their accountability: (1) their close ties with a state, and (2) their position of power relating to adverse effects on human rights⁴³. The same rationale extends to accountability of quasi-state and non-state actors, if not more so. Accordingly, as the United States has taken a more expansive approach to applying IHRL to non-state actors, American precedent holds non-state actors liable for abusing power over citizens in contravention to fundamental human rights principles.

- **Even though Hamas is not a signatory to the ICCPR, it may be bound by the Palestinian Authority’s signatory status and is liable for violations of human rights enshrined in the ICCPR.**

In early 2014, the Palestinian Authority under President Mahmoud Abbas acceded to fifteen international conventions and treaties, including the ICCPR, the ICESCR, the Hague Convention, and the Vienna Convention⁴⁴. Additionally, the United Nations General Assembly (albeit on specious legal authority) recognized Palestine as a state in 2012⁴⁵. Accordingly, the Palestinian Authority is now a recognized government and is bound by these international treaties. Hamas, in turn, was a part of a “unity government” with the Palestinian Authority, agreeing to operate collectively under the Fatah-Hamas Gaza Agreement⁴⁶. The unity government officially expired in November of 2014. For almost a decade beginning in 2006, when Hamas was voted into office by Palestinian civilians, Hamas has played a significant role in Palestinian governance⁴⁷. Because of Hamas’s significant and influential role in Palestinian governance and previous involvement with the Palestinian Authority in the unity government, Palestine’s recent entry into international human rights treaties should be just as binding on Hamas as it is on the Palestinian Authority.

- **Means of Recourse against Hamas for Violations of IHRL.**

Assuming, as argued above, that IHRL and the aforementioned human rights treaties apply to Hamas, several means of recourse are potentially available to Palestinian victims: the United Nations Human

⁴⁰ See e.g., The Alien Tort Statute, 28 U.S.C. § 1350 (holding defendants liable for violations of “well-established, universally recognized norms of international law”).

⁴¹ See e.g., *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013) (noting that the Seventh, Ninth, Eleventh, and D.C. Circuits all hold corporations liable under the Act); *Sikhs for Justice Inc. v. Indian Nat’l Cong. Party*, 17 F. Supp. 3d 334, 341–42 (S.D.N.Y. 2014).

⁴² Weiss & Shamir, *supra* note 39, at 179–81.

⁴³ *Id.* at 182.

⁴⁴ *Documents of Palestine’s Adhesion to International Conventions Delivered by Al-Malki*, PALESTINE NEWS NETWORK (2 Apr. 2014), available at <http://english.pnn.ps/index.php/politics/7263-documents-of-palestine%E2%80%99s-adhesion-to-international-conventions-delivered-by-al-malki>.

⁴⁵ *General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations*, UNITED NATIONS PRESS RELEASES (29 Nov. 2012), available at <http://www.un.org/press/en/2012/ga11317.doc.htm>.

⁴⁶ Holly Yan & Kareem Khadder, *Tension Grows Between Palestinian Authority and Hamas*, CNN (8 Sept. 2014), <http://www.cnn.com/2014/09/08/world/meast/palestinian-abbas-hamas-conflict/>.

⁴⁷ See Jerrold L. Sobel, *Israeli-‘Palestinian’ Insanity Must Stop*, AM. THINKER (9 June 2013), http://www.americanthinker.com/articles/2013/06/israel-palestine_insanity_must_stop.html.

Rights Committees and claims in foreign courts⁴⁸.

First, Palestinians might be able to file claims before the UN Committees that oversee each human rights treaty. “There are nine core international human rights treaties. Each of these treaties has established a ‘treaty body’ (Committee) of experts to monitor implementation of the treaty provisions by its States parties” and to serve as the body where individual complaints may be lodged⁴⁹. The procedure for individual complaints often is established by a separate protocol whereby a state can agree to allow individuals to lodge a complaint against the state based on a violation of the treaty⁵⁰. Because it is established by a separate protocol, the individual complaint mechanism is binding only if ratified by the state. Thus, this remedy is available only if in fact the PA has ratified the separate protocol. At this time, although the PA has acceded to the main human rights covenants, it has not ratified the optional protocols allowing Palestinian civilians to file individual complaints based on violations of the human rights treaties⁵¹. Accordingly, such complaints are not currently a proper means for holding Hamas and/or the PA accountable for its human rights violations. Only if and when the PA ratifies the separate protocol could Palestinians file such claims.

Second, victims of human rights abuses committed by Hamas possibly could sue Hamas in foreign courts. One potential is in the United States, assuming a number of jurisdictional thresholds are met. A few U.S. statutes could provide remedies for Palestinian victims. The first is the Alien Tort statute, which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. Over the past thirty years, this statute has been used as a means for human rights victims of any nationality to file suit in the United States for violations of international human rights law that occurred outside the United States⁵². However, under a recent United States Supreme Court decision, *Kiobel v. Royal Dutch Petroleum*, the Alien Tort Statute now reaches claims only if the relevant conduct occurred in the United States, or if the “claims touch and concern the territory of the United States”⁵³. Exactly when a claim “touches and concerns the territory of the United States” is being litigated in U.S. federal courts right now⁵⁴.

⁴⁸ *E.g.*, *Israeli Legal Organization Files Claim of War Crimes Against Hamas’ Meshaal*, *Middle East Eye* (12 Feb. 2015), <http://www.middleeasteye.net/news/israeli-law-court-files-claim-war-crimes-against-hamas-khaled-meshaal-1052602185>.

⁴⁹ Complaints Procedures, Human Rights Bodies, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last visited 16 Mar. 2015).

⁵⁰ *Id.* For example, “The Human Rights Committee (CCPR) may consider individual communications alleging violations of the rights set forth in the International Covenant on Civil and Political Rights [ICCPR] by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights.” *Id.*

⁵¹ Country Profile for the State of Palestine, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, file:///C:/Users/Jennifer/Downloads/OHCHR_countryProfile_State%20of%20Palestine.pdf (last visited 16 Mar. 2015).

⁵² *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (two Paraguayan nationals residing in the U.S. filed suit against the Paraguayan Inspector General of Police for kidnapping and torturing their family member to death in Paraguay).

⁵³ *Kiobel*, 133 S. Ct. at 1669.

⁵⁴ *Cf.* *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 45–46, 49–50 (2d Cir. 2014) (denying ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner because *Kiobel* bars suits under the ATS where all the relevant conduct occurred outside the United States); *Balintulo v. Daimler AG*, 727 F.3d 174, 179–80 (2d Cir. 2013) (denying claim under the ATS brought by victims of apartheid against South African subsidiaries of American corporations because, under *Kiobel*, “claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States”); *Cardona v. Chiquita Brands Int’l, Inc.*, 2014 WL 3638854 (11th Cir. 2014) (holding no jurisdiction under the ATS where plaintiffs were Colombian citizens filing suit against American corporations for alleged acts of torture occurring in Columbia because, under *Kiobel*, “the ATS does not apply extraterritorially”); *Ben-Haim v. Neeman*, 543 F. App’x 152, 155 (3d Cir.2013) (interpreting *Kiobel* as holding “that the ATS does not apply when all of the relevant conduct took place outside the United States”); *with Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (finding jurisdiction under *Kiobel*’s “touch and concern standard” where four Iraqis sued a United States corporation for alleged torture committed in Iraq during the Iraq war because several factors gave the claim sufficient connection to the United

The second statute that could provide redress against Hamas is the Anti-Terrorism Act⁵⁵. In a recent United States federal court decision, a New York District Court awarded over \$200 million to *American* victims of terrorist acts that were facilitated or financed by the PA or the Palestinian Liberation Organization⁵⁶. The original lawsuit was filed in 2004 under the 1992 U.S. Antiterrorism Act, which allows U.S. victims of international terrorism to seek recourse in federal court⁵⁷. The court found that any abrogation of duties under international human rights law will obligate state actors, quasi-state actors, and non-state actors to pay damages for terrorism that they knowingly facilitate, fund, or otherwise incite⁵⁸. The jury found the Palestinian Authority and the Palestine Liberation Organization liable for knowingly supporting six terrorist attacks in Israel more than a decade ago. Based on a provision in the statute, “the damages w[ere] automatically triple[d] to more than \$655 million because the claims involved an act of terrorism”⁵⁹. This case also displayed the ongoing efforts of the United States to take an active role against terrorist acts that affect American interests. Note that the law, while a potential basis for recourse against Hamas, is limited to claims brought by United States citizens.

Another potential U.S. statute by which Palestinian victims could seek redress against Hamas for human rights abuses (specifically, torture and extrajudicial killing) is the Torture Victim Protection Act (TVPA). The stated purpose of the Act is to “carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing”⁶⁰. The Act provides: “An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death”⁶¹. To file a claim under the TVPA, a claimant must first exhaust domestic remedies “in the place in which the conduct giving rise to the claim occurred”⁶².

Two factors limit the effectiveness of the TVPA as a remedy against Hamas. First, claims under the TVPA are expressly limited to suits against individuals—not organizations⁶³. Second, the individual against whom suit is brought must be acting under the authority of a “foreign nation”. Accordingly, the claimant would have to prove that Hamas is either a state or represents the state of Palestine—both of which conclusions are uncertain and undercut the Israeli position in international law.

States); *see also* *Mwani v. Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013) (finding that an ATS claim involving a terrorist attack against the United States embassy in Nairobi did “touch and concern” the United States with sufficient force to overcome the presumption even though the plaintiffs were all Kenyans, the defendants were all aliens, and the relevant conduct occurred in Kenya); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 311 (D. Mass. 2013) (allowing suit under ATS against American Pastor who “attempted to foment, and to a substantial degree has succeeding in fomenting, an atmosphere of harsh and frightening repression against LGBTI people in Uganda” because “Kiobel makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and his or her conduct are based in this country”).

⁵⁵ Anti-Terrorism Act, 18 U.S.C. § 2331 (2001).

⁵⁶ Benjamin Weiser, *Huge Jury Award Against Palestinian Groups in Terrorist Attacks*, N.Y. TIMES (23 Feb. 2015), http://www.nytimes.com/2015/02/24/nyregion/damages-awarded-in-terror-case-against-palestinian-groups.html?_r=0.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

⁶¹ *Id.* § 2(a).

⁶² *Id.* § 2(b).

⁶³ In the only Supreme Court case addressing the TVPA, *Mohamad v. Palestinian Authority*, the Roberts Court unanimously ruled that the TVPA applies exclusively to natural persons and does not impose liability against any organizational entity. 132 S. Ct. 1702, 1710-11 (2012) (“The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not. There are no doubt valid arguments for such an extension. But Congress has seen fit to proceed in more modest steps in the Act, and it is not the province of this Branch to do otherwise.”).

It appears that there are no strong methods of recourse against Hamas at this time. The PA has not yet ratified the separate protocol establishing the individual complaint mechanism and the applicable United States statutes each present hurdles potentially fatal to any claims brought by Palestinian victims.

THE RIGHTS AND DUTIES OF STATES WHOSE GOVERNING AUTHORITY IS A DESIGNATED TERRORIST ORGANIZATION

States are the primary subjects of International Law⁶⁴. Accordingly, states are afforded both substantial rights and duties once they become recognized members of the international community. This section will address how, if at all, the rights and duties of a recognized state might change if the governing entity of a recognized state is a designated terrorist organization. First, this section will discuss statehood under international law, including the elements of statehood and the theories by which an entity can become a state. Second, this section will briefly discuss some of the well-established rights and duties of states. Next, it will discuss some of the potential specific consequences that could follow if a designated terrorist organization becomes the governing entity of a recognized state. It will conclude by discussing Hamas's governing capacity in Palestine and how some of its actions would violate its international obligations if it were a recognized state.

I. Establishing Statehood under International Law.

Under international law, there are two theories regarding statehood: declarative and constitutive. Under the declarative theory, which is embodied in the Montevideo Convention of 1933, and which represents customary international law⁶⁵, a state is an international legal person that possesses the following qualifications: “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states”⁶⁶. If these four elements are present, the entity is a state, regardless of recognition. Indeed, “[t]he political existence of the state is independent of recognition by the other states”⁶⁷. The constitutive theory, on the other hand, focuses solely on recognition. Under this theory, an entity is considered a state in terms of international law only when it has been recognized by other states—whether or not it has achieved the objective elements of statehood outlined in the Montevideo Convention⁶⁸. The “constitutive” theory contends that the act of recognition itself actually creates the state⁶⁹.

⁶⁴ HUMAN RIGHTS IN ARMED CONFLICT, *supra* note 25, at 6. Moreover, according to the Vienna Convention on the Law of Treaties, states that have signed but not ratified a treaty are bound to act in good faith and not to defeat its object and purpose. Vienna Convention on the Law of Treaties art. 18, 1155 U.N.T.S. 331 (23 May 1969).

⁶⁵ Montevideo Convention on the Rights and Duties of States, 26 Dec. 1933, 49 Stat. 3097, 165 L.N.T.S 19 [hereinafter Montevideo Convention].

⁶⁶ *Id.* art. 1.

⁶⁷ *Id.* art. 3. (“The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.”); *see also id.* art. 6 (“The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law.”).

⁶⁸ *See* LASSA OPPENHEIM & RONALD FRANCIS ROXBURGH, INTERNATIONAL LAW: A TREATISE 135 (3d ed. 1920) (“There is no doubt that statehood itself is independent of recognition. International Law does not say that a state is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Relations and Law.”)

⁶⁹ *Constitutive Theory of Recognition*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/930580/constitutive-theory-of-recognition> (last visited 16 March 2015).

Despite these two concrete theories of statehood, UN membership constitutes the gold standard by which the international community determines statehood. If a state is given membership in the UN, there can be no disputing that the entity is a state, as the Charter limits membership to states⁷⁰ and the act of granting membership signifies support from the international community that the entity should be recognized as a state⁷¹.

II. The Rights and Duties of Recognized States.

In 1970, the General Assembly adopted a resolution that outlined the rights and duties of states⁷². These rights and duties represent customary international law. This section will briefly discuss some of the general rights and duties outlined in the Resolution:

- **States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations⁷³.**

Such a threat or use of force constitutes a clear violation of the U.N. Charter⁷⁴. Along the same lines, a state is prohibited from inciting propaganda that could lead to war against another state or territorial entity:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect⁷⁵.

- **States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered⁷⁶.**

The UN Charter highlights the underlying obligation that states are obligated to settle all disputes by

⁷⁰ U.N. Charter art. 4(1).

⁷¹ *Id.* art. 4(2).

⁷² 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 (XXV), A/RES/25/2625, (adopted on a Report from the Sixth Committee A/8082) [hereinafter UN Rights and Duties of States].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (“Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”); *id.* (“Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.”) *Id.*

⁷⁶ *Id.* “States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.” *Id.* “In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.” *Id.*

mediation, negotiation, reconciliation or other peaceful means⁷⁷. Any state that refuses to recognize such methods of peaceful reconciliation would be in gross violation of international law.

- **States are obligated not to intervene in matters within the domestic jurisdiction of any other state [the principle of non-intervention]**⁷⁸

All States have a duty “not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter”⁷⁹. The principle of sovereign equality of states holds that “the territorial integrity and political independence of the State are inviolable”⁸⁰. Thus, every state has a right under international law to control its own territory without any outside intervention, and this right is enforced by the corollary duty of all states not to intervene in the domestic affairs of another state. The International Court of Justice described the principle this way: “The principle of nonintervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law”⁸¹. The Court further noted:

[T]he principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State⁸².”

According to one commentator, to violate the duty of non-intervention, “the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention”⁸³.

The question is whether these rights and duties change if a state’s governing entity is a designated terrorist organization that not only fails to protect its citizens, but intentionally harms them. (This will be analyzed more in-depth with regards to Hamas as a governing authority in Palestine.) Without action by the Security Council authorizing intervention or the use of force, any “intervention” by foreign states would likely violate international law. The question centers on whether international law has recognized a right of third-party states to “humanitarian intervention,” or, more recently, “the responsibility to protect”. At the UN Millennium Follow-up World Summit of 2005⁸⁴, Heads of State unanimously affirmed that “each

⁷⁷ *Id.* “All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.” *Id.*; see also U.N. Charter chap. VI, “Pacific Settlement of Disputes.”

⁷⁸ UN Rights and Duties of States, *supra* note 72.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, para. 202 (27 June).

⁸² *Id.* para. 205.

⁸³ OPPENHEIM’S INTERNATIONAL LAW 432 (9th ed. 2008).

⁸⁴ The 2005 World Summit, 14–16 September 2005, was a follow-up summit meeting to the United Nations’ 2000 Millennium Summit.

individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”⁸⁵. They further agreed that, when appropriate, the international community should assist states in exercising that responsibility by building states’ protection capacities before crises and conflict break out⁸⁶. The Summit recognized, however, that any “intervention” still must be authorized by the Security Council, even when a state is “manifestly failing” to protect its population from violence or egregious crimes endangering civilian lives⁸⁷.

Accordingly, it appears that the international community has yet to recognize affirmatively the responsibility (or right) of third-party states to protect civilians when a host state fails. If the host state committing human rights abuses is a designated terrorist organization, such a situation could perhaps tilt the scales in favor of intervention, but there is currently scant legal precedent for such action since the international community has rarely recognized (at least to our knowledge) a terrorist organization as a governing entity in a sovereign territory⁸⁸.

- **All states have the duty to co-operate with one another in accordance with the Charter [of the United Nations]⁸⁹.**

This particular duty of states applies with respect to other states regardless of differences in “political, economic and social systems, in the various spheres of international relations⁹⁰.

- **All states have the duty to promote the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter⁹¹.**

This duty is primarily focused on ending colonialism⁹² and obligates states to promote the right of self-determination of all peoples.

III. Potential Consequences of a Terrorist Organization as the Governing Authority in a Recognized State.

Based on the principle of the sovereign equality of all states, it is arguable that once an entity

⁸⁵ *Mission Statement*, UNITED NATIONS OFFICE OF THE SPECIAL ADVISER ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/> (last visited 16 Feb. 2015).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ “Nelson Mandela’s Umkhonto we Sizwe, the military arm of the then-outlawed African National Congress,” and “the Irish Republican Army, often considered the political/military arm of the Sinn Fein”, are two examples where organizations designated by many states as terrorists rose to power in recognized states. Noah Leavitt, *Hamas’s Ironic Victory?: Why It May Change The Way International Law Defines and Prohibits Terrorism*, FIND LAW, 7 Feb. 2006, <http://writ.news.findlaw.com/leavitt/20060207.html>.

⁸⁹ UN Rights and Duties of States, *supra* note 72.

⁹⁰ *Id.*

⁹¹ *Id.* “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.” *Id.* “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 to receive support in accordance with the purposes and principles of the Charter.” *Id.* “Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.” *Id.*

⁹² *Id.* (“To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned”). All states are also obligated to “fulfil in good faith the obligations assumed by them in accordance with the Charter.”

becomes a recognized state in the international community it automatically acquires all the rights and duties of statehood outlined above—whether or not the governing entity is a designated terrorist organization. This section will analyze that claim and other consequences that could follow should a terrorist organization be the governing entity of a recognized state.

- **The Principle of Sovereign Equality**

Under the General Assembly Declaration regarding Friendly Relations and Co-operation among States, “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature”⁹³. This principle is foundational to the international legal system. Indeed, the Charter begins with this very declaration⁹⁴. One commentator even went so far as to declare the principle of sovereign equality as the “linchpin” of the international legal system:

[T]his is unquestionably the only [principle] on which there is unqualified agreement and which has the support of all groups of States, regardless of ideologies, political leanings, and circumstances. It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international law rests⁹⁵.

Accordingly, any state—whether designated by some states as a terrorist organization or not—should theoretically possess all the rights and duties of states. If it is a state, under the theories established above, it must possess all the rights and duties afforded to every other state because it is sovereignly equal with them. While persuasively arguing that the international community needs to rewrite the definition of aggression to include expressly both state and non-state actors, i.e., terrorist organizations, one commentator notes this very thing:

No characteristic can justify the slightest deprivation of the moral or juridical personality of a state. If terrorist organizations are to be considered states under the definition of aggression, they must be automatically entitled to every right attaching to that legal status. To conclude otherwise is to violate accepted norms of international law. Worse, it is to destroy the very foundations upon which the international system is built, for to violate the sovereign equality of states, Italian jurist Giuseppe Carnazza-Amari observed, “is to destroy the very constitution of human kind and of states⁹⁶.”

Thus, based on the principle of sovereign equality of states it is arguable that a state with a designated terrorist organization as its governing entity would still possess all the rights of states in international law.

- **Participation in the United Nations of a State with a Designated Terrorist Organization as its Governing Entity**

Rules concerning membership in the United Nations are outlined in Chapter 2 of the Charter. Membership “is open to all [] peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations⁹⁷.”

⁹³ *Id.*

⁹⁴ U.N. Charter art. 2(1).

⁹⁵ A. CASSESE, *INTERNATIONAL LAW* 48 (2d. ed. 2005).

⁹⁶ Michael Anderson, *Reconceptualizing Aggression*, 60 *DUKE L.J.* 411, 434 (2010).

⁹⁷ U.N. Charter art. 4(1).

Accordingly, membership is limited to (1) states that (2) are “peace-loving,” (3) agree to the obligations set forth in the Charter, and (4) are voted in by the General Assembly after a recommendation by the Security Council⁹⁸. The requirement that the state be “peace-loving” should preclude a state whose governing entity is a designated terrorist organization from being admitted to the UN. However, admission to the UN is much more a political determination than a legal determination. Consider the recent Security Council vote on Palestine⁹⁹. Thus, it is likely that this requirement will be no bar to admission to the UN for a designated terrorist organization—although it certainly can be used for political pressure should the UN ever consider admitting a state whose governing entity is designated as a terrorist organization.

Despite admission to the UN, a state that violates its duties under the Charter may lose certain privileges or have its membership revoked. Article 5 of the Charter allows for suspension of the rights and privileges of a member against whom the Security Council has taken “preventive or enforcement action”¹⁰⁰. And article 6 even provides for expulsion of a member that “persistently violate[s] the Principles contained in the present Charter”¹⁰¹. These provisions would be particularly important if the UN admitted a state whose governing entity was a designated terrorist organization. Despite admission, persistent violation of the Charter—which is likely for a member whose governing entity is a terrorist organization—could cause the state to lose privileges and even its membership.

- **Sovereign Immunity for Terrorists.**

Under international law, heads of state are entitled to immunity. The International Court of Justice discussed head of state immunity in the *Arrest Warrant Case*¹⁰². In this case, Belgium issued an arrest warrant for Abdulaye Yerodia Ndobasi (Yerodia)—the Democratic Republic of the Congo’s (D.R.C) Minister of Foreign Affairs—for allegedly committing crimes against humanity and war crimes within the D.R.C.¹⁰³. The D.R.C. argued that a sitting minister of foreign affairs was immune from suit in Belgium. The Court agreed, finding that sitting heads of state and other ministers whose “functions” require full immunity do in fact enjoy “absolute” immunity from suit while in office¹⁰⁴. The Court even held that there was no exception for war crimes or crimes against humanity¹⁰⁵; while in office, a minister of foreign affairs (or other head of state) enjoys absolute immunity. The Court did note, however, that after a person ceases to be head of state or minister of foreign affairs, a foreign state may try the individual for “acts committed prior to or subsequent to his or her period in office, as well as in respect of acts committed during that period of office in a private capacity¹⁰⁶.” The Court also noted that a minister of foreign affairs or other head of state “may be subject [while in office] to criminal proceedings before certain international criminal courts, where they have jurisdiction¹⁰⁷.”

Based on these rules, leading officials of the designated terrorist organization state (i.e., terrorists) would be entitled to absolute immunity from suit in foreign courts while they were in office. Consequently, by recognizing a state with a governing entity that is a designated terrorist organization, the international community would effectively be granting immunity to terrorists. One commentator noted:

Fundamental principles of international law strongly suggest that all rights attaching to

⁹⁸ U.N. Charter art. 4(2)

⁹⁹ *UN Security Council Rejects Palestinian Resolution*, BBC NEWS (31 Dec. 2014), <http://www.bbc.com/news/world-middle-east-30639764>.

¹⁰⁰ U.N. Charter art. 5.

¹⁰¹ U.N. Charter art. 6.

¹⁰² *Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.)*, 2002 I.C.J. 3 (Feb. 14).

¹⁰³ *Id.*

¹⁰⁴ *Id.* paras. 54-55.

¹⁰⁵ *Id.* para. 58.

¹⁰⁶ *Id.* para 61.

¹⁰⁷ *Id.* para 61.

statehood--including sovereign immunity for senior state officials--should be conferred upon entities that are designated as states. Thus, if terrorist organizations were considered states under the current definition of aggression, then their leaders would acquire functional and personal immunity. . . . As long as they hold their positions, therefore, senior leaders of terrorist organizations that are considered states in all contexts would be completely immune from prosecution in foreign municipal courts, whether they commit aggression, another core international crime, or some lesser offense. Once a senior terrorist leader ceases to hold office, though, personal immunity will no longer offer any protection. But functional immunity may still bar prosecution for the crime of aggression¹⁰⁸.

- **Self-Preservation: Justifying Terrorism?**

All states have a right to existence and self-preservation¹⁰⁹. This right stems partly from the fact that all states have the “inherent right” to individual or collective self-defense if attacked or threatened with imminent attack, under article 51 of the UN Charter¹¹⁰. Indeed, if this right is “inherent” in all states, implicitly all states have a right to ensure their continued existence.

To allow a terrorist organization to become the government of a recognized state would seriously undermine the international community’s efforts to combat terrorism. Indeed, there are a number of UN resolutions, declarations, and conventions on combating terrorism¹¹¹. Together, these documents effectively provide Member States with an affirmative right to take forceful, unilateral action against terrorism. But if that terrorist actor becomes a state under international law, that state would have the right of self-defense, and the international community could no longer have the goal of proactively eliminating that terrorist organization. Indeed, such policy, if implemented, would violate that state’s rights of controlling its own territory and the prohibition on the use of force in international relations. Moreover, the terrorist designated state, if attacked, would be completely justified in defending itself under Article 51.

The danger of a designated terrorist organization becoming a recognized state is exemplified by Hamas. Hamas’s founding Charter calls for the continued annihilation of the State of Israel and the full displacement of her population¹¹². Hamas has even gone so far as to release a video on Israel’s Independence Day (last May 2014) that showed Hamas destroying Israel and murdering Israeli officials and civilians¹¹³. Indeed, its modus operandi is terrorism with respect to Israel. If Hamas were a recognized state, the international community would seriously be hampered in combatting terrorism because statehood legitimizes Hamas’s existence. Therefore, other terrorist organizations, such as the Islamic State of Iraq and Syria (ISIS) and Boko Haram—both of whom have claimed the intent to annihilate entire groups of people and take over nations—could validly claim a right to statehood legitimacy under the precedent set by recognizing a Hamas government¹¹⁴.

¹⁰⁸ Anderson, *supra* note 96, at 433, 435.

¹⁰⁹ *Id.* at 446. The Montevideo Convention further declares that “[t]he fundamental rights of states are not susceptible [to] being affected in any manner whatsoever.” Montevideo Convention, *supra* note 65, art. 5.

¹¹⁰ U.N. Charter art. 51; *see also* Montevideo Convention, *supra* note 65, art. 12.

¹¹¹ *See* United Nations Actions to Counter Terrorism, General Assembly Actions to Counter Terrorism <http://www.un.org/en/terrorism/ga.shtml> (last visited 20 Mar. 2015).

¹¹² *See* The Charter of the Islamic Resistance Movement, chap. 2, art. 9, *trans.* Muhammad Maqdsi, *available at* <http://www.palestine-studies.org/files/pdf/jps/1734.pdf> (last visited 11 Nov. 2014) [hereinafter Hamas Charter]. “The nation of truth is absent and the nation of evil has been established; as long as Islam does not take its rightful place in the world arena everything will continue to change for the worse.” *Id.* (citing The Quran, Sura 2:251).

¹¹³ Dali Halevi & Elad Benari, *Hamas Marks Independence Day with Genocide Video*, ISRAEL NAT’L NEWS (7 May 2014), <http://www.israelnationalnews.com/News/News.aspx/180346#.VT5FvyFVhBc>; *see also* Caroline Alexander, *Hamas Releases End of Hope Video to Mark Israel Independence*, BLOOMBERG NEWS (6 May 2014), <http://www.bloomberg.com/news/2014-05-06/hamas-releases-end-of-hope-video-to-mark-israeli-independence.html>.

¹¹⁴ Leila Fadel, *U.S. Hands Over Tariq Aziz, Other Detainees to Custody of Iraqi Government*, WASH. POST (14

- **Hamas as a State: Violating International Law**

Not only is Hamas already in violation of IHRL as discussed above, but worse, as a recognized state Hamas would be in continual violation of the duties of states outlined above. Indeed, Hamas has been explicitly clear on its intent to annihilate Israel through public incitement of violence in the state-run media. This fact alone directly violates several principles of the obligations of states listed above¹¹⁵.

To illustrate how Hamas as a state would violate the rights and duties of states, consider the 2014 armed conflict between Hamas and Israel. First, Hamas repeatedly utilized places of worship for military purposes, which is in conflict with its duties to respect all people and laws in accordance with the UN Charter, not to mention a direct violation of International Humanitarian Law. Abd al-Rahman Balousha (a militant in Hamas's Al-Qassam Brigade) said that two mosques in Khan Yunis—the Al-Shafi (or Alsafa) and the Alabra mosques—served as “staging grounds for Hamas” militants¹¹⁶. Muhammad Ramadan, another Hamas militant, said his “anti-tank weapons training took place in a hall located under the Alabra mosque”¹¹⁷. The hall served as a training facility for Hamas militants and a secured area where the Al-Qassam Brigade leaders met to plan armed attacks¹¹⁸. Hamas militants also admitted that the Al-Shafi and Alabra mosques in Khan Yunis served as “sites to conceal war materiel such as rocket propelled grenades (RPG), heavy PKC machine guns and AK-47s”¹¹⁹. On 23 August, Israeli planes struck one of the mosques in Khan Yunis, which likely occurred after Israeli forces discovered that both Khan Yunis mosques were used as storage facilities for Hamas artillery¹²⁰. No human casualties were reported from the attack¹²¹. A journalist reported that during one of the attempted cease-fires, “a group of men at a mosque in northern Gaza said they had returned to clean up the green glass. . . . [b]ut they could be seen moving small rockets into the mosque”¹²².

Further, a Hamas militant from Hazara, Iyad Abu Rida, said that the “Hamas-affiliated Jamaat Asnad association was located and operating from the second floor of the Altikva mosque in Hazara”¹²³. Hamas also used civilian neighborhoods for military purposes despite its awareness that civilians were residing in the areas¹²⁴. By placing the entrances to its tunnel network within the densely populated Shujaiya

July 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/14/AR2010071401604.html>; Shelby Lin Erdman, *Who Is the ISIS?* CNN (June 12, 2014), <http://www.cnn.com/2014/06/12/world/meast/who-is-the-isis> (stating that Baghdadi served four years in a U.S. prison camp in Iraq where he almost certainly developed a network of contacts and honed his ideology before being released in 2009); *see also* Mohammed Tawfeeq & Hamdi Alkhshali, *Report: ISIS Kills 270 at Syrian Gas Field*, CNN (18 July 2014), <http://www.cnn.com/2014/07/18/world/meast/iraq-isis-christians-threatened/>.

¹¹⁵ *See supra* note 113.

¹¹⁶ Herb Keinon, *Security Officials Paint Picture of Gaza Street Seething and Hamas in Disarray*, JPOST (26 Aug. 2014), <http://www.jpost.com/Arab-Israeli-Conflict/Security-officials-paint-picture-of-Gaza-street-seething-and-Hamas-in-disarray-372337>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Tactics in Gaza: Use of Human Shields Confirmed by Captured Hamas Operatives*, CIJA (Updated 14 Nov. 2014), <http://www.cija.ca/resource/whats-the-situation-in-gaza/hamas-tactics-in-gaza/> [hereinafter *Gaza Tactics*].

¹²⁰ *Israeli Strike Totally Destroys Gaza Mosque*, ISLAM.RU (23 Aug. 2014), <http://islam.ru/en/content/news/israeli-strike-totally-destroys-gaza-mosque>.

¹²¹ *Id.*

¹²² William Booth, *Israel Launches Ground Invasion of Gaza*, WASHINGTON POST (17 July 2014), http://www.washingtonpost.com/world/gaza-residents-scramble-to-make-most-of-five-hour-truce/2014/07/17/e5485fce-0d7e-11e4-8341-b8072b1e7348_story.html.

¹²³ *Hamas Exploitation of Civilian Facilities*, ISRAEL DIPLOMATIC NETWORK (24 Aug. 2014), <http://www.israeemb.org/washington/NewsAndEvents/Pages/Hamas-exploitation-of-civilian-and-medical-facilities-for-terror.aspx>.

¹²⁴ *Shuja'iyah: Hamas' Terror Fortress In Gaza*, IDF BLOG (20 July 2014), <http://www.idfblog.com/blog/2014/07/20/shujaiya-hamas-terror-fortress-gaza/>.

neighborhood and firing rockets from the same area, Hamas intended to use the civilian population as a shield in an effort to “render [the Shujaiya neighborhood] immune from [Israeli] military operations”¹²⁵. Patrick Martin, a correspondent who reported from Shujaiya (Shejaia), noted the following: “[w]hile the Israelis had warned citizens [in Shejaia] to leave, many had refused . . . because Hamas said it expected people to remain¹²⁶.” One image captured Hamas utilizing the Gaza neighborhood of Sheikh Radwan showing four rocket launch sites sitting next to a cluster of schools and a nearby residential neighborhood¹²⁷. Hamas even used hospitals where Palestinian civilians were being treated as de facto headquarters¹²⁸ for Hamas officials who wished to conduct media interviews while the sick and wounded civilians were turned away¹²⁹. Hamas militants used loudspeakers to declare that the Palestinian Authority officials were “traitors” for supporting any cease-fire agreement¹³⁰, which clearly violates the duty of states and officials to peacefully settle disputes. Hamas placed the hospitals in danger of collateral damage by locating military storage areas adjacent to them¹³¹.

Hamas was voted into political power in the Gaza Strip in 2006 by promising civilians access to water, but since then has used its extensive war chest to plan rocket launches and declare war against the State of Israel, targeting Israel’s civilians and using its own civilians as bait to gain international sympathy and garner universal support against Israel¹³². Hamas’s opinion towards peace initiatives is codified in their Charter and constitutes a deliberate and gross violation of the duty of states to seek peaceful settlement of all disputes:

[International peace] conferences are nothing but a form of enforcing the rule of the unbelievers. There is no solution to the Palestinian Problem except by Jihad. The initiatives, options, and international conferences [on establishing peace in Palestine and a two-state solution with Israel] are a waste of time and a kind of child’s play¹³³.

In short, the above demonstrates that Hamas is determined to (1) use force against the territorial integrity of another state—Israel, (2) intervene within Israel’s sovereign territory, (3) solve its disputes through non-peaceful means, and (4) completely disregard the law of armed conflict. As such, Hamas as a state would be in constant violation of the rights and duties of states.

¹²⁵ International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* art. 28, 12 Aug. 1949, 75 U.N.T.S. 287, available at <http://www.refworld.org/docid/3ae6b36d2.html> (last visited 18 April 2015).

¹²⁶ Patrick Martin, *Death Tolls Mount as Israel Expands Offensive, Hamas Resistance Hardens*, THE GLOBE AND THE MAIL (20 July 2014), <http://www.theglobeandmail.com/news/world/thousands-flee-gaza-homes-as-israel-expands-ground-assault/article19683732/>.

¹²⁷ Hamza Hendawi & Josef Federman, *Evidence Growing That Hamas Used Residential Areas*, AP (12 Sept. 2014), <http://bigstory.ap.org/article/evidence-growing-hamas-used-residential-areas>.

¹²⁸ William Booth, *While Israel Held Its Fire, the Militant Group Hamas Did Not*, WASH. POST (15 July 2014), http://www.washingtonpost.com/world/middle_east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d_story.html.

¹²⁹ *Gaza Tactics*, *supra* note 119.

¹³⁰ *Id.*

¹³¹ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 681, available at <http://www.refworld.org/docid/3ae6b37f40.html>.

¹³² See Hamas Charter, *supra* note 112, art. 16 (stating that Hamas believes its goal is to “train the Muslim generation in our area, an Islamic training that depends on . . . careful study of the enemy’s ability, current events, and new trends, studying the analysis and commentaries on it” (emphasis added)). Hamas’s mode of operation is written in its charter to know political trends and capitalize on the fact that media and the UN will report civilian casualties. *Id.*

¹³³ *Id.* art. 13.

CONCLUSION

This paper first determined that Hamas, as a quasi-state actor, is bound by IHRL. Not only is the purpose of IHRL served by applying it to all international actors, but international law affirmatively obligates in particular quasi-state actors—entities that have significant control and influence over a population—to comply with IHRL. Second, this paper discussed statehood under international law and the consequences should a terrorist organization become the governing entity of a recognized state, including granting immunity to terrorist leaders, justifying terrorism, and undermining the international community’s ability to firmly and decisively combat terrorism.