

Recognition and the Taliban's De Facto Future

By Scott R. Anderson

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Abstract

This chapter delves into the dispute over the recognition of the Taliban. After reviewing and applying the relevant international legal framework to Afghanistan's present conditions, it argues that multilateral recognition of the Taliban as a local or limited de facto authority could better address the legitimate needs of the Afghan people without requiring that the international community accept the Taliban as Afghanistan's new government. This could in turn help alleviate the human costs of the status quo of non-recognition.

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Introduction

More than three years have passed since the Taliban deposed the internationally recognized government of Afghanistan and seized control of the country and its governing institutions. By most accounts, the Taliban regime – which now calls itself the Islamic Emirate of Afghanistan – remains in firm command of both, to the point that it is now fulfilling most of the functions one would expect from any governing authority. Yet no foreign government has formally recognized the Taliban as Afghanistan's new government. Instead, the international community seems intent on withholding recognition until the Taliban's treatment of women and minorities comports with the requirements of international human rights law, among other conditions – none of which the Taliban has thus far been willing to meet.

History suggests that this stand-off may be a long one, as Afghanistan has endured extended periods without a recognized government in the past. But it comes at a cost. The lack of recognition deprives the Taliban of access to resources and capabilities that national governments rely on to govern effectively, including control over Afghanistan's substantial overseas assets. It complicates various areas in which foreign governments need to engage with the state of Afghanistan, from diplomatic engagements over regional security concerns to the management of overseas legal disputes. It deters private actors from engaging in transactions with the Taliban or those under their control for fear that they cannot speak for the state of Afghanistan as other governments can. And, perhaps most significantly, it hinders the Taliban regime's ability to provide public services and fulfil other essential governmental functions that innocent Afghan citizens rely on, adding to the enduring economic and humanitarian crisis the country is facing.

This chapter contributes to the broader policy debate around Afghanistan by delving into this dispute over recognition and considering what steps the international community might take to mitigate the attendant costs without compromising its current position. Drawing from relevant international legal authorities, it provides an overview of the relevant legal framework before applying it to Afghanistan's present conditions. From there, this chapter examines an under-studied aspect of this legal framework – the role of local or limited de facto authorities – and considers how it might provide a legal foundation for a more calibrated relationship between the Taliban and the international community that will allow the Taliban to better address the legitimate needs of the Afghan people without formally accepting its claim to be Afghanistan's new government.

Until either the Taliban or the international community concedes to the demands of the other to some degree, the status quo and its human costs are likely to persist. But the international community can mitigate the latter by accepting that the Taliban now fulfils certain essential governmental functions in-country and extending them the legal capacity to do so more effectively as limited *de facto* authorities. This will require that the international community both clarifies the functions the Taliban may validly fill as a limited *de facto* authority and facilitates its ability to do so. More difficult still, the Taliban will need to demonstrate a willingness and ability to do so in good faith. But if both sides can take these steps, it will provide a foundation for a more manageable and humane status quo as they navigate the longer and more difficult road to fully reintegrating Afghanistan into the international community.

Recognition in Law and Practice

In international law and diplomacy, “recognition” is a term of art used to describe the act by which one state, acting through its government, acknowledges that another geopolitical entity is a state entitled to certain rights and obligations as a matter of international law, and that a given regime is that state’s government and thus has the capacity to exercise those rights and duties on its behalf (Henkin, 1987; Crawford, 2006; Crawford, 2019). While recognition of a government always implies recognition of an associated state, one state may recognize another without recognizing any associated regime as its government. As a result, one state may recognize another as existing, but see it as being without a government able to act on its behalf in international affairs (Roberts, 2009; Crawford, 2019). This is more or less the situation that Afghanistan presently finds itself in, at least in the eyes of the international community.

The international legal relationship between states and their governments is much like that between corporations and their senior executives. Like corporations, states generally have their own legal personality, meaning they can own property, enter into legally binding agreements, and be held liable for unlawful conduct as if they were an independent person. Governments exercise a state’s legal rights and duties on its behalf, just as the legal rights and duties of corporations are managed by their senior executives. Both corporations and states can survive as legal entities even if their senior executives or governments change or disappear. But just as

corporations are liable for the decisions made by former senior executives, states generally remain legally responsible for the decisions of their past governments (Crawford, 2006; Crawford, 2019). In this sense, recognition can determine not just who can act on a state's behalf, but for whose decisions a state will be held responsible.

Unlike with corporations, there is no higher legal authority that can determine a state's rightful government in cases where it is unclear or disputed. Instead, other states generally make this determination individually as part of their bilateral relationship with the state in question. While international organizations such as the United Nations are often described as recognizing a certain government, this is only for the purpose of determining who may participate in line with their internal rules and procedures. Member states' individual recognition policies may inform whether they support the participation of an unrecognized regime in that international organization, but the international organization's collective determination is not binding on individual member states and does not compel them to change their recognition policies to comport with those of the international organization (Crawford, 2019).

The conventional international legal standard for when a regime constitutes a state's government is when it has established "effective control", classically defined to mean that a regime is "sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations" (*Great Britain v. Costa Rica*, 1923, pp. 377–378). But this sets a high bar that is open to substantial interpretation, giving foreign governments a great deal of leeway in deciding where it has been met. Formal recognition as a government is also traditionally understood to be discretionary, meaning a state may choose to withhold it even where these conditions are met, though the regime in effective control may still be seen as having some authority as a matter of international law. In practice, states often set conditions on recognition that are aimed at ensuring the regime in question acknowledges and complies with certain international legal obligations, is rooted in some form of democratic power-sharing institutional process, or meets certain other conditions that the recognizing state sees as desirable from a policy perspective (Henkin, 1987; Talmon, 1998; Crawford, 2019).

Withholding recognition brings real legal consequences. A state without a recognized government still has international legal rights that other

states are obligated to respect, such as the rights to political independence and territorial integrity enshrined in the U.N. Charter. It is also generally still bound by whatever international obligations may have been put in place by its prior governments through treaties and related instruments, and – as discussed in greater detail later in this chapter – it may still be held internationally legally responsible for the actions of certain groups or entities, including *de facto* authorities that may control it, fully or in part (ILC, 2021). But absent a government recognized by foreign states, that state may be without anyone able to exercise affirmative legal rights in ways that are contingent on the acknowledgment and acceptance of those other states (Henkin, 1987; Crawford, 2019). For example, a state may indisputably be the owner of property located in a foreign state's jurisdiction, but lacking a government recognized by that foreign state there may not be anyone with the legal authority to access or control that property under its domestic legal system. Similarly, a state may have indisputably valid legal claims before a foreign or international court, but without a government recognized by the associated foreign state or international organization, the state may be without anyone able to authorize legal counsel to present arguments on its behalf.

This lack of capacity can in turn hinder a regime's broader ability to manage the economy and global relations of its associated state, among other consequences. An unrecognized regime that cannot control its state's foreign property may not be able to access foreign exchange reserves or use them to implement economic policies on the state's behalf. Similarly, an unrecognized regime may not be able to staff the state's foreign embassies or send representatives to participate in international organizations or solicit assistance from international financial institutions, making it hard to manage the state's diplomatic relations or weigh in on international issues that bear on the state's interests. Private actors may in turn be less willing to contract with or otherwise engage an unrecognized regime as they know the actions it takes may not be seen as attributable to the associated state in foreign courts, limiting the available remedies in the event of a legal dispute.

The costs from this lack of capacity undoubtedly fall most heavily on the unrecognized regime and those under its control. But they can also prove to be irritants for foreign governments who need to engage with the state in question but lack recognized counterparts through which they can do so. For this reason, most states eventually recognize even odious regimes effectively governing another state. Following the Iranian revolution,

for example, the United States initially refused to recognize the regime of Ayatollah Khomeini as Iran's government. But as the United States found it necessary to engage with someone able to act on Iran's behalf to address various bilateral issues, it gradually conceded (*National Petrochemical Co. of Iran v. The M/T Stolt Sheaf*, 1988). In most cases, the only question is when the accumulated costs begin to outweigh the perceived policy benefits of withholding recognition.

Recognition in the Afghan Context

Afghanistan is perhaps the leading example as to just how long this can take. Over the past 50 years, Afghanistan has lacked a broadly recognized government almost as often as it's had one. Following the Soviet Union's military intervention in 1979, the United States and many of its allies declined to recognize the various regimes that the Soviets helped to stand up. When the mujahideen ultimately deposed the last of these regimes in 1992, much of the international community similarly refused to recognize any of the various factions involved as Afghanistan's government, though a leadership council headed by Burhanuddin Rabbani was allowed to fill Afghanistan's seat at the United Nations. After the Taliban consolidated power in 1996, only three foreign states – Pakistan, Saudi Arabia, and the United Arab Emirates – proved willing to recognize it as Afghanistan's government, while Rabbani's representatives were allowed to continue. Pakistan subsequently withdrew its recognition after the September 11 terrorist attacks, further isolating the Taliban. Other states generally refused to favor one faction over another with recognition, though the incumbent officials appointed by the Rabbani-led regime were allowed to continue to represent Afghanistan at the United Nations (Rubin, 2013; Rubin, 2020; Anderson, 2021). In this sense, the internationally recognized Islamic Republic of Afghanistan that the United States helped to institute following its 2001 invasion was an interruption in a longer period without a widely recognized government – a state to which Afghanistan returned following that government's fall in August 2021.

The Taliban is undoubtedly aware of the costs of non-recognition and has at times shown signs that it would like to remedy them. During the 1990s, representatives from the Taliban visited the United Nations and various national capitals to actively lobby for recognition (Rubin, 2013; Dam, 2021). The current generation of Taliban leadership has similarly

asserted that it meets the requirements to be recognized as Afghanistan's government and has unsuccessfully pushed for control of Afghanistan's seat in U.N. bodies and access to Afghanistan's foreign reserves, among other attempts at legitimization (ICG, 2024). For this reason, it is perhaps not surprising that, in the wake of the Taliban's August 2021 takeover, U.N. Secretary-General Antonio Guterres described recognition as "the only leverage that exists" over the Taliban (Nichols, 2021).

Nor has the international community been shy about using it. Before the collapse of the Afghan government in August 2021, international interlocutors warned the Taliban that seizing control of the country by force would be seen as an illegitimate act undermining any eventual case for recognition (ICG, 2024). Since then, Guterres himself has vocally urged solidarity within the international community around several conditions for recognition, including demands that the Taliban help preserve regional security (including by combating terrorism and the narcotics trade), work towards greater inter-Afghan dialogue and power-sharing, and bring Afghanistan into compliance with its international human rights obligations, particularly in relation to women and girls (United Nations, 2024). In November 2023, these same conditions were included as key steps on the roadmap to normalization laid out in an independent assessment on how best to engage with the Taliban requested by the U.N. Security Council, suggesting they are likely to remain in place for the foreseeable future (United Nations, 2023).

Thus far, however, the Taliban has proven unable or unwilling to satisfy them. Regional security is the only front where the Taliban has arguably made some progress. While various terrorist groups still operate in Afghanistan, the Taliban has reportedly taken steps to disrupt many of their operations, to the point that even U.S. officials do not contest that the Taliban has effectively met the counterterrorism obligations they agreed to prior to the United States's withdrawal. The Taliban has also actively pursued an array of counter-narcotics operations since outlawing drug production in 2023, though the industry remains vigorous. But the Taliban has sternly resisted calls for power-sharing and has instead focused on consolidating its own control of the government. And the regime has notoriously reimposed any number of harsh restrictions on the activity of women and girls (as well as ethnic and religious minorities) in ways that are widely understood to violate accepted human rights standards (United Nations, 2023; Rahimi & Watkins, 2024).

Due to this lack of progress, the international community has stuck to its strategy of non-recognition with surprising uniformity. No state has recognized the Taliban as Afghanistan's government, and Afghanistan's U.N. seat remains outside of the Taliban's control. While individual states have engaged the Taliban on issues of mutual interest or concern, this has generally been through informal channels and arrangements, not the sorts of formal diplomatic exchanges and international agreements that might be seen as a sign of mutual recognition (ICG, 2024). The country that has come the closest is China, which did accept an ambassador from the Taliban in late 2023. While this move would normally signal recognition, China's foreign ministry has publicly insisted that this was not its intent (MFA, 2024).

Afghanistan, meanwhile, has continued to spiral into a deepening economic and humanitarian crisis (World Bank, 2023). A lack of recognition is not clearly the main, or even a major, driver of this: the economic sanctions levelled against the Taliban by much of the international community would not go away if it were recognized as a government, and there is good reason to doubt whether such sanctions are even the true root cause of Afghanistan's problems. Nonetheless, recognition would provide the Taliban with access to the sorts of diplomatic and economic resources – including diplomatic representation, the ability to engage with international organizations and financial institutions, control over foreign exchange reserves, and the ability to reliably engage with foreign private companies – that governments generally rely on to bring their countries out of such scenarios. Without them, a way forward for Afghanistan is far less clear.

Navigating a de facto Future

For better or worse, Afghanistan is not the first country to find itself in this predicament. The international community has encountered territories and states without recognized governments in the past, from the Confederacy during the U.S. Civil War to Somalia for much of the 1990s and 2000s. This hard experience has led the international community to develop a specialized set of rules for such scenarios. Specifically, international law allows that, in the absence of a recognized government, otherwise private individuals and organizations may step in and perform certain essential governmental functions on the state's behalf as de facto authorities.

There are signs that some members of the international community

may already view the Taliban as a *de facto* authority along these lines. Secretary-General Antonio Guterres and other U.N. officials routinely describe the Taliban in such terms (United Nations, 2023; United Nations, 2024). So did U.S. Secretary of State Antony Blinken shortly after the Taliban takeover (Plett-Usher, 2021), though U.S. officials have since avoided the term. Less clear, however, is whether these actors are using “*de facto*” in a purely descriptive sense – and, if not, whether they understand its full legal implications.

The terms *de jure* recognition, meaning full and formal recognition, and *de facto* recognition, which generally means something less than *de jure* recognition, have been used in diverse and not always consistent ways throughout history (Talmon, 1998; Crawford, 2019). In contemporary usage, the term *de facto* authority is most often used to describe a regime that meets the effective control test in relation to all or most of a state but is not recognized as its *de jure* government. This is often called a general *de facto* authority. By contrast, where a regime or other entity only controls a part of a state or its institutions, they are generally considered to be only local or limited *de facto* authorities (Borchard, 1915; Morris, 2012). Despite their common nomenclature, international law views the actions of general *de facto* authorities and limited *de facto* authorities quite differently.

The clearest contemporary statement of international legal rules regarding *de facto* authorities is in the Articles on the Responsibility of States for Internationally Wrongful Acts authored by the U.N. International Law Commission, which are widely considered to be an authoritative restatement of relevant customary international law. While only expressly addressed towards state responsibility for internationally wrongful acts, the rules of attribution articulated in the Articles reflect broader principles of international law that apply in other contexts as well (Crawford, 2013). In this sense, they provide a useful touchstone for understanding how various acts of *de facto* authorities may be attributable to their host states, whether internationally wrongful or not.

According to the official commentary on the Articles, general *de facto* authorities are generally considered capable of binding the state as its government (ILC, 2001). Foreign governments that do not recognize a general *de facto* authority as a state’s *de jure* government may choose not to engage with it in various discretionary ways, but disregarding that authority’s capacity to speak for the state can run counter to their own international legal obligations (Henkin, 1987; Crawford, 2019). Notably, the Articles

also lay out a related rule specifically intended to apply to insurrections: while states are not generally responsible for the actions of insurrectionary movements, they become responsible if and when such a movement becomes a state's new government.

Local or limited de facto authorities, however, present a far more complicated picture. The Articles set out a test for when such authorities may speak for a state (though it does not describe them as such), stating in Article 9:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority. (ILC 2001, p. 49)

The official commentary describes this as “a form of agency of necessity” reserved for exceptional circumstances, such as “during revolution, armed conflict or foreign occupation,” wherein “the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative.” For a particular set of actions to qualify under this rule, “the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other [governmental] functions in the absence of any constituted authority” (ILC, 2001, p. 49). Where these conditions are met, a limited de facto authority's actions are generally attributable to the state in the same manner as a government (Crawford, 2013). Importantly, this is consistent with the approach taken by many domestic legal systems for identifying which acts by unrecognized foreign authorities they should acknowledge and treat as the acts of a foreign government (Borchard, 1915; Henkin, 1987).

Applying these standards to Afghanistan, a case may certainly be made that the Taliban regime exercises effective control over most if not all of the country and thus is the general de facto authority there, at least for purposes of state responsibility. But many members of the international community are no doubt reluctant to openly reach this conclusion for fear of legitimating or further strengthening the Taliban's seizure of power. At a minimum, however, states should be able to agree that the Taliban serves as a limited de facto authority responsible for various elements of governmental authority within Afghanistan. As the official commentary of

the Articles makes clear, accepting this does not constitute an endorsement of any specific measures the Taliban might pursue in this capacity, only acknowledgement that there was some essential need for someone to step in and fill the governmental function in question (ILC, 2001).

Accepting the Taliban's role as a limited *de facto* authority may in turn open avenues for more effective multilateral engagement. Even as foreign states withhold either formal *de jure* recognition of the Taliban and possible acknowledgment as a general *de facto* authority, they could acknowledge the Taliban's status as a limited *de facto* authority and allow it to act on Afghanistan's behalf only in relation to those essential governmental functions it is fulfilling. So long as the Taliban is acting within the scope of the limited *de facto* authority rule, the state of Afghanistan would still be held responsible for any actions it takes in this capacity, including the exercise of relevant legal rights and obligations on Afghanistan's behalf. For example, a foreign government who acknowledges the Taliban as a limited *de facto* authority for purposes of managing Afghanistan's public health policies might allow relevant officials in the Taliban regime to access foreign accounts held in Afghanistan's name that were previously used to purchase medicine or pay local staff. Those officials' use of that account would in turn be attributable to Afghanistan in the same manner as if they were governmental officials, limiting any future Afghan regime's ability to make a claim against the foreign state on the grounds that it allowed a third party to mishandle Afghanistan's state property.

Openly acknowledging the Taliban's role as a limited *de facto* authority could also help improve its ability to engage with private parties in ways that benefit the Afghan public. The foreign domestic courts that are most likely to hear commercial and other disputes between foreign private actors and the Taliban (or Afghan individuals and corporations subject to Afghan governance) generally defer to the recognition determinations of their parent governments (Henkin, 1987; Crawford, 2019). As a result, foreign private actors are more likely to have confidence that actions undertaken by the Taliban within the scope of the limited *de facto* authority rule will be treated as attributable to Afghanistan in the same manner as actions by a recognized government – a factor that bears heavily on legal risk. In other words, for transactions related to those essential governmental functions that the international community acknowledges the Taliban to be fulfilling, and for those transactions only, foreign private actors are more likely to treat the Taliban as if it were another foreign government.

That said, simply accepting the Taliban's ability to act as a limited de facto authority does not accomplish much. Relevant legal authorities like Article 9 only outline the broad parameters of what types of governmental functions limited de facto authorities can fill, and give limited guidance on what this means in practice. There are also few on point precedents; the question of determining which actions performed by a limited de facto authority should be attributed to the state is usually only reached in isolated cases where relevant courts are scrutinizing actions well after the fact. As a result, there is scarce guidance on what governmental functions a limited de facto authority may legally undertake on the state's behalf in a contemporary context.

Providing such guidance is, however, something that the international community can do. Not only would a shared view among members of the international community carry weight as an international legal matter, but their individual positions are likely to be determinative in their national courts, administrative fora, and other domestic law contexts. To be maximally effective, one would want to not only generate this sort of shared position but embed it in a process that will make it available to national governments, private actors, and other interested third parties, allowing them to take this more nuanced understanding of the Taliban's role and corresponding legal authority into account when planning their own Afghanistan-related business. While there are many ways the international community could approach such a task, most will involve at least three elements.

Identifying Essential Government Functions

The international community will first need to develop a shared understanding of those areas where the Taliban should be accepted as filling a necessary governmental function, in line with the rule on limited de facto authorities in international law and its domestic law corollaries. While this need not be done through a centralized institutional effort, it certainly could be, particularly if the United Nations or some other entity were willing to serve as a facilitator. But even if states continue to develop and apply their own policies in this regard, sharing relevant information and analysis should help coordinate standards and reinforce expectations regarding what the Taliban will and will not be able to do on Afghanistan's behalf across contexts.

There are several possible indicators that the international community could use to identify and build consensus around what governmental functions might reasonably qualify as essential so that the Taliban could reasonably step into to fill them as a limited *de facto* authority. Examples include whether a given function is something that the recognized government of Afghanistan used to perform, that foreign governments generally do for their own countries, or something consistent with international best practices or Afghanistan's international legal obligations. Advice from international lawyers and other experts could assist in this regard, as could dialogue with private actors and other third parties (as well as the Taliban itself). Generally speaking, most legal authorities suggest that limited *de facto* authorities reach "domestic" governmental functions like public health and safety, essential economic functions, and the provision of public benefits, but not those primarily reflecting the factional or foreign policy interests of the regime (Borchard, 1915; Henkin, 1987; Morris, 2012) – a convenient line that the international community seems likely to maintain when it comes to the Taliban.

Whatever process is used, the key is to develop a more detailed understanding of what essential governmental functions need to be filled, acknowledge where the Taliban is the party currently best situated to address this need, and accept their authority to fulfil those functions as a limited *de facto* authority, all in a manner communicated to the public. This will not only coordinate the public policies of participating members of the international community but signal to private actors and other third parties where and when the Taliban's actions are most likely to be viewed and treated as valid acts of the state of Afghanistan by relevant domestic courts.

Facilitating the Exercise of *de facto* Authority

Once the international community identifies the governmental functions eligible to be filled by a limited *de facto* authority, it will then have to take steps to facilitate the Taliban's ability to do so. The most important step in this regard will be to revise the comprehensive sanctions currently imposed on the Taliban to permit related transactions. Fortunately, the international community has a head start in this regard, as it recently installed an exception to U.N. sanctions regimes for action relating to humanitarian assistance or necessary "to support other activities that support basic human needs" that may cover certain essential governmental functions (UNSC,

2022, para. 1). Some countries, like the United States, have already gone even further in their own bilateral sanctions by installing sanctions exceptions that extend to most transactions with the Taliban relating to governmental functions (U.S. Department of the Treasury, 2022).

At times, foreign governments may need to take more affirmative steps as well. Where the Taliban's legal authority to engage in relevant actions on behalf of Afghanistan comes into question, governments in the countries where those transactions are taking place may need to officially weigh in favor of the Taliban's ability to do so in this limited context – views that are likely to weigh heavily in any dispute adjudicated by national courts, giving private actors confidence that they are engaging with a credible counterpart. For example, if a foreign bank were to refuse the Taliban access to an account that is legitimately used to serve an essential governmental function, like paying certain civil servants, the government of the state in which that bank is located may need to intervene to clarify that it views the Taliban as acting for the state of Afghanistan in that area. This also includes situations where the Taliban may have a valid need for access to Afghan resources not under their control, such as the Afghan central bank assets recently transferred from the United States into the control of an independent trust in Switzerland (Anderson, 2022; editor's note here, so that it reads: editor's note: see also the chapter by Rigsby in this anthology). While states may not be able to dictate such outcomes, they can support valid requests by the Taliban in its capacity as a limited de facto authority.

Monitoring for – and Adapting to – Abuse

Finally, the international community will need to take steps to ensure that the Taliban does not abuse the authority it is given as a local de facto authority, or that it uses it for purposes other than the governmental functions they are supposed to be filling, like supporting terrorism or engaging in corruption. This will require not only active monitoring by participating states but a process through which policies developed earlier in the process can be amended or conditioned to address concerns. Such actions by the Taliban may cast doubt on the extent to which it is fulfilling essential governmental functions with its actions. This may in turn warrant reconsideration as to where the international community should accept its role as a limited de facto authority, or the extent to which it should take steps to facilitate the Taliban's exercise of such authority.

Importantly, this is one area where the Taliban can help itself by taking steps to reduce international concerns; it may seek to insulate those implementing relevant policy from factional political pressure, assign the tasks of day-to-day management to technocrats or other non-partisans, and increase transparency in related operations. While the Taliban has resisted such measures in other contexts (ICG, 2024), they may be willing to do so in the less politicized, more technocratic areas most likely to fall within their ambit as limited *de facto* authorities – particularly if doing so is tied to more specific incentives arising from acceptance of its role as a *de facto* authority. In this sense, engagement over the Taliban’s exercise of *de facto* authority could help open channels of communication and build confidence between the Taliban and the international community – collateral consequences that could ease the broader processes of reconciliation and normalization over time.

Conclusion

“The status quo of international engagement is not working”, special coordinator Feridun Sinirlioğlu and his team reported to the U.N. Security Council in late 2023 as part of an independent assessment of U.N. strategy towards Afghanistan. “It does not serve the humanitarian, economic, political or social needs of the Afghan people, nor does it sufficiently address the leading priorities and concerns expressed by international stakeholders”. Instead, a “method of engagement is required that learns from previous efforts, focuses on the needs of the Afghan people and acknowledges the political realities in Afghanistan today” (United Nations, 2023, para. 5). Through the steps outlined in this chapter, the rules regarding local *de facto* authorities could provide a framework for such engagement – one that is grounded in long-standing international law and practice but addresses the unique challenges facing Afghanistan today.

Some will no doubt argue that splitting Afghanistan’s state authority in this way creates opportunities for abuse by members of the international community – or that it only serves to justify further disregarding the reality that the Taliban is Afghanistan’s new government and warrants treatment as such. Others will object that engaging the Taliban on even these limited terms will only serve to legitimize and strengthen its hold on the country. Both objections have merit. But they fail to wrestle with the reality that neither the Taliban nor the international community appear willing

to capitulate to the other's demands, leaving innocent Afghans trapped in between. Accepting the Taliban's status as a limited de facto authority and further articulating what this means will allow both the Taliban and the international community to better address the needs of Afghan civilians within these political confines, until they can reach agreement on the Taliban's status and resolve the matter once and for all.

References

- Anderson, S. (2021, August 26). History and the recognition of the Taliban. *Lawfare*. <https://www.lawfaremedia.org/article/history-and-recognition-taliban>
- Anderson, S. (2022, February 18). What's happening with Afghanistan's assets? *Lawfare*. <https://www.lawfaremedia.org/article/whats-happening-afghanistans-assets>
- Borchard, E. (1915). *The diplomatic protection of citizens abroad*. The Banks Law Publishing Company.
- Crawford, J. (2006). *The creation of states in international law* (2nd ed.). Oxford University Press.
- Crawford, J. (2013). *State responsibility: The general part*. Cambridge University Press.
- Crawford, J. (2019). *Brownlie's principles of public international law* (9th ed.). Oxford University Press.
- Dam, B. (2021). *Looking for the enemy: Mullah Omar and the unknown Taliban*. HarperCollins Publishers.
- Plett-Usher, B. (2021, September 13). How US Secretary of State Blinken defended chaotic Afghan pull-out. *BBC*. <https://www.bbc.com/news/world-us-canada-58550475>
- Great Britain v. Costa Rica, 1 R.I.A.A. 369 (1923).
- Henkin, L. (Ed.). (1987). *Restatement of the law third, the foreign relations law of the United States*. American Law Institute.
- International Crisis Group (ICG). (2024, January 30). *The Taliban's neighborhood: Regional diplomacy with Afghanistan*. https://icg-prod.s3.amazonaws.com/s3fs-public/2024-01/337-afghanistan-regional-dynamics_0.pdf
- International Law Commission (ILC). (2001). *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
- Ministry of Foreign Affairs (MFA) of the People's Republic of China. (2024, January 31). Foreign Ministry Spokesperson Wang Wenbin's regular press conference. https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202401/t20240131_11237282.html
- Morris, D. (2012). Revolutionary movements and de facto governments – Implications of the 'Arab Spring' for international investors. *Arbitration International*, 28(4), 721-755.
- National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988).
- Nichols, M. (2021). Taliban desire for recognition is only leverage point, U.N. chief says. *Reuters*. <https://www.reuters.com/world/asia-pacific/un-aid-groups-appeal-afghanistan-funding-vow-stay-2021-08-19/>
- Rahimi, H., & Watkins, A. (2024). Taliban rule at 2.5 years. *CTC Sentinel*, 17(1), 1-16. <https://ctc.westpoint.edu/wp-content/uploads/2024/01/CTC-SENTINEL-012024.pdf>
- Roberts, I. (2009). *Satow's diplomatic practice*. Oxford University Press.
- Rubin, B. (2013). *Afghanistan from the Cold War through the War on Terror*. Oxford University Press.
- Rubin, B. (2020). *Afghanistan: What everyone needs to know*. Oxford University Press.
- Talmon, S. (1998). *Recognition of governments in international law*. Oxford University Press.
- United Nations. (2023). *Report of the independent assessment pursuant to Security Council Resolution 2679(S/2023/856)*. <https://www.undocs.org/S/2023/856>
- United Nations. (2024, February 19). We all want an Afghanistan at peace, U.N. chief says in Doha. *U.N. News*. <https://news.un.org/en/story/2024/02/1146657>
- United Nations Security Council (UNSC). (2022, December 9). *Resolution 2664 (S/RES/2664)*. <https://documents.un.org/doc/undoc/gen/n22/736/72/pdf/n2273672.pdf?token=pjVuYJ7TLDAq2m78nV&fe=true>

- U.S. Department of the Treasury. (2022, February 25). Treasury issues general license to facilitate economic activity in Afghanistan. <https://home.treasury.gov/news/press-releases/jy0609>
- World Bank. (2023). *Afghanistan development update: Uncertainty after fleeting stability*. <https://thedocs.worldbank.org/en/doc/210d5f24dc33a3460beff3447fceedcf-0310012023/original/Afghanistan-Development-Update-20231003-final.pdf>