THE RECOGNITION AND LEGITIMACY OF THE TALIBAN GOVERNMENT: A CONUNDRUM IN INTERNATIONAL LAW

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Abstract

Recognizing a state under international law is significant as to legal obligation, maintaining diplomatic relations and protecting human rights, etc. This study attempts to analyze whether the Taliban government can be recognized as the legitimate government or not? The study relies on the principles of international law to examine how to effectively control and legitimacy of the recognition. This study does not deal with the political consideration or state practice of recognition. Similarly, the study does not concern with the recognition of Afghanistan, whose legal personality remains intact as Afghanistan has been independent since 1919 despite the country facing several challenges, her permanence cannot be questioned under international law. The study employed doctrinal legal research in which normative approaches are used to evaluate some of the literature to acquire the required legal propositions.

Keywords: Recognition, Taliban government, legitimacy, Belligerency, conundrum, International Law, de facto, de jure

1.0 PROLOGUE

Following the revolution in 1928 resulting in the overthrow of King Amanullah, Nadir Kahn, who eventually succeeded to the throne, neither notified the Government of the United States officially of his accession, which was done in the case of certain of the European powers nor requested American recognition through any official channel. Under the circumstances, the Department considered that the recognition accorded to Afghanistan in 1921 did not extend to the new regime of Nadir Kahn after the assassination of King Nadir Khan in the latter part of 1933 and the accession of the throne of Mohammad Zahir, the Government of the latter transmitted to the Department of State (through the Embassy in Paris in July 1934) a letter addressed

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by the King to President Roosevelt announcing the death of his father and his accession to the throne.\(^2\) The King expressed the desire of his government “to strengthen the political and economic relations, which it had and has still now with the High Government of the United States”. In recommending to the President that recognition be extended to the Afghanistan Government, the Department of State pointed out that all the great powers had recognized it and that the present regime appeared to be a stable one.\(^3\)

### 2.0 Concept of Recognition

Recognition can be of a new state, new governments, or belligerency. It is evidenced, in the case of a new state or government by officially acknowledging the existence of such state or government and indicating a readiness on the part of the recognizing state to enter into formal relations with it. The existence in fact of a new state or a new government is not dependent upon its recognition by other states. The term "recognition of belligerency" as used here refers to a state's acknowledgment that a revolt within another state has entitled revolutionists or insurgents to benefits and imposes the rules of war on them. The issue of foreign government recognition is exclusively a domestic one for the United States, to be handled by the executive branch.\(^4\)

In the United States, recognition has traditionally been done by the president acting unilaterally on his initiative, but in the case of new states, it has also been done by the President with the President's participation. Recognition is mostly a question of purpose, which might be stated or implicit. The act of recognition, on the other hand, must express a clear desire to (1) treat the new state as such, (2) recognize the new government as having the power to represent the state it pretends to rule, and (3) maintain diplomatic relations with it. (3) to recognize that insurgents have the right to engage in hostile behavior. Recognition shall not be accomplished by inference merely but by the full and formal entrance into international relations through the public auction of the respective executives of the two countries.

Every sovereign state has the right to be represented in the international sphere by a government that has effective power over its territory, according to international law.

The challenge with recognition in international law is that it is a policy decision rather than a legal one. It is maintained that recognition is the consequence of a choice made in the pursuit of national interest rather than in the performance of a legal duty. If that's the case, why is it that recognition is so prevalent in the works of these same jurists who feel it's illegal?

While arguing that the act of recognition has legal effects, some argue that it is the beginning point of international personality with all the rights it involves; that in any event, the form and circumstances of recognition are of legal concern and demand the study of such issues as the distinction between de jure and de facto recognition indicated.

\(^2\) I Green Haywood Hackworth Digest of International Law 300 (The Government press office, Washington 1940)
\(^3\) The charge d’ affaires in France (Mariner) to Secretary Hull nos. 493 and 1019, June 30 and July 3, 1934, MS. Department of state, files 890h.001 Zahir/4 890h.001 Zahir/7: the Acting Secretary of state (Phillips) to president Roosevelt, Aug.21,1934, ibid, file 890h.01 Zahir/12; Mr. Phillips to the Ambassador in France (Straus), no 549, Aug. 228, 1934ibid. 890h.001 Zahir/13.
\(^4\) MS. Department of State, file 812.00/25133.
When a policy act results in the so-called premature acknowledgment of the parent states' weight, a legal question emerges. This arrangement hid the fact that the problem of state recognition has been linked to the inconsistency between the conflicting doctrines of declaratory and sequential recognition. Both have rejected that it is an issue of a legal obligation to the common good.

The constitutive theory as much as propounded culminates in two assumptions. The first is that before recognition the community in question possesses neither the right nor the obligation that international law associates with full statehood and the second is that recognition is a matter of political discretion as disqualified from a legal duty owed to the community concerned.

2.1 **The Test of Legitimacy**

The legitimacy of origin as a criterion of recognition was rejected, as we have seen, in various quarters already in the 17th and 18th centuries in favor of the principle of effective one of governmental power. At the beginning of the 19th century, the test of legitimacy became prominent once more in connection with the event which followed the French revolution.

It loomed significantly in the Vienna Congress discussions and Talleyrand's speech. There have been attempts to expand it to include state recognition. The stance of the British government toward the French convention of 1793, the Serbian government of 1903, the Greek government of 1922, and the refusal of various states. To recognize a political community as a state, the state must proclaim that it meets the international law requirements for statehood. The State is obligated to provide recognition based on the fulfillment of the conditions. The majority of practices are said to have adopted these ideas.

The Montevideo Convention on State Rights and Duties establishes the following criteria: (a) a permanent population, (b) a defined territory, (c) governance, and (d) the ability to engage in international affairs.

In this study, it is not proposed to discuss the State, which is the more common instance of the international person, or the semi-sovereign states which have certain of the faculties of the states but not others. The discussion will be restricted to the *De facto* insurgent government.

When a rebel or organization attains such *de facto* power as to wage civil war with the established government on a basis of roughly administrative and military parity, international law confers upon its certain capacities. These fall into two categories (a) The capacity to administer the area under the actual control and thereby commit the state as a whole to liability, and (b) The capacity to exercise belligerent rights against the *de jure* government and thereby commit other states neutrality.

It is not pretended that the *de facto* government in exercising capacities, particularly those under category (a) is a different legal person from the state which it pretends to govern, but it is a different legal person from the *de jure* government in the exercise of rights category under (b). Two good reasons underlie this formulation; as the insurgents gain control of national territory they act as if they were government thereof, and pretend to have legal capacity. If their acts are null and void there is a legal vacuum in their territory, with consequent prejudice to the position of aliens who happen to be therein or own property there.
Secondly, any other rules would prejudice international order by leaving neutralized free to intervene in the war, in the way of gun-running, for example, while depriving the inhabitants of any right to prevent them.\(^5\) Lord Atkin stated, "I understand exercising all the functions of a sovereign government in marination law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and the government by "exercising de facto administrative control" or "exercising effective administrative control." It necessitates the ownership and management of property, whether for military or civic reasons, including battleships and trade ships.

2.2 **DE FACTO AND DE JURE RECOGNITION**\(^6\)

*De facto* recognition implies when there is doubt in the viability of the government and this type of recognition and hesitation or assessment of the situation and attitude to see wait and engage to observe the effectiveness of the State whether to be successful for the *de jure* recognition.

De jure recognition, on the other hand, involves issuing an acceptance letter in which the state acknowledges that the government's effective control is permanent and stable and that there is no legal subservience to the recognizing state. The Soviet government, for example, was *de facto* recognized by the United Kingdom in 1921 and *de jure* in 1924.\(^7\) For instance, the Soviet government was *de facto* recognized by the UK in 1921 and *de jure* in 1924.

2.2.1 **Implied recognition**\(^8\)

This is due to the fact that recognition is founded upon the will and intention of the state that extends the recognition.

2.2.2 **Conditional recognition**

Subject to fulfillment of certain conditions for eg. Treatment of religious minorities

2.2.3 **Collective recognition**

By means of an international decision whether by an international community in its collective dissertation of control over membership because it has not been warmly welcomed nor can one predict general application for some time to come.

The phrase "recognition" encompasses a wide range of factual situations requiring other powers' recognition. They are the emergence of new states with non-constitutional systems of government, geographical changes, particularly those obtained by force and including the expansion of states, and civil war parties.\(^9\)

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5 Nanni v. Pace and the sovereign order of Malta, Ann Dig., 1935 -37 case No. 2. See also sovereign order of Malta v. Soc An. Comm., ILR 1955, p. 1; Scrfi v. Sovereign order of Malta., ILR 1957, p.1 holding that a contract between and Italian and the Order was bit subject to Italian law
6 See e.g., OPPENHEIM’S INTERNATIONAL LAW 154 (Universal Publication 2003)
7 Rich., Recognition of state; the collapse of Yugoslavia and the Soviet Union ;4 EJIL. 1993 p.36.
8 See Sir RABBERT JENNINGS, OPPENHEIM’S INTERNATIONAL LAW, 9th ed. 169; Lauterpacht p.369-408
9 See LAUTERPACHT RECOGNITION IN INTRANATIONAL (1947); CHEN, THE INTERNATIONAL LAW OF RECOGNITION (1951); JEAN CHARPENTIER LA RECONNAISSANCE INTERNATIONAL ET L’ EVOLUTION DU DROIT DE GENS ( Paris,1956); HANS-HERBERT TAUSCHER DURCH RECOGNITION IN THE UNITED NATION (1987).
It is general practice that governmental authorities claim competence over territory and people and foreign states are faced with the choice of recognizing or not recognizing that claim is valid.\(^{10}\) If it is restricted to the idea of the factual situation, recognition is not acknowledged as a political action in which the recognizing States express a desire to admit the factual situation and so bring about specific legal implications of that recognition.\(^{11}\)

### 3.0 Type of situation calling for recognition

#### 3.1 The problem personality: the Constitutive versus the Declaratory schools, on the independence of new states

When a community pretends to statehood, does its capacity in international law date from the moment it becomes independent in factor from the moment when it is recognized.

**3.1.1 The supposed duty to recognize a new state\(^ {12} \)**

The exponent of both the consecutive and declaratory schools have attempted to forge a link between the theory of recognition and the supposed duty to recognize and Lauterpacht and Chen may be taken as representatives of the respective position. Lauterpacht, who is exceptional in this respect among the constitutive school, argues that since the state cannot exist as a legal actor until recognized, international created a duty of recognition to give it birth.

**3.1.2 The condition for recognition\(^ {13} \)**

Recognition is subsequent and consequential and hence is conditional upon the entity being internally organized in such a way as to be competent to perform an international act.

### 4.0 Modes of recognition

Recognition is an act of the executive deliberately performed to bring about the accepted consequence of the act. Hence a government can have almost normal intercourse with another and yet not recognize it, allowing only the consequences of its intercourse and excluding the other consequence which would flow from recognition.\(^ {14} \) The following are some of the acts to be given appropriate weight:

- a) The reception of diplomatic representation
- b) The entry into treaty relationships with unrecognized government
- c) Recognition and, membership in the international organization. The admission of new states to the UN the International Court of Justice dealt with the functions of each organ of the UN in determining the qualification of statehood. (i) Recognition of new States by the international organization and (ii) Decision on credentials of rival governments

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\(^{10}\) SIR RABBET JENNINGS, OPPENHEIM’S INTERNATIONAL LAW, 9th ed. 156 (Universal Publication 2003)

\(^{11}\) MALCOMN SHAW, INTERNATIONAL LAW, 367-368 (Cambridge University press 2003)

\(^{12}\) Id. note 2.

\(^{13}\) IA Shearer, Starke’s International Law 117-125 (Oxford University press 2020)

d) Recognition of a government as the government *de jure* and recognition of a government as the government *de facto*.

There are two theories to the nature of recognition of states namely; the consecutive theory maintains that it is the act of recognition by other states that creates a new State and gives it a new legal personality, not the process which obtained the independence and such states bind by international law.\(^\text{15}\) The constitutive theory asserts that the unrecognized does not have any rights or obligations under international law. The second theory called the declaratory theory is the opposite approach it maintains more practical realities the new state acquires the legal personality, not by the particular factual situation. It will be legally constituted by its efforts and circumstance already existing. The declaratory theory’s emphasis on factual situations reduces the legal power of the state to grant recognition.\(^\text{16}\)

### 5.0 Effect of Non-recognition and the Courts\(^\text{17}\)

Under the English\(^\text{18}\) and US court system

1. An unrecognized government has no *locus standi*
2. An unrecognized government cannot claim Immunity
3. Cognizance of legal acts of unrecognized government can be enforced
4. Contract made by unrecognized will not be enforced
5. Change of nationality will be acknowledged only after recognition
6. Legislation winding up companies or others use altering their legal status will not be given cognizance
7. Suspension of the operation of Treaties concluded by parent government.

### 6.0 Recognition When the Government Change\(^\text{19}\)

Recognition of state and government often goes together, for instance, Great Britain and the United States recognized Israel by *de facto* recognition. The granting or non-granting to a government has nothing to do with the recognition of the state itself.

#### 6.1 Is Official Recognition of a Change of Government Required? The Estrada Doctrine

It is vital to acknowledge the change of administration in order to establish a relationship with the new regime. States may treat the new administration as if it had already been recognized, and this is equivalent to recognition. The creation or maintenance of diplomatic ties with a government does not indicate an endorsement of that country's internal policies, and the continuation of diplomatic connections among American states is desirable.\(^\text{20}\)

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\(^{17}\) Herbert W Briggs, *The Law of Nations* 543-577 (Cornel University 1947)

\(^{18}\) Id. note 15

\(^{19}\) IA Shearer, Starke’s International Law 125-140 (Oxford University press 2020)

6.2 The supposed duty to recognize the change of government: the qualification for recognition

There has scarcely ever been an instance where refusal to grant recognition has not been supported on quasi-legal grounds, which suggests that deference has been paid to the idea that recognition should be accorded if the new government is legally qualified to receive it. In 1918 Great Britain was prepared to recognize the de facto Finnish government if it would obtain the release of British subjects arrested on Finnish territory by the Germans, and give guaranteed passage to allied ships through its waters. The United States’ decision to recognize Hejaz was stated to be largely influenced by the charter and extent of American commercial interests. Great Britain withheld recognition of Mexico in 1918 until satisfaction had been obtained respecting the treatment of British property.

6.2.1 The qualification of effectiveness:

The recognition accorded prematurely is a breach of international law since it involves the bolstering up of the revolutionary regime and thus an intervention in the internal affairs of the state. This rule however is very relative in its application, especially since the tendency in England has been to issue certificates of the foreign office acknowledging the “effective administrative control” of revolutionary governments over only a portion of the national territory. The most can be said is that until a rebel organization attains capacity in international law it lacks the qualification to be recognized as it may be recognized as the former and should be recognized as the latter.

6.2.2 The qualification of constitutional legitimacy:

The Tobar doctrine and the Wilson Policy: The doctrine of Dr. Tobar of Ecuador, advanced in 1907, that government that had risen to power through extra-constitutional means should not be recognized. Was embodied in a treaty of that year between the five central American Republicans. Strictly speaking, recognition is not required of a government established according to an orderly constitutional process; the problem of recognition arises only in the case of unconditional change. There can be therefore no suggestion of making constitutional legitimacy a condition of recognition; such a rule would be tantamount to one of perpetual non-recognition of any revolutionary regime and this is certainly not a rule of international law.

6.2.3 The qualification of willingness to fulfill the international obligation

The United States has with some consistency and increasing frequency refused to recognize governments until they are satisfied with their “willingness”, “disposition”, “capacity”, “power”, “competence” or position to fulfill international obligations. All these terms have been used at one time or another. Great Britain and France have also made recognition conditional at times upon willingness to fulfill the international obligations. The argument favoring this qualification as part of international law is the reputation of liability.

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21 Id. note 6
23 1 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 218 (The Government press Washington, 1940)
24 The Recognition Policy of United States since 1901 (1928) p. 97 et seq.
25 UN rep’, vol I, P. 369 at p.381(1923) in 1973 Jeffers with respect to the French Revolution laid down the policy that actual power and not constitutional legitimacy entitled a regime to be recognized.
to which the reply is given that disposition to fulfill an obligation is irrelevant to the question of liability in any legal system. The reply is unsatisfactory because there are inadequate procedures in international law for the enforcement of claims and non-recognition may be the only effective method of securing fulfillment of the obligation.

7.0 RECOGNITION OF BELLIGERENCY

7.1 PRINCIPLE OF RECOGNITION OF BELLIGERENCY

The underlying principle regulating the recognition of states and governments also applies to the recognition of belligerencies: the statement, express or implicit, that hostilities fought between two groups, one of which is not a sovereign state and the other perhaps not a sovereign state, are of such type and extent as to permit the parties to be considered as belligerents engaged in war in the meaning normally associated to that term by international law. The crux of the notion is that recognition is an obligation imposed by the reality of the situation, not a favor or a matter of unrestricted political choice. The nature of the conditions that impose a duty to recognize belligerency or, according to others, warrant acknowledgment of belligerency is generally agreed upon.

7.2 THE FOLLOWING ARE THE CONDITIONS:

First, there must be an armed conflict of a general (as opposed to just local) nature inside the Stat; Second, the rebels must take control of and manage a significant chunk of the country's territory. Third, they must carry out the hostilities in conformity with the norms of war and with a distinguished armed force functioning under responsible leadership.

Fourth, there must be conditions that force exterior nations to declare their attitude through the use of recognized belligerency.

To grant recognition of belligerency when these conditions are absent is to commit an international wrong against the lawful government. The same applies to premature recognition. To refuse to recognize the insurgent as belligerents although these conditions are present is to act in a manner that finds no warrant in international law.

The practice of states in the matter of recognition of belligerency:

7.2.1 British practice

In contradistinction to recognition of States and government, recognition of belligerency does not, as a rule, take place using a formal declaration to that effect. It occurs either through the express adoption or the actual pursuance of an attitude of neutrality identical to that obtained in ordinary wars – an attitude of which the essence is the impartiality of treatment and submission to cause of interference necessitated by the conduct of the war.

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26 McNair in Law Quarterly Review 481 (Cambridge University Press 1937)
27 Cambridge History of British Foreign Policy 45 (Cambridge University Press 1923)
A formal proclamation of neutrality, as distinguished from limited municipal enactment of announcements enjoining upon individuals and attitude of restraint and non-interfaces, constitutes an unequivocal mode of recognition of belligerency. Such a formal proclamation of neutrality, clearly coupled to recognize e belligerency, was issued by Great Britain on 13 May 1861, during the American civil war.

7.2.2 The practice of the United States of America

The practice of the United States in connection with the wars of independence of the Latin American states shows that the conceptions of belligerency of bodies other than states did not spring up at once in the form which we know it today. It began with the admission of rebel merchant vessels into ports; it continued with the admission of other war vessels and prizes; gradually, it assumed that the form of grant equal and impartial treatment (subject at the outset, to existing treaty obligation). During the revolutions in South America directed against the Spanish rule, there was no express recognition of belligerency employing a proclamation of neutrality. In 1915 President Madison issued, under the neutrality laws, a proclamation in respect of hostile expedition against Spain, but that step did not in itself constitute recognition of belligerency.

It is often maintained that recognition of belligerency by outside states is an important factor in securing compliance with rules of warfare and in helping to infuse into an otherwise savaged and irregular combat an indispensable measure of restraint and humanity. According to the doctrine of price Metternich, the Greeks as rebels are not entitled to the same rights of war, as legitimated belligerents are one of which, we think His Highness would do well to weigh all the consequences before he promulgates it to the world.

8.0 Recognition of Insurgency

Insurgency recognition is distinct from belligerency recognition. Insurgency, as defined by a foreign state, is the totality of rights and advantages according to the rebellious faction of the States during a civil war. The distinction between the status of belligerency and insurgency with the foreign state is best articulated in the thesis that belligerency is a relationship with the foreign state that gives birth to certain rights and obligations, but insurgency does not.

Insurgency as a threat to a foreign state stems, on the one hand, from nations' refusal to recognize the rebellious party as a belligerent because one or more of the belligerency requirements are missing. Recognition of insurgency, on the other hand, is the result of foreign powers' unwillingness to see insurgents as mere lawbreakers, as well as their desire to establish a regular, albeit provisional, relationship with them.


29 IV Manley O. Hudson, International Legislation 2416 (Cambridge University Press 1931) By January 1941 the convention was ratified by the following states; Brazil, Colombia, Costa Rica, Cuba, Ecuador, Salvador Haiti, Mexico Nicaragua, Panama, the Dominican Republic, the United States and Uruguay.
It is possible and has happened, that some of the legal conditions for recognizing belligerency are missing, but it is nevertheless impractical to act as if civil wars in other countries are wholly internal affairs. Thus, it may become necessary to apply municipal enactments intended to prevent nationals from participating in a foreign civil war. The factual recognition of the existence of the limited international personality of the insurgents may somewhat inaccurately but conveniently be referred to as recognition of insurgency.

International law knows of no recognition of insurgency as an act conferring upon insurgents’ international rights flowing from a well-defined status. That insurgency has been recognized in a given case means that right a conceded or particular municipal enactment brought into being.\(^{30}\)

### 8.1 Recognition of Insurgent, during the Cuban War of Independence,

The United States continually refused to recognize the insurgents' belligerent status during the Cuban insurgency against Spain, which lasted from 1868 to 1880. It did so on the grounds that, in the words of President Grant's communications to Congress on December 7, "it did not discover in the insurgency the existence of such a significant political organization, real and manifest to the government towards its people and other States as to lift the fight out of the category of a mere rebellious insurgency, or occasional skirmishes, and place it on the awful footing of war which recognition of belligerency would aim to elevate."

### 8.2 Recognition of Belligerency Spanish Civil War, in 1936-1939

For the grounds that the battle had taken on a complexion different from that of civil war in the ordinary sense of the terms, Great Britain and many other states postponed recognition of the insurgents' belligerency until the end of the civil war. The call for recognition of belligerency during Brazil's revolution in 1893 was firmly denied by the US and other countries. Foreign representatives, including those from the United Kingdom and the United States, warned the rebel commander that any attempt to bomb Rio de Janeiro or disrupt economic operations in the port would be met with force.\(^{31}\)

In 1899 the secretary of state of the US instructed the Minister to Bolivia to have no diplomatic relation with insurgents which might imply their recognition as the legitimate government of Bolivia. Recognition of insurgency creates a factual relation in the meaning that legal rights and duties between insurgent and outsiders states exist only in so far as they are expressly conceded and agreed upon for reason of convenience of humanity or of economic interest.

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\(^{30}\) Lauterpacht, International law 271 (Cambridge University Press 1947)

9.0 STATE PRACTICES ON THE RECOGNITION OF NEW GOVERNMENTS

9.1 ARGENTINA
President Irigoyen of Argentina was forced out of office by a coup d’état\(^{32}\) accomplished by General Uri Buru on September 6, 1930. Formal notice of the establishment of the provisional Government under the provisional presidency of the Uri Buru was given to the American embassy in a note received on September 9, announced for an interim government and seeking recognition for a mutual relationship.\(^{33}\) The American Ambassador recommended to the Department of the State that recognition be extended to the new regime. The US government received the report from its ambassador that the provisional government had full control over all the provinces and exercise through civilian or military intervention except the two provinces that which normal government has under its control\(^{34}\). The US ambassador added that the socialist party protesting the illegality of the provisional government. All other parties in the capital except the Radical parties have approved the provisional government. Finally, the Department of State directed the ambassador to establish diplomatic relations with the new Argentina government.\(^{35}\)

9.2 BOLIVIA
A coup d’état\(^{36}\) led by the republican leader Bautista Saavedra resulted in the toppling of Bolivia's government and the resignation of the president on July 12, 1920. On July 19, the American minister reported to the Department of State that Saavedra assured him that the new administration would uphold all accords. Bolivia held elections in accordance with the amended Constitution. Bolivia conducted an election according to the revised Constitution. In the view of the fact that the election of Dr. Bautista Saavedra to the presidency of the Bolivian constitution as amended by the constitutional convention elected in November 1920 has determined to extend recognition to the constitutional government.\(^{37}\)

9.3 CHILE
Recognition was not granted by the USA to the government of General Altamirano who became acting president of Chile in September 1924, when president Alessandri left the country under pressure from a

\(^{32}\) Means: sudden defeat of a government through illegal force by a small group, often military one coup d’état Dictionary.cambridge.org, https://dictionary.cambridge.org/dictionary/english/coup-d-etat (last visited Dec 12, 2021)


\(^{34}\) 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL 224 (United States Government printing office Washington 1940)

\(^{35}\) Ambassador Bliss to Secretary Stimson no. 124 and 126, September 7 and 9 1930, M.S. Department of State, file 835.00 Revolutions/2 835.00 Revolutions/5; the acting secretary of state (cotton) to Mr. Bliss no. 100, Sept. 11,1930, Ibid. 835.01/7.

\(^{36}\) According to Modern dictionary of international legal terms: coup d'état, also called coup, means the sudden, violent overthrow of an existing government by a small group. CLS Pegasus Library Catalog, https://pegasus.law.columbia.edu/record/322640 (last visited Dec 13, 2021)

\(^{37}\) Minister Magennis to Secretary Colby, July 12, 19 and 20 and 1920 Ms. Department of state files 824.00/55, 824.00/67, 824.00/66; the acting secretary of state (Davis) to Mr. Magennis, Dec. 9,1920, ibid. file 82400/154c; 1920 For. Rel., Vol. I, pp. 372- 386.
military Junta, nominally on a six months leave absence. The reasons for withholding recognition were stated in telegraphic instruction to the embassy in Santiago in 1924.

The policy of the United States of America in extending the recognition to any administration which may come into power in other nations by extra-constitutional means, for the US does not seem to be justified to extend recognition. In determining upon the recognition of a new government in a foreign state, the government of the US must of course, first be guided not only by an assurance of that international obligation carried out by the new government but also may by satisfactory evidence that it is in apposition to maintain stability and retains its power through the acquiesce of the people.

9.4 NICARAGUA

Through a note of September 12, 1910, from his representative in Washington to the Department of State, Seno Juan Estrada, who had proclaimed himself provisional president of Nicaragua, requested recognition of his government by the United States, stating that he was in peaceful and unrestricted possession of the republic and making the following representation: A general election will be held within one year, the date to be fixed by a constitutional convention convoked for that purpose, the provisional government will endeavour to improve and rehabilitate the national finances to which end the aid of the Department of state will be asked in securing a loan in the United States. Those responsible for the death of Cannon and Groce will be prosecuted and punished and suitable indemnity paid to the families of the deceased. The American minister informed him that any government assuming power by force would not be recognised by the United States.

9.5 PARAGUAY

The Ayala government was overthrown by a revolutionary movement that broke out in Paraguay on February 17, 1936; Colonel Franco was selected Provisional president two days later. On February 20 the legation reported to the department of states and the Department replied it would be wise for the matter of recognition to be referred to Chaco Peace Conference, and it should be affirmed by the Paraguayan regime to uphold the peace agreement, based on the agreement in the peace conference the US government expressed its intention recognized the Paraguayan government.
9.6 El Salvador

As a result of a military *coup d'état* carried on December 4, 1931 President Araujo was compelled to leave El Salvador, taking refuge in Guatemala after having deposited the presidential powers in the Third Designate, Dr Olano. General Martinez, the vice president, at once assumed the presidency. On December 20 the Department of State sent the following telegraphic instruction to the Ministers in Guatemala, Honduras, Nicaragua and Costa Rica, that the US reached the conclusion the government headed by General Martinez may not properly be recognized under the terms of Art. 2 of the General Treaty of Peace and Amity of 1923. General Martinez acceded to the presidency through a *coup d'état* and that government has not been recognized as constitutional.

9.7 Greece

Former King Constantine, who had abdicated the throne of Greece on June 1, 1917, in favour of his son Alexander, was recalled to the throne of Greece following an election held in November 1920 resulting in a defeat of the Venizelos government and a plebiscite held on December 5, 1920, showing a majority in favour of his return. The Department of State decided to delay recognition and accordingly instructed the Minister on January 7 as follows: Our final decision will be made upon the usual receipt of notice from the king of his assumption of office, it would be necessary that a formal announcement signed by King Constantine and addressed to the President of the United States.

The charge d’affair stated that this represented a frank declaration that the Greek Government regarded the reign of Alexander as illegal, and added that the British Government and the United States withheld recognition.

9.8 Turkey

The Department of State was notified on April 27, 1909, by the Ambassador in Constantinople (Istanbul) that Sultan Abdul Mohamid Turkey had been dethroned and that his brother Richard had been placed on the throne and would reign under the name of Mohamid V. Similar notification was received on the same date from the Turkish Ambassador in Washington. On April 28 President Taft sent a telegram of congratulations to the new Sultan, and the Turkish Ambassador was informed of this act. The signing of the treaty of peace and of a treaty of extradition on August 6 1923 at Lausanne by the representatives of the United States and the representatives of “The Government of the Grand National Assembly of Turkey” constituted recognition of that Government by the United States.

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43 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL 278-280 (United States Government printing office Washington 1940).

44 Minster Cappe to Secretary Polk, Nov. 15 and Dec.6,1920, MS. Department of states, files 868,001 C76/21; Mr. Cappa to Mr. Davis, Jan, 18 1921 ibid. files 868.001 C76/22; Charge6 Hall to secretary Hughes, Mar. 16, 1921, ibid.868.001 C76/32; 1921 For. Rel., Vol. II pp 138-150


In a dispatch of July 18, 1909, the Legation at Teheran reported to Persia the Department of State that the city had been occupied by revolutionary forces, that the Shah had fled, and that the Crown Prince had been proclaimed Shah. The ex-Shah had taken asylum in the Russian Legation and had formally abdicated on July 17 in favour of the Crown Prince. The minister at Tehran advised the Department of State on October 31, 1925, that the Majlis pass the law that abolished the king Kaja sovereignty. The Reza Pahvlavi formed the provisional government after taking oath in the Parliament on that base the US extend its recognition on Nov.7 1925.48

9.10 RECOGNITION AND LEGITIMACY: IMPLICATIONS OF TALIBAN GOVERNMENT

In the context of recognition of the Taliban government, the question arises is whether this is a legitimate government? Can the Taliban lead to a legitimate government? Whether UN grants legitimacy to the Taliban? The studies found there are two types of practices on the recognition of government or a State the namely, first on the political consideration and the second is the legal ground. The political consideration includes geo strategy interests and political gain, where the Taliban will get recognition: as of now a few countries have given implied de facto recognition to the regime, and these countries include Russia, China, Turkmenistan, Pakistan, Iran and Qatar. These countries have close engagement with the Taliban government despite the Mullah Hassan Akhund an interim Prime Minister of the Taliban being on the UN blacklist in this case Gulbadin Hikmatyar was also in the blacklist but he was given amenesty and participated in the Afghan Presidential Election (APE) and Sirajjudin Haqqani, the Taliban interior minister who was wanted figure by the Federal Bureau of Investigation (FBI). On the other hand on the legal ground, the Taliban government’s legitimacy still is in question since it comes into power by overthrowing the Kabul government.

The UN Security Council has claimed that the Taliban government is not legitimate on grounds; it has committed gross violations of human rights such as the prosecution of journalists, the prevention of women in public participation and prohibition of girls education, and the breach of various provisions of

48 Charege Amory to Secretary Keillog, no. 77 and 78 Oct.31 and Nov.1 1925 MS. Department of States, files 891.01/23, 891.0124; Mr. Kellog to Mr. Amory, no. 53, Nov. 3, 1925, ibid. file 891.01 /25; Mr. Amory to Mr. Kellogg, no. 81, Nov. 5, 1925, and Mr. Kellogg to Mr. Amory, no. 56, Nov. 5, 1925, ibid. 891.01 /27; Mr. Amory to Mr. Kellogg, no. 88, Dec. 15, 1925, and Mr. Kellogg to Mr. Amory, no. 62, Dec. 16, 1925, ibid. 891.01 / 40.
international humanitarian laws in Afghanistan. The Taliban government is not inclusive by its composite it has excluded those who were key stakeholders in the previous government. In the low level of the Taliban government, most of the hard-core criminals joined. Additionally, the Taliban released all the prisoners who committed heinous crimes against humanity such as various atrocities, such murder, rape, the kidnapped of kids for money, bombed the schools, etc. without being tried by a court of law and announced amnesty for all.

10.0 The Constitution of Afghanistan 1923

Looking into the 1923 constitution of Afghanistan the Taliban government is not adopting this law as it was made long ago which is not meeting the criteria for present Afghanistan. For instance, Art.1, protects against discrimination the Jews and Hindus have equal treatment as to the rest of the Afghans. Art.10, personal freedom. Art. 14, right to education, Art. 16, equal rights and duties, Art. 17, public participation by all Afghans in civil administration. Art. 36 directs the Government officials shall be appointed based on the qualification and competence including professional. Conversely arguing that the Taliban permits girls’ education, based on the tenets of Islam, while women are confined at home, women are not allowed to public life such as a political office. The destiny of war-torn countries is hunger and starvation, children suffer from malnutrition. Apart from this political game the Humanitarian support has to be extended to Afghans.

55 (Afghanistan: Taliban wasting no time in stamping out human rights says new briefing, 2021)
61 Foreign Terrorist Organizations - United States Department of State United States Department of State, https://www.state.gov/foreign-terrorist-organizations/ (last visited Dec 12, 2021)
63 THE CONSTITUTION OF AFGHANISTAN APRIL 9, 1923 Dircost.unito.it, http://www.dircost.unito.it/cs/docs/AFGHANISTAN%201923.htm (last visited Dec 14, 2021)
11.0 The Constitution of Afghanistan 1964

After the collapse of Kabul on August 15, 2021, the Taliban announced to adopt the 1964, constitutions which were the Grundorm for forty years during the reign of King Zahir Shah. Legally speaking, the aforementioned constitution ideal is based on the monarch system which requires a king and a Prime Minister and so on, whereas the Taliban government structure is complicated because it is based on self-styled structures. The Taliban government practically does not follow the Zahir Shah constitution. Such as Art. 1, declares the state as a monarch system Art. 4, flags of the country shall be tricolor namely black, red and green whereas the Taliban regime branded themselves with the white flag which indicates the Taliban victory. Art.5, King personifies the sovereignty in Afghanistan: Art. 9 (9) stipulates that the king has the power to grant credentials for the conclusion of international treaties, and in accordance with the provision of Art. 9 (10) the king signs the international treaties. Art. 66, highlighted the succession within the family of the king in case of (Art. 15, death) or (Art.19, abdication) of the king if there is no legal successor the electoral the college shall be employed and can be effective on the majority vote: Art. 25 enshrine equal rights and duties to all Afghans: Art.26 stipulates human rights as inalienable rights, Art. 26 prohibits torture and lies down that no person shall be killed or punished without a court order in pursuance of law: Art. 31 deals with freedom of expression, opinion: Art. 40 mandates the government and citizens to obey the Constitution and rule of law. Finally, Art.64 expresses that the Parliament grants and ratifies the international treaties. Hence, factually the Taliban regime does violate the above provision of Constitution 1964,

12.0 The Constitution of 2004

The Taliban regime does not accept the idea of the Constitution of 2004 and will not bind by the said Grundorm at all and denied adopting the provision of the Constitution as its ideal is based on the idea of democracy universal franchise, freedom fundamental rights, protection of human rights especially the protection of women and minorities. The provisions of the Constitution of 2004 are as follows; Art. 1 enshrines the state as Republic: Art.6 protection of human dignity, equality of rights and duties: Art. 6 says the States shall create a prosperous and progressive society.

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69 Art. 6 says the States shall create a prosperous and progressive society which is based on social, economic and political justice, protection of human rights, realist on democracy attainment of national unity.
In the context of Afghanistan, the provision of the Constitution of Afghanistan read as follows; Art. 7 stipulates the suppression of terrorism. The State shall observe the UN charter international agreements, international treaties, to which Afghanistan is a member, and the observance of the Universal Declaration of Human Rights. The State shall prevent all kinds of terrorist activities, cultivation, smuggling, production, and use of intoxication. Hence, ideally Art. 7 is incorporated to empower the state to make laws on the eradication of terrorists.

Art. 24 stipulates dignity and Human rights in Afghanistan: Art. 34 freedom of expression, Art. 43 free and compulsory education art. 58 Afghan governments shall establish an independent Human Rights Commission.

Art. 60 of the Constitution 2004 deals indirectly with democracy, the President shall be the head of state. Art.61 stipulates that the president shall be elected and earn 51 percent of the vote cast in a fair and transparent election. Finally, Art 62 (3) the individual nominated for the election as the president or the head of the state shall not have been convicted of crimes against humanity, or a criminal act or deprivation of civil rights by a court of justice. Art. 65 says any matter of political and economic is of national importance shall be put to the referendum to the people of Afghanistan and under Art. 90 the Parliament is the highest authority to give recognition to any of the international treaties.

The non-recognition of the Taliban government 1.0, was justified on the following grounds; it was argued by the member of states in the UN and the UN Security Council that, the Taliban regime 1.0, the administration is incompatible with the following international instruments viz; and the UN security Council has passed several Resolutions against the Taliban activities.

13.0 THE CHARTER OF UNITED NATIONS 1945

The UN Charter imposes an obligation upon member states to protect basic fundamental rights and human rights. Also, it calls for international peace and security. However, the Taliban act of violation of human rights must, a commission of war crime in Afghanistan must be questioned under international criminal law. However, in Afghanistan, this doctrine is silent to apply to the victims of war and terrorists. Art. 1 of the UN Charter talks about international peace and security and calls for collective measures. The world is silent in the case of the human catastrophic of Afghanistan, the proclamation does not bring prosperity or human rights protections Art.2 enshrine that the State member shall fulfill their obligation in good faith, some countries have engaged with terrorists for their political gain and there is no question of legal involvement or put them under question for the violation of the right of fellow human beings

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14.0 **The Universal Declaration of Human Rights, 1948**\(^{71,72}\)

The author strongly argues that, since 1978, there were gross violations of Human Rights by government officials and the US forces, and the Taliban. UDHR was silent, it could be appropriated that law has to be applied equally to all the stakeholders in the country.

15.0 **The International Convention on Civil and Political Rights, 1996**\(^{73,74}\)

This convention imposes an international obligation on a member state to protect civil and political rights without discrimination between color, caste, religion, and place of birth. Hence, the Afghan government was a member of this convention and this convention extends to the Taliban government.

15.1 **United Nations Conference on Measures to Eliminate International Terrorism, 1994**\(^{75}\)

This item was added under agenda 27 in 1972 to establish an Adhoc Committee to prevent International Terrorism which takes innocent human lives or endangers to fundamental freedoms and to prohibit the acts of violence which lead to misery and frustration. The group evidently violates the above convention.

15.2 **United Nations Security Council Anti-Terrorism Resolutions post 11\(^{th}\) September 2001, Resolution 1368(2001)**\(^{76}\)

The resolution unequivocally condemns the horrific terrorist acts and puts a commitment on all governments to work together immediately to bring justice to the terrorists' planners, organizers, and sponsors, and emphasizes that anyone who help, finance, or harbor the terrorists' planners or organizers will be held accountable.

15.3 **Resolution 1373 (2001)**\(^{77}\)

*Solidify that all states, even those that cooperate, must work together to prevent and suppress terrorist attacks. Pakistan has gone unquestioned by the UN for harboring and assisting terrorists.*

15.4 **Resolution 1377 (2001)**\(^{78}\)

The afore mentioned resolution was passed to suppress international terrorists and it is considered to be the most serious threat to international peace and security. The member state must extend cooperation for the suppression of terrorists in all forms.

15.5 **Resolution 1378 (2001)**\(^{79}\)

Recognizes the urgency of the security and political situation in Afghanistan in light of the most recent development, particularly in Kabul. Condemning the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist networks

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\(^{71}\) Vide United Nations General Assembly Resolution 217(III), dated December 10\(^{th}\), 1948.


\(^{73}\) Vide United Nations General Assembly resolution 2200A (XXI) of December 16, 1966


\(^{75}\) Vide General Assembly Resolution 49/60, dated December 9\(^{th}\), 1994.

\(^{76}\) Adopted by UN Security council conference No. 1373 vide dated September 28\(^{th}\), 2001.

\(^{77}\) Adopted by the Security council at its 4385\(^{th}\) meeting, dated September 28\(^{th}\), 2001.

\(^{78}\) Adopted by the security council at its 441\(^{th}\) meeting, on November, 2001.

\(^{79}\) Adopted by the Security council at its 441\(^{th}\) meeting, dated November 14\(^{th}\) 2001.
15.6 **Resolution 1383 (2001)**

Reiterating its strong commitment to Afghanistan's sovereignty as well as the inalienable right of the Afghan people to freely select their political destiny, the United States is likewise committed to assisting the Afghan people in ending strategic conflicts in Afghanistan, promoting national reconciliation, long-term peace, stability, and respect for human rights, and ending the use of Afghanistan as a base for terrorist attacks.

15.7 **Resolution 1386 (2001)**

Supporting international efforts to root out terrorism, in keeping with the charter of the United Nations and recognizing the responsibility for providing security and law and order throughout the country resided with the Afghans themselves.

15.8 **Resolution 1388 (2001)**

Reminding Ariana Afghan Airlines is no longer owned, leased, or operated by or on behalf of the Taliban, nor are its fund and other financial resource owned or controlled directly or indirectly by the Taliban. However, it was passed against the Taliban 1.0 and whereas the present, the Taliban own all military helicopters including Ariana Airlines. Hence this particular resolution for the said airline is outdated.

15.9 **Resolution 1390 (2002)**

Condemning the Al-Qaeda network and its affiliated organizations for committing countless criminal terrorist activities that resulted in the lives of many innocent persons and the devastation of property.

16.0 **Conclusion**

Legally speaking, recognition of new states usually carries with its recognition of the government of the state so recognized, since states can speak and act only through their government. This was true in the case of Bulgaria, in 1909, Albania, Estonia, Latvia, Lithuania, and Egypt, all in 1922; and Saudi Arabia in 1931. In certain other instances, a formal note was sent by the Department of State in the USA to the diplomatic representative in the USA of the USA in question. This was the method followed in the case of Armenia in 1922, Finland and Yugoslavia in 1919, and Poland was recognized using a telegram from the secretary of state in 1919 and this context formal reception by the President of an Afghan mission in 1921 was considered to constitute recognition of Afghanistan. The recognition of the Czechoslovakia national council in 1918 as a de facto belligerent government was made through a formal public announcement issued by the secretary and Iraq was recognized in 1931 by accrediting a charge d’affairs to the king. In the case of Iceland recognition is established as a result of certain bilateral agreements. The question is, whether is it legitimate

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80 Adopted by the Security council at its 4434th meeting, dated December 6, 2001.
81 Adopted by the Security council at its 4443rd meeting, dated December 6, 2001.
82 Adopted by the Security council at its 4449th meeting, dated January 1, 2002.
83 Adopted by the Security council at its 4452th meeting, dated January 16, 2002.
that the Taliban be recognized by the USA based on the bilateral dealings which both hold in Doha. The United States facilitated the release of five thousand Taliban fighters, the American withdrawal give wings to the Taliban and taught them to fly in Afghanistan with no limitations, and additionally the US forces left behind a huge number of armaments for the Taliban to mobilize like a self-sufficient government. Considering various countries’ situations, the following condition was held as the basic criterion for the recognition. Constitutional means (b) Acquiescence of people (c) Control of territory and (d) Fulfilment of international obligation

The first condition of the new government takeover by legal means i.e. through the constitution and the consent of the people was the basic element for a new government, the new government should have full control over the territory and the government must be able to fulfill its international obligation. It was the practice in Great Britain and the U.S. did not grant recognition for three types of a new government. The government took the power by extra-constitutional force, a coup d’etat. However, recognition was granted on the fulfillment of the above condition or contesting an election. Legally, speaking the Taliban government did not take over the government in Afghanistan by legal means but by extra-constitutional means. Most of the authors are of believing that the acquiescence of people is absent from most of the Afghan people who fled Afghanistan on the regime does not fulfill the international obligation such as protection of human rights, protection of minorities, or prevention of terrorism. The Taliban government cannot run a government without financial resources and human resources such as professional manpower to run efficient administration. The Taliban government has to include minorities in the administration. The group has abolished the Election Commission, Ministry of Women Affairs, and the Human Rights Commission. It is understood that the Taliban government is based on a strict theological ideology. Therefore, based on keeping in view the legality and complexity of recognition of any government, it may become evident that the group presently in Afghanistan fulfills the criteria for de facto recognition. It would be appropriate for the Afghan people to have peace and stability with and stable transparent government which earns international trust. The economic situation of Afghanistan is deteriorated due to continuous war destructions.