

AFGHANISTAN, INTERNATIONAL SECURITY AND HUMAN RIGHTS[♦]

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1. Last August, the situation in Afghanistan evolved dramatically. Taliban seized power, former government was overthrown, and foreign military forces left after twenty years. The situation raises many legal issues and political questions about security and human rights under the Taliban rule. The paper will briefly address some of these issues and questions.

Preliminary issues concern international personality of Afghanistan and effectivity of the Taliban government. The change of government did not affect the international personality of the State of “Afghanistan”. In international law, in fact, changes of government as well as military occupations, armed conflicts or widespread violence across a country do not usually affect the international personality of concerned State or, however, do not immediately and so easily. Even the long-lasting situation of violence, chaos, and armed conflicts in Somalia has never wiped out the international legal personality of “Somalia” and the UNSC has always and still recognizes the continued existence of Somalia as a State under international law. Notwithstanding twenty years of armed conflicts, violence and terrorism in Afghanistan and the latest change of government, the State of Afghanistan has not vanished within the international legal system, and it still exists today. Moreover, the Taliban government is effective and independent, namely it can control its own territory and govern its own population. These are the only two criteria to assess the legitimacy of a government under international law. In other words, if you are not a puppet-government and you are able to exercise control over people and territory, then you are a “government” before the international legal system.

2. As regards the situation in Afghanistan under Chapter VII of the UN Charter, for years it constitutes a threat to peace and international security, and it is therefore on the agenda of the UN Security Council. The Security Council is enforcing restrictive measures under Article 41 against the Taliban through the blacklists, as well as other individuals, groups, and entities associated with the Taliban to the extent they are a threat to the peace, stability, and security of Afghanistan.

Since 2011, however, Taliban’s sanction regime was separated by the al-Qaeda and ISIS’ sanction regime because the Security Council’s resolution 1988 (2011) recognized that “the security situation in Afghanistan has evolved and some members of the Taliban have reconciled with the Government of Afghanistan, have rejected the terrorist ideology of Al-Qaida, and support a peaceful resolution to the continuing conflict in Afghanistan”. The Security Council also expressed the willingness of removing from the UN sanctions lists the names of those who respect the conditions for reconciliation, and no longer engage in or support activities that threaten the peace, stability, and security of Afghanistan. Today, the Taliban are again in power, want to rule long and need to access

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financial assets and economic resources that have been frozen by the Security Council. Since the most important criterion to be delisted is to reject the terrorist ideology and to not allow any terrorist group to use the soil of Afghanistan for terrorist purposes, it might happen in the future that the Taliban will be more compliant with the Security Council demands for security and stability to be delisted and access the frozen assets.

Of course, one might wonder if the seizure of power by the Taliban can be on its own a threat to peace and international security. However, the seizure of power did not create a serious and prolonged situation of armed conflict and violence across the country or a serious breach (gross or systematic) of international rules such as the prohibition of genocide, torture, or ethnic cleansing. In other words, the main criteria usually assessed by the Security Council to determine the existence of a threat or a violation to peace and international security were not fulfilled by the Taliban's seizure of power on its own. It is paradoxical but the Taliban rule ended the non-international armed conflict with the United States and stabilised the situation in the country. For the Security Council, the present overall level of stability and security in Afghanistan is higher than in the past even if the same, of course, is not true for human rights and democracy. Yet, peace and security are not always and necessarily linked to democracy and human rights, at least for some Permanent Members such as China, Russia, and United States and, at least, within the political dynamics of the Security Council. In its resolution 2593 (2021) of 30 August 2021, in fact, the Security Council did not qualify the seizure of power by the undemocratic Taliban as a threat under Chapter VII. The resolution only focused on terrorism and security issues (attacks at Kabul airport, Afghan territory not to be used for terrorist purposes, humanitarian assistance) and did not address anything but democratic form of government chosen by the Taliban. The word "democracy" was never used in resolution 2593 (2021).

Of course, human rights' violations in Afghanistan are an issue of international concern but, at least for the time being, the Security Council seems not willing to adopt measures under Chapter VII of the UN Charter. Paragraph 4 of resolution 2593 (2021) underlines the "importance" of human rights and "to seek an inclusive, negotiated political settlement, with the full, equal and meaningful participation of women". However, the overall approach and the focus of resolution 2593 (2021) is more about terrorism and security than about human rights and democracy. Moreover, there are no effective measures in international law and politics to force Taliban to comply with gender equality and women's empowerment (two main problems that are not on their agenda), and in any case these kinds of violations are not so serious to justify as a matter of law and politics the use of force according to the UN Charter. And the same is true for humanitarian intervention or R2P. These doctrines allow the use of force against a sovereign State to protect human rights only in case of gross or systematic violations amounting to genocide, ethnic cleansing, war crimes, or crimes against humanity. The denial of human rights in Afghanistan is deplorable and serious but not so serious to cross the line that authorizes the use of force at international level.

3. As regards human rights treaties, Afghanistan is a state party to many of them such as, for instance, the 1948 Genocide Convention, the 1966 International Covenants, the 1984 Convention against Torture, and the 1979 Convention on the Elimination of All Forms of Discrimination against Women which was ratified by Afghanistan in 2003 after the overthrow of the first Taliban government. Afghanistan is also a state party to several treaties on terrorism and is a state party both to the ICC and ICJ Statutes. So, in principle, Afghanistan is bound by many international obligations.

Yet, there are at least three problems. First, the treaty-based bodies whose main task is to supervise the compliance of state parties cannot adopt binding decisions against them because they only have an exhortative authority through non-binding recommendations. Second, in Asia there is no human rights regional treaty and supranational courts like in Europe, America, and Africa. Third, the Taliban government has the right, under international law, to terminate the treaties to which it is bound and to be free from any international obligations. So, the only effective way to deal with Taliban's violations of international human rights law is before the ICC or before the ICJ, namely the two international courts whose jurisdiction and decisions are binding upon States and individuals.

Before the ICJ, the international responsibility of a State for the violation of international human rights treaties may be invoked. To date, for example, some contentious cases are currently being heard, or are about to be filed, before the ICJ. In 2019 Gambia instituted proceedings against Myanmar alleging violations of the Genocide Convention; in 2021 Armenia and Azerbaijan instituted proceedings against each other about alleged violations of the Convention on the Elimination of All Forms of Racial Discrimination, and rumours say that the Netherlands will institute proceedings against Syria alleging violations of the Convention against Torture. These legal actions bear witness to the will of some States to enforce treaty violations before the ICJ. What is most interesting is that the legal standing of the Gambia (and, in case, the Netherlands), namely the right to institute judicial proceedings before the ICJ, is not founded on the violation of a bilateral obligation between the parties to the dispute but on the violation of erga omnes obligations, namely obligations owed by the wrongdoer to the international community as a whole. No Gambian or Dutch citizen suffered injuries from the acts of genocide and torture allegedly committed by Myanmar and Syria. Legally speaking, the Gambia and the Netherlands are not injured States but are however entitled to invoke the international responsibility of Myanmar and Syria precisely because the obligation breached is owed to the international community and therefore is established for the protection of its collective interest.

Provided that the ICJ has jurisdiction pursuant to article 36 of its own Statute, in future any State might institute proceedings against Afghanistan alleging violations of those international human rights treaties whose obligations have also an erga omnes nature. The prohibition of discrimination against women might be a case upon showing the erga omnes nature of such prohibition.

Turning to the ICC, the situation in Afghanistan is already under its jurisdiction because Afghanistan ratified the Statute in 2003. The ICC has the power to investigate and prosecute any international crime (war crimes, crimes against humanity, genocide) committed in Afghanistan by anyone (including foreign nationals) and any international crime committed by Afghan nationals anywhere in the world. It is likely that crimes allegedly committed by the Taliban might be investigated and prosecuted and it is important to remember that the official capacity of the accused person shall in no case exempt him from criminal responsibility pursuant to Article 27 of the Statute because immunities which may attach to the official capacity of a person do not bar the Court from exercising its jurisdiction. It is also worthy to underline that the eventual withdrawal from the Statute of the Afghanistan would not be retroactive; in other words, it would not prejudice in any way the continuance of an investigation already under consideration by the Court prior to the date on which the withdrawal become effective.

In 2017 the Prosecutor concluded that there is a reasonable basis to proceed with an investigation for war crimes and crimes against humanity committed by Afghan nationals (such as the Taliban) as well as by foreign nationals (such as the US soldiers) in Afghanistan and elsewhere. In March 2020, upon request of the Prosecutor, the Appeals Chamber authorized the commencement of the investigation for war crimes and crimes against humanity committed by the Taliban and foreign nationals. The former Afghan government asked the Court to defer the investigation to the Afghan authorities and gave assurances about its genuine ability and willingness to carry out investigations and prosecutions in full compliance with the Statute. While the Prosecutor was considering whether to accept or reject the request for deferral, the Taliban seized the power in Kabul. In September 2021, the Prosecutor requested the Pre-Trial Chamber to restart the investigation before the ICC because the Taliban government is not able and willing to carry out the criminal proceedings. It is highly likely that the international crimes allegedly committed by the Taliban will be under investigation in the near future and the Prosecutor might also issue warrant of arrests for the suspected persons.

4. Last issue to be addressed concerns international political and legal legitimacy of the Taliban government, namely a government that is neither democratic nor respectful of the average international standards on human rights.

As a matter of international law, the Taliban government is effective and independent because it controls its own territory and govern its own population. Under international law, these are the two

only criteria to assess the legitimacy of a government. In other words, if you are not a puppet-government and you are able to exercise control rule over people and territory, then you are a “government” before the international legal system. Gross and systematic violations of human rights have serious legal consequences in terms of sanctions and international responsibility of the wrongdoer but do not affect the legitimacy of a government under international law.

The same is true for the lack of democracy. Democracy is not still a legal criterion for statehood or for being a legitimate government. Of course, there is a political trend towards the democratization of international relations and international law, but, to date, there is no emerging binding rule on democracy. The push coming from western States for making democracy a legal condition of statehood in international law is offset by the counter-pressure of many other non-western States. For the time being, therefore, governments are not measured by international law according to whether they possess democratic credentials or not. This is the reason why Security Council’s resolution 2593 (2021) never use the word “democracy” and the only oblique reference to democracy is in paragraph 4 where the Security Council “encourages all parties to seek an inclusive, negotiated political settlement [...] that responds to desire of Afghans to sustain and build on Afghanistan’s gains over the last twenty years in adherence to the rule of law”. Of course, it is an important statement, but the overall approach of the resolution, as anticipated, remains more focused on protecting international security from the threat of terrorism coming from Afghanistan (whatever form has the government in power) rather than promoting democracy as a political model in Afghanistan.

5. A final thought on present and future political landscape of Afghanistan. Current situation is of course unacceptable for the EU and its Member States whose political agenda has the main purpose of promoting democracy and human rights in the wider world. And it is even more unacceptable in the light of the progress that had been achieved in Afghanistan in the last twenty years in terms of fostering and implementing the rule of law, democracy, and human rights. The EU stands ready to implement any kind of political and economic pressure to change Taliban’s conducts and improve current human rights and humanitarian situation. One of the most powerful political tools is the non-recognition of the Taliban government and the EU has repeatedly made clear that it will not recognize the Taliban until when democracy and human rights will be fully restored in Afghanistan and within the Afghan society. Policy of non-recognition, however, may exert a strong pressure on the Taliban only if it is also implemented by most States, to begin with the US, Russia and China. Yet, unlike the EU, many States have not still adopted a firm and clear position about non-recognition of the Taliban and China and Russia have not ruled out the recognition of the Taliban government in the future. If so, the EU position would be weakened. The reason for this different stance lies in the fact that, according to the EU, there is no international security without democracy and human rights at global level while, according to other States, democracy and human rights are important in international relations but are not always necessary to have international security because peace and security may exist even in the absence of advanced protection of human rights and deep democracy as it is typical of the EU and its Member States.

As a result, the situation in Afghanistan becomes paradoxical, if not grotesque, for the EU. For those States primarily looking for security at any cost rather than for security together with human rights and democracy, the Taliban can be an uncomfortable but useful partner to restore security in the region and degrade the threat of terrorism, especially if the Taliban will no longer allow any terrorist group to use the soil of Afghanistan to threaten international security and the security of some Permanent Members of the Security Council. The final trade-off between the Taliban and these States could be just that: the Taliban will stay in power as a recognized government provided that the Afghanistan will no longer be a sanctuary of international terrorism.

This kind of trade-off which marginalizes human rights and democracy from the future of Afghanistan is precisely confirmed by the Doha Agreement signed between the US and the Taliban in February 2020. In fact, the *Agreement for Bringing Peace to Afghanistan* has the main (if not only) purpose to guarantee the security of the US. Pursuant to the Agreement, the Taliban will prevent any

group or individual from using the soil of Afghanistan for terrorist purposes and will send a clear message that terrorism has no longer place in Afghanistan. In return, the US will release combat and political prisoners and will review national and international sanctions and the reward list against the Taliban. Also, the US and its allies will refrain from the threat or the use of force against the Afghanistan or intervening in its domestic affairs. It is also important that in the Doha Agreement the new post-settlement Afghan government is always termed as “Islamic” and there are no direct and express references to democracy.

The US priorities seem not to overlap with EU priorities which revolve around a European way of life for the future Afghanistan grounded on human rights, rule of law, and European-style democracy. As recognized by the US President after the seizure of power by the Taliban in August 2020, in fact, the US mission in Afghanistan “was never supposed to have been nation-building. It was never supposed to be creating a unified, centralized democracy [the] only vital national interest in Afghanistan remains today what it has always been: preventing a terrorist attack on American homeland». It is quite clear that democracy and human rights have a different place in the political agenda of the EU and the US. The most important goal of EU foreign policy is to spread in the wider world the fundamental values of the EU (democracy, rule of law, human rights, gender equality, etc.). The most important goal of US policy is to protect its own vital national interests from terrorism at any cost; even at the cost of sacrificing on the altar of its own security a large amount of human rights and democracy in Afghanistan. The EU and the US have been in Afghanistan for twenty years with different goals and policies and now that the mission in Afghanistan is over the final toll is not the same for the two players. The Afghanistan under the Taliban is the grave of democracy and human rights, but it is also an insurance policy for international security and national security of some States like the US. The budget balance for the US is in surplus, it is positive; the same is not true for the budget balance of the EU.