

**2023**

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**Recommended Citation**

Devendra Verma and Tanmay Kumar, 'Taliban and International Recognition: A Facet of Desperation' (2023) 2 IJHRLR 239-250.

Available at [www.humanrightlawreview.in/vol-2-issue-3/](http://www.humanrightlawreview.in/vol-2-issue-3/).

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## **TALIBAN AND INTERNATIONAL RECOGNITION: A FACET OF DESPERATION**

Devendra Verma<sup>1</sup> and Tanmay Kumar<sup>2</sup>

### **ABSTRACT**

*Afghanistan has suffered from enduring warfare for many years. Battles against the Taliban and the Khorasan Province branch of the Islamic State (IS-KP) have been fought by the Afghan National Security Forces (ANSF) with assistance from the US. The Taliban organization completed their astoundingly quick assault throughout the nation by capturing Kabul on August 15, 2021, after the evacuation of US troops from Afghanistan in 2021. ISIS-K has expanded despite a Taliban conflict that is destabilizing. Opening up additional avenues for accountability is the Taliban's acceptance as the country's administration. Prior to meeting a number of requirements, like as respect to constitutional principles, human rights norms, and counterterrorism measures, the Taliban cannot be regarded as a legitimate government. The recognition of the Taliban and the benefits that go along with it, including economic and other advantages, should be conditioned on their accomplishment of international policy goals including inclusive government and the preservation of human rights and evidence of success in combating terrorism.*

*“The principal cause of suffering during humanitarian crises is insufficient respect for applicable rules of international humanitarian law.” – Peter Maurer*

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## **INTRODUCTION**

Afghanistan has been plagued by persistent warfare for many years. With assistance from the US, the Afghan National Security Forces (ANSF) engaged in combat with the Taliban and the Khorasan Province (IS-KP) affiliate of the Islamic State. The Taliban, however, quickly progressed and finally took control of Kabul on August 15, 2021, establishing themselves as the de facto administration of the nation after the withdrawal of US soldiers from Afghanistan in 2021.<sup>3</sup> Millions of people have been displaced as a result of the violence that has accompanied this change in power. The Taliban steadily destroyed the fundamentals of the rule of law as they rose to power.

Jobs have dried up since the Taliban took control of Afghanistan, and many government employees have gone months without pay in a country that was almost entirely reliant on foreign help under the previous US-backed government. The United Nations has warned that half the Afghanistan's population faces food shortages. With several members of the Taliban's "interim government" on an international sanctions list, nations have a tricky issue of channelling money to the country's ailing economy without backing up the regime. The concern now is how the group will manage the country, their norms for women, human rights, and political freedoms, as well as the repercussions of recognition.

## **WHAT IS RECOGNITION?**

Recognition in international relations conveys the degree to which the party recognising the entity accepts it. When referring to governments, it means the recognising party is willing to start or maintain official ties

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<sup>3</sup> The Visual Journalism Team, 'How the Taliban stormed across Afghanistan in ten days' (BBC, 16 August 2021) <<https://www.bbc.co.uk/news/world-58232525>> accessed 19 June 2023.

with the acknowledged government.<sup>4</sup> Recognition is inherently arbitrary and ambiguous because it is a very political issue. Additionally, the criteria used to decide whether or not to acknowledge a government are not transparent. Even while the choice may be politically motivated, it does have legal implications and is thus relevant in international law.

The act of recognition is an expression of state sovereignty and falls under the unilateral discretion of the recognizing state. The government seeking recognition is not obliged to recognize others and does not possess an inherent right to be recognized. According to prevailing opinion, foreign recognition does not have a legal "constitutive" or decisive effect on determining whether an entity is the government of a state. Instead, an entity qualifies as the government when it effectively, autonomously, and sustainably manages the territory of the state.<sup>5</sup> While its authority may be acknowledged, it is not always universally supported by the public, and there is no competing authority that holds effective control. Although recognition may be "declaratory" of this legal status, the entity will remain the legal government even if it is not recognised.

Even in cases where an entity comes to power through unconstitutional means, as long as there is no competing entity with a valid constitutional claim, the entity would still be recognized.<sup>6</sup> This recognition is based on the principle that international law seeks to avoid political vacuums. A political entity that exercises its authority without consideration to the existence of a government would not be subject to the obligations of the state and would not be held responsible for them. The organisation would also be unable to exercise state

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<sup>4</sup> Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', Max Planck UNYB, 6 (2002) 559-601.

<sup>5</sup> Great Britain v. Costa Rica, 1 UN Rep. Int'l Arb. Awards 369 (1923).

<sup>6</sup> Federica Paddeu and Niko Pavlopoulos, 'Between Legitimacy and Control: The Taliban's Pursuit of Governmental Status' (Just Security, 7 September 2021) <<https://www.justsecurity.org/78051/between-legitimacy-and-control-the-talibans-pursuit-of-governmental-status/>> accessed 15 February 2021.

powers like safeguarding the interests of its citizens or defending the state against outside influence.

The United Nations Security Council's (UNSC) binding declaration that a situation is illegitimate and should not be recognised is the only real barrier to acknowledging an organisation as a government. Examples include instances where a basic principle of international law (*jus cogens*) is violated, such as when a government takes power by illegal foreign interference or denies the right to self-determination, or when South Africa occupies Namibia in defiance of an international mandate.

Additionally, the recognised government is in charge of upholding all of its country's obligations under international law, including those relating to human rights, international humanitarian law, international criminal law, economic law, environmental law, counterterrorism conventions, and UNSC resolutions.

### **RECOGNITION IN TERMS OF "DE FACTO" VERSUS "DE JURE" STATUS**

Recognizing an entity as the legitimate government or supreme representation of a state is known as "de jure" recognition. The recognized authority can get this kind of acknowledgment openly. While the entity has not yet shown the stability and permanence necessary to be recognised as a "De Jure" government, "De Facto" recognition indicates that the recognising state feels the entity fulfils the requirements to be recognised as a government.<sup>7</sup> According to Malcolm Shaw, *"De facto recognition entails a cautious evaluation of the situation, adopting a "wait and see" approach, with the intention of transitioning to de jure recognition once doubts are adequately resolved and formal*

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<sup>7</sup> J. Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya', *Yearbook of International Humanitarian Law*, 18 (2015) pp 3-41.

*acceptance can be extended.*"<sup>8</sup> While not explicitly stated, de facto recognition can be inferred through practical indications, such as the signing of a bilateral treaty.

### **THE POSITION OF THE TALIBAN ADMINISTRATION AND THE IMPORTANCE OF RECOGNIZING OR NOT RECOGNIZING THEM**

Based on the conventional assessment, the Taliban currently exercises effective control over Afghanistan, leading to the erosion of the former Afghan government's authority and its loss of a valid constitutional claim as the governing body. The former government's military disagreement in the Panjshir valley was easily put down. The Islamic State - Khorasan Province (ISIS-K) has expanded its insurgency as the Taliban insurgency continues to be a source of instability. Similar to how the Ghani administration continued to be acknowledged as the government of Afghanistan despite a more disruptive Taliban insurgency in the past, it does not now constitute a serious danger to the Taliban's overall authority. At this point, the decline in the Afghan economy and an uptick in criminal activity do not portend the end of Taliban rule. In contrast to the circumstance in Namibia, the UN Security Council (UNSC) has not demanded that the Taliban not be recognised since they came to power. Instead, a possible recognition pathway has been envisioned. No nation has formally acknowledged the Taliban as Afghanistan's new government as of yet.

Regardless, a Taliban administration would be expected to fulfill its obligations under international and humanitarian law. The Taliban should also impose financial sanctions imposed by the UNSC against themselves (including key members of their own government), Al-Qaeda, and ISIS-K. Despite being a de facto, unrecognized government, the Taliban is considered a state organ in the context of state responsibility

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<sup>8</sup> Shaw M, *International law* (Cambridge University Press 9<sup>th</sup> edn, Cambridge 2021) 332-333.

law. Therefore, any breaches of Afghanistan's obligations would be the responsibility of its government, which is obligated to prevent violations and provide reparations. The Taliban is also accountable for its previous transgressions as an insurgent group, prior to assuming governmental power through a successful uprising.

Nevertheless, recognition can carry legal implications in various ways. Firstly, in cases where the effectiveness of an entity is in question, recognition or non-recognition can serve as evidence of other states' legal perspectives on whether it qualifies as a government, reinforcing the objective legal assessment. However, caution must be exercised when considering the viewpoints of other countries. Apart from effectiveness, factors such as political legitimacy, constitutionality, human rights record, and willingness to engage in diplomatic relations are often debated in discussions surrounding recognition. These aspects are central to the discourse on recognizing the Taliban. Nine governments accepted the necessity to take into account the Taliban's rise to power in Afghanistan during the Moscow Format Consultations in October 2021, regardless of whether the new Afghan government had received official recognition from the international community.<sup>9</sup>

Consequently, recognition holds a second implication in which legal consequences arise for both sides involved. As much of international law hinges on consent, governments possess political discretion to lawfully engage with recognized states through diplomatic relations, the associated privileges and immunities, treaty negotiations, and other means. If other countries can provide something that the entity wants or needs very much, withholding recognition can be used as a weapon to pressure people into changing their behaviour on issues like democracy, human rights, or counterterrorism. However, it is essential

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<sup>9</sup> The Ministry of Foreign Affairs of the Russian Federation, 'Joint Statement of the Participants in the Moscow Format Consultations on Afghanistan, Moscow, 20 October 2021' (MIDRU, 20 October 2021) <[https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/4913908](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4913908)> accessed 19 June 2023.

to make sure that providing humanitarian and medical relief to the needy Afghan population is not constrained by such political considerations since doing so would only serve to punish innocent people.

To be clear, nations are not required to recognise other governments. Some countries don't engage in the practise at all because they are worried that approval of the entity's legitimacy rather than its efficacy may be implied by recognition. However, engaging with the entity does not always equate to recognition. Several countries, including China and Russia, collaborate with the Taliban on evacuations, provide humanitarian aid, and maintain embassies, despite their official stance of non-recognition towards the Taliban.

Depending on the viewpoints of various countries, international organisations may or may not recognise a certain institution as the government of a member state. The UN General Assembly delayed its decision to recognise the Taliban as Afghanistan's representation in the instance of the Taliban's rule over that nation between 1996 and 2001, despite the Taliban's extensive authority over it at that time..<sup>10</sup> It is significant to remember that the Rabbani administration was making its constitutional claim at that time. The UN Credentials Committee also delayed its decision about the incoming Taliban administration in December 2021. <sup>11</sup> This delay may be a sign that people are unhappy with the Taliban and the UN's unwillingness to recognise them as a legitimate government. The World Bank and the International Monetary Fund have thus withheld payments to Afghanistan as a result of the lack of formal recognition, including crucial emergency assistance

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<sup>10</sup> Rebecca Barber, 'Will the Taliban Represent Afghanistan at the UN General Assembly?' (EJIL Talk, 01 September 2021) <<https://www.ejiltalk.org/will-the-taliban-represent-afghanistan-at-the-un-general-assembly/>> accessed 19 June 2023.

<sup>11</sup> Rick Gladstone, 'U.N. Seats Denied, for Now, to Afghanistan's Taliban and Myanmar's Junta' (NYT 01 December 2021) <<https://www.nytimes.com/2021/12/01/world/americas/united-nations-taliban-myanmar.html>> accessed 19 June 2023.

designed to treat the COVID-19 outbreak and the current economic crisis.<sup>12</sup>

The Taliban's acceptance as the country's administration creates new avenues for accountability. In accordance with Article 10(1) of the Articles on State Responsibility,<sup>13</sup> the Taliban's actions are now subject to the State of Afghanistan's accountability, providing a foundation for its assumption of international legal responsibility. It can then be charged with violating humanitarian law, customary human rights law, and sponsoring terrorism. Furthermore, for those who fear the worst, accepting the Taliban dictatorship as Afghanistan's government enables threatened governments to defend themselves. It should be noted that Article 51 of the UN Charter<sup>14</sup> only recognises a right to self-defense against a state's military assault. There is no such clear right to begin military conflict when violence is perpetrated by non-State actors, such as the Taliban if they were not acknowledged.

### **TALIBAN AS A NON-STATE ACTOR? WHAT DOES THE FUTURE HOLD FOR AFGHANISTAN?**

Although the Taliban may not hold legal recognition as the government at present, they are still bound by minimum international obligations, which mitigate but do not eliminate any legal void. Primarily, the Taliban, as a collective entity, along with individuals and entities associated with them, are subject to United Nations Security Council (UNSC) sanctions such as asset freezes, arms embargoes, and travel bans.

Significantly, Resolution 1267,<sup>15</sup> adopted in 1999 during the Taliban's rule and currently enforced, calls upon the Taliban to cease offering

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<sup>12</sup> Beth Timmins, 'IMF suspends Afghanistan's access to funds' (BBC, 19 August 2021) <<https://www.bbc.com/news/business-58263525>> accessed 19 June 2023.

<sup>13</sup> Responsibility of States for Internationally Wrongful Acts 2001, art. 10(1).

<sup>14</sup> Charter of the United Nations 1945, art. 51.

<sup>15</sup> United Nations Security Council 1999, Resolution 1267.

refuge and instruction to global terrorists and affiliated organizations. Additionally, it mandates the Taliban to implement suitable and efficient measures to prevent their controlled territory from being utilized for terrorist bases, training facilities, or the planning and execution of terrorist activities against other nations or their people. Moreover, it obliges the Taliban to collaborate with endeavors aimed at bringing indicted terrorists to justice.

Second, civilians are given special protection under the Geneva Convention.<sup>16</sup> Abusing prisoners of war or civilians has no justification. Moreover, engaging in widespread and organized assaults or capturing Afghan civilians collaborating with or supporting the United States constitutes a crime against humanity and a grave infringement upon human rights. These actions are considered crimes under international law. The Taliban is required to abide by international humanitarian law since it is a non-state armed organisation engaged in an NIAC against ISIS-K.<sup>17</sup> This includes putting restrictions on hostile conduct, protecting people, and treating prisoners humanely. In addition, the Taliban is in charge of looking into and prosecuting any war crimes perpetrated by ISIS-K or by any of its own fighters.

The Taliban may or may not be obligated by human rights legislation as a non-state actor, however it is generally known that de facto governmental entities exercising territorial authority are subject to such requirements. In order to combat terrorism, the Taliban must uphold human rights, hence they must use the required caution to minimise known threats to life.

It is unclear how the Taliban want to govern Afghanistan. They assert that their main objective is to set up a "Islamic government" and that they won't be a danger to other nations. Taliban spokesperson Suhail

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<sup>16</sup> First Geneva Convention 1949, art. 3.

<sup>17</sup> United Nations General Assembly Security Council (UNDOCS, 02 September 2021) <<https://undocs.org/S/2021/759>> accessed 20 June 2023.

Shaheen claims that the organisation would uphold the rights of women and minorities "in accordance with Afghan customs and Islamic values".<sup>18</sup> The insurgents declared an amnesty for all of Afghanistan and invited women to join their administration. whatever, it is concerning that under Taliban control, women are restricted in their capacity to work, dress whatever they choose, and even go out alone.

The possibility that the nation would once again be exploited as a terrorist training ground is another major worry. According to several assessments, Al-Qaeda terrorists are deeply ingrained in the Taliban and participate in their training. Al-Qaeda's strength and ability to re-establish its worldwide network are likewise unknown.

## **CONCLUSION**

Since the Taliban are regarded as the de facto rulers of Afghanistan, they are most likely the country's legitimate government. Therefore, in addition to the particular requirements imposed on the Taliban as a group by the Security Council, nations can already hold the Taliban responsible for upholding Afghanistan's commitments under international law regarding counterterrorism. The Taliban are legally bound by Afghanistan's obligations under international human rights and humanitarian law.

According to international law, there are a variety of ways to handle and react to various risks and incentives, including diplomatic channels, dispute resolution processes, countermeasures, sanctions, and more. Clarifying whether their non-recognition of the Taliban implies (a) a decision to delay establishing discretionary bilateral relations until the Taliban complies with certain requirements, such as adhering to constitutionalism, respecting human rights, and participating in counter-terrorism efforts, or (b) a belief that the Taliban does not have

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<sup>18</sup> Alexandra Fouché, 'Uncertain times ahead for Afghan women' (BBC, 17 August 2021) <<https://www.bbc.co.uk/news/world-asia-58244017>> accessed 20 June 2023.

the legal status of a government until it complies with such requirements is crucial for eliminating the legal ambiguity that currently exists.

Given that it is currently believed that recognition is primarily a political choice rather than a legal requirement, it is essential that the Taliban's recognition and any benefits that may follow, such as financial assistance, be conditioned on the Taliban making clear advancements in their anti-terrorism efforts as well as achieving other international policy goals like inclusive governance and respect for human rights. But given the continued economic crisis, it is crucial to make sure that such conditions do not prevent the distribution of humanitarian goods and medical care to the poor Afghan populace.