

Exhibit 19

Publications

“Recognition” and the Taliban’s International Legal Status

Ben Saul

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No country has “recognised” the Taliban as Afghanistan’s new government since it took power in August 2021. There has been [much speculation](#) about the preconditions and consequences of recognition. One important question is whether and how recognition or non-recognition may affect counter-terrorism efforts.

Governments under International Law

The conventional approach is that foreign recognition is not legally “constitutive”, or determinative, of whether an entity is the government of a state. Rather, [an entity qualifies as the government](#) if it effectively, independently and durably controls the state’s territory, its authority is recognised (but not necessarily supported) by the population, and there is no rival effective authority. Recognition may then simply be “declaratory” of this legal situation; but even in the absence of recognition, the entity will still be the legal government.

This is the case even if the entity came to power unconstitutionally, at least [where there is no rival entity with a valid constitutional claim](#); and even if it is not democratic or does not respect human rights. The essential rationale is that international law abhors a vacuum. To pretend that a government does not exist where a political entity is obviously exercising authority would mean that the entity is not bound by the state’s international obligations or responsible for breaches of them. It would also mean the entity cannot assert the state’s rights, including to protect its people’s interests or defend the state from foreign intervention.

The only absolute bars on an entity being accepted as a government are where the United Nations Security Council (UNSC) has made a binding determination that a situation is illegal and must not be recognised ([as when South Africa occupied Namibia in breach of an international mandate](#)); or other situations where there is a [breach of a jus cogens obligation which must not be recognised](#), such as a government that came to power through illegal use of force by a foreign state or denial of self-determination. In the *Namibia* case already mentioned, all states were accordingly required not to enter into or apply treaties with South Africa in relation to Namibia (except humanitarian ones), and to abstain from diplomatic, economic and other relations.

If an entity has effective control in a state, as its government it is entitled to exercise the state's international rights and bears its international obligations. These include the rights to:

- be free from foreign military force (except in self-defence) or other interventions in internal affairs;
- conduct the state's diplomatic and international relations;
- enjoy privileges and immunities from foreign domestic jurisdiction;
- enter into treaties and benefit from treaty rights;
- bring international claims against other states; participate in international organisations (subject to the organisation's rules and procedures);
- own and deal with state property or assets held abroad;
- exclusively govern within its territory;
- exploit the state's natural resources; and
- engage in the international economic order (as through trade, finance, investment, and development).

Further, the government bears the burden of fulfilling its state's international obligations, whether in the fields of human rights, international humanitarian law, international criminal law, economic law, environmental law and so on. This includes the state's international counter-terrorism obligations, under conventions or UNSC resolutions.

The Status of the Taliban Administration

Applying the traditional test, it is clear that the Taliban effectively controls Afghanistan. Not only did the former Afghan government's authority collapse, it no longer maintains even a formal constitutional claim to be the government – unlike in the period 1996-2001, when few states recognised the Taliban as the government even after five years in power. The former government's military resistance in the Panjshir valley was swiftly suppressed. The Islamic State – Khorasan Province (ISIL-K) insurgency has grown, but does not yet challenge the effectiveness of the Taliban's authority as a whole – just as the Ghani government was still the government of Afghanistan despite a much more destabilising Taliban insurgency. The deterioration of the Afghan economy, and rising crime, are not yet at such levels as to signify the disintegration of Taliban authority, although it is still early days.

Unlike in the *Namibia* case, the UNSC has not required non-recognition of the Taliban since it came to power, but to the contrary has envisaged a pathway to eventual recognition. On 30 August 2021, the UNSC [called](#) on 'all parties to seek an inclusive, negotiated political settlement, with the full, equal and meaningful participation of women, that responds to the desire of Afghans to sustain and build on Afghanistan's gains over the last twenty years in adherence to the rule of law, and underlines that all parties must respect their obligations'.

In principle, as the *de facto* government, the Taliban would be competent to exercise the counter-terrorism rights and responsibilities of the state of Afghanistan, including to:

- establish and exercise criminal jurisdiction, extradite or prosecute offenders, and punish convicted persons;

- request or provide mutual legal assistance, and request extradition from other states;
- maintain border security;
- freeze and confiscate terrorist financing (as through [Afghan state or private banks and the hawala sector](#));
- prevent and suppress terrorist acts through law enforcement (including cross-border information sharing and other cooperation);
- suppress preparatory acts such as recruitment, training, foreign fighters and the supply of arms to terrorists, and incitement.

The Taliban would also be required to enforce UNSC financial sanctions against listed individuals and entities from the Taliban itself (including senior members of its own government), al-Qaeda, and ISIL-K.

In fulfilling its counter-terrorism obligations, a Taliban government must comply with its obligations under international human rights law and international humanitarian law. Indeed [the UN Secretary-General has called for](#) “adherence to the international obligations of Afghanistan, including all international agreements to which it is a party”. Even as a de facto, unrecognised government, the Taliban is treated as a state organ [for the purpose of the law of state responsibility](#). Thus, its government is responsible for any breaches of Afghanistan’s obligations, and has a duty to cease violations and make reparation. As a successful insurgency, it is additionally [responsible for its own past violations as an insurgent group](#), that is, before it became the government.

Foreign states contemplating cooperation with the Taliban on counter-terrorism must themselves not violate UN sanctions (including military, financial, and diplomatic sanctions), or aid or abet Taliban violations (for instance, through law enforcement cooperation which leads to the unlawful detention, torture or killing of a suspect).

The Significance of Recognition or Non-recognition of the Taliban

Recognition may nonetheless be legally significant in four ways. First, where there is doubt about the effectiveness of an entity, recognition or non-recognition [may be evidence of the legal views of other states about whether it is a government or not](#), and thus reinforce the objective legal assessment. The views of other governments must, however, be approached very cautiously. Talk of “recognition” [often concerns factors other than effectiveness](#), such as political legitimacy, constitutionality, human rights performance, or willingness to establish diplomatic relations.

Indeed most of the discussion about recognising the Taliban concerns such matters. Many states have linked recognition to the formation of an inclusive and representative government, respect for human and women’s rights, and a commitment to counter-terrorism – but do not appear to doubt the Taliban’s effectiveness. At the Moscow Format Consultations in October 2021, [nine states acknowledged](#) that “practical engagement with Afghanistan needed to take into account the new reality, that is the Taliban coming to power in the country, irrespective of the official recognition of the new Afghan government by the international community”. [China separately affirmed](#) that “[i]t is a customary international practice that the recognition of a government comes after its formation.” These states have not yet recognised the Taliban. It is also not obvious – although it is sometimes unclear – that states intend the above criteria to be new or emerging legal preconditions of government, as opposed to policy preferences designed to shape Taliban behaviour.

This leads to the second sense in which recognition may have (bilateral) legal consequences. Since much of international law is based on consent, states enjoy a political discretion whether to legally deal with other states – including even recognised ones – whether by establishing diplomatic relations (and the privileges and immunities which follow), negotiating treaties, or engaging in cooperation or technical assistance, as on development, law enforcement or security. Withholding recognition can be leverage to induce behavioural change – whether on democracy, human rights, or counter-terrorism – assuming that other states can offer things that the entity needs or wants strongly enough. At the same time, humanitarian and medical assistance to the vulnerable Afghan population must not be made hostage to political conditionalities of this kind, which would only serve to punish innocent people.

In the late 1990s, only Pakistan, Saudi Arabia and the US [recognised the first Taliban regime](#). This time around, more states have interests in cooperating with the Taliban, particularly on counter-terrorism, counter-narcotics, border security, economic development (such as infrastructure and mining), or technical assistance. Among others, these include Pakistan, China, Iran, Russia, Turkey, Qatar and neighbouring Central Asian states.

It should be emphasised that there is no duty on states to recognise other governments. Some states avoid the practice altogether out of concern that recognition could imply approval of the entity's legitimacy, as opposed to an acceptance of its effectiveness. In such cases, a state may impliedly recognise the entity, evident from the nature and extent of its inter-governmental "dealings" with it, including the establishment of full diplomatic relations.

Importantly, however, interacting with the entity does not *necessarily* imply recognition. For example, various states deal with the Taliban on evacuations and humanitarian aid, or even maintain embassies (such as China and Russia), while explicitly refusing to recognise it. Indeed, it is open to states to deal extensively with unrecognised entities (such as Taiwan), and minimally with recognised governments (such as North Korea), depending on their foreign policy preferences.

Thirdly, flowing from the previous points, non-recognition may have domestic legal consequences in foreign states. [Foreign courts may be compelled or influenced](#) to follow the position of their own government as to whether the entity is a government. Foreign courts may consequently deny the competence of the Taliban to request extradition or mutual assistance. Yet, courts may still give effect to an unrecognised entity's laws [where they affect private rights](#), even where the regime is unlawful under international law. [Some courts](#) have even upheld sovereign immunity or public property laws of unrecognised entities.

In practice, even if an entity is a government, non-recognition by other states may complicate or even thwart the enforcement of its rights (whether on the international plane or in foreign courts), for instance by denying the state's immunities or treaty rights, withholding its assets (unless required to do so by Security Council sanctions), refusing it access to a dispute settlement procedure, or intervening in its internal affairs. It would, however, be a violation of international law for the non-recognising party not to give effect to the state's established rights under international law.

Finally, the attitudes of individual states may influence whether international organisations accept an entity as the government representing a member state. The UN General Assembly [deferred any decision](#) on whether the Taliban represented Afghanistan from 1996-2001, despite it ruling most of the country at the time. The difference then was that the Rabbani government maintained its constitutional claim, whereas now there is no rival claimant. The the UN Credentials Committee [deferred a](#)

[decision](#) about the new Taliban administration in December 2021 (alongside Myanmar's military government). Again, this may indicate displeasure with the Taliban and its shunning by the UN, rather than a denial that it is legally a government. The [World Bank](#) and [International Monetary Fund](#) have withheld funds from Afghanistan on the basis of non-recognition by states – including emergency funds to combat COVID and an economic crisis.

The Taliban as a Non-state Actor?

In the unlikely event that the Taliban is not yet legally the government, minimum international obligations still apply to it, thereby reducing – but not eliminating – any legal vacuum. First, UNSC sanctions apply to the Taliban as a group and to associated listed individuals and entities. These include an assets freeze, an arms embargo, and a travel ban. The sanctions measures do not, however, criminalise mere membership of the Taliban or participation in its activities. Importantly, they require the Taliban itself to suppress terrorism. [Resolution 1267](#), adopted in 1999 when the Taliban was then a de facto governmental authority, and which remains in force, requires the Taliban to:

cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

To be sure, these obligations are not as extensive as those applicable to states under counter-terrorism conventions, [resolution 1373 \(2001\)](#) and subsequent resolutions, which impose additional and more specific counter-terrorism requirements to suppress terrorist financing, criminalise terrorist acts and various preparatory acts, suppress foreign terrorist fighters and so on. But they correspond in important respects concerning prevention, denial of safe haven, and cooperation in criminal justice.

Secondly, the Taliban would remain bound to respect international humanitarian law as a non-state organised armed group in the non-international [armed conflict \(NIAC\) against ISIS-K](#). This includes not only restraints on the conduct of hostilities, protection of civilians, and humane treatment of prisoners, but a duty on the Taliban to investigate and punish war crimes by ISIS-K or itself. International criminal law also applies to individual Taliban members.

Thirdly, less settled is the extent to which the Taliban would bear human rights obligations as a non-state actor. It is increasingly well settled that [human rights obligations apply to de facto governmental authorities](#) exercising territorial control. (As mentioned earlier, a de facto government is treated by the law of state responsibility as a state organ.) This means both that the Taliban must itself comply with human rights in countering terrorism, but also exercise due diligence in suppressing foreseeable terrorist threats to the right to life. The UN Security Council has routinely called on the Taliban to respect human rights even before it became a de facto government, and the UN Assistance Mission in Afghanistan (UNAMA) has consistently [reported on human rights violations](#) by the Taliban.

Finally, mention should also be made of the much criticised [US-Taliban Peace Agreement of February 2020](#), in which the Taliban committed to not threaten or allow others to threaten from Afghanistan the security of the US or its allies, including by preventing recruitment, training, fundraising, hosting, abuse of asylum or misuse of travel documents. Since the Taliban was not then representing the Afghan state, the Agreement is not a treaty under international law. Like many other peace agreements with non-state armed groups, it is nonetheless seemingly [intended to be a binding instrument](#) under international law.

One hesitation is that it was negotiated without the consent of the sovereign Afghan government, which was not a party to it, thus constituting possible unlawful intervention in Afghanistan's internal affairs. Nonetheless, in [resolution 2513 \(2020\)](#) the Security Council 'welcomed' and annexed the Agreement, arguably contributing to its 'legalization', although it did not adopt the Agreement as such, nor was it negotiated under a Security Council authorized peace process. Neither party has since sought to rescind the Agreement.

Conclusion

As the effective authority in Afghanistan, the Taliban is likely its legal government. As such, in principle states can already hold it responsible for fulfilling the international counter-terrorism obligations of the state of Afghanistan, in addition to Security Council obligations applicable directly to the Taliban as a group. It is also bound by Afghanistan's obligations under international human rights law and international humanitarian law.

As with any government which systematically violates international law, enforcement is of course difficult. A suite of threats and rewards is available under international law, including diplomatic means, dispute settlement, counter-measures, sanctions, multilateral actions, conditionality on foreign assistance, influencing Taliban allies such as Pakistan, and ultimately the carrot of recognition and the rewarding bilateral relationships which can follow.

To avoid the present legal confusion, however, states should clarify whether their non-recognition of the Taliban is intended to mean that (a) discretionary bilateral relations will not be established until the Taliban meets certain criteria (such as constitutionalism, human rights, or counter-terrorism); or – unlikely – (b) the Taliban is not legally a government until it meets such criteria, which would then constitute emergent new conditions of being a government.

On the prevailing basis that recognition is a political discretion and not legally constitutive, recognition of the Taliban, and consequential economic and other benefits, should be universally conditioned on it meeting benchmarks of counter-terrorism progress, alongside other international policy goals (such as inclusive governance and respect for human rights). Such conditionality must not, however, come at the expense of humanitarian and medical assistance to a highly vulnerable Afghan population in the midst of an economic crisis.

Professor Ben Saul is Challis Chair of International Law at the University of Sydney, Australia and an Associate Fellow of the Royal Institute of International Affairs in London. He has taught at Harvard, Oxford, The Hague Academy of International Law and Italy, India, Nepal, and Cambodia, and been a visitor at the Max Planck Institute for International Law and the Raoul Wallenberg Institute for Human Rights.

Related readings:

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Mehra, T. and Coleman, J. [The Fall of Afghanistan: A Blow to Counter-Terrorism and Rule of Law Efforts](#). Perspective, The International Centre for Counter-Terrorism – The Hague, 23 August 2021.

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