

RECOGNITION OF THE TALIBAN GOVERNMENT UNDER INTERNATIONAL LAW

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Abstract

The Fall of Kabul in 2021 initiated the debate of the recognition of the Taliban government by the international community. This development has significant regional and global implications under international law. Even though the Taliban regime fulfills the significant criteria provided by international law for the recognition of governments, none of the states have recognized it so far as they are reluctant to become the first country to legitimize the Taliban regime. The policy choices for Pakistan are more challenging due to its close proximity to Afghanistan and the challenges posed of the resurgence of TTP in various parts of the state. Therefore, Pakistan needs to devise its policy of recognizing the new Taliban government on conditional terms i.e. if they agree to fulfill the demands of Pakistan. On the contrary, the wait-and-see approach of the international community can also be adopted. However, Pakistan should avoid any unilateral recognition of the Taliban government.

Keywords: Taliban Regime, Recognition of Government, International Law, International Community, Afghanistan, Pakistan

I) Introduction

The Fall of Kabul on 15 August 2021, resulted in a quick and sudden takeover by the Taliban. They not only established their authority over most of the provinces of Afghanistan, but also announced an interim government. In 2021, the Qatar deal between the United States (“US”) and the Taliban resulted in the complete withdrawal of the US and other international forces, such as the NATO.¹

Soon after the US withdrawal and the control of the Taliban, the former announced the establishment of a new political system which was solely based on their strict interpretations of the *sharia* and Islam. With the Taliban coming into power and taking control of the majority of the provinces of Afghanistan, the international community was faced with the dilemma of whether or not to grant recognition to the new government, as per the criterion established in international law.²

For now, all states abstained from recognizing the Taliban government and have adopted a “wait and see” approach. The abstention stems from a reluctance to become the first country to legitimize the new Taliban regime. Western countries are conditioning their recognition on respect of human rights, future political settlement, or assurances against terrorism.³

This policy brief discusses the concept of the ‘recognition of governments’ under international law and state practice regarding it. As such, international law provides little guidance for this concept of recognition of government by other states. Nevertheless, it has become an important issue in recent years because many legal consequences flow from it. Therefore, it is important to elucidate this concept to understand whether the Taliban government meets the criterion of recognition under international law. The question that then follows is whether Pakistan should move forward with recognition or not.

¹ “The Road to Peace in Afghanistan”, Council on Foreign Relations, September 11, 2020 <https://www.cfr.org/article/what-know-about-afghan-peace-negotiations> accessed January 9, 2023

² Faheem M and Minhas Majid, “Recognition of the Taliban Government in Afghanistan” (2022) 42, Strategic Studies 81

³ Al Jazeera, “Taliban announces new government in Afghanistan”, September 8, 2021

II) Recognition of Governments under International Law

International Law defines ‘recognition’ as the “willingness of the recognizing side to establish or maintain official relations with the recognized government”⁴. It means that states are recognizing a person or group of persons as competent to make decisions on behalf of the state by entering into bilateral agreements, treaties, or conventions with other states. The decision to recognize a government is a unilateral act that is left to the discretion of states without any compulsion. Nevertheless, the decision has far-reaching effects under international law.

When a certain government of the state is recognized by other states, it means that the acts of the government are binding on the state and it is capable of entering into diplomatic relations and international treaties or conventions⁵. This means that all the executive and legislative acts will be considered official acts in the courts of the recognizing state. On the other hand, when a government is refused to be recognized by the international community, which means the legislative and executive acts of the refused government are not accepted by the international community, it is also refused immunities, including sovereign immunity, and the right to approach domestic courts for redressal.⁶ Therefore, the question of recognition of governments has become an important issue in the jurisprudence of international law.

III) State Practice on Recognition of Governments under International Law

In international law, when governments change through democratic processes, the issue of recognition of the government does not arise. However, when a government changes through a revolution, internal strife or any other undemocratic process, the question of the recognition of the state arises amongst the international community. For instance, in 1949, the US refused to recognize the regime of the Communist Party of

⁴ Rudiger Wolfrum and Philipp, “The Status of the Taliban: Their Obligations and Rights under International Law” Max Planck Yearbook of United Nations Law 6, (2002) Online 559

⁵ Faheem M and Minhas Majid, “Recognition of the Taliban Government in Afghanistan” (2022) 42, Strategic Studies 81

⁶ Rudiger Wolfrum and Philipp, “The Status of the Taliban: Their Obligations and Rights under International Law” supra (n.3)

China because it was not established through democratic processes.⁷ Similarly, the international community has also refused to acknowledge the post-revolutionary regimes of Iran and the Taliban government in Afghanistan, because they were established through undemocratic means.

Generally, there are two doctrines of international law that guide states' behavior regarding the recognition of new governments including the "Tobar Doctrine" and the "Estrada Doctrine".⁸ The Tobar Doctrine was presented by the Former Minister of Ecuador and states that a new government in the state can only be acknowledged or recognized by the international community if it has come to power through legal means.⁹ On the other hand, the Estrada Doctrine, propounded by the Mexican Minister of Foreign Affairs, states that recognition allows other states of the international community to interfere in another state's affairs by judging the legitimacy of its government. This helped states to avoid embarrassing situations where regimes were changed through undemocratic means and where hasty decisions were made on the part of the states to recognize illegitimate governments.

The United Kingdom ("UK") adopted the Estrada Doctrine in 1980, and stopped recognizing the changes in the government. Many other states including France, the US, Australia, and the European Union made similar declarations that they do not recognize governments but acknowledge states only.¹⁰ Generally, it is part of customary international law that states prefer to abstain from diplomatic relations with questionable governments, instead of making explicit announcements regarding their plans of unrecognition.

In the current situation of the Taliban government in Afghanistan, the majority of the states have either applied the doctrine of Estrada or adopted the policy of complete silence. Therefore, now the question before the international community is not regarding the statehood of Afghanistan but the issue of recognition of the Taliban

⁷ Michael Gunter, "US Refusal to Recognise China (1949-1979)," *Cappadocia Journal of Area Studies* 2, no. 1, (2020): 2-18

⁸ Gregory Weeks, "Almost Jeffersonian: U.S. Recognition Policy," *Presidential Studies Quarterly* 31, no.3 (2020): 489-503. <https://www.jstor.org/stable/27552325> accessed January 9, 2023

⁹ *Ibid*, 497

¹⁰ "Recognition of States and Governments" (Law Explorer May 5, 2018) <https://lawexplores.com/recognitionof-states-and-governments/> accessed January 9, 2023

government as the legitimate representative of the people of Afghanistan in the comity of nations and international institutions.

IV) International Law Standards for Recognition of Governments

Under international law, the rules for the recognition of states are different from the criterion provided for the recognition of governments. The former is governed by the Article 1 of the ‘1933 Convention on the Rights and Duties of State’ which is also known as the Montevideo Convention. On the contrary, for the recognition of government, the only criterion available is the “effective control” of new government in the majority areas of the state.

This principle was applied in the Tinoco arbitration where the UK decided not to recognize Costa Rica’s Tinoco government but Chief Justice Taft stated that the concerned authority occupies the majority of the states of the country and therefore must be recognized by the international community.¹¹

The same criterion was applied in ‘Hesperides Hotel v. Aegean Holidays Limited’, where it was held that even though the UK does not recognize the Turkish administration of Northern Cyprus. However, the courts of the country recognize this governing body which has effective control over the majority of the state.¹²

The jurisprudence of international law explains the concept of effective control of the government as; firstly, that the government should be independent and capable of exercising an autonomous authority by making decisions of their own, secondly, it must be habitually obeyed by the majority of the population, thirdly, there should be sustainability of the power and the authority must not be temporary rather consolidated, and fourthly, that the concerned government must have the control of the capital as the effective control is gauged by the territories under control instead of the extent of territories.¹³ Although the last one has been cited as the most important criterion for the recognition of the government of states, the state practice has always remained vague and undefined.

¹¹ Ibid, 152

¹² Hesperides Hotels v. Aegean Holidays Limited case (1978) Q.B. 205 and 218 (C.A.)

¹³ Faheem M and Minhas Majid, “Recognition of the Taliban Government in Afghanistan” (2022) 42, Strategic Studies 81

There are instances in international law where states have recognized governments that did not have effective control of the state. For instance, the international community recognized the government of President Hadi in Yemen in 2015¹⁴, and President Trump acknowledged Guaido as the President of Venezuela but both government did not enjoy effective control in their territories. Similarly, another important criterion used in international jurisprudence, for the recognition of states, is a de facto government's willingness to fulfill international obligations including human rights and other humanitarian obligations.

In the context of Afghanistan, many states are not recognizing the Taliban government because of their lack of compliance with international obligations, particularly international human rights obligations. The last important criterion used by states for the recognition of governments is whether the government has come into power through democratic legitimacy or unconstitutional means.¹⁵ For instance, the international community supported the ousted yet constitutionally elected government in Haiti in 1994 and in Sierra Leone in 1998 even though these governments lacked effective control in their jurisdictions¹⁶.

The baseline is that there is no stringent criteria adopted by the international community for the recognition of states as they have already recognized many non-democratic states in Africa and the Middle East. Thus, most scholars of international law agree that a customary law norm on the non-recognition of governments established undemocratically has not yet emerged as significant as the other criteria for legitimacy.

V) Recognition of the Taliban Government under International Law

The Taliban government first came into power in 1996 and remained in power till November 2001. During these years, their government was recognized by three states only including Pakistan, Saudi Arabia, and the UAE. In the present scenario, the Taliban government fulfills the criterion of effective control as they control 90% of the

¹⁴ Serralvo, "Government Recognition and International Humanitarian Law Applicability" (supra n. 6)

¹⁵ Sean Murphy, "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 Int'l & Comp LQ 543

¹⁶ Ibid, 545

territory of Afghanistan including its capital Kabul and other significant territories.¹⁷ The previously elected government of Ashraf Ghani has already left the state and his statements show that he has already accepted the de facto authority of the Taliban government.

Furthermore, the Secretary of State of the US called the Taliban government- a de facto government before the House of Representatives which indicates that the US also acknowledges the effective control of the Taliban government¹⁸. Secondly, the Taliban government fulfills the criterion of habitual obedience from the majority of the population as they did not encounter any strong resistance from the people of Afghanistan as they took over control of the capital within a few days after the withdrawal of the US.

However, they do not fulfill the third criterion of democratic legitimacy as they have not come into power through any legitimate way after ousting the democratically elected government.¹⁹ There have been multiple reports by international organizations and non-governmental organizations that the Taliban government are violating multiple international obligations, including human rights, women's rights, and other humanitarian obligations.

Furthermore, the interim government announced by the Taliban government does not include ethnic groups, minorities or women, as the majority of the cabinet positions are occupied by the members of the Taliban itself.²⁰ Owing to this situation, the international community has refused to accept the legitimacy of the Taliban government.

VI) Recognition by Pakistan of the Taliban Government under International Law

Pakistan has been trying its best to make the most out of the undesirable outcome of the Afghan conflict as it has supported the Taliban for years. However, in

¹⁷ Al Jazeera, "Taliban announces new government in Afghanistan", September 8, 2021

¹⁸ Time, "Biden Administration Grapples with How to Send Aid to Afghanistan Without Supporting the Taliban", September 22, 2021

¹⁹ McMaster and Bradely, "Opinion | in Afghanistan, the Tragic Toll of Washington Delusion" (The Wall Street Journal August 17, 2021) <https://www.wsj.com/articles/afghanistan-withdrawal-biden-human-rights-terrorist-jihadist-islamist-taliban-kabul-11629044191> accessed January 9, 2023

²⁰ Ibid.

recent circumstances, it has categorically ruled out the possibility of independently recognizing the Taliban government even though they fulfill the significant criterion of effective control over the majority of the areas of the state.²¹ Pakistan should use its influence carefully, to convince the Taliban towards compromises in order to gather greater support from other regional states and the western countries to ease the humanitarian crisis in Afghanistan.²²

On 17 September 2021, the then Prime Minister of Pakistan, Imran Khan, made a statement to recognize the Taliban government, referring to an agreement at the outskirts of the Shanghai Cooperation Organization summit, held in Dushanbe. It was agreed by Pakistan, Tajikistan, Uzbekistan and Iran that the following three criteria would serve as the test for recognition:

1. Inclusive Government in Afghanistan
2. Assurances of Human Rights
3. Afghan territory not to be used for terrorism against any other state.

Therefore, considering the persisting issues with the new Taliban government over the Pak-Afghan border, and the resurgence of the Tehreek-e-Taliban Pakistan (“TTP”), it would be unwise for Pakistan to stand alone in recognizing the Taliban government.

Moreover, any recognition of the Taliban government should be conditional, based on the fulfillment of the following requirements:

1. The Taliban government shall agree not to provide safe havens to the TTP or use them as a proxy against Pakistan. Shortly after coming into the power, the Taliban government set free over two thousand members of the TTP which resulted in 294 attacks in Pakistan since last year.
2. The new Afghan government shall acknowledge the internationally demarcated Pak-Afghan border and resolve the related border issues. Lately, minister of information for Pakistan, Minister Zabiullah Mujahid, has mentioned that the issue of the Durand Line remains unresolved. Therefore, the Taliban

²¹ International Crisis Group, “Pakistan's Hard Policy Choices in Afghanistan” (Crisis Group September 6, 2022) <https://www.crisisgroup.org/asia/south-asia/pakistan/pakistans-hard-policy-choices-afghanistan> accessed January 9, 2023

²² Ibid, 25

government needs to accept the Pak-Afghan border as an internationally recognized border.

3. Instead of becoming the spokesperson of the Taliban government in the international community, Islamabad should convince the new rulers of Afghanistan to initiate dialogue with Western nations and other European countries, to save themselves from the much foreseeable economic meltdown.
4. Islamabad needs to use its influence over the Taliban to convince them, either through back channel diplomacy or direct communication, to meet the demands of the Western nations. These include respect for basic rights, active participation of women in social and political life, and counter-terrorism commitments.
5. The new government of the Taliban should not expect Islamabad to endorse its restrictions on women's rights which they impose on the grounds of a hardline version of Sharia.

VII) Conclusion

The fall of Kabul and the control of the Taliban government generated a new discussion about the recognition of governments by the international community. This touches upon an area of international law that has been left to the discretion of states. More time is needed to speculate whether the de facto control of the Taliban government will turn into de jure control or not. Legally, the new Taliban regime does satisfy the most important requirement for the recognition of governments by the international community including effective control, habitual obedience from the bulk of the population of the state, and control of the capital.

However, recognition of a government such as the Taliban, remains a political question as opposed to a legal one. International law will only come into play when and if there is a political decision on the way forward. Moreover, it needs to be noted that Pakistan is part of a consensus reached amongst the immediate neighbors of Afghanistan during a sideline meeting at the SCO Summit, held on 17 September 2021, in Dushanbe. Refereeing to this meeting, the then Prime Minister, Imran Khan clearly stated that any recognition of the Taliban government will be done as a group with

Afghanistan's neighbors.²³ Moreover, in the 2021 SCO Summit, Afghanistan was given observer status in the summit but was not invited to participate because the member states do not recognize the legitimacy of the Taliban government.

Thus, whereas international law provides the criteria for the recognition of an undemocratic government, the assessment of the situation and final decision is based on political and diplomatic concerns rather than legal ones.

²³ United States Institute of Peace, "Taliban Seek Recognition, But Offer Few Concessions to International Concerns", <https://www.usip.org/publications/2021/09/taliban-seek-recognition-offer-few-concessions-international-concerns> accessed 8 February 2023

"On September 21, Prime Minister Imran Khan told the BBC that Pakistan would only recognize the new government in coordination with Afghanistan's neighbors, referring to an agreement reached at the September 17 Shanghai Cooperation Organization (SCO) summit in Dushanbe in which Pakistan, Iran, Uzbekistan and Tajikistan agreed on three criteria for recognition: 1) establishment of an inclusive government, 2) assurance of human rights and 3) adherence to the principle that Afghan territory not be used for terrorism against others."