

PAPER

THE ISLAMIC EMIRATE OF AFGHANISTAN AND THE RECOGNITION OF GOVERNMENTS UNDER INTERNATIONAL LAW

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THE ISLAMIC EMIRATE OF AFGHANISTAN AND THE RECOGNITION OF GOVERNMENTS UNDER INTERNATIONAL LAW

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1. Introduction

On August 15, 2021, the Taliban took over Kabul after a weeks long offensive against the Afghan government in which they seized control of key cities and provinces in the country.¹ The elected President Ghani has since fled Afghanistan and the Taliban announced a new government on September 7.² No State has yet recognised the Taliban as the government of Afghanistan. Some seem to be adopting a ‘wait and see’ approach as they are hesitant to be seen as the first country to legitimise the Taliban’s taking of power. Were the Taliban to consolidate their control and prove the sustainability of their rule, this may change. Other States meanwhile are conditioning recognition on respect for human rights, future political settlement, or assurances against terrorism.

This paper analyses the notion of recognition under international law. It discusses how modern State practice had largely discarded the recognition of governments as a custom until the civil war in Libya and that the criteria underscoring the decision to recognise or to not are vague, undefined, and inconsistent. As such, international law offers little by way of guidance for the largely political act which is the recognition of governments. Nevertheless, the notion remains an important one as it is one from which legal consequences flow, namely issues of classification of conflicts under international humanitarian law and liability under the law of state responsibility. Therefore, it is important that this concept is elucidated in order to aid in understanding the ways in which recognition of the Taliban as the government of Afghanistan would affect its foreign relations with the international community. This paper aims to shed some light on this uncertain and arbitrary area of the law.

2. What is Recognition?

Recognition manifests the extent to which the recognising party accepts the recognised entity in foreign relations.³ In the context of governments, it indicates the willingness of the recognising side to establish or maintain official relations with the recognised government.⁴ The decision to recognise is an attribute of State sovereignty and is a unilateral act which is left up to a State’s discretion. There remains no duty to recognise and no corresponding right to be recognised on the part of the government wishing to be recognised.⁵ The issue of recognition is highly political in nature rendering it inherently arbitrary and uncertain with a lack of transparency in the criteria underscoring the decision to recognise or not recognise a government.⁶ Whilst the

¹ NPR, *A Look At Afghanistan's 40 Years Of Crisis — From The Soviet War To Taliban Recapture*, August 19, 2021

² Al Jazeera, *Taliban announces new government in Afghanistan*, September 8, 2021

³ Rudiger and Philipp, ‘The Status of the Taliban: Their Obligations and Rights under International Law’, Max Planck UNYB, 6 (2002)

⁴ *ibid.*

⁵ Anne Schuit, ‘Recognition of Governments in International Law and the Recent Conflict in Libya’ (2012) 14 Int’l Comm L Rev 381

⁶ J. Serralvo, ‘Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya’, Yearbook of International Humanitarian Law Volume 18, 2015 pp 3-41

decision itself may be political, it is one from which legal consequences flow and so is relevant as a matter of international law.⁷

Recognition means that the government's acts are binding on the state as a matter of international law, that it possesses the capacity to enter into diplomatic and consular relations and conclude international agreements with other states, and that its executive and legislative acts will constitute the state's official acts in the courts of the recognising state.⁸ In refusing recognition, the government in question is refused as a member of the international community with which interactions may be had; the acts of its organs are treated as invalid, it may be refused immunities, and it cannot sue in foreign courts.⁹ An unrecognised government may even arguably lose the right to wage war.¹⁰ Therefore, the question of why a government may or may not be recognised remains a very important one and yet it is one for which international law, as will be seen through the course of this paper, has few answers.

3. Historical Practice relating to the Recognition of Governments

Governments used to routinely recognise new governments in other States, however, modern practice has discarded this procedure. The Estrada doctrine, named after a Mexican statesman, asserts that recognition is an insulting practice and also constitutes an unjustified interference in another State's affairs by judging the desirability, legitimacy or viability of its new government.¹¹ In ceasing to recognise governments, States were also able to avoid embarrassing situations where regime changes came after bloody insurgencies or where hasty decisions were made and the wrong entities were recognised.¹² The UK adopted the Estrada position in 1980 and stopped formally recognising changes in the government of a state.¹³ Dozens of countries followed this change in practice, including the US, France and Australia.¹⁴ The EU made a similar declaration in 1999 stating that it does not recognise governments, only states.¹⁵ Instead, States now prefer to sever or downgrade diplomatic relations with a government they object to rather than making explicit declarations of non-recognition.¹⁶ For instance, the US has stated that its practice is now to “de-emphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments.”¹⁷

⁷ Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' supra (n. 5)

⁸ Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' supra (n. 3)

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Oxford Reference, *Estrada Doctrine*: <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095758788>

¹² Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n 6)

¹³ Warbrick C, 'The New British Policy on Recognition of Governments' (1981) 30 Int Comp Law Q 568–592

¹⁴ Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n 6)

¹⁵ European Commission (1999) Bulletin of the European Union 7/8:1–153

¹⁶ Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n. 6)

¹⁷ Diplomatic Relations and Recognition, 1975 Digest Of United States Practice In International Law sec. 3, at 20

As a result of this move away from express recognition, what now usually happens is that there is an implicit recognition of authorities which come to power, particularly so when there is a change of government through normal constitutional processes in a State where continued recognition is assumed.¹⁸ This approach, however, was abandoned when it came to the recent civil wars in Syria and Libya. President Obama recognised the National Coalition of Syrian Revolutionary and Opposition Forces as the legitimate representative of the Syrian people in December 2012.¹⁹ However, the State Department then clarified that this was merely a political step from which no legal consequences, such as to territorial or property issues, would flow.²⁰ The Libyan civil war, by contrast, involved recognition with legal consequences. In March 2016, the Ministers of Foreign Affairs of France, Germany, Italy, UK and USA and the High Representative of the European Union for Foreign Affairs and Security Policy expressed their full support for Libya's Government of National Accord recognising it as the sole legitimate government in Libya.²¹ The UN pushed for the creation of the GNA and backed its recognition in a rather messy way since it had already acknowledged the legitimacy of the Tobruk-based House of Representatives, another party to the dispute.²² Nevertheless, this recognition of the GNA allowed it to gain access to Libyan state assets held in foreign banks.²³ It is still unclear whether the Taliban will form a government in Afghanistan that will be recognised, both in political and legal form, by the international community.

4. Recognition of States vs. Recognition of Governments

The recognition of a government must be distinguished as a separate issue from that of recognition of States merely as a point of clarity. According to Article 1 of the Montevideo Convention, a State possesses:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other States.²⁴

While there is no Montevideo Convention or similar instrument for the criteria required to form a government, one of the criteria for statehood is the existence of a government. This is because a State participates on the international plane through its government. However, the elements required for statehood have proven to be

¹⁸ Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (supra n. 3)

¹⁹ Brad R Roth, 'Whither Democratic Legitimism: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments' (2014-2015) 108 AJIL Unbound 213

²⁰ *ibid.*

²¹ Ministers of Foreign Affairs of France, Germany, United Kingdom, Italy, USA and EU (2016) Ministerial meeting in Paris: France, Germany, United Kingdom, Italy, USA, EU—Statement on Libya, EU Doc. 160313_01

²² UN Security Council Resolution 2213 (2015)

²³ Roth, 'Whither Democratic Legitimism: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments' (supra n. 19)

²⁴ Montevideo Convention on the Rights and Duties of States, 26 December 1933, 164 LNTS 19

rather flexible in practice, including that of a government.²⁵ Once statehood is established the existence of a state continues even if it temporarily has no government, such as due to a civil war or foreign occupation.²⁶ States have also come into existence even though there has been no government, such as the Democratic Republic of the Congo.²⁷ Therefore, even a lack of existence or recognition of a government in Afghanistan does not mean that the State itself does not exist. It is necessary to emphasise this distinction in the context of the Taliban in Afghanistan as, somewhat confusingly, the peace deal between the US and the Taliban repeatedly refers to “the Islamic Emirate of Afghanistan which is not recognized by the US as a state and is known as the Taliban”.²⁸ The US, despite the lack of clarity in language, attempts to emphasise that it does not recognise the Taliban as the Afghan government, not that the State itself does not exist.

5. De Facto vs. De Jure Recognition

De jure recognition means that the recognising state considers the recognised entity to be the government, i.e. the ultimate representative, of the state.²⁹ This mode of recognition can be explicitly communicated to the recognised authority.³⁰ De facto recognition implies that the recognising state believes that the entity fulfils the criteria to be considered the government but has not yet proven that it will maintain its stability in order to become the de jure government.³¹ According to Shaw, “[d]e facto recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by de jure recognition when the doubts are sufficiently overcome to extend formal acceptance”.³² It is often not expressly communicated but can be implied through practice such as through the conclusion of a bilateral treaty concluded with the government or the exchange of credentials for an ambassador.³³ For instance, although the US ended diplomatic relations with Iran after the 1979 revolution, it did tacitly recognise the new government by entering into the 1981 Algiers Accord to help free American hostages held in the country and also pursued cases at a claims tribunal established to resolve disputes between the two states.³⁴ The US also agreed that an institution belonging to the Khomeini regime could represent itself in a court case, also indicating tacit recognition.³⁵ Implied recognition does not flow however from participation in a multilateral treaty.³⁶

²⁵ See generally Crawford J (2006) *The Creation of States in International Law*. Clarendon Press, Oxford

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ State Department, *Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America*, February 29, 2020

²⁹ *ibid.*

³⁰ Schuit, ‘Recognition of Governments in International Law and the Recent Conflict in Libya’ *supra* (n. 5)

³¹ Serralvo, ‘Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya’ (*supra* n. 6)

³² Shaw M (2014) *International law*. Cambridge University Press, Cambridge, p. 332-333

³³ Schuit, ‘Recognition of Governments in International Law and the Recent Conflict in Libya’ *supra* (n. 5) and Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

³⁴ Politico, *Biden unlikely to formally recognize Taliban government*, September 11, 2021

³⁵ *ibid.*

³⁶ Schuit, ‘Recognition of Governments in International Law and the Recent Conflict in Libya’ *supra* (n. 5)

Whilst there is a general rule in international law that a State is to only have one government, state practice has indicated that two entities can be recognised as the government of the same state as long as one is recognised de jure and the other is recognised as the de facto government.³⁷ For instance, in the Spanish civil war, the Republican government was recognised in the last two years of the conflict as the de jure government while Franco's administration was recognised as the de facto government.³⁸ Similarly, at the end of Gaddafi's reign in Libya, some states recognised the National Transitional Council as being the de facto government. The de jure government remains able to speak externally to the international community of states on behalf of the state it represents.³⁹ The de facto government is usually labelled such because it has effective control of territory with the de jure government retaining mere administrative control. Effective control is one of the criteria for recognition to which we now turn.

6. Criteria for Recognition

As recognition is a discretionary and unilateral act, the criteria upon which recognition is granted is thus left up to States. However, there have been efforts to establish some form of policies for recognition so there is uniformity among the international community.⁴⁰ The one universally agreed upon criterion seems to be that of effective control over territory.⁴¹ States are still reluctant though to enact any legal criteria for recognition as their decision to accord or not accord recognition lies at the heart of their sovereignty and they want to retain some leeway in this regard.⁴² The most frequently cited criteria are considered in this section.

6.1 Effective Control

The notion of effective control is classically defined to mean when an authority is "sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations."⁴³ It can be derived from the principle of territorial integrity which prohibits states from recognising an authority that is not in effective control to the detriment of one that is.⁴⁴ The Tinoco arbitration affirmed the requirement of effective control as a principle.⁴⁵ Chief Justice Taft superseded the UK's non-recognition of Costa Rica's Tinoco government in this case stating that the authority was in effective control of the country and therefore was the valid government.⁴⁶ Similarly, in *Hesperides Hotels v. Aegean Holidays Limited*, it was

³⁷ Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n. 6)

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' supra (n. 5)

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

⁴⁴ Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' supra (n. 5)

⁴⁵ Tinoco Claims Arbitration (Great Britain v. Costa Rica) (1923) 1 R.I.A.A. 369

⁴⁶ *ibid.*

held in regards to the UK's non-recognition of the Turkish administration of Northern Cyprus that "the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto".⁴⁷ What effective control necessarily entails is a matter of debate. It does seem to require the following:

1. An independent government: a key requirement is that the government be independent in that it is able to exercise autonomous authority and have the capacity to make its own decisions without the interference of foreign actors.⁴⁸ If a government can only control territory with the support of the armed forces of another state it does not do so independently and therefore cannot be a legitimate government. For instance, the Heng Samrin government in Cambodia was denied recognition due to the Vietnamese support that brought it into power.⁴⁹ However, states have also recognised entities that did require foreign support, such as the Obote government in Uganda in 1979 even though the Tanzanian armed forces that ousted Idi Amin from power were still in the country.⁵⁰
2. It must be habitually obeyed by the bulk of the population: the Pakistani Supreme Court itself has noted, while quoting Kelsen, that "[i]t is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens".⁵¹ Habitual obedience however remains a very difficult fact to prove and international law does not offer any guidance on how it can be evidenced.
3. The sustainability of power: the authority must be likely to continue to exercise power in a way which prevents the shifting of power between opposing parties every time one gains the upper hand.⁵² Therefore, effective control must not just be temporary but consolidated.⁵³
4. Some suggest that control of the capital city is a relevant factor when it comes to effective control. Although the capital city lacks any legal relevance it is significant when recognition controversies emerge and some argue that effective control is more likely gauged by locations as opposed to the extent of territory under control. As a result, much may hinge, politically and also legally, over control of the capital.⁵⁴

⁴⁷ *Hesperides Hotels v. Aegean Holidays Limited* case (1978) Q.B. 205 and 218 (C.A.).

⁴⁸ Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n. 6)

⁴⁹ Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' supra (n. 5)

⁵⁰ *ibid.*

⁵¹ *Asma Jilani v. The Government of Punjab*, PLD SC 139 (1972)

⁵² Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' supra (n. 5)

⁵³ Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (supra n. 3)

⁵⁴ Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' supra (n. 5)

However, state practice has not always accorded recognition to a government which possesses the required level of control. For instance, President Ouattara in Côte d'Ivoire in 2011, President Hadi in Yemen in 2015 nor the Government of National Accord of Libya in 2016 possessed effective control over their territory.⁵⁵ Similarly, in 2019, President Trump recognised Guaidó as Venezuela's President even though Maduro remained in effective control of the State.⁵⁶ Consequently, it is clear that though effective control remains an important criterion and one which is the most often cited, its parameters remain vague and undefined.

6.2 Compliance with International Obligations

A resolution by the Second Special Inter-American Conference adopted in 1965 recommended that a de facto government's willingness to fulfil the state's international obligations should be a criteria in determining whether it is to be recognised.⁵⁷ This seems somewhat pre-emptive though as those obligations fall on a state and therefore a recognised government. Non-recognition on the basis that a proclaimed government may not be fulfilling its human rights or other humanitarian obligations may be a countermeasure under the law of state responsibility in order to ensure compliance with international law.⁵⁸ The United States has previously used the Taliban's lack of compliance with international obligations, including Security Council resolutions as well as its failure to hand over Osama bin Laden as a reason for not recognising them as the government of Afghanistan.⁵⁹ The same allegations have been levelled today as a reason for not recognising the Taliban as the government.

6.3 Democratic Legitimacy?

In the past 25 years since the Cold War, there has been an increase in interest in the role of democratic legitimacy in recognising governments.⁶⁰ The question, however, as to whether it is a distinct criterion for recognition is debatable. States have at times refused to recognise governments that have come to power through revolution or through violence. In Haiti in 1994 and Sierra Leone in 1998, the international community sided with an ousted yet democratically elected government which lacked effective control in order to restore democracy against an insurgent government.⁶¹ States may refuse to recognise a non-democratic regime which usurps a democratically elected government in an effort to persuade the government to transition back to democracy.⁶² For instance, the US broke off diplomatic relations with Iran following the Islamic Revolution in 1979 and imposed sanctions against it.⁶³

⁵⁵ Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n. 6)

⁵⁶ L. Ali Khan, 'Why the U.S. Should Recognize the Taliban as Afghanistan's Lawful Government', JURIST – Academic Commentary, September 13, 2021

⁵⁷ AJIL 60 (1966), 460

⁵⁸ Article 22 and Articles 49-53 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts

⁵⁹ Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (supra n. 3)

⁶⁰ *Opinio Juris*, 'Recognition of Governments: Legitimacy and Control Six Months after Guaidó', August 18, 2019

⁶¹ *ibid.*

⁶² Sean D Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *Int'l & Comp LQ* 545

⁶³ L. Ali Khan, 'Why the U.S. Should Recognize the Taliban as Afghanistan's Lawful Government', JURIST – Academic Commentary, September 13, 2021

However, the US has acted inconsistently in this regard having had no issue with recognising Musharraf's government in Pakistan despite the fact that it came into power through a military coup.⁶⁴

Significantly though, international law does not prohibit revolutions as a means of governmental change and therefore, not complying with a country's constitutional processes should not preclude recognition.⁶⁵ Moreover, there are dozens of non-democratic States in Africa and the Middle East that are recognised by the international community.⁶⁶ Most scholars also agree that a customary law norm on the non-recognition of governments established anti-democratically has not yet emerged with effective control remaining the primary criterion for legitimacy.⁶⁷

7. Does the Taliban meet these Criteria?

The Taliban first came to power when they took control of Afghanistan on September 27, 1996 and proceeded to rule the country until the Transitional Authority was established, with American support, in June 2002. In these years, they were only recognised as the government of Afghanistan by Pakistan, the United Arab Emirates, and Saudi Arabia despite the fact that they were in effective control of 90 per cent of Afghanistan's territory.⁶⁸ Pakistan was the first country to recognise the government and since then made persistent efforts to get the Taliban the country's seat at the UN.⁶⁹ Saudi Arabia and the UAE meanwhile recognised the Taliban in an attempt to counter growing Iranian influence in the country.⁷⁰ Saudi Arabia suspended diplomatic relations after the Taliban leader Mullah Muhammad Omar refused to hand over Osama bin Laden in August 1998.⁷¹ However, despite the lack of recognition and lack of diplomatic relations between the Taliban and the non-recognising states, the Taliban did form the government of Afghanistan at this time under international law.⁷² This is clear from the fact that many scholars saw the US' invasion of Afghanistan in October 2001 as sparking an international armed conflict between the two states.⁷³

Currently, the Taliban controls vast swathes of Afghanistan including its capital and provincial capitals.⁷⁴ They exercise control over state machinery and small-scale

⁶⁴ *ibid.*

⁶⁵ Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (supra n. 3)

⁶⁶ Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (supra n. 62)

⁶⁷ James Gathii, 'Introduction to the AJIL Unbound Symposium on Recognition of Governments and Customary International Law' (2014-2015) 108 AJIL Unbound 199 and Erika de Wet, 'From FreeTown to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition', 108 AJIL Unbound 201 (2015)

⁶⁸ Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n. 6)

⁶⁹ Rudiger and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (supra n. 3)

⁷⁰ *ibid.*

⁷¹ United States Institute for Peace, *Leveraging the Taliban's Quest for International Recognition*, Afghan Peace Process Issues Paper, Barnett R. Rubin, March 2021

⁷² Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post Gaddafi Libya' (supra n. 6)

⁷³ *Ibid.*, and also see Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, *International law and armed non-state actors in Afghanistan*, International Review of the Red Cross, Volume 93 Number 881 March 2011

⁷⁴ Just Security, *Expert Backgrounder: Recognition and the Taliban*, August 17, 2021

insurrections or minor resistance will not negate the efficacy doctrine.⁷⁵ The elected President Ghani has left the country and is not claiming he is still in charge and his statements since leaving seemingly accept the Taliban's de facto authority and accord them responsibility for governing the country.⁷⁶ A resistance movement has emerged, however, in the form of Amrullah Saleh, the First Vice-President under the Ghani Administration who is claiming to be the caretaker president under the constitution and Ahmad Massoud, a prominent tribal leader and head of the recently declared National Resistance Front of Afghanistan.⁷⁷ Both have taken refuge in the Panjshir Valley, the same place the Rabbani regime was sheltered in the 1990s, and are seeking external support to resist the Taliban or force them to adopt a power-sharing arrangement.⁷⁸ It remains to be seen whether they will offer any serious resistance to the Taliban, however as it stands, a limited insurgency will not negate the effective control criterion being fulfilled.⁷⁹ Indeed, US Secretary of State Antony Blinken called the Taliban the "de facto government" of Afghanistan before the House Foreign Affairs Committee on September 13,⁸⁰ indicating a growing acknowledgment that they wield effective control over territory which is not hampered (currently) by a limited resistance. The EU in its latest resolution has also acknowledged that the Taliban is the de facto government with which operational engagement is necessary but with which there will be no official recognition.⁸¹

In terms of habitual obedience by the people, the rapid collapse of Ghani's government indicates that the Taliban does enjoy some popular support in Afghanistan which is sufficiently widespread given its quick takeover of the capital and all provincial capitals.⁸² However, given fears of human rights and an influx of refugees, time will tell whether this habitual obedience is securable and sustainable.

Ghani also suggests that they must earn the legitimacy of the Afghan people and the Taliban has said it would hold talks to establish an "open, inclusive Islamic government."⁸³ In terms of democratic legitimacy, the Taliban have not come into power democratically or in a constitutionally legitimate way after ousting the current government following a decades-long insurgency. The Ghani Administration has itself been beset by legitimacy problems. Ghani's re-election in 2019 was mired by allegations of rigging by his primary opponent Abdullah Abdullah. Afghan elections over the past several years have seen very low turnouts, in 2019 only 20 percent of the electorate had voted and no independent reports by election observers exist.⁸⁴ It

⁷⁵ L. Ali Khan, Why the U.S. Should Recognize the Taliban as Afghanistan's Lawful Government, JURIST – Academic Commentary, September 13, 2021

⁷⁶ Just Security, Expert Backgrounder: Recognition and the Taliban, August 17, 2021

⁷⁷ Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Time, *Biden Administration Grapples With How to Send Aid to Afghanistan Without Supporting the Taliban*, September 22, 2021

⁸¹ European Parliament resolution of 16 September 2021 on the situation in Afghanistan (2021/2877(RSP))

⁸² Just Security, *Expert Backgrounder: Recognition and the Taliban*, August 17, 2021

⁸³ *ibid.*

⁸⁴ Responsible Statecraft, *The generals lied and the fantasy died*, August 16, 2021

is unclear whether the Taliban will hold elections as their previous constitutions oppose elections for having no basis in Sharia.⁸⁵ The interim government announced by the Taliban has included members of various ethnic groups in the country, however, unsurprisingly the majority of cabinet positions have gone to members of the Taliban itself. As already mentioned, however, the lack of democratic legitimacy would jeopardise the recognition of countless governments around the world and is not an established criterion under international law despite some state practice.

8. Implications of Recognition

Recognition has implications for a number of regimes in international law as well as domestic law. For instance, a client of a US law firm was the now-defeated government of Afghanistan in a case in which it was being sued by the family of a victim of the September 11 attacks.⁸⁶ A stay has been granted by the judge at the law firm's request, however, it will take much longer to determine who will now be the defendant.⁸⁷

This section will consider only some of the implications for recognition on international humanitarian law, the law of state responsibility, and counter-terrorism in the form of sanctions levied against the Taliban.

8.1 International Humanitarian Law

The question of who is the government of a state can also have an impact in terms of the initial classification of a conflict and any subsequent reclassification. In terms of classification of the conflict over the years a rough timeline can be provided below:⁸⁸

⁸⁵ Dawn, *A big test for the Taliban*, August 22, 2021

⁸⁶ Politico, *Biden unlikely to formally recognize Taliban government*, September 11, 2021

⁸⁷ *ibid.*

⁸⁸ See Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, International law and armed non-state actors in Afghanistan, *International Review of the Red Cross*, Volume 93 Number 881 March 2011; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add.4; The Office of the Prosecutor, Report on Preliminary Examination Activities 2016, 14 November 2016, para.197

Dates	Events and Classification
<i>September 1996 - 7 October 2001</i>	The Taliban took power in 1996 and was embroiled in a non-international armed conflict with the Northern Alliance until the US invasion
<i>7 October 2001 - 18 June 2002</i>	Airstrikes by a US-led coalition sparks an international armed conflict between coalition States and Afghanistan. It then occupies the territory (therefore still an international armed conflict) until Hamid Karzai is appointed President of the Transitional Authority in June 2002
<i>18 June 2002 - 15 August 2021</i>	The establishment of the Karzai government led to there being a non-international armed conflict in Afghanistan between the Government, which is supported by international military forces, and various armed groups including the Taliban
<i>August 2021</i>	US forces withdraw, the Taliban controls vast swathes of territory and the Ghani government has fled Afghanistan

The US invasion of Afghanistan was an international armed conflict between the two states. However, when Hamid Karzai’s administration was installed in power, the conflict transformed into a non-international armed conflict between the Afghan government and the Taliban. This non-international armed conflict was internationalised by the presence of foreign forces, including US troops, however, the conflict remains non-international as it does not involve opposing States.⁸⁹ In order to preclude an international armed conflict, consent must be valid and given by an authority authorised to do so on behalf of the state without coercion.⁹⁰ Sassòli has stated that a de jure authority without de facto control cannot validly consent to foreign intervention, but he also notes that consent by de facto authorities which possess control against the will of the de jure authority is also insufficient.⁹¹

In this situation, if the Taliban withdraws consent for US armed forces to operate on Afghan soil, the situation would be an international armed conflict. This is because Ghani’s government with Amrullah Saleh at the helm may wield de jure authority still but without effective control does not possess the required de facto control in order to validly consent. As a result, this could affect the classification of the conflict which has until now been a non-international armed conflict with American troops supporting the Afghan government through its consent. US troops withdrew from the country on

⁸⁹ Stephane Ojeda, ‘US detention of Taliban fighters: some legal considerations’, in Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, International Law Studies, Vol. 85, US Naval War College International Studies, Naval War College Press, 2009, pp. 358–359

⁹⁰ Ferraro T, Cameron L (2016) *Commentary to the Geneva Conventions: Common Article 2*. International Committee of the Red Cross, Geneva, para. 263

⁹¹ Sassòli M (2015) *The Concept and Beginning of Occupation*. In: Clapham A, Gaeta P, Sassòli M (eds) *The Geneva Conventions: A Commentary*. Oxford University Press, Oxford, pp 1389–1420

August 31, 2021. If America were to use force in Afghanistan without the Taliban's consent, an international armed conflict would exist between the two states. This is particularly interesting in light of the drone strike conducted by the US on August 31 against ISIS-Khorasan which the Pentagon has since confirmed was a tragic mistake that killed 10 civilians.⁹² The Taliban condemned the strike stating the US had violated the country's sovereignty.⁹³ Any such attacks are a violation of Article 2(4) of the UN Charter and would trigger an international armed conflict between the US and Afghanistan absent any Taliban authorisation.

8.2 State Responsibility

The UN human rights chief has already stated that she had received reports of possible war crimes by the Taliban during their offensive on Afghan cities as well as by pro-government militias.⁹⁴ She contends that many civilians were killed in the weeks running up to the Taliban's victory over Kabul.⁹⁵ Article 10 of the ILC Articles on State Responsibility states that "the conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law". Therefore, if a non-state group replaces the existing government and becomes the new government, it is responsible for the acts committed while it was an insurrectional movement. This would mean that the Taliban is responsible for its violations of international law during its insurgency. This form of responsibility is not contingent upon recognition, however, any State invoking the responsibility of an insurrectional movement which it does not recognise as the current government may run into difficulties.⁹⁶ For instance, making a claim or rendering responsibility effective would require and may even imply recognition.⁹⁷ This is a strong argument in favour of recognising them as a government as it promotes accountability in holding the Taliban liable for breaches they have committed up till now.

Paradoxically, States not wishing to recognise the Taliban may also hinge their non-recognition on the basis that they are obliged to not recognise them due to the war crimes they may have committed during the insurgency. The law of state responsibility obliges states to not recognise situations created by a serious breach of a jus cogens norm under Article 41(2) of the ILC Articles. States are under a duty to not recognise as lawful situations created by a serious breach of international law and to not render aid or assistance in maintaining the situation. This collective duty of non-recognition may be in the form of a Security Council resolution. For instance, the Security Council resolutions of 1965 and 1966 characterised the Smith regime in Rhodesia as unlawful in terms of the UN Charter and called upon all states not to recognise it.⁹⁸ Rules of

⁹² The New York Times, *Pentagon acknowledges Aug. 29 drone strike in Afghanistan was a tragic mistake that killed 10 civilians*, September 17, 2021

⁹³ CNN, *Ten family members, including children, dead after US strike in Kabul*, August 31, 2021

⁹⁴ The Guardian, *Taliban told that Afghan government installed by force will go unrecognised*, August 10, 2021

⁹⁵ *ibid.*

⁹⁶ Remigiusz Bierzanek, 'Responsibility of States in Armed Conflicts, The' (1981-1982) 11 Polish YB Int'l L 93

⁹⁷ *ibid.*

⁹⁸ SC Res 216 (1965); SC Res 217 (1965); SC Res 232 (1966)

international humanitarian law have been held to be ‘intransgressible principles of international customary law’ in the *Nuclear Weapons* Advisory Opinion and therefore may be considered of a peremptory character.⁹⁹ However, no State has refused to recognise a government on the basis that there is an obligation to do so under the law of state responsibility.

It is more likely that States would argue that non-recognition is a form of countermeasure taken under Article 22 and Articles 49-53 of the ILC Articles in response to a previously wrongful act. This is a form of ‘self-help’ taken in order to secure compliance.¹⁰⁰ They have been referred to as a form of ‘private justice’ as States themselves qualify the conduct of another State as wrongful and act to remedy it. However, the difficulties with recognition become apparent with this argument as counter-measures are to be taken against the ‘act of a State’ whereas non-recognition in and of itself involves the assumption that the unrecognised authority is not the state.

8.3 Sanctions

The Taliban have been sanctioned by the United Nations under UNSC Resolutions 1267 (1999) and 1988 (2011). The Security Council Committee was established under Resolution 1988 and it oversees the sanctions measures imposed by the Security Council on individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan. Sanction measures include asset freezes, travel bans, and arms embargoes. The Taliban as well as individuals within it have also been sanctioned by the European Union, the United States, the United Kingdom, Australia and other countries. Some of the leaders of the Taliban have been listed by the Committee while those involved in negotiating on behalf of the organisation are not so listed.¹⁰¹

During negotiations for the peace deal, Taliban leaders made it clear that they wanted the lifting of all sanctions imposed against them.¹⁰² Ending sanctions requires a vote in the Security Council and modifying the list of designated Taliban requires unanimity among its members with any member able to block a change.¹⁰³ The Security Council on March 10, 2020 unanimously passed a resolution which called upon states to support the peace negotiations and signalled its willingness to review UN sanctions imposed on the Taliban once intra-Afghan negotiations began.¹⁰⁴ It also urged States to conduct their own national reviews whilst saying it is mindful “that Taliban action, or the lack thereof, to further reduce violence, make sustained efforts to advance intra-Afghan negotiations, and otherwise cease to engage in or support activities that

⁹⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, p 257

¹⁰⁰ ARSIWA Commentary Article 22

¹⁰¹ Castellum, *Which Taliban Leaders Are Sanctioned? The Answer Will Surprise You*, August 17, 2021

¹⁰² United States Institute for Peace, *Leveraging the Taliban’s Quest for International Recognition*, Afghan Peace Process Issues Paper, Barnett R. Rubin, March 2021

¹⁰³ *ibid.*

¹⁰⁴ Security Council Resolution 2513, March 10, 2021; also see “United States Signs Agreement with the Taliban, but Prospects for Its Full Implementation Remain Uncertain” (2020) 114 *American Journal of International Law* 529

threaten the peace, stability and security of Afghanistan, will affect the review”.¹⁰⁵ The UN Security Council has also recently omitted the word ‘Taliban’ from its statements regarding terrorist groups in Afghanistan. On August 16, 2021, it issued a statement that “neither the Taliban nor any other Afghan group or individual should support terrorists operating on the territory of any other country.”¹⁰⁶ On August 27, this paragraph was reproduced but now states that “no Afghan group or individual should support terrorists operating on the territory of any country.”¹⁰⁷ These small changes in the language used to describe the group indicate some small steps are being taken to acknowledge that the Taliban are an authority; whether they are a legitimate one is another question however.

In September 2021, the US requested that the UN Security Council extend sanctions exemptions that allow top Taliban officials to travel abroad to participate in international discussions in order to promote ‘peace and stability’ in Afghanistan.¹⁰⁸ The travel ban waiver was initially granted in 2019 to allow Taliban leaders to participate in peace talks in Doha and it has been requested that it be extended until December 2022 and that they be permitted to withdraw funds from frozen bank accounts to pay travel expenses.¹⁰⁹ It is likely that there will be more waivers in the future if the Taliban continue to represent the State internationally and interact with foreign entities.

The US Treasury Department has issued two licenses which facilitate the provision of humanitarian aid and financial assistance to Afghanistan while upholding sanctions on the Taliban.¹¹⁰ However, it does not extend to any other form of developmental aid and nor is it expected to, all developmental aid projects under the World Bank group have also been put on hold. The sanctions freeze any US assets, of up to 9.5 billion USD, belonging to the Taliban and bar US citizens from engaging in transactions with them, including by way of contributing funds, goods or services.¹¹¹ Meanwhile, Republican senators have tabled a bill titled the ‘Afghanistan Counterterrorism, Oversight, and Accountability Act’, which aims to impose sanctions on the Taliban and anyone assisting them.¹¹² It also singles out Pakistan as an entity providing support for the Taliban.¹¹³ China has countered US actions by calling for sanctions on Afghanistan to be lifted and saying its foreign exchange reserves are “national assets that should belong to and be used by its own people, and not be used as a bargaining chip to exert political pressure on Afghanistan”.¹¹⁴ Its Foreign Minister has also called on the World

¹⁰⁵ *ibid.*

¹⁰⁶ Dawn, *UN softens up to Taliban, but keeps them on sanctions list*, September 2, 2021

¹⁰⁷ *ibid.*

¹⁰⁸ Foreign Policy, *U.S. Asks U.N. to Waive Taliban Travel Ban*, September 16, 2021

¹⁰⁹ *ibid.*

¹¹⁰ U.S. Department of the Treasury, *Press Release: Treasury Issues General Licenses and Guidance to Facilitate Humanitarian Assistance in Afghanistan*, September 24, 2021

¹¹¹ CNBC, *Treasury carves path for U.S. humanitarian aid to Afghanistan while upholding sanctions on Taliban*, September 24, 2021

¹¹² The Express Tribune, *Bill moved in US Senate to sanction Taliban, supporters*, September 29, 2021

¹¹³ *ibid.*

¹¹⁴ South China Morning Post, *China calls for end to sanctions on Afghanistan ‘as soon as possible’*, September 23, 2021

Bank and the IMF to release Afghan government accounts and provide economic aid to the country.¹¹⁵

Other countries have, similarly to the US, been less responsive to the Taliban's desire for sanctions relief. Russia's Special Envoy has already dismissed a request by the Taliban to remove sanctions stating that they had not done anything to merit sanction relief.¹¹⁶ The EU which has three seats on the Council (France, Ireland and Estonia) has also favoured a democratic system in Afghanistan where human rights are protected and will likely insist on this before any removal of sanctions.¹¹⁷

It may be that sanctions and recognition will both be leveraged in order to force the Taliban to uphold "democratic" values and human rights. The EU Parliament has even suggested placing sanctions on other governments supporting the Taliban even to the point of investigating and revoking the Generalised Scheme of Preferences (GSP) plus status of countries providing safe havens to the regime.¹¹⁸ How the Taliban and other governments respond to this given sanctions and the withholding of recognition could have a crippling effect on their ability to rule Afghanistan and represent the country externally is yet to be seen. The World Health Organization has already urged the international community to take action as the Afghan health care system is on the verge of collapse and the country faces a humanitarian catastrophe¹¹⁹ and the World Food Programme has warned that one in three Afghans are facing food insecurity.¹²⁰

8.4 Diplomatic Relations

Recognition differs from diplomatic relations and is not a prerequisite for their establishment. The recognition of a government is legally not necessary for diplomatic relations which involve a traditional exchange of ambassadors, diplomatic personnel and related facilities between states.¹²¹ States can maintain diplomatic relations even when they do not recognise the government of another so long as the state does not take steps such as the submission of credentials for a new ambassador which would require the affirmative consent of the other state's government.¹²² It is widely accepted that revolutionary regime change does not end the function of diplomats.¹²³

Diplomatic recognition does, however, open channels for development aid and loans from states as well as institutions such as the World Bank and International Monetary

¹¹⁵ *ibid.*

¹¹⁶ United States Institute for Peace, *Leveraging the Taliban's Quest for International Recognition*, Afghan Peace Process Issues Paper, Barnett R. Rubin, March 2021

¹¹⁷ *ibid.*

¹¹⁸ European Parliament resolution of 16 September 2021 on the situation in Afghanistan (2021/2877(RSP)) which expressly refers to Pakistan as a country providing safe haven to the Taliban in paragraph 46.

¹¹⁹ VOA, *China Urges G-20 to End 'Unilateral' Sanctions on Taliban-Ruled Afghanistan*, September 23, 2021

¹²⁰ South China Morning Post, *China calls for end to sanctions on Afghanistan 'as soon as possible'*, September 23, 2021

¹²¹ Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

¹²² *ibid.*

¹²³ See Lukas Kleinert, *Recognition of a Taliban Government?: A Short Overview on the Recognition of Governments in International Law*, *Völkerrechtsblog*, September 8, 2021; they also do not fall under Article 43 of the Vienna Convention on Diplomatic Relations, 1961

Fund (IMF).¹²⁴ The US, European Union and Britain have currently suspended their aid programs to the country and Afghanistan's central bank reserves held abroad have been frozen.¹²⁵ The IMF has withheld 400 million USD which was scheduled to be delivered to the old government.¹²⁶ There are talks of channelling aid through UN agencies or a possible new trust fund from the World Bank so that countries would not have to give directly to the Taliban.¹²⁷ As the Taliban forms its new government, diplomats posted abroad represent a deposed government.¹²⁸ Unless the new authority is recognised, Afghan ambassadors and diplomats will continue to represent the defeated administration.¹²⁹ It remains unlikely however that states like the US will name an ambassador to Afghanistan as sending an ambassador requires consent from a recognised government.¹³⁰ It may instead choose to have a diplomatic office dedicated to the country which does not operate at full strength¹³¹ but allow the Taliban to have access to some Afghan state assets within its jurisdiction so that it can pay civil servants to provide basic services.¹³²

8.5 Representation at the UN General Assembly

In the UN General Assembly, a credentials committee gives recommendations on who should be allowed to represent each member state.¹³³ These recommendations are based on a review of the credentials submitted by state representatives to ensure that they comply with the Assembly's procedural rules.¹³⁴ The Committee's recommendations are then voted on by the entire Assembly. The Assembly may agree to the recommendation or defer its decision. Regimes are often represented and agreed to by the Assembly that some other member states choose not to recognise.¹³⁵ In the past, the Assembly has deferred making a decision on submissions from Afghanistan - from 1997 to 2000 both the Rabbani Government and the Taliban submitted credentials.¹³⁶ The Assembly deferred its decision allowing Rabbani's representative to participate until the Interim Authority took office in December 2001.¹³⁷ The credentials of this authority were then accepted by the Assembly.¹³⁸

The currently accredited Afghan Ambassador submitted a list of Afghanistan's delegation for the General Assembly's 76th annual session on September 15.¹³⁹ The Taliban submitted a communication to the Secretary-General on September 20

¹²⁴ The New York Times, *Will the World Formally Recognize the Taliban?* September 1, 2021

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ New Statesman, *Will the Taliban receive international recognition?* August 23, 2021

¹²⁹ *ibid.*

¹³⁰ Politico, *Biden unlikely to formally recognize Taliban government*, September 11, 2021

¹³¹ *ibid.*

¹³² Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

¹³³ *ibid.*

¹³⁴ EJIL:Talk! *Will the Taliban Represent Afghanistan at the UN General Assembly?* September 1, 2021

¹³⁵ Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

¹³⁶ EJIL:Talk! *Will the Taliban Represent Afghanistan at the UN General Assembly?* September 1, 2021

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ AP News, *UN: Afghanistan's Taliban want to address General Assembly*, September 22, 2021

nominating a UN new permanent representative for Afghanistan.¹⁴⁰ They also stated that the former representative no longer represents the country as that administration has now been ousted.¹⁴¹ It is likely that the Assembly may go on deferring its decision as per its previous practice.¹⁴² Therefore, until the Taliban garner widespread support at the Assembly, it will be unable to obtain a General Assembly seat and be able to vote on resolutions of international importance.

9. Recent Statements from the International Community regarding Recognition of the Taliban

On August 10, the US envoy Zalmay Khalilzad went to Doha to tell the Taliban that if they come to power through force they will not be internationally recognised.¹⁴³ A statement by a number of states, namely China, the United States, UK, Uzbekistan, Pakistan, Germany, India, Norway, Qatar, Tajikistan, Turkmenistan, and Turkey as well as representatives of the United Nations and the European Union, have “reaffirmed that they will not recognize any government in Afghanistan that is imposed through the use of force,” effectively conditioning recognition on gaining power through a “future political settlement.”¹⁴⁴ The UN Secretary General Antonio Guterres has even gone so far as to state that recognition is “the only leverage that exists” over the Taliban whilst pushing for a united front among U.N. member states.¹⁴⁵

The British Prime Minister has said that nobody should bilaterally recognise the Taliban as the government of Afghanistan as there would be a new administration in the country and that like-minded countries should do “whatever we can to prevent Afghanistan lapsing back into being a breeding ground for terror.”¹⁴⁶ The US Secretary of State Antony Blinken stated that “A future Afghan government that upholds the basic rights of its people and that doesn’t harbor terrorists is a government we can work with and recognize.”¹⁴⁷ Though he then later went on to acknowledge that the Taliban were the de facto government of Afghanistan.¹⁴⁸ French President Macron stated that France has initiated a dialogue with the Taliban whilst confirming that this did not amount to recognition of the group as the country’s legitimate leaders.¹⁴⁹ He stated that “[l]et’s be clear: it is the Taliban who are in control of Kabul. In an operational, practical way, we must have these discussions.”¹⁵⁰

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² EJIL:Talk! *Will the Taliban Represent Afghanistan at the UN General Assembly?* September 1, 2021

¹⁴³ The Guardian, *Taliban told that Afghan government installed by force will go unrecognised*, August 10, 2021

¹⁴⁴ Just Security, *Expert Backgrounder: Recognition and the Taliban*, August 17, 2021

¹⁴⁵ Lawfare, *History and the Recognition of the Taliban*, August 26, 2021

¹⁴⁶ Reuters, *Britain says Taliban should not be recognised as Afghan government*, August 15, 2021

¹⁴⁷ Just Security, *Expert Backgrounder: Recognition and the Taliban*, August 17, 2021

¹⁴⁸ Time, *Biden Administration Grapples With How to Send Aid to Afghanistan Without Supporting the Taliban*, September 22, 2021

¹⁴⁹ RFI, *Talks with Taliban not a sign of recognition, says France's Macron*, August 30, 2021

¹⁵⁰ *ibid.*

However, despite these statements, some countries may be adopting their own policies regarding recognition. The Chinese foreign ministry has indicated that recognition would wait until after the government is established, implying that recognition would ensue once a government was in place.¹⁵¹ The foreign ministry also complimented the Taliban's "good, positive and pragmatic behaviors".¹⁵² The Turkish government has also stated it is prepared to de facto recognize the Taliban and engage with its leadership.¹⁵³ Russia and China have both kept their embassies open in Afghanistan.¹⁵⁴ Russia has stated that "Firstly, no one is going to rush with this [recognition]. Recognition or non-recognition will depend on the behavior of the new authorities. We will carefully watch how responsibly they will govern the country in the near future. As a result, the Russian leadership will draw the necessary conclusions and make a decision."¹⁵⁵

Warmer relations between Russia and the Taliban mark a difference from those which existed when the Taliban were in power previously. In 2000 the Taliban had recognised the secessionist government of Chechnya and also recognized Chechnya as an independent State following which the Chechen government then opened an embassy in Kabul.¹⁵⁶ This thawing is probably due to the fact that the Afghan Taliban has given specific assurances to both Russia and China that it will not support Chechen and other rebels against Russia, Uighur rebels against China and they have also promised Iran that they will not provide bases for Saudi-supported anti-Iranian Sunni rebels.¹⁵⁷

Pakistan has stated that recognition will be a regional decision and it will not be taking any unilateral steps in this regard.¹⁵⁸ However, its Foreign Minister has also said that the international community should develop a roadmap which leads to diplomatic recognition of the Taliban in which they are not isolated and expectations regarding human rights are fulfilled.¹⁵⁹ Pakistan is proposing that the international community develop a road map that leads to diplomatic recognition of the Afghan Taliban — with incentives if they fulfill its requirements — and then sit down face to face and talk it out with the group's leaders.

Most States are adopting a wait and see approach where they are hesitant to be the first country seen to legitimise the Taliban's taking of power. If their doubts are sufficiently overcome, and the regime is able to consolidate power over time, it is likely that an implicit recognition of their de jure status as a government will follow. Whilst

¹⁵¹ War On The Rocks, *After Withdrawal: How China, Turkey, And Russia Will Respond To The Taliban*, August 31, 2021

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ Just Security, *Expert Backgrounder: Recognition and the Taliban*, August 17, 2021

¹⁵⁵ *ibid.*

¹⁵⁶ Grant, Thomas D. "Current Development: Afghanistan Recognizes Chechnya." *American University International Law Review* 15, no. 4 (2000): 869-894.

¹⁵⁷ Time, *What Pakistan Stands to Gain From the Taliban Takeover of Afghanistan*, August 18, 2021

¹⁵⁸ Dawn, *Recognition of Taliban regime in Afghanistan will be a 'regional decision': Fawad Chaudhry*, August 17, 2021

¹⁵⁹ Dawn, *'Be more realistic': FM Qureshi details roadmap for Afghan Taliban's recognition*, September 23, 2021

some states will leverage recognition and sanctions relief on the Taliban's attitude towards elections and upholding human rights, countries such as China and Russia may be less taciturn in granting the Taliban the legitimacy they seek.

10. Conclusion

The recognition of governments is a highly uncertain area of international law with little clarity owing to the fact that it is largely left to States as to which governments they recognise and which they do not and the reasons underlying that decision. It is too early to tell whether the Taliban's de facto control over Afghanistan will ripen into de jure control. However, one of the key requirements, that of effective control, does appear to have largely been satisfied, in that they are independent, arguably enjoy the habitual obedience of the population, and control the capital city. Whether they are able to stay in power in a sustainable manner which is not temporary is as of yet unclear. However, the speed with which they have defeated the Afghan government and the fact that any opposition has not yet led to a formidable adversary to the Taliban or been given international support suggests that this consolidation may be tenable. If so, it is likely that more States will implicitly recognise the Taliban without making any express declarations to that effect, this could be by way of diplomatic relations or through bilateral treaties. Some, however, may keep hold of recognition as a bargaining chip to not legitimise the authority until it provides democratic legitimacy, protection for human rights, or counter-terrorism assurances. In sum, the recognition of governments is entirely discretionary and the ability to deny a government the right to participate in the community of States is left to States themselves. Whether the Taliban will allay States' concerns about their rule or aggravate them remains to be seen.

