

## State Responsibility of Afghanistan under Taliban Regime

M. Yakub Aiyub Kadir\*, Siti Nurhaliza

Department of Law, Faculty of Law, Syiah Kuala University, Indonesia

\*Corresponding Author: [m.yakub.akadir@unsyiah.ac.id](mailto:m.yakub.akadir@unsyiah.ac.id)

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### ABSTRACT

Serious concerns on the rights of Afghanistan's women and girls have been raised ever since the Taliban returned to power on 15th August 2021. This research uses a normative methodology to investigate the discrepancy of legal argument in the international law of succession in terms of status of Taliban within the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) framework. This research confirmed that the Taliban is the de facto government of Afghanistan as the Taliban have effective and integrated control over a state territory and there is no competing entity with a solid constitutional claim. Therefore, the Taliban is bound by international law to guarantee that women enjoy equal educational rights, including access to school and curriculum. However, the current framework of CEDAW, including the CEDAW committee has not be able to cope with such issues, as it should be reformed in the next future.

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### 1. Introduction

Islamic Emirate of Afghanistan is the new name of the government under Taliban rule in Afghanistan. The Taliban rose to power to build a "pure" Islamic state in Afghanistan and to enforce their interpretation of Islamic sharia law. Anyone who questioned the various restrictions on Islam was ruthlessly punished.<sup>1</sup> Islamic sharia law is seen as severe and stringent in current Islamic civilization, make it difficult for Afghans, particularly women, to accept the Taliban's laws in the present life.<sup>2</sup>

<sup>1</sup> Anchita Borthakur and Angana Kotokey, 'Ethnicity or Religion? The Genesis of the Taliban Movement in Afghanistan', *Asian Affairs*, 51.4 (2020), 817-37 <https://doi.org/10.1080/03068374.2020.1832772>

<sup>2</sup> Anisa Indraningtyas and Gonda Yumitro, 'Bibliometric Analysis of International Publications Trend on The Taliban', *Pustabliblia: Journal of Library and Information Science*, 6.1 (2022), 103-24.

Now that the Afghan government has collapsed and the Taliban have returned to power in Kabul on late 2021, the group has succeeded in re-controlling the Afghan government in addition to occupying most of the State's territory and deploying troops in much of the territory in just two weeks. It has been very notable to see how much the Taliban accepts human rights pledges as a de facto entity that exercises territorial control in a given area. Said acceptance also implies that in its war against terrorism, the Taliban must safeguard human rights while simultaneously ensuring that terrorist threats to the right to life will be suppressed. Another implication on said action means that they are also accountable for its previous crimes as an insurgent organization, before becoming a government.<sup>3</sup>

Succession might be universal or partial, when a nation's sovereignty is transferred wholly to a successor entity, it is referred to universal succession.<sup>4</sup> However, the Taliban's status as a new "unrecognized government" under international law might be referred to as government succession, which may be understood as a change of government in a country. From this perspective, the government has changed but the nation nominally remains to be recognized as Afghanistan. The Taliban continue to fight the Afghan government, ergo for Afghani, the Taliban is also the de facto government and now is a full-fledged parallel political order. Taliban are increasingly seeking local support to present themselves as more legitimate to govern than the governments they are at war with.<sup>5</sup>

However, the Taliban government will still require recognition from other countries for the ability of the Taliban to represent Afghanistan as a country in order to be able to carry out international relations and be accepted by the international community. In case of the Taliban commits crimes against Afghan or foreign citizens, Afghanistan's liability for said violations of international law may hinge on whether the Taliban is the state's government. It can refer to rules of attribution of conduct of private individuals such as Articles 9 and 10 (1) of the Articles on Responsibility of States for Internationally Wrongful Acts.<sup>6</sup> Therefore, it is crucial to see how the Taliban as a new government behave in this "uncertainty" Afghan future.

Islam has long had a special place in Afghan society and the political system. In recent times, both the 1964 and 2004 Afghan constitutions included Islam as the state's religion and no law made should contradict the teaching of Islam. Said ruling made it is impossible to effectively administer Afghanistan without using Islamic principles.<sup>7</sup> The Taliban understandably will continue to strive for the application of a strict Islamic system in government, including in the provisions regarding women's rights with cultural traditions and religious rules in mind.<sup>8</sup>

Therefore, since the Taliban return in late 2021, they have been struggling in gaining international recognition. Taliban must initially be able to prove in upholding international obligations, basic democratic and rule-of-law principles, and the most important red line is to

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<sup>3</sup> Ben Saul, "Recognition" and the Taliban's International Legal Status', *International Centre for Counter-Terrorism*, 2021.

<sup>4</sup> Manank Panchmtia Manank Panchmtia, 'The State Succession', *International Journal of Political Science, Law and International Relations*, 8.3 (2018), 11–16 <https://doi.org/10.24247/ijpsliroct20182>

<sup>5</sup> Ashley Jackson and Florian Weigand, 'The Taliban's War for Legitimacy in Afghanistan', *Current History*, 118.807 (2019), 143–48 <https://doi.org/10.1525/curh.2019.118.807.143>

<sup>6</sup> Federica Paddeu and Niko Pavlopoulos, 'Between Legitimacy and Control: The Taliban's Pursuit of Governmental Status', *JUST SECURITY*, 2021.

<sup>7</sup> Amin Tarzi, 'Islam and Constitutionalism in the Persianate World', *Journal of Persianate Studies*, 5.2 (2012), 93–94 <https://doi.org/10.1163/18747167-12341239>

<sup>8</sup> Ma'ruf Amini and Devina Arifani, 'The Taliban & Afghanistan: Conflict & Peace in International Law Perspective', *International Journal of Law Reconstruction*, 5.2 (2021), 306–306 <https://doi.org/10.26532/ijlr.v5i2.17704>

respect women's rights in every aspect of their life.<sup>9</sup> This is in line with Article 7 of the 2004 Afghanistan constitution that said the state is required to uphold the Universal Declaration of Human Rights, the United Nations Charter, and all other foreign treaties that Afghanistan has ratified.

However, the Taliban instantly abolished the 2004 constitution when they regained power in August 2021. The Taliban regarded the 2004 constitution as an intellectual text dominated by western ideas and have thereby largely rejected. Taliban drafted a new constitution and intended to temporarily impose articles from Afghanistan's 1964 constitution which are not in contradiction with Islamic law.<sup>10</sup> The constitution's preamble claims that it would guide the country with the values of the rule of law, democracy, and Islam yet omits to explain how these may coexist in Afghanistan. Afghanistan must observe the Universal Declaration of Human Rights, interstate agreements, and international treaties to which Afghanistan has ratified. According to Article 3 of the Constitution, no legislation shall violate the principles and rules of Afghanistan's revered to Islamic faith. Even at the time of the constitution's drafting, there was a conflict between the role of Islam and Afghanistan's international duties, leading to a constitution full of ambiguity.<sup>11</sup>

Several international conventions and declarations have been ratified by Afghanistan include: The Universal Declaration of Human Rights (UDHR), The International Covenant on Social and Political Rights (ICCPR), The Declaration of Elimination of Violence against Women, The Convention on Elimination of Torture and Other Oppressive Inhuman and Degrading Treatment (CAT) and the main convention for the protection of women's rights is The Convention on Elimination of all Forms of Discriminations against Women (CEDAW).<sup>12</sup>

Through ratification of the CEDAW in 2003, Afghanistan was assumed to have obligation to take a decision to tackle discrimination against all forms of women. Article 1 of the CEDAW explains the discrimination against women as any restriction, exclusion, or distinction based on sex that has the effect or purpose of preventing women from recognizing, enjoying, or exercising their human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field, regardless of their marital status, on the basis of equality of men and women.

Afghan women does not have agency of power under the Taliban government; the leadership has made this plain since regaining control. Soon after assuming power, the Taliban barred women and girls from secondary and higher education. In addition, with strict women's dress code, travel restriction, sex segregation in the workplace. These restrictions are enforced by intimidation and inspections. In outrageous cases, women have been killed for holding occupations that are believed to disregard conventional practices or are considered un-

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<sup>9</sup> Valeri Modebadze, 'Afghanistan under Taliban: A New Regime Poses A Threat to International Stability', *Journal of Liberty and International Affairs, Institute for Research and European Studies - Bitola*, 8.1 (2022), 277-91 <https://doi.org/10.47305/JLIA2281277m>

<sup>10</sup> Shamsad Pasarlay, 'Dead or Alive?: The Taliban and the Conundrum of Afghanistan's 2004 Constitution', *I·CONnect*, 2022.

<sup>11</sup> Sebghatullah Qazi Zada, 'Legislative, Institutional and Policy Reforms to Combat Violence against Women in Afghanistan', *Indian Journal of International Law*, 59.1-4 (2021), 257-83 <https://doi.org/10.1007/s40901-020-00116-x>

<sup>12</sup> Carine Situmorang, 'Studi Kasus Terhadap Mekanisme Penegakan Konvensi CEDAW Di Afghanistan Berdasarkan Hukum Internasional', 2016.

Islamic.<sup>13</sup> Most women's rights organizations, media outlets, and more than 3,000 small to medium-sized women-owned businesses were shut down. Doctors have been told not to see any female patients alone, and taxi drivers have been told not to pick up any female passengers who are not accompanied by men or who are dressed outside of Islamic norms.<sup>14</sup>

Barr mentions that in some areas in Afghanistan that fell under Taliban rules, women were prohibited to go and leave their homes without being accompanied by male relatives or their husbands, and they are also forced to wear a burqa *i.e.*, loose clothing that covers the whole body and face.<sup>15</sup> Not only this restriction, but Afghan women have also limited ability of women to receive medical attention and the ability to work. The most important thing, the Taliban also ban education access for women of all ages in most parts of Afghanistan.<sup>16</sup> This is clearly in violation of Article 10 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which states: States Parties are required to take all reasonable steps to end discrimination against women in order to guarantee their equal rights to those of men in the area of education, in particular.

The right to education for girls and women is a core commitment of state parties under CEDAW, Afghanistan therefore has one of the lowest global rankings in the United Nations Development Programme's (UNDP) 2018 Gender Inequality Index with score of 168 out of 189. The score resulted from widespread violence against women; fewer Afghan women attend school than Afghan men. According to Amnesty International, gender-based violence against women is still being perpetrated by state and non-state actors, particularly in areas under Taliban control.<sup>17</sup> The wellness of survivors, exposed children, and society is threatened by violence and restrictions on various fronts, including social, economic, and health.<sup>18</sup>

Gender-based violence remain to be commonplace in Afghanistan which unfortunately also appears to be ignored. Women and children are designated as having a long-standing human rights deficit.<sup>19</sup> Gender inequalities exist as a result of the fact that many fail to comprehend the connection between gender and sexuality. The relational idea of "gender" is necessary to comprehend the value accorded to someone's biological sex and unequal power structures.<sup>20</sup>

Afghanistan is one of the world's poorest nations with a severe gender gap and little progress made in the development of human resources. Central to success will be the education of boys

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<sup>13</sup> Nilofar Sakhi, 'The Taliban Takeover in Afghanistan and Security Paradox', *Journal of Asian Security and International Affairs*, 9.3 (2022), 383–401 <https://doi.org/10.1177/23477970221130882>

<sup>14</sup> Nargis Nehan and Michael Cox, 'The Rise and Fall of Women Rights in Afghanistan', *LSE Public Policy Review*, 2.3 (2022) <https://doi.org/10.31389/lseppr.59>

<sup>15</sup> Mariam Raqib and Amilcar Antonio Barreto, 'The Taliban, Religious Revival and Innovation in Afghan Nationalism', *National Identities*, 16.1 (2014), 15–30 <https://doi.org/10.1080/14608944.2013.843517>

<sup>16</sup> United Nations High Commissioner for Human Rights, 'Situation of Human Rights in Afghanistan', *UN Human Rights Council*, 2022.

<sup>17</sup> Qazi Zada.

<sup>18</sup> Kathryn M. Yount and others, 'Development and Validation of the LoVI: The Laws on Violence against Women and Girls Index', *BMC International Health and Human Rights*, 20.1 (2020), 13–13 <https://doi.org/10.1186/s12914-020-00233-z>

<sup>19</sup> Maretha Syawallin Umarach, Derina Faslig Silitonga, and Humairah Muljabar, 'Analysis of the Significant Increase of Gender-Based Violence During the Covid-19 Pandemic in the Conflict Zone: The Case of Afghanistan', *Journal of Islamic World and Politics*, 6.1 (2022), 1–19.

<sup>20</sup> Hiqma Nur Agustina and Tenia Ramalia, 'Parvana's Trilogy: A Study of Violence toward Afghanistan Women and Girls', *PALASTREN Jurnal Studi Gender*, 10.2 (2018), 204–204 <https://doi.org/10.21043/palastren.v10i2.2664>

and girls with an equitable opportunity for both. Under the Taliban administration, large gender disparities in school enrolment, dropout rates, and literacy continue to hinder Afghan youth's access to education. Insecurity and violence from the ongoing conflict and general lawlessness, including attacks on educational institutions, have been identified as barriers for universal female education. Other obstacles include the lack of schools in many areas, the high cost of education, and the lack of female teachers.<sup>21</sup>

Taliban education monitors compel teachers to show up and watch their work, forcing those who don't meet their requirements to be fired. They have prohibited a cultural textbook that featured a picture of a female police officer and eliminated items deemed to be "un-Islamic," from the curricula *i.e.*, civic education. In many of their controlled regions, they have also incorporated religious education into the classroom and prohibited girls from attending secondary school.<sup>22</sup>

This article therefore explores on what is the status of Taliban under International Law? to what extent Taliban could be held responsible for the international human rights system, in particular for the implementation of Article 10 CEDAW? In addition, how should the international human rights mechanism (CEDAW Committee) respond to the violation of Article 10 of CEDAW in Afghanistan.

## 2. Research Method

The research method used is normative research, which is legal research undertaken by reviewing library resources or secondary data, which includes primary data, namely the CEDAW. Secondary legal materials include books, related journals, thesis, articles, and answers from interviewees. The resources are then organized systematically, reviewed, and conclusions produced regarding the subject related to the state responsibility of the Taliban in implementing the international human rights system.

## 3. Result and Discussion

### 3.1. The Status of Taliban Under the International Law

International law does not recognize constitutionality of a state as a necessary condition for governmental status (and may never do so). Indeed, where no constitutionally valid claim exists, international law allows a functional institution with no legally valid claim power to exercise governmental status. The exercise of secure and effective power over a state's territory and people was sufficient to establish that entity's status as that state's government.<sup>23</sup>

Many states used to frequently recognize new governments, despite how they gained power. Recognizing that a political body has distinct obligations and responsibilities does not automatically mean that the entity is a government. At the same time, treating the Taliban's behavior as relevant to assessing Afghanistan's compliance with its international legal obligation may imply the legitimacy of the Taliban as the government. States appear largely inclined to acknowledge an unlawful administration having effective control in the absence of

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<sup>21</sup> Robert Wm. Blum and others, 'Coming of Age in the Shadow of the Taliban: Education, Child Marriage, and the Future of Afghanistan From the Perspectives of Adolescents and Their Parents', *Journal of Adolescent Health*, 64.3 (2019), 370-75 <https://doi.org/10.1016/j.jadohealth.2018.09.014>

<sup>22</sup> Jackson and Weigand.

<sup>23</sup> Jackson and Weigand.



a constitutionally acceptable claim to power, as evidenced by the broad acceptance of Yahya Jammeh's claim to power in 1996.<sup>24</sup>

As Afghanistan currently is experiencing a set of government successions, the Taliban renamed the country from "Islamic Republic of Afghanistan" to the "Islamic Emirate of Afghanistan". Said renaming does not necessarily create a new state, it is just a reflection of the Taliban's specific approach to establishing an Islamic state under the Sharia law.<sup>25</sup>

Since occupying Kabul on late 2021, the Taliban self-declare themselves to be the representative of the current Afghanistan government and to establish a new united government with full inclusion, equality, and meaningful participation of women.<sup>26</sup> However, many Western nations, particularly the United States of America and the European Union, regards the Taliban as an outmoded force that disregards human, children, and women's rights.

After taking over Kabul, the Taliban dominate all parts of the country, including its order and administration. There is no civil war or indication of a credible competing alternative to the Taliban, or to put it another way, there are no other group claiming to represent the Afghan people. By maintaining their strongholds, the Taliban are also winning the perception battle, making the US and the Kabul government appear weak and unstable in comparison.<sup>27</sup> Many nations may not acknowledge the Taliban, but a certain degree of international, political, economic, humanitarian, and social participation must be maintained at all costs for the sake of the Afghan people, who are suffering from a succession of humanitarian catastrophes. The Taliban cannot be ignored because they control the military tools for imposing security throughout the world.

Furthermore, The Afghan constitution of 2004 specifies the procedure of a presidential retirement the president should personally present resignation to the National Assembly. Ashraf Ghani, the former president of Afghanistan, claimed that the Taliban had won through his Facebook posts. Apparently, his Facebook posts do not meet this constitutional requirement. More significantly, Ghani does not appear to be a legitimate candidate for power. Article 67 of Afghanistan's constitution states: the First Vice-President takes over the President's duties and powers in the event of the President's retirement, impeachment, demise, or incurable illness that prohibits him from carrying them out.

As Ghani's presidential bid fails, Amrullah Saleh as the first vice president may have a constitutional valid run for the presidency. Amrullah Saleh, Afghanistan's former vice president, has stated that he is in the nation and is the rightful caretaker president following the fall of the government when the Taliban gained control of the capital. However, both Ghani and Saleh have been largely forgotten in the growing political conversation surrounding Afghanistan's government and having no valid claim over the territory.<sup>28</sup>

The effective authority that the Taliban has over the majority of Afghanistan's territory and population will be a critical factor in determining whether or not it qualifies for governmental

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<sup>24</sup> Paddeu and Pavlopoulos.

<sup>25</sup> Raqib and Barreto.

<sup>26</sup> Larry D Jhonson, 'Expert Backgrounder: How Can The Taliban Be Prevented From Representing Afghanistan In The United Nations?', *JUST SECURITY*, 2021.

<sup>27</sup> Ashok Behuria, Yaqoob Ul Hassan, and Sanya Saroha, 'US-Taliban Talks for Afghan Peace: Complexities Galore', *Strategic Analysis*, 43.2 (2019), 126-37  
<https://doi.org/10.1080/09700161.2019.1595483>

<sup>28</sup> Reuters, 'Afghan Vice President Says He Is "Caretaker" President', *Reuters*, 2021.

legitimacy. Since Ghani has departed the country and has made no claim to power and the population appears to have recognized the Taliban's de facto authority and given them control of the country. Due to these circumstances, the Taliban is considered a stable but unrecognized de facto government in Afghanistan.

Essen argued that the Taliban became the de-facto government of Afghanistan after taking control of the country and exercising effective power over the territory.<sup>29</sup> The de facto regime maintains its de facto status until these entities declare agreement or acknowledgment, with the phrase 'de facto' referring to the government's factual control. As a result, other nations refuse to acknowledge these regimes' legality, resulting in the regime's lack of full international personality.<sup>30</sup> Because they are not the region's legal or official government, yet have actual control and power over it, these regimes have authority and control as a matter of fact instead of law. Tan states that when legitimate governments lack effective control of territory, they are unable to defend and fulfill their human rights commitments in that territory, including protecting persons from armed groups.<sup>31</sup> If de facto regimes that hinder the government's effective control of an area do not have human rights duties in that territory, there is a huge gap in safeguarding persons.

### 3.1.1. The Recognition of Taliban

In terms of official recognition, the question is which organization is capable of representing the country before the world community. If a state's authorities fail to obtain the acceptance of other nations and the international community, the state's international personality is never jeopardized. According to classical legal doctrine, if a government takes power by non-constitutional means, its legitimacy is questioned until it is recognized by a large number of states.<sup>32</sup> Rebels who attempt to gain control of a country may be regarded as a legitimate government if they win the power struggle. This recognition can be achieved by either a unilateral proclamation by the recognizing state or a bilateral transaction.<sup>33</sup>

However, states are not obligated by international law to maintain ties with one another. They can refuse to interact with a particular entity. Refusing to maintain diplomatic ties with an entity does not indicate that that entity's status as a government is invalidated. When it comes to the Taliban, it is important to remember that most governments have announced their rejection to engage in diplomatic contacts with the group, however, this does not rule out the possibility that the Taliban will become the Afghan government. However, acknowledging the Taliban as Afghanistan's government opens up additional options for responsibility. Recognition opens the door to diplomatic interaction with the Taliban, including the

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<sup>29</sup> Jonte Van Essen, 'De Facto Regimes in International Law', *Merkourios-Utrecht J. Int'l & Eur. L.*, 28 (2012), 31-31.

<sup>30</sup> Yordan Gunawan and others, 'Does the Protection of Minority Groups in Xinjiang Fail', *Sriwijaya Law Review*, 4.2 (2020), 205-20.

<sup>31</sup> Daron Tan, 'Filling the Lacuna: De Facto Regimes and Effective Power in International Human Rights Law', *NYUJ Int'l L. & Pol.*, 51 (2018), 435-435.

<sup>32</sup> Hamed Hasyemi Saugheh and Rohaida Nordin, 'Legitimacy as a Precondition for the Recognition of New Governments: A Case of Libya', *Sriwijaya Law Review*, 2.1 (2018), 69-69 <https://doi.org/10.28946/slrev.Vol2.Iss1.111.pp69-81>

<sup>33</sup> Sofyan Wimbo Agung Pradnyawan, Arief Budiono, and Jan Alizea Sybelle, 'Aspects of International Law and Human Rights on The Return of The Taliban in Afghanistan', *Audito Comparative Law Journal (ACLJ)*, 3.3 (2022), 132-38 <https://doi.org/10.22219/aclj.v3i3.23237>

possibility of establishing treaties requiring the Taliban to adhere to enforceable human rights and anti-terrorist obligations.<sup>34</sup>

As Afghanistan's de facto government, states will be faced with a variety of options if the Taliban is able to sustain such authority. Nations could recognize the Taliban as the government and carry-on regular interstate ties with it; acknowledge it as the new regime of government but deny maintaining normal relations with it; accept it as the government but only have relations with it if some criteria are met or deny the Taliban's status as the government of Afghanistan.<sup>35</sup>

Malik explains that it is critical to consider Afghanistan's future in order to avoid a repeat of the 1996 situation.<sup>36</sup> Since assuming power, the leadership of the Taliban has shown no desire to share power or to make any kind of concessions to the demands of the international community to protect human rights. The revolutionary group anticipated a total transfer of power, and this is exactly what took place. It was evident that the Taliban were unwilling to make any meaningful compromises in exchange for world acceptance, the lifting of sanctions, or the resuming of assistance from Western nations.<sup>37</sup> If their fears are allayed and the regime is able to retain power over time, an implicit acknowledgment of its de jure position as a government will almost certainly follow.<sup>38</sup>

The Taliban spokesperson, Zabiullah Mujahed, stated at a news conference that "Recognize us first, then human rights," indicating that it appears that the Taliban government in its current form only views human rights as a concession to gain recognition from other nations.<sup>39</sup> As a result, it can be said that the Taliban first rejected the idea of human rights, but under pressure from other nations and international organizations, they changed their mind and established circumstances for the respect of human rights in Afghanistan.<sup>40</sup>

Long War Journal listed as of September 6, 2021, the Taliban are in charge of running 407 districts and 34 provinces. This demonstrated the Taliban's capacity to eliminate other parties in order to seize power and stability in the nation, even adversaries, allowing them to be considered to have stability in sustaining the existence of their regime. The true issue that lies ahead is maintaining control. In practice, if a new government can effectively control the state over the territory and population, the recognition can no longer be postponed, which is known

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<sup>34</sup> Vanshaj Jain, 'To Recognise Taliban or Not? This Question Shows Poor Understanding of International Law', *The Print*, 2021.

<sup>35</sup> Paddeu and Pavlopoulos.

<sup>36</sup> Ayesha Malik and Rsil Associate, *Paper-The Islamic Emirate of Afghanistan and the Recognition of Governments under International Law 2 Paper-The Islamic Emirate of Afghanistan and the Recognition of Governments under International Law Design: Ayesha Mushtaq*, 2021.

<sup>37</sup> Florian Weigand and Michael Cox, 'Why Did the Taliban Win (Again) in Afghanistan?', *LSE Public Policy Review*, 2.3 (2022) <https://doi.org/10.31389/lseppr.54>

<sup>38</sup> Malik and Associate.

<sup>39</sup> Yordan Gunawan, 'Responsibility of People's Republic of China for Minority Based on ICERD: Uyghur Case', *Varia Justicia*, 15.2 (2019), 65-73 <https://doi.org/10.31603/variajusticia.v15i2.3116>

<sup>40</sup> Mohammad Hakimy and Basel Rokba, 'Human Rights Situation under Taliban (Islamic Emirate) Regime', *Innovations*, 70 (2022), 36-36.



as the Effective Control Doctrine.<sup>41</sup> However, despite its diplomatic activity during the last year, the Taliban have not been legally recognized by any government in the world.<sup>42</sup>

They need to develop both internal and external legitimacy. Internally, they must uphold people's expectations of being treated with dignity, making sure that interactions with them are seen as courteous and equitable. They must make sure that everyone, regardless of location, gender, nationality, or religious or political convictions, feels valued in order to achieve this. In the meantime, the Taliban are up against a threat to their external legitimacy.<sup>43</sup>

Ozturk argued that the Taliban turned from proponents of terrorism to compromisers during the Obama administration. Rebels that are involved in governance cannot take their relationship with the civilian population for granted. The mechanics of legitimacy are always being contested.<sup>44</sup> Even rebel organizations that primarily use violence to enforce their authority may engage in legitimization practices to improve civilian participation. Legitimacy can be understood as a broad sense or presumption that an entity's acts are desirable, legitimate, or suitable within any socially formed system of norms, values, and beliefs. Rebel groups may have some amount of legitimacy among a certain constituency despite not having legal standing or international recognition. Even external legitimacy, or how a rebel organization is seen and handled in the international arena, is crucial, especially for separatist movements.<sup>45</sup>

The Taliban's backing for terrorist organizations, notably Al-Qaeda, continues to worry Western observers, posing a regional and international security danger but the Taliban agreed that no terrorist organization would be allowed to use it. While the Taliban claim to have evolved and are eager to address Western officials' concerns, there are no indications that they would modify their hardline religious doctrine or social policies on women's mobility, education, and the freedom to work.<sup>46</sup>

In recent declarations about terrorist groups in Afghanistan, the UN Security Council Resolution 1988 has avoided the term "Taliban" and removed the Taliban's designation as a terrorist organization in order for other countries to participate peace talks in Afghanistan. "The Taliban, nor any other Afghan organization or individual, should assist terrorists operating on the territory of another country." These little shifts in the vocabulary used to describe the Taliban show that some small measures are being taken to accept the Taliban as a legitimate administration.<sup>47</sup>

The United Nations Security Council (UNSC) has not requested that the Taliban not be recognized since they came to power but has instead considered a path toward eventual

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<sup>41</sup> Indah P. Amaritasari and Sri Bagas Sugiharto, 'The Security Landscape from the International Law Perspectives on the New-Taliban-Afghanistan State', *Jurnal Keamanan Nasional*, 8.1 (2022), 92-113 <https://doi.org/10.31599/jkn.v8i1.544>

<sup>42</sup> Ejaz Hussain, 'Taliban 2.0 and Afghanistan-Pakistan Relations', *Journal of Asian Security and International Affairs*, 9.3 (2022), 462-74.

<sup>43</sup> Weigand and Cox.

<sup>44</sup> Selim Öztürk, 'The Taliban Regime in Afghanistan: En Route to International Recognition?', *Middle East Policy*, 26.4 (2019), 102-12 <https://doi.org/10.1111/mepo.12460>

<sup>45</sup> Niels Terpstra, 'Rebel Governance, Rebel Legitimacy, and External Intervention: Assessing Three Phases of Taliban Rule in Afghanistan', *Small Wars & Insurgencies*, 31.6 (2020), 1143-73 <https://doi.org/10.1080/09592318.2020.1757916>

<sup>46</sup> Alamgir Khan, 'Current Afghanistan Crisis: The Impact of External Factors on Internal Crisis', *Global Regional Review*, VII.I (2022), 118-29 [https://doi.org/10.31703/grr.2022\(VII-I\).13](https://doi.org/10.31703/grr.2022(VII-I).13)

<sup>47</sup> Malik and Associate.

recognition. On August 30, 2021, the UNSC urged all parties to pursue a negotiated political settlement that included full, equitable, and meaningful involvement of women that meets the desires of the Afghan people in maintaining and building on the interests of Afghanistan over the past twenty years in accordance with the law, as well as requiring that all parties honor their commitments.<sup>48</sup>

### 3.2. The Implementation of Article 10 of CEDAW Towards Taliban Responsibility

Afghanistan participates in a number of international human rights conventions. All forms of discrimination against girls and women are prohibited under international treaties and conventions to which Afghanistan is a member. Afghanistan is required by said treaty to ensure women have access to legal protection and are not subject to legal discrimination. The commitment to uphold international treaty obligations is acknowledged in Article 7 of the Afghan Constitution. The Afghanistan National Peace and Development Framework (ANPDF) establishes inclusiveness and gender equality benchmarks. Apart from that, Afghanistan also signed the Sustainable Development Goals (SDGs), which seek to "leave no one behind" in achieving gender equality.<sup>49</sup>

The CEDAW has been ratified by 189 state parties. While CEDAW has considerable number of signatories, it also has considerable number of reservations issued by state parties to the convention. The great majority of reservations are filed by states claiming that sections of the Convention violate cultural traditions and religious regulations. Many Muslim governments, including Bangladesh, Egypt, and Morocco, have adopted reservations to enable non-compliance if the Convention contradicts with Islamic Shariah, rendering the reservation incompatible with mandates to eliminate discriminatory laws, custom, and practices.<sup>50</sup> Afghanistan accepted the Convention without any reservations, making it the first Muslim nation to do so. For Afghan women, this is seen as a significant development.<sup>51</sup>

The adoption of CEDAW by Afghanistan was a significant step forward for women's rights not only in Afghanistan but across the Muslim world. Since the convention's entry into force, women's rights have received more attention, and this situation will continue to strengthen and grow as a result of internal reforms and external strengthening of women's rights activists and other civil society actors. Many women responded positively to this convention, believing that these were valuable instruments for pushing woman's rights. The Afghan women's movement was becoming increasingly interested in learning more about the convention and considering how it could be utilized as an advocacy tool for women's rights in Afghanistan. However, while the vast majority of women were eager to learn and apply these tools, a very tiny number of equally enthusiastic fundamentalists saw CEDAW as a western imperialist goal.<sup>52</sup>

In addition to ensuring women's equality, CEDAW addresses a broad range of problems, including nationality, freedom of religion, assembly and association, sexual and reproductive

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<sup>48</sup> Saul.

<sup>49</sup> Kristie Drucza and Valentina Peveri, 'Gender in Afghanistan's Wheat and Agricultural Literature-How to Get to Empowerment?', *Feminist Research*, 2.2 (2019), 43-52 <https://doi.org/10.21523/gcj2.18020202>

<sup>50</sup> Lauren Bock Mullins, 'CEDAW: The Challenges of Enshrining Women's Equality in International Law', *Public Integrity*, 20.3 (2018), 257-72.

<sup>51</sup> Ozair Ahmad Omarzada, 'The Impact of CEDAW on the Rights of Women in Afghanistan', *Journal of Asian and African Social Science and Humanities*, 2.1 (2016), 81-94.

<sup>52</sup> Meghan Campbell and Geoffrey Swenson, 'Legal Pluralism and Women's Rights after Conflict: The Role of CEDAW', *Colum. Hum. Rts. L. Rev.*, 48 (2016), 112-112.

rights, the right to education, healthcare, access to political and public rights. Article 2 of the Afghan constitution states that states must "establish equal protection for women by modifying or abolishing existing laws, practices, and customs which constitute discrimination against women" in order to advance gender equality through national constitutions or through legislation.<sup>53</sup>

Protection and enforcement of human rights are primarily the duty of states; however, international law acknowledges that de facto governments are bearers of international legal rights, indicating that they also bear duties.<sup>54</sup> As a result of their actions and obligations, de facto regimes have a minimum international legal identity. Furthermore, de facto regimes are governed by international humanitarian law (IHL) and international criminal law (ICL) minimal requirements, those under the jurisdiction of foreign nations and non-state entities, as well as those in territory under the jurisdiction of the de facto government, are protected.<sup>55</sup>

A de facto government's resolve to comply with international responsibilities differs from that of a regular government since it demonstrates capability and willingness. As a result, while determining whether or not to recognize a new government, other governments may take into account any such violation of their individual international responsibilities. Therefore, Taliban in carry out the Security Council's mandate to actively combat terrorism, as well as cessation of human rights violations, particularly to those of women, thereby fulfilling their international obligations under the relevant human rights agreements. The Taliban's widespread non-recognition was based on their failure to conform to international agreements committed by Afghanistan.

Articles 4 to 11 of the 2001 ILC Articles on State Responsibility for Internationally Wrongful Acts establish the broad international law framework for assessing attribution (ASR). According to Article 4(2) ASR, "an organ includes any person or entity that has that status in accordance with the internal legislation of the state". The Taliban now lacks the constitutional power to rule. As a result, according to Afghan internal legislation, their organization does not have the status of a governmental organ.<sup>56</sup>

The usage of the phrase 'includes' in ASR Articles 4(2), on the other hand, suggests that domestic legal status as an entity is essential but not required, to constitute a state organ under the ASR. To put it another way, even if an entity is not acknowledged under domestic state law, there could be other factors that qualify it as a state organ under Article 4. In this regard, the ILC commentary on the ASR indicates that factual control of a group will satisfy these purposes; it states that a de facto government is itself a state apparatus and that the behavior of such a government's institutions is protected by article 4 of the ASR.<sup>57</sup>

The individual or group acting must be carrying out governmental responsibilities, even if they are acting on their own initiative. It's vital to note that the private persons covered by article 9 are not like a de facto government in general while a general de facto government is a governmental organization that replaces the one that previously existed. Article 4 rather than

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<sup>53</sup> Mohd Shahzad, 'The State of Women in Afghanistan since 2001', *International Journal of Humanities & Social Science Studies (IJHSSS)*, 2 (2022), 252–58.

<sup>54</sup> Van Essen.

<sup>55</sup> Van Essen.

<sup>56</sup> Marco Vöhringer, 'ICC Prosecutions as an Alternative to State Responsibility for Taliban Crimes', *Verfassungsblog on Matters Constitutional*, 6 April 2022 <https://verfassungsblog.de/balancing-accountability-and-legitimacy/>

<sup>57</sup> United Nations, *Responsibility of States for Internationally Wrongful Acts (2001)*, 2001.

article 9 governs the activity of such government institutions. Given that the Taliban are the *de facto* regime of Afghanistan, activities committed by the Taliban will constitute the conduct of state institutions under Article 4 and so be attributable to the Afghan state.<sup>58</sup>

The Taliban is treated as a state organ for the purposes of the law of state responsibility, even though it is a *de facto*, unrecognized government. Under international law, a regime is regarded as the government when it is adequately established to provide good assurance of its stability and of those who make up the state's confidence in its capacity to survive and fulfill its internal and external responsibilities. Furthermore, the conduct of an unrecognized government can give rise to international legal rights and obligations for the state. As a result, regimes that are not recognized as governments will not be able to use the domestic courts of other states, take ownership of state-owned property situated overseas, govern their country's foreign diplomatic facilities, and a range of other rights that would be accessible to them if they were recognized.<sup>59</sup>

Additionally, Article 10(1) of the International Law Commission's Articles on State Responsibility provides that "the behavior of an insurrectional movement that becomes a state's new government shall be regarded an act of that state under international law". As a result, if a non-state group takes over the old government and becomes the new government, it is liable for the atrocities committed during the insurgency. This would imply that the Taliban is responsible for the violations committed while the insurgency was in full force, but it raises the question about the willingness of the Taliban to do so. When the Taliban is recognized as Afghanistan's government, its activities are attributed to the country, creating a framework for the country to bear international legal responsibility.<sup>60</sup>

Although the Taliban is not yet a legally recognized government, it is subject to minimum international duties. First, sanctions imposed by the UNSC apply to the Taliban overall, as well as individuals and corporations associated with them. The penalties do not make Taliban membership or involvement in its acts unlawful; rather, the UNSC demands that the Taliban fight terrorism, and take reasonable effective steps to guarantee that the area under its jurisdiction is not utilized for terrorist facilities and camps, or for planning of terrorist attacks oppose other States or their nationals and assist with attempts to bring accused terrorists to justice. Second, the Taliban would be obliged under Non-International Armed Conflict (NIAC) international humanitarian law. Third, as a non-state actor, it is unclear to what degree the Taliban would be obligated by human rights obligations. Human rights requirements are increasingly recognized as a response to *de facto* governmental authorities exercising territorial authority.<sup>61</sup>

Despite the dramatic changes taking place in Afghanistan, both the *de jure* and *de facto* states still has a legal obligation to defend women's human rights under international human rights law. In particular, as a signatory to CEDAW since 2003, Afghanistan must abolish gender discrimination in the country's political and public life and in every sector regulated in the convention. Taliban in control of the region is obliged to uphold and safeguard human rights since such commitments do not change when new authorities come to power, and the responsibility applies regardless of a state's political, economic, or cultural systems, as has been repeatedly stated.<sup>62</sup> The World Bank froze payments to Afghanistan on August 24, and

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<sup>58</sup> Vöhringer.

<sup>59</sup> Scott R Anderson, 'History and the Recognition of the Taliban', *LAWFARE*, 2021.

<sup>60</sup> Jain.

<sup>61</sup> Saul.

<sup>62</sup> United Nations High Commissioner for Human Rights.

it is expected that the most serious consequence of a lack of funds would be a significant impact on the well-being of women and children.<sup>63</sup>

Taliban leadership has reiterated their commitment to upholding Sharia laws and protecting women's rights, but it does not mean they will not respect the international treaties that Afghanistan had ratified. The Taliban leadership stressed that Afghanistan's objectives are compatible with those of the international world. The Taliban will follow only those international laws and conventions that do not contradict Islam and the Taliban government, according to the justice minister.<sup>64</sup>

The Taliban must demonstrate that they are no longer prohibiting Afghan women from enrolling in school and receiving an education, as required under CEDAW. States must ensure that women have equal educational opportunities, such as equal access to educations, skills training, curricula, and other educational resources according to Article 10 of CEDAW. Afghan women and girls, on the other hand, continue to face prejudice in all aspects of their lives, particularly when it comes to education. Furthermore, Afghanistan's official religion is Islam and according to Article 45 of Afghanistan's constitution states in addition to creating and implementing a unified educational curriculum based on national culture, academic standards, and the teachings of Islam, the state must also create curricula for religious topics in schools based on the various Islamic sects that exist in Afghanistan.

The Taliban, as Afghanistan's de facto government, is obligated to carry out Article 45 of the Afghan Constitution. But now, it becomes doubtful considering the Taliban no longer recognizes the Afghan constitution used by the previous government. Furthermore, States must ensure that education is free of discrimination and that all children receive a free and obligatory elementary education. States who adopt steps that intentionally obstruct the fulfillment of the right to education are known as retrogressive measures.

Jackson & Weigand states that the Taliban tried to seize control of public schools and govern them according to Taliban rules.<sup>65</sup> The Taliban education policy is pro-education, requiring the education commission to build modern educational facilities to the fullest extent practicable and to hire professional, knowledgeable, and highly capable personnel to improve educational activities. The Taliban leadership seems to believe that by demonstrating its support for education, the world community would reconsider its perception of the Taliban as anti-modern and regressive and acknowledge that it is capable of managing service quality.

### 3.3. CEDAW Committee Response to Violation in Afghanistan

Afghanistan is now governed by a harsh Taliban theocracy after an unparalleled international effort to improve Afghan institutions came to an end. Nevertheless, as the economy collapses and many of the human rights advancements made over the last 20 years are swiftly undone, an estimated 22.8 million people, or more than half the country's population, now face life-threatening food insecurity.<sup>66</sup> Millions of people are now in danger, and a humanitarian catastrophe is brewing. Human rights advocates, journalists, professors, professionals, and

<sup>63</sup> Cecilia Acuti Martellucci and others, 'Afghan Women and Children's Health: Three Main Challenges under Taliban and COVID-19', *Journal of Global Health*, 11 (2021).

<sup>64</sup> Maryam Jami, 'The Lawless Land: How Does the Taliban's Abolishing of Afghan Laws Affect Citizens' Security?', *JURIST*, 2022.

<sup>65</sup> Jackson and Weigand.

<sup>66</sup> Michael Callen, Shahim Kabuli, and Michael Cox, 'Three Sins: The Disconnect Between de Jure Institutions and de Facto Power in Afghanistan', *LSE Public Policy Review*, 2.3 (2022) <https://doi.org/10.31389/lseppr.57>



members of civil society have all been seriously threatened. Women's and girls' essential rights have been revoked.<sup>67</sup>

The Taliban seem to have differing opinions on the topic of female engagement in the general society, particularly in the workplace and in school. Many remarks expressing the wish to permit women to pursue an education and find employment have been made, but they are accompanied by suggestions that this will all be put off for several reasons.<sup>68</sup> The Taliban's new Afghanistan has demonized education for all practical purposes. The country's conservative leadership has rejected modern education, prohibiting girls from attending school and maintaining that the Islamic curriculum given at madrassas is all that is required.<sup>69</sup>

In the field of education, remarkable progress has been made, particularly for females, over the last two decades. Before August 2021, 9,2 million children were enrolled in school, with girls accounting for 38% of the total. The school system, however, had limited capability, particularly in distant areas, due to a scarcity of female instructors, continuous conflicts, and insufficient funding. 41% of Afghanistan schools do not have construction. Girls are not valued and or permitted to pursue education because of harmful gender stereotypes.<sup>70</sup> According to the de facto minister of higher education, Afghanistan's 40 public institutions will reopen on November 18, 2021. But it is controversial to what is happening in Afghanistan where girls are not able to go to school because the Taliban still closing most of the schools.<sup>71</sup>

While the Taliban have stated that women would be able to complete their education, private universities in Kabul continued to function under conditions that differed from the previous government's policies. The Taliban have already limited academic, research, and teaching freedoms by imposing restrictions on academic resources in libraries and through their gender segregation policy and the Taliban have also issued rules segregating girls and boys, as well as requiring women to wear burqa.<sup>72</sup>

These regulations are violating Article 10 CEDAW. As a result of the crisis, public school teachers, particularly contract educators, have not received their monthly salaries consistently. There are no finances available to offer crucial educational inputs such as educational funding, teaching and learning resources, including textbooks, or teacher training support, placing students in public schools in danger of dropping out. Prohibition of education exposes them to increased abuse, poverty, and exploitation, which is a major worry at a time when the country is struggling with several problems. It is futile and immoral to disempower half of Afghanistan's people. Structural discrimination has also harmed the country's chances of recovery and prosperity in the future.<sup>73</sup>

When CEDAW was being developed in the 1970s, there was a lot of debate over whether an international monitoring mechanism was necessary. Consequently, the decision was made to

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<sup>67</sup> United Nations High Commissioner for Human Rights.

<sup>68</sup> Afzal Ashraf, Caroline Kennedy-Pipe, and Michael Cox, 'Woman, War, and the Politics of Emancipation in Afghanistan', *LSE Public Policy Review*, 2.3 (2022) <https://doi.org/10.31389/lseprr.58>

<sup>69</sup> Maroof Bin Rauf, 'Educational Challenges in Afghanistan after the Return of Taliban', *Pakistan Journal of International Affairs*, 4.4 (2021).

<sup>70</sup> Rahil Majeed Lone, Samreen Naz, and Prof Sona Shukla, 'Women under Taliban Regime: A Theoretical Perspective', *IJRAR1905208 International Journal of Research and Analytical Reviews*, 2018 [www.ijrar.org](http://www.ijrar.org)

<sup>71</sup> United Nations High Commissioner for Human Rights.

<sup>72</sup> Abdul Mohammed Ali Jinnah, 'Braving Misconceptions In The Name Of Education', *Journal of Language and Linguistic Studies*, 17.4 (2022).

<sup>73</sup> United Nations High Commissioner for Human Rights.

form an independent expert panel. As a result, the CEDAW committee was formed. The committee is made up of 23 independent women's rights professionals who are chosen for four-year term. Ratifying the CEDAW convention entails reporting to the CEDAW Committee at the United Nations on its implementation. The provisions of the Convention must be implemented by nations that have ratified or acceded to it. They have also pledged to produce national reports on their efforts to meet their treaty obligations at least every four years based on Article 18 of CEDAW.<sup>74</sup>

After the Taliban took over Afghanistan on late 2021, the CEDAW committee urge the Taliban to keep their promises to safeguard Afghan women and children and to observe and implement the CEDAW's human rights provision. The restrictive policies on accessing education concern the committee because the excessive and unjustified limits on the educational rights of women and girls are contrary to the principles of proportionality and non-discrimination. CEDAW committees urge everyone in places of power and effective control in Afghanistan to follow the basic principles of international human rights law, notably the responsibility to protect women and girls from gender-based unfair treatment in particular to educational rights. The committee is also concerned that women will play a significant role in society, They underline that religious values and practices cannot be invoked to justify violations of women's and girls' human rights especially in limiting women's right to education.<sup>75</sup>

Afghan girls are entitled to the same rights and privileges as Afghan males, and the international community should see their exclusion as a red line. As shown in the Quran, Islam not only enables girls and women to receive an education, but it also places a great value on both men's and women's knowledge and education. Education is a divine requirement both for men and women in Islam. Preventing girls from acquiring an education prevents them from carrying out Allah's holy order and interfering.<sup>76</sup>

#### 4. Conclusion

A governmental entity must successfully and completely manage the country's territory and there is no competing authority with a legitimate constitutional claim. Afghanistan's president, Ashraf Ghani, no longer has a legitimate claim to power because he has flown into exile after the Taliban seized control of Kabul on late 2021. Afghanistan's then to be under Taliban control. Based on this situation, the Taliban is holding the status of de facto government of Afghanistan, thus the Taliban have rights and obligations under International Law. As Afghanistan ratified CEDAW, the Taliban must provide future protection from discrimination for Afghan women and girls, particularly in access to education, as stipulated under Article 10 of CEDAW, i.e., they must make sure that women have equal educational rights, including equal access to school and curricula because this commitment does not change when new authority comes to power. the CEDAW committee urges the Taliban to adhere to the fundamental principles of international humanitarian law and keep their word to protect Afghan women and children, as restrictions on educational rights are contradictory with the principles of proportionality and non-discrimination. Indeed, the CEDAW Committee has

<sup>74</sup> Afandi Sitamala, Ferina Ardhi C, and Ahmad Lanang C, 'The Implementation of CEDAW Principles on Reducing Gender-Based Violence During The COVID-19 Pandemic', *Journal of Law and Policy Transformation*, 7.1 (2022), 44-44 <https://doi.org/10.37253/jlpt.v7i1.6724>

<sup>75</sup> United Nations Office for the Coordination of Humanitarian Affairs, 'Afghanistan: UN Committees Urge Taliban to Honour Their Promises to Protect Women and Girls', *Reliefweb*, 2021.

<sup>76</sup> Onward for Afghan Women, 'Girls's Education and Islam: A Devine Command with Historical Precedent.', *Georgetown Institute for Women, Peace, and Security*, 2022.

limited its role to ensure the implementation of this essential right for women and children, and it would need a reform to strengthen the power of this Committee.

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