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U.S. RECOGNITION PRACTICE: REALISM, LEGITIMACY, OR PRAGMATISM?

*Milena Sterio**

I. INTRODUCTION

The United States, under both the Trump and Biden Administrations, has engaged in particular recognition practices, such as recognizing Israeli sovereignty over the Golan Heights and Morocco's sovereignty over Western Sahara.¹ These acts of recognition involve situations where a territory was occupied (by Israel and by Morocco), and where after several decades of occupation, the United States adopted a realist approach and recognized the de facto situation as the legitimate, de jure, state of affairs. This recognition approach by the United States may indicate a new recognition practice: that the United States has moved away from recognizing governments based on legitimacy or based on formal legal factors toward using a realist recognition practice that is based on the actual situation on the ground. Alternatively, this

* The Charles R. Emrick Jr. – Calfee Halter & Griswold Professor of Law, Cleveland-Marshall College of Law. The author would like to thank the *George Mason International Law Journal* and the Center for the Middle East and International Law of the George Mason Antonin Scalia Law School for hosting the symposium titled, “The New U.S. Recognition Policy,” on December 16th, 2021, and for the opportunity to present an earlier version of this paper at the event.

¹ Regarding the United States’ recognition of Israeli sovereignty over the Golan Heights under the Trump Administration, see Vanessa Romo, *Trump Formally Recognizes Israeli Sovereignty Over Golan Heights*, NPR (Mar. 25, 2019), <https://www.npr.org/2019/03/25/706588932/trump-formally-recognizes-israeli-sovereignty-over-golan-heights> (noting that President Trump signed a proclamation that recognized Israeli sovereignty over Golan Heights). The Biden Administration has not reversed this recognition policy. See *Blinken Stops Short Of Endorsing Trump Recognition Of Golan Heights As Israel*, REUTERS (Feb. 8, 2021), <https://www.reuters.com/article/us-usa-israel-blinken-stops-short-of-endorsing-trump-recognition-of-golan-heights-as-israel-idUSKBN2A82N5> (noting that Secretary of State Blinken stopped short of endorsing the Trump Administration’s recognition of Golan Heights as part of Israel, but that he stated that this territory was important for Israel’s security); see also John Quigley, *The Biden Administration and the Golan Heights*, OPINIO JURIS (Aug. 2, 2021), <https://opiniojuris.org/2021/08/02/the-biden-administration-and-the-golan-heights/> (reporting that the U.S. State Department tweeted on its Near East Affairs Account on June 25, 2021, following reports that President Biden would reverse the Trump-era policy of recognition of Golan Heights as part of Israel, that “US policy regarding the Golan has not changed.”). Regarding the United States’ recognition of Moroccan sovereignty over Western Sahara under the Trump Administration, see, e.g., John Bolton, *Biden Must Reverse Course on Western Sahara*, FOREIGN POLICY (Dec. 15, 2020), <https://foreignpolicy.com/2020/12/15/biden-reverse-course-western-sahara/>.

approach to recognition indicates that the United States is distinguishing between recognition of governments and recognition of borders and applying a realist approach to the latter.

This Article will analyze recent United States’ recognition practice and will attempt to decipher the United States’ apparent shift in its recognition practice toward a realist approach and/or toward focusing on recognizing new borders. As outlined below, this Article will conclude that United States’ recognition practice, toward both new regimes as well as borders, seems to be driven by pragmatic concerns rooted in American foreign policy as well as American political and strategic interests in a given country or region. Thus, it may be inaccurate to discuss such recognition practices as realist or legitimacy-based in any normative sense; instead, it may be more prudent to approach recognition through the lens of foreign policy, pragmatism, and international politics.

In Part II, this Article will discuss the concept of recognition by focusing on what recognition entails and why it matters. In Part III, this Article will discuss the United States’ history of recognition practices, including the so-called legitimacy-based approach and the realist or “*de facto*” approaches to recognition. In Part IV, this Article will analyze the United States’ recognition practice in the context of the Israeli-Arab conflict. In this section, the Article will distinguish between recognition of governments and recognition of borders to assess whether the United States has moved toward a more uniform realist approach toward the latter. This Article will conclude that the U.S. recognition policy—whether of governments or borders—is rooted in pragmatism and foreign policy. In fact, the United States has recognized governments and borders when this has been consistent with American foreign policy toward the particular country or region. Thus, the United States’ recognition policy seems to have oscillated between legitimacy and realism in cases of both government and border recognition practices. As this Article will conclude, it would be incorrect to argue that the United States has adopted a realist approach toward recognition because of any normative values; instead, the various recognition approaches adopted by the United States, including the most recent one by the Trump Administration, have been driven by foreign policy interests and pragmatism.

II. RECOGNITION: WHAT IT MEANS AND WHY IT MATTERS

International law is not uniform on the subject of recognition. In fact, recognition is inherently a political act which does not lend itself

well to any type of normative rules.² However, recognition implies international and legal issues and consequences; as such, it remains an important concern of international law scholars.³ This section will address some preliminary issues regarding recognition.

Although it may be argued that international law obligates states to treat a regime that is in effective control of a state as that state's government for certain fundamental purposes (this is referred to as *de facto* recognition), states remain at liberty to extend or reject *de jure* recognition to any regime.⁴ "De jure recognition implies that the recognizing State is of the opinion that the recognized government meets the required criteria, and that it wishes to be bound by the international legal consequences of recognition. . . . In contrast, *de facto* recognition implies doubt as to the long-term viability of the government, and is the result of a 'hesitant assessment of the situation, an attitude of wait and see.'"⁵ *De jure* recognition is often granted formally, while *de facto* recognition can be granted informally through state behavior and state practice.⁶

It is also important to distinguish recognition of governments (the subject of this Article) and recognition of states. While the former refers to practices related to a state's decision on whether or not to formally engage with a new regime, the latter has to do with a state's decision to acknowledge a new state as such.⁷ In other words, recognition of governments deals with regime changes while recognition of states relates to acknowledging the creation and existence of new states.⁸ It should be noted that state and government recognition are not always linked. In fact, a state may recognize another state as a sovereign entity

² See, e.g., Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 612 (1941) (noting that the "political act of recognition of a state or government means that the recognizing state is willing to enter into political and other relations with the recognized state or government...").

³ Anne Schuit, *Recognition of Governments in International Law and the Recent Conflict in Libya*, 14 INT'L COMM. L. REV. 381, 383-84 (2012).

⁴ *Id.*

⁵ Schuit, *supra* note 3, at 385-86 (citing Malcolm Shaw, *International Law* 460 (2008)).

⁶ *Id.*

⁷ See Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMP. L.Q. 545-581, 546 n. 2 (1999).

⁸ For a discussion of recognition of states under international law, see Mariya Pallwala, *State Recognition under International Law*, IPLEADERS BLOG (Feb. 10, 2020), <https://blog.iplayers.in/state-recognition/> (describing the different views on the recognition of states under international law); see generally Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605 (1941).

without recognizing its corresponding government.⁹ The best example of this is Somalia in the early 1990s, when most states recognized Somalia as a state without recognizing a particular government as the state’s legitimate representative.¹⁰

Moreover, there are two generally-accepted views on government recognition: (1) the effective control doctrine; and (2) the legitimacy doctrine.¹¹ The former asserts that whichever authority exercises effective control over a territory, that authority ought to be recognized as its government.¹² Thus, this approach toward recognition focuses on an analysis of facts only and extends recognition to both offensive regimes as well as those that come into power through extra-constitutional means.¹³ The so-called *Tinoco* arbitration is often cited as the landmark case confirming the principle of effective control.¹⁴ In that case, Chief Justice Taft held that Costa Rica’s Tinoco government exercised effective control over the country and was thus a valid government.¹⁵ The latter maintains that recognition should be extended only to those governments which come into power through the established legal order, regardless of whether such governments actually exercise effective control over their territory.¹⁶ The legitimacy-based view on recognition is enshrined in the Tobar doctrine, embodied in a treaty among the Central American States, as well as in the Wilson doctrine, and advanced by the U.S. President Woodrow Wilson post-World War I.¹⁷

In addition to these two opposing views on recognition, a third view has been advanced—the so-called de factoism, which posits that the existence of governments is a question of fact and that recognition of governments ought to be eradicated.¹⁸ This view was espoused by the so-called Estrada doctrine—an express codification of this view by Mexico in the 1930s, named after the then-Mexican Secretary of Foreign Affairs,

⁹ See Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT’L & COMP. L.Q. 545-581, 566, 571 (1999).

¹⁰ Scott Anderson, *What Does It Mean for the United States to Recognize Juan Guaidó as Venezuela’s President?*, LAWFARE (Feb. 1, 2019), <https://www.lawfareblog.com/what-does-it-mean-united-states-recognize-juan-guaidó-venezuelas-president>.

¹¹ See Schuit, *supra* note 3, at 388-89.

¹² See *id.* at 389.

¹³ See *id.*

¹⁴ See *id.* at 390.

¹⁵ See *id.* at 390-91.

¹⁶ See *id.* at 391.

¹⁷ See *id.* at 392.

¹⁸ See *id.* at 393.

Mr. Estrada.¹⁹ As this Article will discuss below, the United States has, throughout history, ascribed to different views of recognition, including all three mentioned above. For the purposes of this Article, the effective control test and *de factoism* will be analyzed in the same manner, as these two recognition views largely overlap and coincide in their rejection of any legitimacy-based criteria to recognition of governments.

Despite the lack of clarity in international law on the subject, recognition matters. Although an unrecognized government's actions can create international legal rights and obligations for that state, a recognized government typically enjoys a broader range of privileges, none of which are typically available where there is no formal recognition.²⁰ Such recognition-based privileges include access to other states' domestic courts, ownership of property located overseas, exercise of control over foreign diplomatic facilities, and many other sovereign prerogatives.²¹ "While these consequences may not be significant in relation to every bilateral relationship, they can be costly when a major power is involved and potentially debilitating if a substantial share of the international community shares the same position."²² In fact, states who wish to advance a policy agenda through their recognition policy often seek to coordinate with as many other states as possible.²³

As a practical matter, states exercise a great deal of discretion in making recognition determinations. In the modern era, the most common approach followed by many states, including the United States, has been to avoid express forms of governmental recognition and to implicitly recognize new governments.²⁴ This is done by simply continuing to routinely engage with them on official matters.²⁵ As one scholar has noted,

¹⁹ See *id.*

²⁰ See Scott R. Anderson, *History and the Recognition of the Taliban*, LAWFARE (Aug. 26, 2021), <https://www.lawfareblog.com/history-and-recognition-taliban>; see also Anderson, *What Does It Mean for the United States to Recognize Juan Guaido as Venezuela's President?*, *supra* note 10, at 2 (describing recognition of states versus recognition of governments as follows: "[t]he former identifies a physical territory and associated population as a state that is—or should be—governed by a single political system. The latter specifies the political actors believed to be in 'effective control' of the state, meaning they have the ability to govern in a manner that complies with the state's international legal obligations.").

²¹ See Anderson, *History and the Recognition of the Taliban*, *supra* note 20.

²² *Id.*

²³ *Id.*

²⁴ Schuit, *supra* note 3, at 394.

²⁵ See *id.*

The UK was one of the first States to abolish the recognition of governments, and in 1960 announced to no longer grant recognition to governments and reserve recognition solely to States. Belgium and France followed in 1965, and Australia and Canada in the 1980s. The Netherlands changed its policy in the 1990s by stating that it has no duty to recognise a new government and neither do new governments have a right to be recognised. It later on added that abolishing the recognition of governments avoids the appearance of interference in internal affairs of other States.²⁶

States have also used recognition as a foreign policy tool. In some instances, states have subjected recognition to certain preconditions—“for example, by requiring that a regime acknowledge certain international legal obligations, implement democratic reforms, or capitulate on a given policy dispute before they formally recognize it.”²⁷ In other instances, states have extended formal recognition “to a favored opposition movement in order to provide it with legitimacy and access to state resources, even if its claim to effective control is dubious.”²⁸

In some instances, however, states have reached explicit recognition determinations, most often in situations where there has been a revolution, a military coup, or another type of extra-constitutional seizure of power by a new regime. In fact, many democratic states are often hesitant to accept the replacement of a lawfully appointed government with one that has taken power through violence or other unlawful means.²⁹ In these situations, states may choose to continue to recognize an ousted government which had been lawfully elected or appointed despite the latter’s lack of effective control over its country.³⁰ Finally, in some situations, “when a state is plagued by domestic political instability, other states have sometimes been unwilling to recognize it as having any government whatsoever.”³¹

In sum, although international law lacks uniformity on the subject of recognition, the latter is important and may influence a

²⁶ *Id.*

²⁷ Anderson, *History and the Recognition of the Taliban*, *supra* note 20.

²⁸ *Id.*

²⁹ See *infra* Part III.A for a full discussion of this type of a legitimacy-based approach to recognition.

³⁰ See *infra* Part III.A for a full discussion of this type of a legitimacy-based approach to recognition.

³¹ Anderson, *supra* note 20.

regime's ability to fully exercise its sovereign functions in the international arena.

Different states have followed different recognition practices throughout history. As the following section will discuss, the United States has also been inconsistent in its approach toward recognition of government. At times, the United States has recognized new governments based on their ability to exercise effective control over their respective territories, while on other occasions, the United States has focused on a given government's legitimacy before extending formal recognition thereto.³²

III. HISTORY OF UNITED STATES' RECOGNITION PRACTICE

During the first century and a half of its existence, the United States would establish diplomatic relations with various foreign governments in an ad hoc fashion.³³ To this day, there are few codified rules concerning recognition in American law.³⁴ Generally speaking, it is the policy of the U.S. government to recognize states, not governments, and to engage with whichever leader is de facto in charge of any given state.³⁵ This approach can be viewed as "realist," and has also been referred to by scholars as the "effective control" test for recognition—the application of this approach would lead the United States to recognize whichever government or leader has effective control over the relevant state, regardless of the leader's democratic legitimacy.³⁶

The United States has not always utilized the realist approach. For example, Woodrow Wilson used nonrecognition to de-legitimize

³² See *infra* Part III.

³³ Joshua Keating, *How Does the U.S. Decide Which Governments to Recognize?*, FOREIGN POLICY (Apr. 13, 2010), <https://foreignpolicy.com/2010/04/13/how-does-the-u-s-decide-which-governments-to-recognize/>.

³⁴ In the United States, recognition decisions are the exclusive authority of the President, but Congress can incorporate recognition decisions into other areas of law. See Anderson, *What Does It Mean for the United States to Recognize Juan Guaido as Venezuela's President?*, *supra* note 10.

³⁵ *Id.*

³⁶ See, e.g., Federica Paddeu & Alonso Gurmendi Dunkelberg, *Recognition of Governments: Legitimacy and Control Six Months After Guaido*, OPINIO JURIS (July 18, 2019), <http://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/> (noting that normally states apply the effective control test toward recognition of governments); see also Maria Aristodemou, *Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia*, 5 EUR. J. INT'L L. 532, 534 (1994) (noting that the United Kingdom government has throughout history used the effective control test to decide whether to recognize governments).

nondemocratic foreign leaders, such as the Mexican dictator Victoriano Huerta.³⁷ In addition, for years, the United States recognized the anti-communist government in Taipei as the legitimate government of China.³⁸ This approach to recognition practice is opposed to the realist one as it is based on the United States’ assessment of the legitimacy of the relevant government, and not on whether the latter has effective control over the territory it is attempting to administer. The section below will discuss the two different approaches to recognition used by the United States: (1) the legitimacy approach; and (2) the realist approach. As this section will demonstrate, the United States has used both approaches throughout history.

A. *Legitimacy Approach*

For its first century and a half, the general policy of the United States was to recognize de facto governments—those that had effective, de facto control over their purported state.³⁹ As an example, “despite many military coups and dictatorial governments established in Mexico between 1823 and 1860, the United States withdrew its diplomatic representatives from Mexico City only three times, and that for only short periods.”⁴⁰ In the early twentieth century, this recognition practice changed somewhat—motivated in large part by moralism—which seemed to be one of the driving ideologies of the Woodrow Wilson presidential administration.⁴¹ In addition to moralism, Wilson was driven by the ideology of self-determination and seemed to base recognition decisions on whether the relevant government had acquired power pursuant to the will of its people.⁴² Thus, in 1920, Bainbridge Colby, Wilson’s third and last Secretary of State, announced that the United States would not recognize the Soviet Union because it had subverted

³⁷ See, e.g., *The Mexican Revolution and the United States in the Collection of the Library of Congress*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/mexican-revolution-and-the-united-states/wilson-to-veracruz.html> (last visited Mar. 25, 2022).

³⁸ Keating, *supra* note 33.

³⁹ *American Foreign Relations*, U.S. POLICY IN THE RECOGNITION OF STATES, <https://www.americanforeignrelations.com/O-W/Recognition-U-s-policy-in-the-recognition-of-states.html> (last visited Mar. 25, 2022).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* For a full discussion of Woodrow Wilson’s approach to self-determination, see generally Allen Lynch, *Woodrow Wilson and the Principle of ‘National Self-Determination’: A Reconsideration*, 28 REV. INT’L STUDIES 419 (2002); RITA AUGESTAD KNUDSEN, *Woodrow Wilson, ‘Self-Determination’ and the Liberal-Conservative Idea of Freedom, in THE FIGHT OVER FREEDOM IN 20TH- AND 21ST-CENTURY INTERNATIONAL DISCOURSE* (2020).

popular government and denied Russians the democratic right of self-determination.⁴³

The United States refused to recognize a number of states other than the Soviet Union in the 1920s and 1930s.⁴⁴ Although not a signatory, the United States at times embraced the so-called Tobar Doctrine that grew out of treaties of peace and amity negotiated among the Central American republics in 1907 (renewed in 1923).⁴⁵ Designed to discourage revolutions, these treaties provided that the parties "shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a coup d'état, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country."⁴⁶ The application of these treaty provisions also disqualified the leaders of a coup d'état from assuming the presidency or vice presidency.⁴⁷ "The United States applied the doctrine to the revolutionary leader Federico Tinoco in Costa Rica in 1917, to Honduras in 1924, and to the government of Emiliano Chamorro of Nicaragua in 1925, thereby giving extreme expression to Jefferson's 'will of the nation substantially declared,' out of fear that dictatorships and revolutionary governments posed a danger for international peace."⁴⁸

During the post-Wilson era, following a similar policy of "moralism," the United States refused to recognize forcible territorial changes or governments engaged in acts of aggression. Examples include: the case of Japan, the aggressor with respect to Manchuria; the Soviet Union with respect to the Baltic states, which were not recognized until the end of the Cold War once freed of Soviet control; or Germany with respect to its conquest of western Europe during World War II.⁴⁹ Most recently, the United States has refused to recognize the Russian occupation of Crimea as legitimate.⁵⁰ Instead, the United States remains committed to the restoration of Ukraine's territorial integrity and

⁴³ *American Foreign Relations*, *supra* note 39.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Chandler P. Anderson, *The Central American Policy of Non-Recognition*, 19 AM. J. INT'L L. 164, 164 (1925).

⁴⁷ *American Foreign Relations*, *supra* note 39.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Bureau of European and Eurasian Affairs, *U.S. Relations with Russia: Bilateral Relations Fact Sheet*, U.S. DEPARTMENT OF STATE (Sept. 3, 2021), <https://www.state.gov/u-s-relations-with-russia/> (noting that Russia had violated Ukraine's sovereignty and territorial integrity in 2014, and referring to "Russian aggression" vis-à-vis Ukraine).

sovereignty.⁵¹ It does not recognize Russia’s claims to Crimea, and it has encouraged Russia and Ukraine to resolve the conflict via the Minsk Agreement, a series of accords signed in 2014 and 2015 and brokered by France and Germany. The Minsk Agreement calls for a cease-fire, a withdrawal of heavy weapons, Ukrainian control over its border with Russia, local elections, and a special political status for certain areas of the region.⁵²

The United States also followed a policy of non-recognition toward governments it deemed illegitimate or contrary to the will of the relevant people. As an example, the United States refused to recognize the communist government of China, despite the latter’s effective control of the country.⁵³ Most recently, in 2019, the United States recognized Juan Guaidó as Venezuela’s lawful president even though Nicholas Maduro, who won the controversial elections, effectively controlled the state machinery.⁵⁴ Here, the United States’ recognition seems to also have been rooted in the principle of legitimacy, as Guaidó was viewed by the United States as the legitimate leader of Venezuela.⁵⁵

It may be argued that the United States has also obtained collective support for the moralist or legitimacy-based policy from Latin American states, democratic European nations, as well as African countries. For example, the Organization of American States issued Resolution 1080 in 1991, which proclaimed that one of the organization’s goals was to “promote and consolidate representative democracy,” and which enabled the organization to act in case of an

⁵¹ *Id.*

⁵² See, e.g., Jonathan Masters, *Why NATO Has Become a Flash Point With Russia in Ukraine*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/why-nato-has-become-flash-point-russia-ukraine> (last updated Jan. 20, 2022); see also Bureau of European and Eurasian Affairs, *supra* note 50. For more detailed information about the Minsk Agreement, see, e.g., *Factbox: What Are the Minsk Agreements on the Ukraine Conflict?*, REUTERS (Dec. 6, 2021), <https://www.reuters.com/world/europe/what-are-minsk-agreements-ukraine-conflict-2021-12-06/>.

⁵³ Keating, *supra* note 33.

⁵⁴ See Ned Price, *U.S. Recognition of Venezuela’s 2015 National Assembly and Interim President Guaidó*, U.S. DEPARTMENT OF STATE (Jan. 4, 2022), <https://www.state.gov/u-s-recognition-of-venezuelas-2015-national-assembly-and-interim-president-guaido/>.

⁵⁵ Anderson, *What Does It Mean for the United States to Recognize Juan Guaidó as Venezuela’s President?*, *supra* note 10 (noting that the United States, and other countries, have “renounced the legitimacy” of Venezuela’s current president, Nicolás Maduro). The Biden Administration has continued and reaffirmed the recognition of Guaidó as the legitimate president of Venezuela. See Price, *supra* note 54 (“[T]he United States continues to recognize the authority of the democratically elected 2015 National Assembly as the last remaining democratic institution and Juan Guaidó as Venezuela’s interim president.”).

extra-constitutional seizure of power within any of its member states.⁵⁶ When democratically-elected Haitian President Jean-Bertrand Aristide was ousted in a military coup in 1990, the Organization of American States condemned the coup in accordance with the previously mentioned Resolution 1080.⁵⁷ In addition, the United Nations General Assembly unanimously passed Resolution 46/ (which also condemned the military coup), affirmed “as unacceptable any entity resulting from that illegal situation,” and demanded the “immediate restoration of the legitimate Government of President Jean-Bertrand Aristide.”⁵⁸ In October 1991, the Conference (today, Organization) for Security and Cooperation in Europe adopted a policy on extra-constitutional seizures of power similar to the one expressed in the Organization of American States Resolution 1080.⁵⁹ Additionally, the Constitutive Act of the African Union lists as a core principle the “condemnation and rejection of unconstitutional changes of governments.”⁶⁰ Moreover, the Act prohibits participation in African Union activities for governments coming to power through such unconstitutional means.⁶¹

In sum, throughout history, starting with the Wilson era, the United States has used the legitimacy-based approach to recognition of governments, choosing to officially recognize only those which were deemed legitimate and/or those which came into power based on the free will of the governed people. Other countries and regional organizations, such as the Organization of American States, the Conference on Security and Cooperation in Europe, and the African Union, have also adopted core principles which reflect such a legitimacy-based or moralist approach toward recognition of governments. Despite state practice and international policy adopting the legitimacy-based approach, international law is far from uniform on the issue of recognition of governments. The following section will discuss the opposing view on recognition, the so-called realist approach, which has also been used by states, including the United States.

⁵⁶ O.A.S. Res. AG/RES 1080 (1991).

⁵⁷ See, e.g., *O.A.S. Group Begins Effort To Return Aristide to Power*, N.Y. TIMES (Nov. 12, 1991), <https://www.nytimes.com/1991/11/12/world/oas-group-begins-effort-to-return-aristide-to-power.html>; see generally Dexter S. Boniface, *Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States*, 8 GLOB. GOVERNANCE 365 (2002).

⁵⁸ G.A. Res. 46/7, *The Situation of Democracy and Human Rights in Haiti* (Oct. 11, 1991).

⁵⁹ See Morton Halperin, *Guaranteeing Democracy*, FOREIGN POLICY (1993), <https://www.jstor.org/stable/1149062>.

⁶⁰ *Constitutive Act of the African Union* 7, AFRICAN UNION (Jul. 11, 2000), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.

⁶¹ *Id.*

B. *Realist Approach*

Until Wilson's presidency, United States' practice prior to extending recognition to any government was to avoid the question of legitimacy and instead focus on effectiveness and evidence of popular consent, as expressed through, for example, free elections.⁶² Secretary of State Thomas Jefferson famously stated in the context of the French Revolution, "[i]t accords with our principles to acknowledge any government to be rightful which is formed by the will of the people, substantially declared."⁶³ However, Jefferson added that in certain instances he would deal with a "government de facto."⁶⁴ Jefferson has been declared a pioneer of "de factoism," and it may be argued that this approach toward recognition of governments is rooted in realism.⁶⁵ During the 19th century, the United States largely followed this approach. As an example, "despite many military coups and dictatorial governments established in Mexico between 1823 and 1860, clearly not based on the free will of the people, the United States withdrew its diplomatic representatives from Mexico City only three times," and that for only short periods.⁶⁶

Wilson's legitimacy-based approach to recognition of governments, which was sparingly used by subsequent administrations in the 1920s, 1930s, and 1940s, as described above, could be seen as an interlude in the otherwise consistent policy of realism or *de factoism*. In fact, the realist approach toward recognition permeated through multiple

⁶² Keating, *supra* note 33.

⁶³ See, e.g., *Thomas Jefferson, a Revolutionary World*, LIBRARY OF CONGRESS <https://www.loc.gov/exhibits/jefferson/jeffworld.html> (last visited Mar. 25, 2022).

⁶⁴ *Id.*

⁶⁵ Some scholars have argued that *de factoism* is a separate approach to recognition of governments. "*De factoism* to a large extent asserts the same principles as the effective control doctrine, and the two widely overlap. However, *de factoism* proposes to eradicate the recognition of governments, and reserve recognition for States." Schuit, *supra* note 3, at 393. This doctrine was specifically codified by Mexico, after which it became known as the Estrada Doctrine. The Mexican government issued a formal declaration to this effect in 1931: "... The Mexican government is issuing no declaration in the sense of grants of recognition, since that nation considers that such course is an insulting practice and one which, in addition to the facts that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments...." See Marjorie Millace Whiteman, *Digest of International Law*, Vol 2, at 85, citing LV Boletín Oficial de la Secretaría de Relaciones Exteriores, Estados Unidos Mexicanos (Sept. 1930, No. 9), p. 9). For the purposes of this Article, realism and *de factoism* will be analyzed in the same manner as they largely overlap and as they both reject the application of any legitimacy-based criteria to recognition.

⁶⁶ See *American Foreign Relations*, *supra* note 39.

United States' presidential administrations following the Wilson era.⁶⁷ "In 1930, Secretary of State Henry L. Stimson agreed that subsequent legitimation by constitutional methods would warrant the recognition of a new government—even if such a government came to power through extra-constitutional means."⁶⁸ In fact, during the same year, the United States recognized new governments in Argentina, Bolivia, and Peru on a de facto basis; in 1932, the United States recognized a new government in Chile. In order to issue such formal recognition, all "Stimson required was that a new government furnish evidence "that it is in control of the country and that there is no active resistance to it."⁶⁹ He suggested, however, that each government "hold in due course elections to regularize its status."⁷⁰ Stimson thus adhered to the realist principle of recognition based simply upon the effectiveness of a government, thereby repudiating the Wilson policy of moralism.⁷¹ In the more recent years, the United States has followed such a realist policy of recognition and has recognized leaders who came into power through military coups or other extra-constitutional means. In 1999, the United States recognized the Musharraf military coup, which overthrew Pakistan's democratically-elected government.⁷² And in the late 1990's, the United States was one of a handful of states which officially recognized the first Taliban regime as the official government of Afghanistan, despite the regime's lack of rule-of-law based legitimacy.⁷³

Recognition of governments can become more complicated when there are multiple leaders or groups within a country claiming to be the legitimate government. Thus, in the more recent decades, United States' leaders have mostly tried to avoid getting involved in recognition battles in countries where competing factions might be seeking legitimacy.⁷⁴ "Instead, the United States typically avoids taking the lead in recognition, waiting for the domestic politics to play out or for regional bodies, such as the Organization of American States, to resolve

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² See, e.g., Caroline Wadhams & Brian Katulis, *Musharraf's Resignation Creates an Opening for U.S. Policy*, AMERICAN PROGRESS (Aug. 18, 2008), <https://www.americanprogress.org/article/musharraf-resignation-creates-an-opening-for-u-s-policy/>.

⁷³ Ben Saul, "Recognition" and the Taliban's International Legal Status, INT'L CTR. FOR COUNTER-TERRORISM (Dec. 15, 2021), <https://icct.nl/publication/recognition-talibans-international-legal-status/>.

⁷⁴ Joshua Keating, *Foreign Policy: Who Is In Charge Here?* NPR (Apr. 15, 2010), <https://www.npr.org/templates/story/story.php?storyId=126011690>.

the crisis before deciding whether to confer legitimacy on the new government.”⁷⁵ For example, in the case of Honduras, “the United States followed the lead of other Latin American countries in deeming Zelaya’s ouster illegitimate.”⁷⁶ Another example, in 2010, when Kyrgyz President Kurmanbek Bakiyev announced that he would resign, one week after being forced to flee the capital amid a bloody uprising, the U.S. Embassy in Kyrgyzstan announced that it had no plans to help Mr. Bakiyev.⁷⁷ Shortly thereafter, then-Secretary of State Hillary Clinton announced that she had already spoken with the country’s new leader to “support the efforts of the Kyrgyz administration.”⁷⁸ Additionally, in the most recent cases of Afghanistan, post-Taliban takeover, and Sudan, post-military coup, the United States seems to have adopted a wait-and-see approach, where it has refused to explicitly recognize the new regime while implicitly recognizing such new regimes’ effective control over the given territory.⁷⁹

Regarding the Afghanistan situation, the United States can also condition recognition on the new regime’s promise to satisfy certain conditions; for example, the respect of human rights norms.⁸⁰ It may be argued that the wait-and-see attitude toward recognition is also rooted in realism. In these situations, the United States has preferred to wait until the governance situation is resolved so that it can then recognize the leader who is *de facto* in control. In other words, because in some of these conflicts no particular leader exercises effective control, the United States adopts a neutral attitude, based in realism, until a leader or a group establishes such control and can then be recognized as legitimate.

In sum, as the discussion above demonstrates, the United States has followed both a legitimacy-based as well as a realist approach throughout history. In addition, the United States has at times adopted a “neutral” attitude where it has waited for other states or organizations lead the recognition efforts of a new leader in post-coup settings, or a wait-and-see attitude of refusing to explicitly engage in recognition or

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Keating, *supra* note 33.

⁷⁸ *Id.*

⁷⁹ The United States has explicitly condemned the military coup in Sudan and has withheld financial assistance; the United States has also chosen to not formally recognize the new military regime. See Matthew Lee, *US Condemns Sudan Coup, Suspends \$700 Million in Aid*, AP NEWS (Oct. 25, 2021), <https://apnews.com/article/middle-east-africa-sudan-khartoum-96e7b33b6e1045f0e01189e81b36814a>.

⁸⁰ For an analysis of the U.S. recognition practice vis-à-vis the Taliban regime in Afghanistan, see, e.g., Tess Bridgeman & Ryan Goodman, *Expert Backgrounder: Recognition and the Taliban*, JUST SECURITY (Aug. 17, 2021), <https://www.justsecurity.org/77794/expert-backgrounder-recognition-and-the-taliban/>.

non-recognition vis-à-vis a post-coup or post-conflict leader. The following section will discuss the concept of recognition of borders, and it will attempt to distinguish between this concept and that of recognition of states and governments. This section will then focus on the United States' practice of recognition of borders to determine whether this practice aligns itself with the realist approach to the recognition of governments.

IV. RECOGNITION OF BORDERS: THE ISRAELI-ARAB CONFLICT

Border issues and disputes are difficult to resolve. International law does not contain a clear set of norms for determining state sovereignty over territory in the face of competing factual claims.⁸¹ As with recognition of governments, states as well as the international community, through its organizations, are at liberty to choose to recognize borders.

The concept of recognized borders refers to borders which are legitimized by the international community. Such recognition of border can occur through a mutual agreement on permanent borders between two or more states (sharing the relevant border) through: (1) an approval of the international community via an explicit resolution or via a binding ruling by the International Court of Justice (ICJ); or (2) through reference to the existence of a historical boundary line.⁸² Throughout history, states have engaged in different methods of resolving border dispute, which have often resulted in the official recognition of such negotiated borders. The ICJ has ruled over territorial disputes in at least fourteen cases; in most of these cases, the relevant states submitted the dispute to the world court for resolution, and the court's ruling was peacefully implemented.⁸³ Thus, it may be argued that the ICJ has played a crucial role in recognizing state sovereignty over particular territory and specific borders. The Permanent Court of Arbitration has also played a prominent role in resolving territorial disputes, thereby implicitly legitimizing borders. In a relatively recent example, the Court presided over the *Abyei* dispute, opposing Sudan and the Sudan People's Liberation Movement.⁸⁴

⁸¹ *Approaches to Solving Territorial Conflicts*, THE CARTER CENTER (May 2010), https://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/solving_territorial_conflicts.pdf.

⁸² *See generally id.*

⁸³ *Id.* at 4-19 (discussing the fourteen ICJ cases, involving territorial disputes, at length).

⁸⁴ *Id.* at 11.

In some instances, states have negotiated and arbitrated territorial disputes on an ad hoc basis, often with the help of other, so-called guarantor nations. The location of the inter-entity border, between the Bosniak-Croat Federation and the Republika Srpska, two regions established within the then newly-created state of Bosnia-Herzegovina, was resolved through the *Brcko* Arbitration, an arbitral panel set up through the Dayton Peace Agreement.⁸⁵ The ad hoc arbitral panel's ruling has contributed toward a legitimization of this internal boundary and the prevention of further conflict.⁸⁶ Peru and Ecuador negotiated and arbitrated a border disputed under the so-called Rio Protocol, a 1942 treaty entered into by the disputants as well as four “friendly powers”—Argentina, Brazil, Chile, and the United States—acting as guarantors.⁸⁷ This territorial dispute was ultimately resolved in 1998 with the signing of the Brasilia Agreements, through the help of the guarantor nations and with reference to the Rio Protocol.⁸⁸ Argentina and Chile negotiated a maritime territorial dispute over the Beagle Channel with the help of the Holy See and Pope John Paul II.⁸⁹

The United Nations also has played a key role in mediating state border disputes. For example, “in 2006, with facilitation by then U.N. Secretary-General Kofi Annan, Cameroon and Nigeria signed an agreement on implementation of the ICJ 2002 decision recognizing Cameroonian sovereignty over the Bokassi Peninsula and other contested areas.”⁹⁰ In addition to the above-mentioned processes for resolving territorial disputes and determining boundaries, states are also free to engage in their own border recognition practices.⁹¹ Thus, as this section will discuss below, while the international community may adopt a particular stance toward a specific border, other states, like the United States, can depart therefrom and reach a different border recognition decision.

Recognition of borders is theoretically a separate concept from the recognition of states or recognition of governments.⁹² However, in

⁸⁵ *Id.* at 27.

⁸⁶ *Approaches to Solving Territorial Conflicts*, *supra* note 81, at 27-29.

⁸⁷ *Id.* at 18 (discussing the Peru-Ecuador territorial dispute).

⁸⁸ *Id.* at 20-21.

⁸⁹ *Id.* at 23-24.

⁹⁰ *Id.* at 26.

⁹¹ The ability to recognize borders is one of the attributes of state sovereignty. For a full discussion of statehood, recognition, and sovereignty, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 139-140 (2nd ed. 2006).

⁹² See Beth A. Simmons, *Borders Rules*, FAC. SCHOL. AT PENN LAW, 2019, at 1, 7-8, 20-22, 41-42; Harvey Starr, *International Borders: What They Are, What They Mean, and Why We Should Care*, 26 SAIS REV., no. 1, Winter-Spring 2006, at 3, 4-6, 8-9.

practice this concept is closely linked to recognition of states and governments. In fact, one of the fundamental elements of statehood is territory—delineated by borders—and it can be argued that the recognition of a new state implies the recognition of its borders.⁹³ When the United States decided to recognize Kosovo and South Sudan as new states, it may be argued that the United States also implicitly acknowledged their new borders as legitimate.⁹⁴ In addition, recognition of borders is linked to recognition of governments. If the United States chooses to recognize the new Taliban regime as the legitimate ruler of Afghanistan, the United States will be implicitly acknowledging the Taliban rule over the country's borders, thereby legitimizing such borders. These recognition practices are most complex in situations of conflict, such as the one opposing Israel and Palestine.

The United States has been a strong supporter of Israel.⁹⁵ However, multiple U.S. administrations have proposed road maps for a peace process that would result in two states, one Israeli and one Palestinian. Over time, and throughout different U.S. administrations, the United States has attempted to broker peace between Israel and the Palestinian Authority without explicitly providing support for specific borders or territory for either side; it theoretically supports the two-state solution.⁹⁶ Nonetheless, the United States sided with Israel during the 1973 conflict, opposing Israel and its Arab neighbors attempting, among other aims, to reclaim territory lost to Israel in the 1967 war.⁹⁷ Moreover, the United States has used its veto power in the United Nations Security Council to block resolutions condemning the Israeli building of settlements in the West Bank.⁹⁸ Thus, although the United States has

⁹³ The four criteria of statehood are derived from the Montevideo Convention on the Rights and Duties of States, which posits in Article 1: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Montevideo Convention on the Rights and Duties of States, art. 1, *opened for signature* Dec. 26, 1933, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934).

⁹⁴ Although the United States has not taken a formal position on the borders of Kosovo or South Sudan, it may be argued that by recognizing these entities as states, the United States has also recognized their specific territories.

⁹⁵ *U.S. Relations With Israel*, U.S. DEPARTMENT OF STATE, (Jan. 20, 2021), <https://www.state.gov/u-s-relations-with-israel/>.

⁹⁶ See Kali Robinson, *What Is U.S. Policy on the Israeli-Palestinian Conflict?*, COUNCIL ON FOREIGN RELS. (May 17, 2021), <https://www.cfr.org/background/what-us-policy-israeli-palestinian-conflict>.

⁹⁷ *Id.*

⁹⁸ *Id.* (noting that since 1970, the United States has consistently used its veto power to block resolutions censuring Israel, and that, since 1980, the United States has allowed the Security Council to condemn Israel for its settlement construction only once, in 2016, when the United States abstained from voting).

attempted to appear to support the two-state solution, it has also implicitly supported Israeli claims of territorial control over Gaza and the West Bank.

It can be argued that the United States policy toward the Israeli-Palestinian conflict changed explicitly under the Trump Administration. President Trump distanced himself from the two-state solution by implementing a series of controversial policies regarding various components of the conflicts: the Trump Administration mediated the so-called Abraham Accords, and it recognized Jerusalem as Israel’s capital as well as Israeli sovereignty over Golan Heights.

First, in August 2020, the Trump Administration mediated an agreement between Israel and the United Arab Emirates, known as the Abraham Accords, in which the two countries pledged to begin normalizing ties; Bahrain, Sudan, and Morocco later announced similar U.S.-brokered deals.⁹⁹ The case of Morocco is particularly interesting for the purpose of recognition, as it implicated United States’ recognition practices toward both Israel as well as toward the disputed territory of Western Sahara. On December 10, 2020, the Trump Administration announced that Morocco would join the Abraham Accords and begin to normalize relations with Israel.¹⁰⁰ The Moroccan government agreed to “resume diplomatic relations as soon as possible” and to reopen liaison offices with Israel that had been closed since 2000.¹⁰¹ At the same time, President Trump announced that the United States would recognize Moroccan sovereignty over Western Sahara, a territory disputed between Morocco and Mauritania.¹⁰² President Trump’s proclamation recognizing Morocco’s sovereignty over Western Sahara stated, in part:

[A]s of today, the United States recognizes Moroccan sovereignty over the entire Western Sahara territory and reaffirms its support for Morocco’s serious, credible, and realistic autonomy proposal as the only basis for a just and lasting solution to the dispute over the Western Sahara territory. The United States

⁹⁹ Steven A. Cook, *What’s Behind the New Israel- UAE Peace Deal?*, COUNCIL ON FOREIGN RELS. (Aug. 17, 2020), <https://www.cfr.org/in-brief/whats-behind-new-israel-uae-peace-deal>.

¹⁰⁰ Michele Kelemen, *Morocco Agrees to Join Trump Administration’s Abraham Accords*, NPR (Dec. 10, 2020), <https://www.npr.org/2020/12/10/945136662/morocco-agrees-to-join-trump-administrations-abraham-accords>.

¹⁰¹ Lara Jakes et al., *Morocco Joins List of Arab Nations to Begin Normalizing Relations With Israel*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/10/world/middleeast/israel-morocco-trump.html>.

¹⁰² *Id.*

believes that an independent Sahrawi State is not a realistic option for resolving the conflict and that genuine autonomy under Moroccan sovereignty is the only feasible solution.¹⁰³

While the United States did not expressly address how its recognition was consistent with international law on self-determination, the White House clarified in a subsequent statement that that U.S. recognition of Moroccan sovereignty still “leaves room for a negotiated solution and the United States remains committed to working with Morocco, the Polisario, and all involved regional and international actors to support the necessary work ahead and create a more peaceful and prosperous region.”¹⁰⁴ Furthermore, it emphasized that “President Trump urges all parties to constructively engage with the United Nations and consider creative and genuine ways to move the peace process forward.”¹⁰⁵ This move by the Trump Administration underscored a realist approach toward recognition of borders in both Israel and Western Sahara/Morocco. The Trump Administration acknowledged Moroccan sovereignty over Western Sahara as the only “just and lasting solution,” thereby demonstrating its own realist view of recognition.¹⁰⁶

At the same time, the Trump Administration enticed Morocco into also embracing a realist approach toward recognition of Israel and its post-1973 borders.¹⁰⁷ “Opponents of [such] normalization say these moves betray the Palestinian cause, as the 2002 Arab Peace Initiative stipulates that Arab League members will establish relations with Israel only after the creation of a Palestinian state, among other conditions.”¹⁰⁸ Although the United States was not a member of the 2002 Arab Peace Initiative, the United States’ formal policy had always been to promote the two-state solution and the United States had not, until the

¹⁰³ Proclamation No. 10126, 85 Fed. Reg. 81329 (Dec. 15, 2020); *see generally* R. Joseph Huddleston, Harshana Ghoorhoo, & Daniela A. Maquera Sardon, *Biden Can Backtrack on Trump’s Move in Western Sahara*, FOREIGN POLICY (Jan. 9, 2021), <https://foreignpolicy.com/2021/01/09/biden-can-backtrack-on-trumps-move-in-western-sahara/>.

¹⁰⁴ *President Donald J. Trump Has Brokered Peace Between Israel and the Kingdom of Morocco*, TRUMP WHITE HOUSE ARCHIVES (Dec. 11, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-brokered-peace-israel-kingdom-morocco/>.

¹⁰⁵ *Id.*

¹⁰⁶ Proclamation No. 10126, 85 Fed. Reg. 81329 (Dec. 15, 2020).

¹⁰⁷ Marina Ottaway, *As a Parting Gift to Israel, the Trump Administration Pushes Sudan and Morocco to Recognize Israel*, WILSON CENTER (Dec. 17, 2020), <https://www.wilsoncenter.org/article/parting-gift-israel-trump-administration-pushes-sudan-and-morocco-recognize-israel>.

¹⁰⁸ *See* Robinson, *supra* note 96.

Trump Administration, undertaken formal initiatives to entice Arab States to normalize relations with Israel prior to the negotiation of a two-state solution.¹⁰⁹ Thus, it may be argued that these normalization agreements reflected the Trump Administration’s implicit departure from the United States’ adherence to the two-state solution as well as the Administration’s acknowledgement of borders as they existed post-1967 and 1973 conflicts. It may also be argued that these normalization agreements further underscore the Trump Administration’s realist policy toward recognition of borders in the context of the Israeli-Palestinian conflict.¹¹⁰

Second, President Trump officially granted U.S. recognition of the Golan Heights as Israeli territory in 2019—another dramatic shift from decades of U.S. policy.¹¹¹ The Golan Heights is located about 60km (40 miles) south-west of the Syrian capital, Damascus, and it covers about 1,000 sq km (400 sq miles).¹¹² Israel seized most of the Golan Heights from Syria in the closing stages of the 1967 Middle East war.¹¹³ In 1973, Israel thwarted a Syrian attempt to retake the region.¹¹⁴ The two countries negotiated a disengagement plan the following year that involved the creation of a 70km-long (44-mile) demilitarized zone patrolled by a United Nations observer force.¹¹⁵ However, Israel and Syria remained technically in a state of war. In 1981, Israel formally annexed the Golan Heights through the passage of domestic legislation.¹¹⁶ This move was not recognized internationally; in fact,

¹⁰⁹ *See id.*

¹¹⁰ For a discussion of the U.S. role in encouraging Arab states to normalize relations with Israel under the Trump Administration, *see* Mohammed Ayoob, *Why Arab States are Recognizing Israel*, THE STRATEGIST (Dec. 14, 2020), <https://www.aspistrategist.org.au/why-arab-states-are-recognising-israel/>; *see also* Robinson, *supra* note 96.

¹¹¹ *See* Romo, *supra* note 1.

¹¹² *Golan Heights: Why it matters to US, Israel and Syria*, DW, <https://www.dw.com/en/golan-heights-why-it-matters-to-us-israel-and-syria/a-48019484> (last visited March 9, 2022).

¹¹³ Quigley, *supra* note 1.

¹¹⁴ Emanuel Miller, *The Golan Heights: A Brief History*, HONEST REPORTING (June 18, 2019), https://honestreporting.com/golan-heights-brief-history/?gclid=Cj0KCCQiAjJQQBhCkARIsAEKMT010BML_iWBAr2fzcfStfNLQo06_5xrlUzkirfhUpCzWkW7i8abhlRAaAnLhEALw_wcB.

¹¹⁵ *See* Frederic Hof, *The Golan Heights: Avoiding an Unforced Error*, ATLANTIC COUNCIL (July 20, 2018), <https://www.atlanticcouncil.org/blogs/syriasource/the-golan-heights-avoiding-an-unforced-error/>; *see also* UNDOF Fact Sheet, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/en/mission/undof> (last visited Mar. 25, 2022) (noting that the United Nations Disengagement Observer Force (UNDOF) was established in 1974 through Security Council Resolution 350, and that UNDOF has remained in the area to maintain the ceasefire between Syria and Israel since then).

¹¹⁶ Miller, *supra* note 114.

United Nations Security Council Resolution 497, adopted in the same year, declared the Israeli annexation of Golan Heights “null and void and without international effect.”¹¹⁷ The international community remained united in its stance not to extend recognition to the Israeli claim of legal sovereignty over Golan Heights.¹¹⁸ In 2019, the United States became the first country to recognize Israeli rather than Syrian sovereignty over the Golan Heights.¹¹⁹ It may be argued that this move by the Trump Administration also reflects a realist policy toward recognition of borders, as Israel has, de facto, exercised effective control over the Golan Heights region since 1967.

Third, and most strikingly, the Trump Administration officially recognized Jerusalem as the capital of Israel, thereby recognizing Israeli sovereignty over this city, and thereby, repudiating decades-long U.S. policy of neutrality toward the status of Jerusalem.¹²⁰ The status of Jerusalem has been the subject of controversy since the 1940s.¹²¹ When the United Nations General Assembly voted to recommend dividing British-controlled Palestine into separate Arab and Jewish states in 1947, it set aside the city of Jerusalem, as well as surrounding areas, as a *corpus separatum*, or separate body, recognizing its shared religious significance for Christians, Jews, and Muslims.¹²² Following the 1948 Arab-Israeli War, hundreds of thousands of Palestinians were displaced from their home and resettled in East Jerusalem and the West Bank, which came under Jordanian control pursuant to a 1949 armistice, establishing the so-called “green line”—a line of demarcation between the new Israeli state and territories under Jordan’s control.¹²³ The newly-created state of Israel set up its government in the western half of Jerusalem and later captured East Jerusalem from Jordan during the 1967 Six-Day War.¹²⁴ Post-1967, Israel de facto annexed Jerusalem and the

¹¹⁷ S.C. Res. 497 (Dec. 17, 1981).

¹¹⁸ Miller, *supra* note 114.

¹¹⁹ Quigley, *supra* note 1.

¹²⁰ Zachary Laub, *What’s At Stake With the U.S. Recognition of Jerusalem*, COUNCIL ON FOREIGN RELS. (Dec. 6, 2017), <https://www.cfr.org/backgrounder/whats-stake-us-recognition-jerusalem>.

¹²¹ *Id.*

¹²² See Robinson, *supra* note 96.

¹²³ Dan Murphy, *How East Jerusalem Went From Jordanian to Israeli to Disputed Control*, CHRISTIAN SCIENCE MONITOR (Aug. 5, 2009), <https://www.csmonitor.com/World/Global-News/2009/0805/how-east-jerusalem-went-from-jordanian-to-israeli-to-disputed-control>.

¹²⁴ *Id.*; see also Abraham Rabinovich, *Six Day War: When Israel Reclaimed Jerusalem, Its Eternal Capital*, JERUSALEM POST (June 4, 2021), <https://www.jpost.com/arab-israeli-conflict/six-day-war-when-israel-reclaimed-jerusalem-its-eternal-capital-670067>.

neighboring Palestinian municipalities.¹²⁵ During the 1993 Oslo Accords, Israel and the Palestinian Liberation Organization left the status of Jerusalem unresolved, and after Oslo, both parties continued to claim Jerusalem as their respective capital.¹²⁶ For decades, the United States, as well as other countries, kept their embassies outside of Jerusalem in order not to preempt a future peace accord.¹²⁷ This long-standing United States’ policy was reversed in 2017 when the Trump Administration announced that it would recognize Jerusalem as Israel’s capital, and when it relocated the U.S. Embassy from Tel Aviv to Jerusalem.¹²⁸

The Biden Administration has reversed some of the Trump-era policies but has left others in place, including President Trump’s decision to recognize Jerusalem as Israeli capital as well as Israeli sovereignty over Golan Heights. President Biden has stated that he will continue the nearly two decades of U.S. support for a two-state solution, which calls for separate Israeli and Palestinian states with borders resembling those that existed before the 1967 war; this territory includes the Gaza Strip, the West Bank, and parts of East Jerusalem.¹²⁹ According to the U.S. State Department webpage, “[s]upporting a negotiated two-state solution will continue to be a core U.S. policy objective.”¹³⁰ However, the Biden Administration has also left the recognition of Golan Heights as Israeli territory in place. Secretary of State, Antony Blinken, has stated that security in Golan Heights remains of utmost importance to Israel and that if the situation in Syria were to change, the United States would take

¹²⁵ Murphy, *supra* note 123.

¹²⁶ Ziad AbuZayyad, *Israel and Palestine – Last Chance for the Bilateral Process*, PALESTINE-ISRAEL JOURNAL (2014), <https://pij.org/articles/1536/israel-and-palestine--last-chance-for-the-bilateral-process>.

¹²⁷ Laub, *supra* note 120.

¹²⁸ *Id.*

¹²⁹ Robinson, *supra* note 96. The United States Congress passed the so-called Jerusalem Embassy Act in 1995; the Act had enjoyed overwhelming Senate and House of Representatives bipartisan support and had set the deadline of May 31, 1999 for the United States to move its embassy to Jerusalem. However, Presidents Clinton, George W. Bush, and Obama had delayed the move by exercising a presidential waiver on national security grounds, available within the Act. See *Upholding the 1995 Jerusalem Embassy Law Act Would Prevent Biden from Instituting Consulate in Jerusalem for Palestinians*, GOVTRACK INSIDER (Dec. 29, 2021), <https://govtrackinsider.com/upholding-the-1995-jerusalem-embassy-law-act-would-prevent-biden-from-instituting-consulate-in-836f3edbb1e1>; see also Jerusalem Embassy Act of 1995, Pub. L. 104-45, § 3, 109 Stat. 398 (1995) (“Beginning on October 1, 1998, the President may suspend the limitation set forth in section 3(b) for a period of six months if he determines and reports to Congress in advance that such suspension is necessary to protect the national security interests of the United States.”).

¹³⁰ *U.S. Relations With Palestinian Territories*, U.S. DEPARTMENT OF STATE (June 11, 2021), <https://www.state.gov/u-s-relations-with-palestinian-territories/>.

another look at the issue of sovereignty over Golan.¹³¹ In a June 2021 Tweet, the U.S. State Department confirmed that its policy vis-à-vis Golan Heights has not changed—in other words, the United States continues to recognize this region as part of Israel's territory.¹³²

Moreover, the Biden Administration has not reversed the Trump-era recognition of Jerusalem as the capital of Israel.¹³³ It may be argued that the Trump Administration, as confirmed by the Biden Administration, has implicitly adopted a realist approach toward recognition of borders, by acknowledging the factual situation (Israel has had control over the Golan Heights and Jerusalem since the 1967 War) as legitimate and legal. While the U.S. recognition of governments practice seems to have shifted between a realist and a legitimacy-based approach, the approach toward recognition of borders seems more firmly rooted in a realist approach. By the same token, it can be argued that the U.S. recognition practices, whether toward governments or borders, is not normatively rooted in either legitimacy or realism, but that it is instead driven by a foreign policy rooted in politics, pragmatism, and American interests. The following section will discuss American recognition practice as focused on political self-interest as opposed to normative criteria.

V. UNITED STATES' RECOGNITION PRACTICE: LEGITIMACY, REALISM, OR PRAGMATISM?

As the discussion above demonstrates, the United States has used both the legitimacy-based as well as the realist approach toward recognition of governments. In the case of recognition of borders, specifically in the context of the Israeli-Arab conflict, the United States seems to have shifted from a legitimacy-based approach, used between 1967 and the Trump Administration, toward a realist approach, adopted by the Trump Administration and confirmed by the Biden Administration. However, it is this Article's conclusion that these different recognition practices are not rooted in particular allegiances to legitimacy or realism, but are instead a direct reflection of pragmatism and of the United States' foreign policy toward a country or toward a particular region. If the United States ascribed consistently to legitimacy-based recognition practices, it would not have recognized various Mexican as well as South American leaders in the 19th and 20th

¹³¹ See *Blinken Stops Short of Endorsing Trump Recognition of Golan Heights as Israel*, *supra* note 1.

¹³² Quigley, *supra* note 1.

¹³³ Robinson, *supra* note 96.

centuries.¹³⁴ More recently, it would not have recognized the military coup’s leaders in Kyrgyzstan¹³⁵ or the forcefully-installed Taliban leaders in Afghanistan in the late 1990s.¹³⁶ If legitimacy mattered and constituted consistent American recognition policy, then these regimes would have been denied recognition because they seized power through illegitimate, extra-constitutional means. Conversely, if realism represented the official United States policy on recognition, then a regime’s effective control of a country would be the only relevant criterion in the United States’ decision on whether to extend recognition to that regime. If the United States followed a consistent realist approach, it would have extended recognition to Soviet-occupied Baltic states, to the communist regime in China, and more recently, to Maduro in Venezuela and to the Russian-occupied Crimea.

Following either a legitimacy-based or a realist approach to recognition uniformly would pose significant challenges to the United States (or to any other country). Adopting a legitimacy-based recognition policy may be difficult, as it obligates countries to continue to deal with ousted regimes that do not exercise effective control over their respective countries. For example, the United States’ recognition of Guaido¹³⁷ as the legitimate leader of Venezuela seemingly obligates the United States to engage in diplomacy with Guaido, although the latter has no real control or sovereignty over anything in Venezuela. Conversely, this also signifies that the United States cannot engage on the diplomatic level with those actually in charge in Venezuela. Additionally, ascribing to a realist approach to recognition poses serious issues as it may legitimize heinous or aggressive regimes. For example, a true realist approach toward recognition of governments would signify recognizing the Russian government in Crimea as legitimate, the new Taliban regime in Afghanistan, and the extra-constitutional military leadership in Sudan. In other words, realism would tie American diplomacy to heinous regimes and potentially encourage extra-constitutional seizures of power. Thus, it may be argued that the United States has adopted a pragmatic policy on recognition, which combines legitimacy and realism depending on the desirability of recognizing a particular regime.

¹³⁴ See generally Michael Gobat, *The Invention of Latin America: A Transnational History of Anti-Imperialism, Democracy, and Race*, 118.5 AM. HIST. R. 1345 (NOV. 2, 2013); Joshua Keating, *How Does the U.S. Decide Which Governments to Recognize?*, FOREIGN POLICY (Apr. 13, 2010), <https://foreignpolicy.com/2010/04/13/how-does-the-u-s-decide-which-governments-to-recognize/>.

¹³⁵ Keating, *supra* note 33.

¹³⁶ Saul, *supra* note 73.

¹³⁷ Anderson, *What Does It Mean for the United States to Recognize Juan Guaido as Venezuela’s President?*, *supra* note 10.

This pragmatic view of recognition is firmly rooted in American foreign policy: determining whether to legitimize a regime depends on whether doing so is consistent with American interests in that country or in that region. It is this Article's conclusion that pragmatism has also been the determining factor in border recognition practices, as demonstrated by the case of Israel-Arab. As argued above, the United States has been a consistent supporter of Israel; official American policy toward Israel proclaims that "Israel is a great partner to the United States, and Israel has no greater friend than the United States," and that "[t]he unbreakable bond between our two countries has never been stronger."¹³⁸ It is thus not surprising that the United States would adopt a recognition policy favorable to Israel, regardless of the legitimacy of Israel's sovereignty claim over the Golan Heights or over Jerusalem.

Similarly, the United States had recognized the Musharraf regime in Pakistan, despite the regime's extra-constitutional seizure of power, as American regional foreign policy at the time appeared linked to an implicit allegiance with the military leadership in Pakistan.¹³⁹ These two realist recognition policies were rooted in a pragmatic and a foreign-policy driven version thereof, not in a normative claim of realism as the official general recognition policy. Conversely, the United States has refused to apply the same type of realism to other situations, such as in Crimea,¹⁴⁰ in Afghanistan in 2021,¹⁴¹ or in Sudan,¹⁴² as recognition of these regimes did not coincide with American foreign policy interests. These refusals to extend recognition are not rooted in a normative legitimacy-based approach to recognition but are instead reflections of American self-interest and foreign policies.

It is not this Article's contention that this pragmatic and foreign policy-based approach to recognition embraced by the United States is somehow undesirable. It even may be argued that recognition is inherently a political act, driven by self-interested politics of the recognizing state, and that this type of pragmatic recognition, combining both realist and legitimacy-based approaches, produces the most desirable outcomes. The United States can, by adopting this approach, choose to legitimize Israeli borders, while denying the same type of border recognition to Russia. Moreover, the United States can also adopt a wait-and-see attitude in situations where competing individuals and groups assert sovereignty claims and recognizing one over the other is

¹³⁸ *U.S. Relations With Israel*, *supra* note 95.

¹³⁹ Wadhams and Katulis, *supra* note 72.

¹⁴⁰ Bureau of European and Eurasian Affairs, *supra* note 50.

¹⁴¹ Bridgeman & Ryan Goodman, *supra* note 80.

¹⁴² Lee, *supra* note 79.

not aligned with American interests. However, it is this Article’s conclusion that no normative claims can be discerned about United States’ recognition practices. Although the Trump Administration recognition policy seemed more squarely rooted in realism, such realism was closely aligned with American foreign policy interests and applied to Israel, one of American closest allies. Thus, this Article concludes that government and border recognition practices of the United States, throughout the various American presidential administrations, are not realist or legitimacy-based; instead, they coincide with United States’ geo-political and foreign policy interests.

VI. CONCLUSION

Recognition is a contested area of international law; different states have ascribed to different recognition practices and have held different views. As this Article analyzed above, the United States has used both a realist as well as a legitimacy-based approach toward recognition of governments and recognition of borders. Throughout its history, the United States has extended recognition to illegitimate regimes because they have had effective control over their respective territories; nonetheless, the United States has also denied recognition in other instances to governments which had asserted territorial control citing legitimacy. In the case of the Israeli-Arab conflict, the United States has mostly used a realist approach, acknowledging and legitimizing Israel’s de facto control over the Golan Heights and Jerusalem. It is this Article’s conclusion that the United States’ recognition practice is not rooted in any normative values, but that it is instead a reflection of American foreign policy, rooted in pragmatism, and of American political interest in a specific country or region. Recognition remains a political and self-interested act rather than a normative or legal judgment regarding the recognized or unrecognized regime.