

Washington International Law Journal

Volume 32 | Number 3

2023

International Law and the Taliban's Legal Status: Emerging Recognition Criteria?

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Haroun Rahimi & Mahir Hazim, *International Law and the Taliban's Legal Status: Emerging Recognition Criteria?*, 32 Wash. Int'l L.J. (2023).

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INTERNATIONAL LAW AND THE TALIBAN'S LEGAL STATUS: EMERGING RECOGNITION CRITERIA?

Haroun Rahimi* and Mahir Hazim**

ABSTRACT: After the American-mediated attempts at facilitating a negotiated transition failed in Doha, on August 15, 2021, the Taliban retook the Afghan capital and soon after re-established the “Islamic Emirate of Afghanistan” (2021-) along with a caretaker government. The forceful return of the Taliban to power in Afghanistan poses difficult questions of international law. Chief among these questions is who has the right to represent the Afghan state internationally after August 15, 2021. Applying the rules of public international to the case of the Taliban’s caretaker government, this article argues that the strongest argument for disqualifying the Taliban as a government capable of representing Afghanistan is that the regime espouses principles, as a matter for formal governmental policies, which, in their totality, are so fundamentally discriminatory that they violate *jus cogens* norms of international law. These violations are especially egregious regarding the Taliban’s treatment of women. In many ways, the Taliban’s gender-based discrimination shares similarities to South Africa’s racial apartheid. As a result, the Taliban’s effective control over Afghanistan may not be enough to confer on it the status of a “government” under international law. This argument depends on the comparability of race-based discrimination with some fundamental forms of gender-based discrimination in a world where gender-based restrictions are not uncommon albeit not to the extent that the Taliban imposes. The Taliban’s caretaker government has provided the occasion where the unanimous condemnation of the international community could indicate that international law has come to contain a *jus cogens* norm banning some fundamental forms of gender-based discrimination denying admission to a government that holds those policies *de jure* recognition under international law.

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INTRODUCTION

After the American-mediated attempts at facilitating a negotiated transition failed in Doha, on August 15, 2021, the Taliban retook the Afghan capital and soon after re-established the “Islamic Emirate of Afghanistan” (2021-) along with a caretaker government. The Taliban’s caretaker government is supposed to be a temporary government until a permanent government is formed. Taliban replaced the internationally sponsored Islamic Republic of Afghanistan (2004 - 2021).

So far, the “Taliban 2.0’s” (2021-) domination over the population and territory of Afghanistan has exceeded that of the “Taliban 1.0” (1996-2001).¹ Having inherited functioning state institutions and a large pool of skilled bureaucrats, the Taliban 2.0 is better positioned, relative to the Taliban 1.0, to maintain normal governmental functions. Taliban is a group sanctioned by the United Nations Security Council (UNSC), *inter alia*, for support of terrorist activities. Hence, the forceful return of the Taliban to power in Afghanistan poses difficult questions of international law. Chief among these questions is who has the right to represent the Afghan state internationally after August 15, 2021.

This question is of great consequence. The answer to this question will determine several key legal issues: (1) who can exercise ownership rights to the assets of the Afghan state abroad, including the country’s near 9 billion USD in foreign reserve?;² (2) who can represent the Afghan interests in the international, intergovernmental forums, including the United Nations and its agencies?;³ and (3) who can staff Afghanistan’s diplomatic offices, and who can bind the Afghan state internationally in pursuit of bilateral and multilateral, economic, security, and political cooperation? These are issues of great importance for the lives of the nearly 40 million people who make up the population of Afghanistan.

To answer the above question, this paper examines the legal status of the Taliban regime under international law and identifies the conditions that have so far prevented states from recognizing the regime. The paper also assesses whether the current position of states with a unified voice toward the Taliban could indicate an evolution in criteria for recognition of governments under international law. Finally,

¹ For an analysis of Taliban’s ongoing security challenges, *see*, CRISIS GROUP INTERNATIONAL, AFGHANISTAN’S SECURITY CHALLENGES UNDER THE TALIBAN, ASIA REPORT N. 326 (Aug. 12, 2022), <https://www.crisisgroup.org/asia/south-asia/afghanistan/afghanistans-security-challenges-under-taliban>.

² Recently, a U.S. Magistrate Judge issued a recommendation against use of blocked assets of Afghanistan’s Central Bank to satisfy a judgement against Taliban partly on the ground that enforcement cannot be allowed without passing a judgement on the status of Taliban as the legal government of Afghanistan which is the exclusive prerogative of the U.S. President. *See generally*, Report and Recommendation in re: Terrorist Attacks on September 11, 2001, 03-MD-01570 (S.D.N.Y. Aug. 26, 2022).

³ So far, the United Nation’s Credential Committee has deferred making a decision on the status of Representative from Afghanistan, *see* UN Affairs, General Assembly defers decision on Afghanistan and Myanmar seats, UN NEWS, Dec. 6, 2021, <https://news.un.org/en/story/2021/12/1107262>.

the paper analyzes the Taliban's approach to international law and suggests their understanding of Islamic governance may put them on an inevitable collision course with an international legal order that has evolved of states to protect a limited number of fundamental individual rights by imposing minimal restrictions on state sovereignty.

I. RECOGNITION OF STATE AND GOVERNMENT UNDER INTERNATIONAL LAW

In international legal jargon, “recognition of state” and “recognition of government” are distinguishable terms. Recognition of state refers to affirming the birth of a new or existing entity with international legal personality by the current states.⁴ Recognition of state has been subject to extensive theoretical debates by scholars and jurists,⁵ and no universally recognized principle governs the concept of “statehood”⁶ in international law. For instance, adopting the declaratory doctrine,⁷ Article 1 of the Montevideo Convention on the Rights and Duties of States (1933) requires four qualifications for an entity to become a state with international legal personality: (1) a permanent population; (2) a defined territory; (3) an established government; and (4) the capacity to enter into relations with other state.⁸ Although the convention is regional and ratified by only 16 countries,⁹ some western legal scholars have granted it the status of customary international law.¹⁰

Although these qualifications seem simple and straightforward, state practice shows that the application of those criteria could get complicated as they have not always been regarded and interpreted strictly; thus, many entities have emerged and functioned in the international arena without meeting all the required qualifications.

⁴ See MALCOLM SHAW, *INTERNATIONAL LAW* 387 (9th ed. 2021).

⁵ See e.g., Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 4, 605, 605–617 (1941); H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L. J. 3, 385, 385–458 (1944).

⁶ Errol Mendes, *Statehood and Palestine for the Purposes of Article 12 (3) of the ICC Statute: A Contrary Perspective*, at 1, <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281876/OTPErrolMendesNewSTATEHOODANDPALESTINEFORTHEPURPOS.pdf> (last visited Mar. 21, 2023).

⁷ Christoforos Ioannidis, *Are the Conditions of Statehood Sufficient? An Argument in Favour of Popular Sovereignty as an Additional Condition of Statehood*, 21 JURISPRUDENCE 974, 975 (2014).

“According to the “declaratory” theory of recognition, which is supported by international practice, the act of recognition signifies no more than the acceptance of an already-existing factual situation—i.e., conformity with the criteria of statehood.” *States in International Law*, BRITANNICA, <https://www.britannica.com/topic/international-law/States-in-international-law> (last visited May 2, 2023).

⁸ Convention on the Rights and Duties of States as adopted in the Seventh International Conference of American States, art. 1, Dec. 12, 1933, CLXV L.N.T.S. 3801–3824.

⁹ Montevideo Convention on the Rights and Duties of States, University of Oslo, <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (last visited Mar. 21, 2023).

¹⁰ Mendes, *supra* note 6, at 2.

For instance, states like Nauru and San Marino maintain very small populations. Some states such as Israel with disputed territorial boundaries were recognized by a large part of the international community as a state.¹¹ Similarly, while some entities, like Liechtenstein and Monaco, were controlled by other states—Switzerland and France, respectively—and lacked the capacity to enter into relationship with other states, these functioned as states for many years and were members of many international organizations.¹²

Recognition of government, on the other hand, concerns transition of power within an already recognized state or country between two entities: a new “authority” or “government” and the extant or outgoing government. By recognizing the new government, other states acknowledge that the incoming government has the capacity and authority to represent the country internationally and to enter diplomatic relations with foreign counterparts. Changes in government do not change the essence of a state, and the “state does not cease to be an international legal person because its government is overthrown.”¹³ According to Malcom Shaw, the difference is that “[r]ecognition of a state will affect its legal personality, whether by creating or acknowledging it, while recognition of a government affects the status of the administrative authority, not the state.”¹⁴

Due to the lack of a clear guidance and an established practice in international law, recognition of government is a more controversial, enigmatic, contextual, discretionary, and unsettled issue among states¹⁵ than the recognition of state. In recognition of government, the main question is when and under what circumstances a new government or regime needs to be recognized by other states. After all, within the democratic paradigm that underpins rule-based international order,¹⁶ change in government is often routine and mundane, rarely demanding serious efforts in determining the new government’s status. In most cases, intergovernmental interactions continue implying the new government possesses the proper qualifications. However, the issue of recognition arises only when changes in government are not ordinary or routine such as toppling a government by force or a civil war that may raise the question of what group or party may have the right to represent the state.¹⁷

¹¹ See Rewand Hajjaj, *International Recognition Evolving Statehood Criterion: Comparative Analysis of Palestine and Kosovo*, Central European University 14 (2012) (Master of law thesis).

¹² See generally *id.* at 31.

¹³ SHAW, *supra* note 4, at 387.

¹⁴ SHAW, *supra* note 4, at 387.

¹⁵ See generally Ramanand Mundkur, *Recognition of Governments in International Organizations, Including at the International Monetary Fund*, in 4 CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW (2008).

¹⁶ For an analysis of democratic assumptions of international law, see TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* (2021).

¹⁷ See Rudiger Wolfrum & Christiane E. Philipp, *The Status of the Taliban: Their Obligations and Rights under International Law*, 6 THE MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 559, 572 (2002).

In recognizing a government, states have taken into account several factors such as effective control or legitimacy. Historically, the most influential factor that has shaped and guided the decision of states in recognizing governments has been “effective control.”¹⁸ Effective control doctrine suggests that if the entity seeking recognition exercises a predictable, continued total or substantial control over either the entire or a large part of the territory and population of a state, that entity should be recognized as a legitimate government.¹⁹ Another important factor historically considered by states in recognizing governments is “legitimacy.”²⁰ Although the use and meaning of legitimacy doctrine has evolved over time, current states practice indicates that two types of legitimacy have been considered by recognizing states: constitutional legitimacy and democratic legitimacy.²¹ According to constitutional legitimacy theory, governments that seize power through extra-constitutional schemes such as by force or *coups d'état* should not be recognized by other states.²² Democratic legitimacy, however, conditions the recognition of governments on democratic processes such as election and observation of human rights norms.²³ Because political considerations heavily dictate the decision to recognize a state, states—or even different administrations within a state—have not consistently applied these recognition theories..²⁴

While states have no obligation under international law to recognize a *de facto* government, in a couple of instances, there might be an obligation for states to avoid recognizing a new government. In the first instance, “[t]he duty not to recognize as lawful a situation created by a serious breach of an obligation arising under a norm of *jus cogens* is . . . laid down in article 41(2) of the International Law Commission’s Articles on Responsibility of States of Internationally Wrongful Acts (2001).”²⁵ Accordingly, if a new entity is in serious breach of a peremptory norm of general international law, such as imposing racial apartheid, states are obligated to not recognize that entity as a state or government. In the second instance, a treaty or a UNSC’s binding resolution may create an obligation to not recognize a

¹⁸ See SHAW, *supra* note 4, at 388.

¹⁹ See e.g., Brunson MacChesney, *Recognition of States and Governments in International Law Studies*, 62 INT’L L. STUD. 693 (1980); Liselotte Kasse B’nicco, *Recognition of Governments in International Law: A Case Study of the Venezuelan Presidential Crisis* 8 (2021) (Masters dissertation), https://libstore.ugent.be/fulltxt/RUG01/003/007/761/RUG01-003007761_2021_0001_AC.pdf.

²⁰ See SHAW, *supra* note 4, at 388.

²¹ See B’nicco, *supra* note 19, at 9.

²² See *id.*

²³ See *id.*

²⁴ Mundkur, *supra* note 15, at 79.

²⁵ *Recognition of States and Governments in International Law*, KARABAKH, <https://karabakh.org/articles/recognition-of-states-and-governments-in-international-law/> (last visited Mar. 25, 2023).

government.²⁶ Thus, the UNSC may require states to avoid recognizing a new *de facto* government.

Recognition of government may take different forms based on the circumstances in a case. Notably, recognition of government can be *de facto* or *de jure*. According to one definition, “[a] *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time, it may be deprived of them.”²⁷ In contrast, *de facto* recognition refers to “a declaration that the body claiming to be the government actually wields effective authority without, however, satisfying other conditions of a full *de jure* recognition.”²⁸

In addition, recognition of government can be explicit or implied. When the recognizing state clearly declares and communicates its decision of recognition officially by issuing a statement or establishing diplomatic channels, the recognition is said to be “explicit.”²⁹ However, when the recognizing state takes some actions such as establishing a diplomatic or consular relationship, but does not clearly declare its intent to officially recognize the other state, the recognition is said to be “implied.”³⁰ That said, a recognizing state avoids implicitly recognizing another state if it explicitly declares that none of its actions should be understood as an act of recognition.³¹ Many Arab countries have taken this approach with Israel.³² Beyond that, establishing and maintaining an informal relationship with a new *de facto* authority, without officially recognizing that authority, is considered completely normal and even sometimes necessary³³ such as the informal relationship many states have established with Taiwan³⁴ or the current engagement of states with the Taliban to address humanitarian crisis in Afghanistan.

II. THE CURRENT POSITION OF STATES AND INTERNATIONAL ORGANIZATIONS TOWARD THE TALIBAN

Since the Taliban’s return to power in August 2021, the world has taken a rather unified approach toward the new regime, refraining from recognizing it, on a *de jure* basis, as the legitimate government of Afghanistan. Even Pakistan, the Taliban’s main supporter and closest ally, has explicitly and repeatedly refused to recognize

²⁶ See *id.*

²⁷ Eugene F. Kobey, *International Law - Recognition and Non-Recognition of Foreign Governments*, 34 MARQ. L. REV. 282, 282 (1951).

²⁸ *Id.*

²⁹ B’nicco, *supra* note 19, at 15.

³⁰ *Id.*

³¹ See SHAW, *supra* note 4, at 394.

³² *Id.*

³³ See generally MacChesney, *supra* note 19, at 695.

³⁴ Sigrid Winkler, *Biding Time: The Challenge of Taiwan’s International Status*, BROOKINGS (2011), <https://www.brookings.edu/research/biding-time-the-challenge-of-taiwans-international-status/>.

the Taliban government. This section examines the recent developments and how different states and intergovernmental organizations have demonstrated divergent views and justifications for not recognizing the Taliban.

A. *States' Recognition of the Taliban*

Unlike the Taliban 1.0, whose government was officially recognized by at least three states (Pakistan, Saudi Arabia, and the United Arab Emirates),³⁵ no state has formally recognized the Taliban 2.0 regime as of May 2023. However, this does not mean that no state has informal relationship or any sort of engagement with the Taliban. In fact, the opening of the Taliban's first office in a foreign country, Qatar, in 2013 was a major development in the Taliban's international relations and political engagement after its fall in 2001. As such, the Taliban was allowed to send its representatives to conferences to discuss Afghanistan's issues. Many countries, including the United States, continued to engage with the Taliban for the purpose of peace talks in the years leading up to the fall of the republic government. The Doha Agreement between the United States and the Taliban was a major result of such engagements. Since 2021, many countries have stayed engaged with the Taliban while explicitly refusing to recognize their government.³⁶ Several countries have indicated that the matter of recognition should be decided in a concerted manner with the rest of the world.³⁷

A few countries such as Pakistan, Iran, Uzbekistan, Turkmenistan, Russia, Turkey, and China have established some level of a relationship with the Taliban from the beginning of the Taliban return to power.³⁸ These countries were quick to reopen their embassies in Kabul, albeit with very limited staff and activities.³⁹ And while Pakistan was the first country to hand over Afghanistan's embassy and

³⁵ *Recognition and the Taliban: Session 15 of the Congressional Study Group*, BROOKINGS (2022), <https://www.brookings.edu/research/recognition-and-the-taliban-2/#:~:text=Only%20three%20countries%E2%80%9494Pakistan%2C%20Saudi,the%20hands%20of%20Rabbani%20s%20supporters.>

³⁶ See e.g., Kate Bateman, *A Year After the Taliban Takeover: What's Next for the U.S. in Afghanistan?*, USIP (2022), <https://www.usip.org/publications/2022/08/year-after-taliban-takeover-whats-next-us-afghanistan>.

³⁷ See e.g., Kamran Yousaf, *Pakistan Rules Out Solo Flight on Taliban Recognition*, THE EXPRESS TRIBUNE (2022), <https://tribune.com.pk/story/2367408/pakistan-rules-out-solo-flight-on-taliban-recognition>.

³⁸ See e.g., Sarah Zaman, *How Should Countries Engage with the Afghan Taliban*, VOA (2022), <https://www.voanews.com/a/afghan-taliban-maintain-hardline-policies-despite-longing-for-international-recognition-/6870901.html>.

³⁹ The only neighboring country that has resisted establishing any form of relationship with the Taliban is Tajikistan, which has allegedly hosted many leaders from the Taliban's opposition and the National Resistance Front of Afghanistan. That said, in March of 2023, the Taliban claimed that Tajikistan has allowed a delegation of Taliban-controlled Ministry of Foreign Affairs to visit an Afghan consulate in Tajikistan after the consulate was damaged by a recent earthquake. However, this visit was not officially confirmed by Tajikistani officials and the current Afghan ambassador in Dushanbe disputed the claim. See Banafsha Binesh, *MOFA Said Delegates Visited Afghan Consulate in Tajikistan*, TOLONews (2023), <https://tolonews.com/afghanistan-182700>.

consulates in Pakistan to the Taliban's representatives, several other countries—Uzbekistan, China, and Russia—slowly followed suit. Iran,⁴⁰ Turkey,⁴¹ and the United Arab Emirates⁴² handed over Afghanistan's embassies and consulates to Taliban-appointed officials in February and May 2023. As of March 24, 2023, Taliban spokesperson Zabiullah Mujahid claimed that its diplomats were operating in 14 countries.⁴³ But even though these 14 countries may have established a relationship with the Taliban, they have repeatedly disclaimed that their relationship should not be construed as recognition and announced that they have not recognized the Taliban regime. For instance, after Iran handed over its Afghan embassy to the Taliban's appointees, the country's Foreign Affairs Minister reiterated that they had not recognized the Taliban government but had only established a relationship with regard to issues of trade and common challenges facing the two countries.⁴⁴

In the countries with whom Afghanistan had diplomatic or consular relationships, including Canada, Japan, and all European countries, but excluding the United States, the Afghan embassies are still run by diplomats from the Republic government. On the other side, a few of these countries have had some level of engagement with the Taliban and occasionally sent their representatives to Afghanistan. The United States, however, closed the Afghan embassy and consulates in the United States in March 2022, and the US Department of States took control of those facilities.⁴⁵ Beyond Qatar and United Arab Emirates, Arab and many other Islamic countries have taken a cautious approach toward recognizing the Taliban. Notably, Saudi Arabia, an old ally of the Taliban, has been reluctant to recognize the regime even though Taliban officials have visited the country to perform the Islamic pilgrimage.

⁴⁰ See Ayaz Gul, *Iran Hands Over Afghan Embassy in Tehran to Taliban*, VOA (2023), <https://www.voanews.com/a/iran-hands-over-afghan-embassy-in-tehran-to-taliban-/6980784.html>.

⁴¹ See *Taliban Announce Taking Over of Afghan Consulate General in Istanbul*, AFGHANISTAN INTERNATIONAL (2023), <https://www.afintl.com/en/202302275594>.

⁴² See *Taliban Opens Consulate in UAE*, THE BALOCHISTAN POST (2023), <https://thebalochistanpost.net/2023/03/taliban-opens-consulate-in-uae/>.

⁴³ Banafsha Binesh, *Islamic Emirate Has Diplomates in 14 World Countries: Mujahid*, TOLONEWS (2023), <https://tolonews.com/afghanistan-182651>.

⁴⁴ *Wazir Khareja Iran: Hanoz Hukumat Taliban Ra Ba Rasmeyat Nameshnasaim [Iran's Foreign Minister: We Have Not Recognized the Taliban Government Yet]*, TOLQUN NEWS (2023), <https://tolqunnews.com/fa/2023/01/14/%D9%88%D8%B2%DB%8C%D8%B1-%D8%AE%D8%A7%D8%B1%D8%AC%D9%87-%D8%A7%DB%8C%D8%B1%D8%A7%D9%86-%D9%87%D9%86%D9%88%D8%B2-%D8%AD%DA%A9%D9%88%D9%85%D8%AA-%D8%B7%D8%A7%D9%84%D8%A8%D8%A7%D9%86-%D8%B1%D8%A7-%D8%A8/>.

⁴⁵ Matthew Lee, *US Takes Control of Afghan Embassy, Consulates in NY, CA*, ASSOCIATED PRESS (2022), <https://apnews.com/article/afghanistan-government-and-politics-united-states-taliban-d27a667b6b8c763eb33cb3a133f5ec45>.

B. *The Taliban's Absence from International Organizations and Summits*

International organizations' recognition of governments may have different legal consequences than recognition by individual states.⁴⁶ For instance, a recognizing state is not required to engage, establish, or expand its relationship with a newly recognized government.⁴⁷ In contrast, an international organization cannot deny the new government its rights, membership, and other responsibilities within the organization.⁴⁸ This might also explain why many international organizations have been even more reluctant to recognize the Taliban as compared to individual states. Similar to states, no international organization has allowed the Taliban to officially represent the state of Afghanistan..

The UN twice rejected the Taliban's request to occupy Afghanistan's seat in the UN.⁴⁹ The second time, in December 2022, the UN General Assembly unanimously approved a deferral recommendation by the UN Credentials Committee, indicating that the seat should stay with the previous Afghan government, currently represented by a diplomat appointed by President Ghani.⁵⁰ Similarly, the Permanent Mission of Afghanistan to the UN Office in Geneva is still led by officials appointed by the Republic government. All other UN-affiliated agencies in which Afghanistan is represented have similarly retained the representatives from the republic government, when available.

Another important international institution, the International Criminal Court (ICC), has not established any direct communication with the Taliban yet. The ICC recently authorized its Prosecution Office to resume its investigation into alleged atrocities committed in Afghanistan since 2003.⁵¹ Even though any investigation necessitates the Taliban's cooperation as *de facto* authorities, the ICC has refrained from establishing any sort of direct relationship or contact with the Taliban. Instead, the ICC ostensibly communicated its letters to the Taliban through the UN and the UN Assistance Mission in Afghanistan (UNAMA).⁵² The ICC has avoided communicating directly with the Taliban due to the fear that such communications could be a step toward recognizing the Taliban as the legitimate government of

⁴⁶ See Mundkur, *supra* note 15, at 81–82.

⁴⁷ See *id.*

⁴⁸ See *id.* at 82.

⁴⁹ See *Taliban's Attempt to Grab Afghanistan's Seat at UN Fails*, AFGHANISTAN INTERNATIONAL (2022), <https://www.afintl.com/en/202212155105>.

⁵⁰ Edith M. Lederer, *UN Rejects Seats for Myanmar Junta, Taliban, Libya's East*, ASSOCIATED PRESS (2022), <https://apnews.com/article/afghanistan-libya-myanmar-united-nations-aung-san-su-kyi-6cc1aaa418262cff1bcb0959ccdea2c>.

⁵¹ See *Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation*, INT'L CRIM. CT., ICC-02/17 (2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06500.pdf.

⁵² See e.g., *Order Seeking the Assistance of the United Nations and the United Nations Assistance Mission in Afghanistan*, INT'L CRIM. CT., ICC-02/17 (2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_02774.pdf.

Afghanistan.⁵³ Furthermore, because the Taliban is one of the main targets of the ICC's investigation, the ICC is rightfully skeptical that the Taliban, as *de facto* authorities, would be willing or able to provide any assistance to the ICC investigators, regardless of whether the Taliban is officially recognized.⁵⁴

Regional organizations to which Afghanistan is a party or member have taken a similar stance toward the Taliban. For instance, although it was Afghanistan's turn to propose one of its diplomats a secretary general for the South Asian Association for Regional Cooperation (SAARC), the organization replaced Afghanistan with Bangladesh to do the nomination for the organization for three years.⁵⁵ SAARC's removed Afghanistan from this position because the Taliban, as a non-recognized government, could not represent Afghanistan in the organization.⁵⁶

Outside formal recognition, the regional practice on allowing Taliban to attend regional forums have been mixed. Russia invited the Taliban to attend a conference held in Moscow about Afghanistan in October 2021.⁵⁷ However, in February 2023, Russia refused to include or invite the Taliban to conferences and summits held by Russia to discuss Afghanistan with Afghanistan's regional allies and major player such as Iran, China, India, Uzbekistan, and Tajikistan.⁵⁸ Taliban were not invited to the Shanghai Cooperation Organization's Meeting held in Uzbekistan in September 2022.⁵⁹ However, in April of this year (2023), Taliban acting Minister of Foreign Affairs attended a regional meeting on Afghanistan held in Samarkand City of Uzbekistan.⁶⁰ The conference included Russia and six neighbors of Afghanistan: China, Pakistan, Iran, Tajikistan, Uzbekistan, and Turkmenistan.⁶¹ The conference came at a sensitive time as United Nations is reviewing its presence in the country considering Taliban's recent edicts banning Afghan women from working for United Nations and other humanitarian agencies in Afghanistan.⁶² In May of this year (2023), a high-ranking Taliban delegation also attended a trilateral meeting with

⁵³ See *id.*

⁵⁴ See *Prosecution's Communication of Materials and Further Observations Pursuant to Article 18(2) and Rule 54(1)*, INT'L CRIM. CT., at 9–14, ICC-02/17 (2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06044.pdf.

⁵⁵ Anil Giri, *Banladesh Will Get to Pick New SAARC Secretary General*, THE KATHMANDU POST (2023), <https://kathmandupost.com/national/2023/02/19/bangladesh-will-get-to-pick-new-saarc-secretary-general>.

⁵⁶ See *id.*

⁵⁷ *Moscow Invites Taliban to Afghanistan Talks on Oct. 20*, REUTERS (2021), <https://www.reuters.com/world/asia-pacific/moscow-host-afghanistan-talks-oct-20-2021-10-07/>.

⁵⁸ See e.g., Fatema Adeeb, *Regional Security Officials Meet in Moscow, Discuss Afghanistan*, TOLONEWS (2023), <https://tolonews.com/afghanistan-181962>.

⁵⁹ Nayanima Basu, *Issue of Legitimacy, International Recognition – Why Taliban Was Not Invited to SCO Summit*, THE PRINT (Sept. 15, 2022), <https://theprint.in/diplomacy/issue-of-legitimacy-international-recognition-why-taliban-was-not-invited-to-sco-summit/1129041/>.

⁶⁰ Ayaz Gul, *Taliban Foreign Minister Joins Regional Huddle on Afghanistan*, VOA (2023), <https://www.voanews.com/a/taliban-foreign-minister-joins-regional-huddle-on-afghanistan-/7048604.html>.

⁶¹ *Id.*

⁶² *Id.*

Pakistan and China hosted by Pakistan.⁶³ It should be noted that even when the Taliban are invited to these meetings, the other countries reiterate the conditions that Taliban need to meet before they receive formal recognition focusing on the need for forming an inclusive government, moderating their policies on women, and upholding their counterterrorism commitments.⁶⁴

III. LEGAL AND PRACTICAL HURDLES IN THE WAY OF RECOGNIZING THE TALIBAN

States have provided several justifications for not recognizing the Taliban regime, at least until now. There are many factors that can be drawn from the statements of states as to why the Taliban are not yet eligible to represent the government of Afghanistan. Currently, illegitimacy, violation of human rights, gender persecution or arguably gender apartheid, ties with international terrorism, and lack of an inclusive government have been the main factors that influence states' decision to not recognize the Taliban. As previously discussed, these factors normally demonstrate state practice which may constitute the criteria for recognition of government in the context of Afghanistan.

A. *Illegitimacy*

The fact that the Taliban took power extra-constitutionally and by force is a primary factor justifying states' decision not to recognize the Taliban as the official government. Prior to the takeover and during peace negotiations, the UN and many countries including the United States warned the Taliban not to take power by force, or else the Taliban would not be recognized as the legitimate government of Afghanistan.⁶⁵ But the Taliban ignored those warnings, and those countries and the UN kept their word and refused to recognize the Taliban government. In the 2020 Doha deal, the Taliban promised to commit to an intra-Afghan negotiation for enduring peace. However, the Taliban immediately broke this promise by intensifying military operations against the republic Afghan government and attacking cities in 2020 and 2021.⁶⁶ The Taliban could not uphold its minimal Doha

⁶³ Abbid Hussain, *Pakistan set to host trilateral dialogue with China, Afghanistan*, AL JAZEERA (2023), <https://www.aljazeera.com/news/2023/5/6/pakistan-set-to-host-trilateral-dialogue-with-china-afghanistan>.

⁶⁴ See Ministry of Foreign Affairs of the People's Republic of China, *Samarkand Declaration of the Fourth Meeting of Foreign Ministers of Afghanistan's Neighboring States* (2023), https://www.fmprc.gov.cn/eng/wjb_663304/wjbz_663308/2461_663310/202304/t20230414_11059110.html.

⁶⁵ See e.g., S.C. Pres. Statement 2021/14596 (Aug. 6, 2021).

⁶⁶ See e.g., Roshan Noorzai & Bezhan Hamdard, *Afghans 'Disappointed' One Year into US-Taliban Deal*, VOA (2021), https://www.voanews.com/a/extremism-watch_afghans-disappointed-one-year-us-taliban-deal/6202621.html.

deal promise to commit to peace negotiations and ultimately returned to power by force.⁶⁷

In addition to the Taliban's seizure of power by force, the Taliban are also generally considered illegitimate because they do not believe in any mechanisms that would allow for the Afghan public to express their preferences about the makeup, form, and the policies of Taliban's appointed government. Because the Taliban does not represent the will of Afghans', in violation of the Afghan's fundamental rights to self-determination under international law, many countries consider the regime illegitimate.

B. *Serious Human Rights Violations*

The Taliban are notorious for human rights violations. In addition to imposing what many have called "gender apartheid" in the country, the Taliban has suppressed dissent and the media; persecuted minorities' arbitrarily detained, displaced, and tortured Afghans; brutally suppressed peaceful demonstrations, carried out summary killings—the list goes on and on.⁶⁸ Numerous countries have refused to recognize the Taliban unless and until the Taliban complies with international human rights norms and standards.⁶⁹

C. *Gender Persecution, or Gender Apartheid?*

Perhaps the most serious violation of human rights committed by the Taliban is gender persecution and the implementation of extremely draconian and misogynistic policies and practices toward women. This has certainly been one of the main factors influencing many countries' decision not to recognize the Taliban regime.⁷⁰ The Taliban has slowly but surely implemented misogynistic policies and erased women from the public sphere despite earlier assurances to the international community that women's rights would be respected. The Taliban have functionally prohibited women from working and completely deprived women and girls of their right to

⁶⁷ See *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America*, US DEPARTMENT OF STATE (2020), <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

⁶⁸ See e.g., *Afghanistan 2022*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/afghanistan/report-afghanistan/> (last visited Mar. 29, 2023).

⁶⁹ See e.g., Ryan Heath, *Western Nations Coordinating to Block Taliban Recognition*, POLITICO (2021), <https://www.politico.com/news/2021/08/20/us-allies-taliban-un-linda-thomas-greenfield-506380>; Kate Bateman et al., *Taliban Seek Recognition, But Offer Few Concessions to International Concerns*, USIP (2021), <https://www.usip.org/publications/2021/09/taliban-seek-recognition-offer-few-concessions-international-concerns>.

⁷⁰ See e.g., *West: Ta Zamane Ke Taliban Az Sarkub Zanan Dast Nakashand, Mashruait Paida Namekonand* [West: The Will Not Be Recognized Unless They Cease to Suppress Afghan Women and Girls], 8AM (2023), <https://8am.media/west-until-the-taliban-stop-oppressing-afghan-women-and-girls-they-will-not-gain-legitimacy/>.

work and education.⁷¹ The Taliban's outrageous and systemic discrimination against women (both during their first rule and today) is unprecedented by modern standards.

The Taliban's conduct may amount to a crime against humanity and the crime of gender persecution under the article 7(1)(h) of the ICC's Rome Statute,⁷² thus subjecting the regime to ICC jurisdiction. The ICC's Policy on the Crime of Gender Persecution defines persecution and explains how it occurs with gender attribution.⁷³ According to the Policy, "'persecution' refers to the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a group or collectivity. Gender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender."⁷⁴ In fact, the Taliban's systematic discrimination against women has reached a level of severity that many international law scholars,⁷⁵ human rights and women's rights activists,⁷⁶ and even the UN⁷⁷ have called the situation "gender apartheid," analogous to the racial apartheid that existed in South Africa. For example, Richard Bennett, the UN Special Rapporteur on the situation of human rights in Afghanistan, asserted in his report to the Human Rights Council that "The cumulative effect of the restrictions on women and girls [in Afghanistan] had a devastating long-term impact on the whole population and was tantamount to *gender apartheid*."⁷⁸ The UN Women Executive Director, Sima Bahous, also characterized women's situation in Afghanistan as gender apartheid, and⁷⁹ the UN Secretary-General António Guterres has used a similar phrase: "gender-based apartheid."⁸⁰ In a statement issued by the UNAMA after Taliban extended their ban on female

⁷¹ See e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948); Convention Against Discrimination in Education, Dec. 14, 1960 (entered into force May 22, 1962).

⁷² See The Rome Statute of the International Criminal Court art. 7 (1) (h), July 17, 1998, 2187 U.N.T.S. 90.

⁷³ *Policy on the Crime of Gender Persecution*, INT'L CRIM. CT. 6 (2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

⁷⁴ *Id.*

⁷⁵ See e.g., Karima Bennouna, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUM. HUM. RTS. L. REV. 1, 1–88 (2022).

⁷⁶ See e.g., Patrick Wintour, *Campaign Calls for Gender Apartheid to Be Crime under International Law*, THE GUARDIAN (2023), <https://www.theguardian.com/society/2023/mar/08/campaign-calls-for-gender-apartheid-to-be-under-international-law>.

⁷⁷ See *Human Rights Council Hears That the Human Rights Situation in Eritrea Remains Dire and Shows No Sign of Improvement, and that the Situation of Human Rights in Afghanistan Continues to Deteriorate*, HUMAN RIGHTS COUNCIL (Mar. 6, 2023), <https://www.ohchr.org/en/news/2023/03/human-rights-council-hears-human-rights-situation-eritrea-remains-dire-and-shows-no>.

⁷⁸ *Id.* (emphasis added)

⁷⁹ See Sima Bahous, *Speech: We Need a Radical Change of Direction*, UN WOMEN (2023), <https://www.unwomen.org/en/news-stories/speech/2023/03/speech-we-need-a-radical-change-of-direction>.

⁸⁰ *UN's top woman envoy in Afghanistan for talks on Taliban crackdown*, FRANCE24 (2023), <https://www.france24.com/en/asia-pacific/20230117-un-s-top-woman-envoy-in-afghanistan-for-talks-on-taliban-crackdown>.

workers to the United Nations agency, the UN Secretary General Envoy of Afghanistan is quoted to say “In the history of the United Nations, no other regime has ever tried to ban women from working for the Organization just because they are women. This decision represents an assault against women, the fundamental principles of the UN, and on international law”⁸¹ This grim assessment and wording by UN officials is significant as it may set the groundwork for formally criminalizing gender apartheid in international law, thereby further distancing the Taliban regime from international recognition.

D. *Ties with International Terrorism*

From the Taliban’s emergence in 1990s until today, its alliance and partnership with international terrorism has significantly impeded its recognition by other states.⁸² The Taliban harbored Al-Qaeda and other international terrorists in Afghanistan during its first rule,⁸³ and it continues to do so today.⁸⁴ For example, in May 2022, a U.S. drone attack in Kabul killed the leader of Al-Qaeda, Ayman Al-Zawahiri, revealing the Taliban’s continued relationship with international terrorists.⁸⁵ Some reports indicate that the country harbors at least twenty (20) active terrorist groups.⁸⁶

The UN and many individual states have sanctioned the Taliban because of its connections to international terrorism. For example, the UN Security Council (UNSC) Resolution 1267 (1999) enacted expansive and strict sanctions against individuals, entities, groups, and undertakings associated with the Taliban. As the basis for the sanctions, the UNSC referenced the Taliban’s human rights record, its treatment of religious and ethnic minorities, its failure to protect the UN personnel, and its attack against the Iranian Generate Consulate in Mazar-e-Sharif in addition to its continued support for Al-Qaeda. Resolution 1267 stipulates that the sanctions are to remain in place until such a time that the UN Secretary-General reports that the Taliban have fully complied with its international obligations. In the following year, in response to further Al-Qaeda attacks, the UNSC Resolution 1333 (2000)

⁸¹ UNAMA, *UN Protests Order from Taliban De Facto Authorities Prohibiting Afghan Women From Working With The United Nations In Afghanistan* (Apr 5, 2023), <https://unama.unmissions.org/un-protests-order-taliban-de-facto-authorities-prohibiting-afghan-women-working-united-nations>.

⁸² See generally Barnett Rubin, *Leveraging the Taliban’s Quest for International Recognition*, USIP 2–6 (2021), https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Talibans-Quest-for-International-Recognition.pdf.

⁸³ See *id.*

⁸⁴ See Akmal Dawi, *Taliban Counterterrorism Commitments Face Growing Doubts*, VOA (2023), <https://www.voanews.com/a/taliban-counterterrorism-commitments-face-growing-doubts-7004663.html>.

⁸⁵ Robert Plummer & Matt Murphy, *Ayman Al-Zawahiri: Al-Qaeda Leader Killed in US Drone Strike*, BBC (2022), <https://www.bbc.com/news/world-asia-62387167>.

⁸⁶ See Dawi, *supra* note 84.

reaffirmed and expanded the sanctions against the Taliban, this time also referencing the Taliban's connection with the narcotic industry.⁸⁷

When the United States decided to discuss peace with the Taliban, the sanction regimes needed to change. In 2011, the UNSC Resolution 1988 (2011) decoupled the sanctions against Al-Qaeda from sanctions against the Taliban, enabling exemptions and the delisting of certain Taliban members.⁸⁸ Through this, the UNSC intended to advance the reconciliation process with the Taliban. However, the exception from the sanctions and travel ban for thirteen Taliban leaders expired in August 2022 after the UNSC members could not agree to extend the exemption.⁸⁹

As reconciliation efforts with the Taliban progressed, UNSC Resolution 2255 (2015) provided time-bound exemptions to the sanctions.⁹⁰ This resolution enabled the Taliban's Doha office to negotiate an agreement with the United States for the withdrawal of the U.S. troops in Afghanistan in exchange for counter-terrorism commitments. Citing the Doha agreement, the Taliban maintains that the United States is obligated to lift its unilateral sanctions and support the rescission of UNSC sanctions.⁹¹ However, the United States argues that the Taliban's continued ties to Al-Qaeda demonstrate the regime's failure to honor its commitments under the agreement.⁹²

Following this agreement, before the completion of troops withdrawal, in the fall of 2021, the Taliban retook power in Afghanistan putting all the institutions of the Afghan state under their control which meant that the sanctions acted as barriers against vital humanitarian and aid assistance to a country that was chronically depended on international assistance for survival. To deal with the unwanted consequences of the UNSC sanctions, the UNSC Resolution 2615 (2021) decided "that humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation of paragraph 1 (a) of resolution 2255 (2015), and that the processing and payment of funds, other financial assets or economic resources,

⁸⁷ S.C. Res. 1333 (Dec. 19, 2000).

⁸⁸ S.C. Res. 1988 (June 17, 2011).

⁸⁹ "China and Russia have called for an extension, while the United States and Western nations have sought a reduced list of Taliban officials allowed to travel to protest against the Taliban's rollback of women's rights and failure to form an inclusive government as it promised." *UN Fails to Reach Agreement to Extend Taliban Travel Ban Waiver*, AL JAZEERA (Aug. 20, 2022), <https://www.aljazeera.com/news/2022/8/20/divided-un-council-fails-to-approve-more-top-taliban-travel>.

⁹⁰ S.C. Res. 2255 (Dec. 21, 2015).

⁹¹ Mawlawi Amir Khan Muttaqi, Taliban's Acting Minister of Foreign Affairs, recently stressed this point in an Op-Ed published by Al Jazeera. Mawlawi Amir Khan Muttaqi *Afghanistan is ready to work with the US, but sanctions must go*, AL JAZEERA (Mar. 23, 2023), <https://www.aljazeera.com/opinions/2023/3/23/afghanistan-is-ready-to-work-with-the-us-but-sanctions-must-go>.

⁹² The fact that Zawahiri, Al-Qaeda's leader, was killed in the Afghan capital under supposed protection of top Taliban leadership was cited as a gross violation by Taliban, for example. *Blinken says Taliban 'grossly' violated Doha agreement by sheltering al Qaeda's Zawahiri*, REUTERS (Aug. 1, 2022), <https://www.reuters.com/world/asia-pacific/blinken-says-taliban-grossly-violated-doha-agreement-by-sheltering-al-qaedas-2022-08-02/>.

and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted.”⁹³ However, the Resolution 2615 also “strongly encourages providers relying on this paragraph to use reasonable efforts to minimize the accrual of any benefits, whether as a result of direct provision or diversion, to individuals or entities designated on the 1988 Sanctions List, and further decides to review the implementation of this provision after one year”.⁹⁴

E. Lack of An Inclusive Government

Finally, many states, including the United State, Pakistan, Iran, Tajikistan, Russia, and many European countries, have continually cautioned the Taliban that it would not be recognized as the legitimate government of Afghanistan unless and until it establishes an inclusive government that reflects the diversity of Afghanistan’s population.⁹⁵ In particular, UN and EU officials and many states including United States, Russia, Iran, Tajikistan have repeatedly asked the Taliban to be more inclusive in its government.⁹⁶ Afghanistan is a diverse country and home to at least 14 ethnic groups, different religious sects, speakers of various languages, and wide variety of social and political groups.⁹⁷ Afghan society is deeply divided along ethnic fault lines,⁹⁸ a peaceful and prosperous Afghanistan is unimaginable without an inclusive and representative government. Yet nearly 95% of the Taliban members come from one ethnic group, Pashtuns, according to one reliable estimation⁹⁹ However, the Taliban cannot represent all Pashtuns either because many Pashtuns do not adhere to the Taliban’s strict ideological interpretation of Islam. Additionally, Taliban maintain women cannot hold high-ranking government position as a matter

⁹³ S.C. Res. 2615 (Dec. 22, 2021).

⁹⁴ *Id.*

⁹⁵ See e.g., Ryan Heath, *Western Nations Coordinating to Block Taliban Recognition*, POLITICO (2021), <https://www.politico.com/news/2021/08/20/us-allies-taliban-un-linda-thomas-greenfield-506380>; Kate Bateman et al., *Taliban Seek Recognition, But Offer Few Concessions to International Concerns*, USIP (2021), <https://www.usip.org/publications/2021/09/taliban-seek-recognition-offer-few-concessions-international-concerns>; and Shamil Shams, *Munich Security Conference Talks Afghanistan*, DW (2023), <https://www.dw.com/en/munich-security-conference-discusses-afghanistan-dilemma/a-64753264>.

⁹⁶ See e.g., *EU Slams Taliban Over Failure to Create ‘Inclusive Political System’ on Eve of Takeover Anniversary*, RFE/RL (2022), <https://www.rferl.org/a/afghanistan-eu-taliban-failure-inclusive-politics/31987287.html>; *The Lates: UN Says Taliban Must Form Inclusive Afghan Govt*, ASSOCIATED PRESS (2021), <https://apnews.com/article/middle-east-iran-pakistan-afghanistan-taliban-d6f8d71f48cc33cc61f4cd38226cb14f>.

⁹⁷ Sean Carberry, *Afghans Confront Sensitive Issue of Ethnicity*, NPR (2013), <https://www.npr.org/2013/05/08/179079930/afghans-confront-sensitive-issue-of-ethnicity>.

⁹⁸ See *Afghanistan: A Deeply Divided Country*, CONFLICT OBSERVATORY PROJECT (2013), <http://cscubb.ro/cop/afghanistan-community-profile/#.ZFF0BuzMK3I>.

⁹⁹ Antonio Giustozzi, *The Taliban Beyond the Pashtuns*, CIGI 3 (2010), https://www.files.ethz.ch/isn/121069/Afghanistan_Paper_5.pdf.

of formal policy.¹⁰⁰ Accordingly, it is unsurprising that the international community has projected a unified voice requiring the Taliban to form an inclusive government.

IV. DOES STATES PRACTICE TOWARD THE TALIBAN INDICATE EMERGING CRITERIA FOR RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW?

Because the Taliban does not claim the creation of a new state through annexation or secession, its rise to power does not create a question of state recognition. The Taliban takeover demonstrates a change in government, not state. As such, Afghanistan as a state never lost its international legal personality. Yet, the Taliban, citing the Montevideo Convention,¹⁰¹ conflates Afghanistan's statehood and governance, arguing that recognizing Afghanistan's statehood necessitates recognizing the legitimacy of the Taliban's regime's governance.¹⁰² But the Taliban's error of legal reasoning raises an important question: who may represent Afghanistan under international law? Even though the question of which entity possesses government status can be profoundly consequential, international law on this question remains underdeveloped. The return of the Taliban to power in Afghanistan, however, is far from mundane and routine. It presents a difficult case where a constitutionally elected government was overthrown by a group sanctioned by the UNSC and others for acts of international terrorism and now may carry policies so discriminatory that it may qualify as "gender apartheid" in the recognized state in which it has assumed complete control. How the international community reckons with the Taliban's assumption of power can direct the development of international law on the qualifications of a government. That is why it is important to analyze whether the current standing of states toward the Taliban regime could be considered a formal recognition of the regime and whether any emerging criteria for recognition of government in international law can be identified. Based on the facts and international law of recognition presented in previous sections, we draw several conclusions.

First, despite the Taliban's effective control, its government has not been officially recognized by any state. As discussed above, recognition of government is very contextual and dependent on the political concerns of every relevant individual state. While many countries have engaged with and established some level of a relationship with the Taliban, the barriers identified above have prevented

¹⁰⁰ Abdul Hakim Haqqani, *Islamic Emirate and its Order [Al-Emirate Al-Islami'a wa Nezmaha]* (Office of Darul Ulum Shari'a: April 2022) pps. 148 and 151.

¹⁰¹ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933.

¹⁰² Interview of Taliban's Ministry of Foreign Affairs Spokesman with the DWnews, Taliban spokesperson defends Afghanistan government's actions, <https://www.youtube.com/watch?v=uHeXCMakrB4&t=9s> (2022).

the world from recognizing the Taliban as a legitimate government. It can be argued that the current Taliban relationship with these states cannot be characterized as even a tacit recognition because every single country has unequivocally expressed that its relationship with the regime should not be understood as official recognition.

One fact, however, cannot be disputed: the Taliban regime is the current *de facto* authority in the country. States that have established relationship with the Taliban have done so for practical reasons, such as continuing trade, dealing with issues related to Afghan refugees, and addressing the intensifying humanitarian crisis. When Iran allowed the handover of the Afghan embassy and consulates to the Taliban, the Taliban reportedly received 268 Afghan prisoners who committed various crimes in Iran.¹⁰³ The UN and western countries' engagement with the Taliban has been largely reactionary, focusing on controlling the situation, preventing another wave of refugee migration to Europe, or monitoring terrorist groups.

Second, as pointed out earlier, the Taliban regime (both its first rule and today) demonstrates a unique situation for other states which may require a unique response with regard to recognition. This might be the reason why the universal and united standing of the world toward the Taliban regime may suggest new criteria for recognition of government. Among the five criteria discussed above, two—illegitimacy and violation of human rights norms--have precedent in international law.¹⁰⁴ However, gender persecution/"gender apartheid", ties with international terrorism, and lack of an inclusive government could be emerging qualifications for recognition of government in international law. Many states have conditioned their recognition of the Taliban government upon the regime's ability to improve those areas. Given that no state has recognized the Taliban after over one and a half years since it returned to power,¹⁰⁵ this failure to recognize suggests a remarkable development in state practice concerning recognition of governments.

A. Gender as an Emerging Recognition Criterion

Out of these three emerging qualifications, gender apartheid poses the strongest argument against international recognition of the Taliban regime. If principles espoused by an entity violate a *jus cogens* norm of international law (such as the apartheid regime in South Africa did, presuming retroactive application), the claim that international law would disqualify that entity from being recognized as

¹⁰³ *Taliban Confirms Transfer of 268 Afghan Prisoners from Iran*, AFGHANISTAN INTERNATIONAL (Mar. 3, 2023), <https://www.afintl.com/en/202303067708>.

¹⁰⁴ See B'nicco, *supra* note 19, at 10–11.

¹⁰⁵ As of June 2023.

government becomes more compelling.¹⁰⁶ Taking the apartheid regime as the paradigmatic case on this matter, this Article asserts that the Taliban's gender policies might be the most probable basis for making such an argument.

The similarities between the South African apartheid government's treatment of race and the Taliban regime's treatment of gender are striking. The Taliban's gender policies are formally adopted as a matter of law by the Taliban, making them different from other examples of human rights violations by the Taliban, which the Taliban explain away as deviations from unwritten norms. Similarly to South Africa's *de jure* racial discrimination, the Taliban's gender policies are unparalleled in modernity.¹⁰⁷ This lends credence to the position that the Taliban's gender policies may make its regime comparable to the South African apartheid regime in its discriminatory nature and therefore unqualified to receive government status internationally. This position is assuming the existing of a *jus cogens* norm of international law that prohibits the most extreme form of gender-based discrimination.

As explained previously, many UN officials, human rights activists, and international law scholars have used the term "gender apartheid" to highlight the severity of the human rights crisis in the country.¹⁰⁸ While "gender apartheid" is not a legally defined term, but it's being applied in the case of Afghanistan to highlight the severity of gender-based discrimination that Taliban has adopted as a matter of formal government policy. Taliban has, as a matter of state policy, banned Afghan girls and women from receiving an education beyond primary school, holding most jobs including working for the United Nations or other humanitarian organizations, traveling or appearing in public without a male chaperon, and appearing in public without a face-to-toe cover.¹⁰⁹

If the Taliban maintains its extremely discriminatory policies toward women despite continued international oppositions, the UNSC may intervene with a binding resolution obligating states to not recognize the Taliban unless the group meets the conditions required by the international community. The UNSC has already called

¹⁰⁶ International Law Committee, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, at 114–115 (2001) (supports the obligation of non-recognition in the case of *jus cogens* violation using apartheid regime as the paradigmatic case).

¹⁰⁷ "There's no country in the world where women and girls have so rapidly been deprived of their fundamental human rights, purely because of gender," stated UN Special Rapporteur Richard Bennett to the UN Human Rights Council on the September 12, 2022.

¹⁰⁸ See e.g., Edith Lederer, *Former Afghan MP: Taliban is a 'gender apartheid' regime*, ASSOCIATED PRESS (Sept. 12, 2022), <https://apnews.com/article/afghanistan-race-and-ethnicity-racial-injustice-united-nations-taliban-e545022f191d5b5f00af82231915a7e5>.

¹⁰⁹ The United States Institute for Peace has catalogued the Taliban's edicts, orders, and directives infringing on the rights of Afghan men and women. The catalog reveals more than 20 edicts, order, or directives targeted against women. Belquis Ahmadi & Hodei Sultan, *Taking a Terrible Toll: The Taliban's Education Ban*, USIP (2023) <https://www.usip.org/publications/2023/04/taking-terrible-toll-talibans-education-ban>.

on the Taliban to reverse its bans on women time and time again.¹¹⁰ Similarly, the push for recognition of the systematic and large-scale discrimination against women as “gender apartheid” may gain momentum; moreover, the UN may identify prohibition of the practice as a preparatory norm of international law akin to the prohibition of racial discrimination and apartheid.

B. Inclusive Government as Emerging Recognition Criterion

In addition, establishing an inclusive government as a condition for recognition of the Taliban regime as the legitimate government of Afghanistan could be another emerging qualification for recognition of government. As several states indicated, an inclusive government should reflect the diversity of Afghan society and be representative of all ethnicities, gender identities, political parties and groups, religious sects and groups, and other social groups and minorities.¹¹¹ Every single state and international organizations such as the UN have been very vocal about this condition. Whenever there is a discussion about preconditions for the recognition of the Taliban, the topic of inclusivity is always present in the statements of states. Given that how states are united behind this condition, one can draw the conclusion that the condition could be an emerging criterion for recognition of government.

C. Counterterrorism Measures as Emerging Recognition Criterion

Another emerging criterion may be conditioning government recognition upon terminating any relationships with international terrorism and effective counterterrorism measures. Almost every country including Pakistan seems concerned about the Taliban’s ties with transnational terrorist groups.¹¹² This universal concern is evident in the statements of states demanding the Taliban to not only break their ties with terrorist groups but also to effectively counter the threat. The international community has made it clear that without meeting this condition, no international recognition is in sight. The UNSC sanctions originated from, and continue to exist due to, this concern. Being subject to the UNSC sanctions may not necessarily disqualify an entity from being considered a government under international law—that is, unless the UNSC issues a binding resolution declaring the

¹¹⁰ See e.g., *UN Security Council members urge Taliban to void bans on women*, AL JAZEERA (2023), <https://www.aljazeera.com/news/2023/1/14/un-security-council-members-urge-taliban-to-void-bans-on-women>.

¹¹¹ See e.g., *Will Not Recognise Taliban Until Group Fulfills Commitments, Says Russian FM*, AFGHANISTAN INTERNATIONAL (2023), <https://www.afintl.com/en/202304260131>.

¹¹² See e.g., *Pakistan Calls on Taliban to Act against ‘Terrorists’ Operating on Afghan Soil*, RADIO FREE EUROPE (2022), <https://www.rferl.org/a/pakistan-afghanistan-air-strikes-taliban/31807177.html>.

recognition illegal.¹¹³ However, while the UNSC sanctions remain, which in their current formulations could be indefinitely, the sanctions obligate states to limit engagements with the Taliban within the exceptions that Resolution 2615 carves out. These sanctions, coupled with states practice demanding the Taliban to end its relationship with and combat international terrorists, may point to another condition for recognition of governments under international law.

V. CLAIMS TO LEGITIMACY: WHO OUGHT TO BE THE LEGITIMATE GOVERNMENT

In the previous section, we discussed roadblocks to the international community recognizing the legitimacy of the Taliban's governance in Afghanistan and how these may represent emerging norms of government recognition. Because the regime's "gender apartheid" and ties to international terrorists appear to be formidable barriers to its recognition, the question remains: Who ought the international community to recognize as the government of Afghanistan? Two competing theories, discussed below, have emerged.

A. *The last government of the Islamic Republic Of Afghanistan*

In the absence of a legal transfer of power under the constitution of the Islamic Republic of Afghanistan (IRA) (2004-2021?), the last President¹¹⁴ and Vice President¹¹⁵ of the IRA have argued that they continue to possess the legal authority to represent the Afghan state. These leaders premise this argument on the assertion that, as a norm, international law favors a valid constitutional claim—enhanced by the democratic nature of that claim—over effective control when competing entities vie for recognition as the official government.¹¹⁶ There are many instances in which states have recognized a party with a valid constitutional claim over the party with effective control.

¹¹³ Ben Saul, "Recognition" and the Taliban's International Legal Status, INTERNATIONAL CENTER FOR COUNTER-TERRORISM (Dec. 15, 2021), <https://www.icct.nl/publication/recognition-and-talibans-international-legal-status>.

¹¹⁴ Ariana News, 'I am still president of Afghanistan', Ghani says in TV interview, YOUTUBE (Aug. 11, 2022), https://www.youtube.com/watch?v=zbKwVL_0le4.

¹¹⁵ Amrullah Saleh tweeted on 17 Aug 2021, "Clarity: As per d constitution of Afg, in absence, escape, resignation or death of the President the FVP becomes the caretaker President. I am currently inside my country & am the legitimate care taker President. Am reaching out to all leaders to secure their support & consensus." However, since then VP Saleh has left Afghanistan likely for Tajikistan. @AmrullahSaleh2, TWITTER (Aug. 17, 2021, 6:49 AM), <https://twitter.com/amrullahsaleh2/status/1427631191545589772?lang=en>.

¹¹⁶ Federica Paddeu & Niko Pavlopoulos, *Between Legitimacy and Control: The Taliban's Pursuit of Governmental Status*, JUST SECURITY (Sept. 7, 2021), <https://www.justsecurity.org/78051/between-legitimacy-and-control-the-talibans-pursuit-of-governmental-status/>.

In Afghanistan, during the first Islamic Emirate of Afghanistan (IEA) (1996-2001), the Mujahedeen government headed by President Rabbani continued to enjoy broad international recognition and held on to Afghanistan's seat at the United Nations even though the first IEA controlled all but a few districts of the country.¹¹⁷ By contrast, post-August 15, 2021, most states have adopted the position that Afghanistan no longer has an internationally recognized government. The United States, for example, has refused to extend the diplomatic credentials of the IRA-appointed diplomats.¹¹⁸ Many states in the region and beyond have even allowed the IEA-appointed diplomats and consular officers to assume their work.¹¹⁹ Even though the IRA's last minister of foreign affairs tried to enact staff change at the country's UN mission,¹²⁰ the credential committee of the UN has allowed the IRA-appointed representative to keep on to Afghanistan's seat for now. However, the Afghan envoy at the UN stated, "I am not representing the former corrupt government," and called for the freezing of the top leadership of the IRA's ill-gotten assets.¹²¹

Even the legitimacy of the IRA's last President and Vice President relies on a dubious constitutional claim. Their administration came to power through an extra-constitutional agreement that terminated an electoral impasse.¹²² In addition, the last IRA administration notoriously disregarded the constitutional checks on the executive power and engaged in extreme corruption throughout its tenure.¹²³ The last administration's claim to constitutional legitimacy ignores these difficult facts.

¹¹⁷ Bruce Pannier, *Afghanistan: Foreign Minister promotes Rabbani's cause in Europe*, RELIEFWEB (May 28, 2021), <https://reliefweb.int/report/afghanistan/afghanistan-foreign-minister-promotes-rabbani's-cause-europe> ("The government of ousted President Burhanuddin Rabbani controls only 10 percent of Afghan territory, but it is still recognized as the legitimate government of Afghanistan by much of the world community.").

¹¹⁸ Lara Jakes, *Afghan Embassy, Now Out of Money, Will Shut Down, U.S. Says*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/2022/03/11/us/politics/afghan-embassy-closing.html>.

¹¹⁹ In March 2023, Taliban's Spokesperson said in a video, quoted by PBS NewsHour, "The Islamic Emirate has sent diplomats to at least 14 countries and efforts are underway to take charge of other diplomatic missions abroad, ... Diplomats of the former government are continuing their activities in coordination with the Foreign Ministry." *Taliban push for control of more Afghan diplomatic missions*, PBS NEWSHOUR (Mar 25, 2023), <https://www.pbs.org/newshour/world/taliban-push-for-control-of-more-afghan-diplomatic-missions>.

¹²⁰ Mohammad Farshad Daryosh, *Atmar's Letter to UN Regarding Afghan Mission Denied: Faiq*, TOLONEWS (Feb. 16, 2022), <https://tolonews.com/afghanistan-176746>.

¹²¹ The Afghan Envoy tweeted his speech to the UNSC: "I announced that I am not representing the former corrupt government. At the UNSC meeting, I also called on the UNSC for the freezing and confiscation of Afghanistan's assets illegally transferred to accounts of the former corrupt government officials, and called for holding" @faiq_naseer, TWITTER (Feb. 7, 2022, 2:02 PM), https://twitter.com/faiq_naseer/status/1490808180439502857?s=20&t=9FRUIkCFAKFyAgmxXU7P2w.

¹²² Mujib Mashal, *Afghan Rivals Sign Power-Sharing Deal as Political Crisis Subsides*, N.Y. TIMES (May 17, 2020), <https://www.nytimes.com/2020/05/17/world/asia/afghanistan-ghani-abdullah.html>.

¹²³ Ali Yawar Adili et al., *The Stagnation of Afghanistan's State Institutions: Case studies of the Supreme Court, Senate, provincial councils and the constitutional oversight commission*, AFGHAN ANALYST NETWORK (Mar. 31 2021).

B. *Afghanistan Does Not Have a Government*

Maintaining that neither the Taliban nor the leadership of the IRA possesses the right to represent the Afghan state, another view holds that Afghanistan is without any government. Proponents of this view argue that customary international law has emerged in favor of using democratic (or at least constitutional) rule and human rights as criteria for recognizing an entity as a government.¹²⁴ This view maintains that the Taliban are disqualified from the status of government because it continues to violate the basic human rights of Afghans.¹²⁵ Because no other options exist, proponents of this view contend that Afghanistan does not have a government and will not until a constitutional government can be established in the country. Until that constitutional government is formed, proponents of this view often propose that the country should be effectively put under the tutelage of the United Nations.

In connection to this theory, one should note that the Taliban's appalling human rights record may not be sufficient in denying them legal recognition under international law. Although states have, at times, cited human rights abuses as reasons for not recognizing an entity's governance,¹²⁶ even states that decry an entity's human rights record sometimes continue to recognize the same entity's legal status as a government under international law. An appalling human rights record does not per se disqualify an entity from being recognized as the legitimate government of a state. That is why this Article maintains that the most compelling case against Taliban recognition may be their unprecedented gender-based discrimination as a matter of policy.

VI. THE TALIBAN'S APPROACH TO INTERNATIONAL LAW AND THEIR STRUGGLE FOR RECOGNITION

The Taliban has been seeking international recognition from day one. This is evident in its statements and speeches to foreign diplomats, UN officials, and journalists. On March 23, 2023, in an opinion piece for Aljazeera, the acting foreign

¹²⁴ For a complete debate on this issue see Erica de Wet, *From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition*, in RECOGNITION OF GOVERNMENTS AND CUSTOMARY INTERNATIONAL LAW 206–207 (2014) (Professor Erika de Wet argues against the emergence of such a customary rule in place of effective control and six commentators vigorously debate his arguments).

¹²⁵ For instance, the former chairwoman of Afghanistan's Independent Human Rights put it like this: "The diplomatic tools in the international community's hands are this they say: 'We do not recognize you because you violate human rights'". *Shaharзад Akbar in an interview with Nimrokh: People used to die of war in the past but now they die of hunger*, NIMROKH MEDIA (Feb. 5, 2022), <https://nimrokhmedia.com/en/2022/02/05/shaharзад-akbar-people-used-to-die-of-war-in-the-past-but-now-they-die-of-hunger/>.

¹²⁶ See Paddeu & Pavlopoulos, *supra* note 116, for recent examples from international engagements with regimes and groups in Syria and Libya.

minister of the Taliban regime, Mawlawi Amir Khan Muttaqi, once again urged the United States and the world to establish a relationship with the Taliban regime.¹²⁷ But his plea—premised on assertions about the regime’s progress on issues of international concerns such as counterterrorism, anti-narcotic policies, and human rights—has been unconvincing.

In support of its claim to represent the Afghan state, the Taliban have advanced a series of arguments. Reiterating its longstanding position, the Taliban refuses to recognize the authority of Afghanistan’s 2004 Constitution, erroneously claiming that it was imposed by foreign powers.¹²⁸

More fundamentally, the Taliban’s views on the necessity of a formal constitution to form a government vary. The Taliban’s acting Chief Justice, acknowledged the necessity of having a formal constitution in a recent book endorsed by the movement’s Supreme Leader.¹²⁹ And even the Taliban’s acting Minister of Justice, while meeting with the Chinese Ambassador, reportedly said that the Taliban had adopted the country’s 1964 Constitution as an interim constitution.¹³⁰ However, the Taliban has *never* formally adopted a constitution (even during the first Taliban rule) and has yet to observe, or even reference, the 1964 Constitution in its conduct.¹³¹

The Taliban’s default operative position is that a government does not necessarily need to be established by a formal constitution. According to this view, the Holy Quran, the authoritative tradition of Prophet Muhammad, and the dominant school of Islamic jurisprudence in a territory where Muslims are the majority require, constitute, and legitimize the Taliban’s instantiation of an Islamic government.¹³² However, the regime’s deputy minister of justice has stated that if the Taliban’s

¹²⁷ See Mawlawi Amir Khan Muttaqi, *Afghanistan Is Ready to Work with the US, But Sanctions Must Go*, AL JAZEERA (2023), <https://www.aljazeera.com/opinions/2023/3/23/afghanistan-is-ready-to-work-with-the-us-but-sanctions-must-go>.

¹²⁸ See e.g., *In Moscow, Taliban say Afghan constitution not ‘valid’*, PAJHWOK AFGHAN NEWS (Feb. 4, 2019), <https://pajhwok.com/2019/02/05/moscow-taliban-say-afghan-constitution-not-valid/>.

¹²⁹ ABDUL HAKIM HAQQANI, ISLAMIC EMIRATE AND ITS SYSTEM [AL-EMIRATE AL-ISLAMI’A WA NEZAMAHA] 160 (Office of Darul Ulum Shari’a, Apr. 2022).

¹³⁰ Ayaz Gul, *Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now*, VOA NEWS (Sept. 28, 2021), <https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>.

¹³¹ Haroun Rahimi, *Remaking of Afghanistan: How the Taliban are Changing Afghanistan’s Laws and Legal Institutions* (Inst. of S. Asian Stud., Working Paper, 2022), <https://www.isas.nus.edu.sg/papers/remaking-of-afghanistan-how-the-taliban-are-changing-afghanistans-laws-and-legal-institutions/>.

¹³² A recent statement by the Taliban’s deputy minister of justice explains this view. Responding to a question on the lack of constitutional formwork, the deputy minister said, “in every Muslim country, the Holy Quran, the authoritative tradition of Prophet Muhammad PBUH, and that country’s school of Islamic jurisprudence make up the text and basics of the constitution for that country, both in generality and specificity.” TOLONews, *Officials: Afghanistan Does Not Need a Constitution*, YOUTUBE (Sept. 4, 2022), <https://www.youtube.com/watch?v=QzlgWWVSr2Y>.

Supreme Leader instructs the ministry, it is ready to prepare a constitution based on the Hanafi jurisprudence of Islam.¹³³

The notion of state sovereignty under international law, at least in the way the Taliban understands it, empowers the Taliban to constitute such an Islamic state within the boundaries of Afghanistan and proscribes other states from interfering with its establishment. As a member of the community of sovereign states, the Taliban maintains that it owes to other states, in return, the twin, reciprocal obligations of no interference and no harm.¹³⁴ Nearly echoing the doctrine of absolutism of state sovereignty within its borders,¹³⁵ the Taliban rejects the notion that international law imposes certain obligations on a state, vis-a-vis its citizens, underpinned by a set of universal values. Thus, the Taliban rejects the idea that state sovereignty gives way to international human rights.

While the Taliban's foreign policy wing has not reconciled the regime's position with Afghanistan's treaty obligations, the Taliban's top leadership suggests that it subscribes to the totality of the Hanafi jurisprudence of Islam, at least as far its mandatory and prohibitory rules are concerned. Under Hanafi jurisprudence, there is a non-derogable, constitutional character prevailing over any international obligations agreed to by Afghanistan's earlier governments.¹³⁶ While this line of reasoning may be logically coherent within the Taliban's framework of laws, it does not discharge Afghanistan, as a state, from fulfilling its international responsibilities or exonerate the Taliban as the country's de facto ruler for failing to comply with its "would-be" international obligations. No state or group can invoke its internal laws, including its constitution, as a justification for violating its international obligations.¹³⁷

Afghanistan is a party to international human rights treaties (many of them without inserting a reservation) and is required to fulfill its obligations.¹³⁸ Thus, whoever is in control—if they claim legitimacy under international law—must comply with those international human rights treaties.

¹³³ *Id.*

¹³⁴ "We assure our neighbors, the region and the world that we will not allow anyone to use our territory to threaten the security of other countries. We also want other countries not to interfere in our internal affairs," Akhundzada said in an address ahead of the Eid al-Adha holiday. Rahim Faiz, *Taliban leader: Afghan soil won't be used to launch attacks*, ASSOCIATED PRESS (July 6, 2022), <https://apnews.com/article/afghanistan-religion-united-states-taliban-osama-bin-laden-23c9e636a45f909b487eba3a20157a82>.

¹³⁵ For a historical evolution of principles of sovereignty see SAMANTHA BESSON, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, SOVEREIGNTY (2011).

¹³⁶ Rahimi, *supra* note 131.

¹³⁷ International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, at 81 (2001).

¹³⁸ EVAN BERQUIST ET AL., AN INTRODUCTION TO INTERNATIONAL LAW FOR AFGHANISTAN 54 (Ingrid Price et al. eds., 2011).

The Taliban has held a similarly divergent view on the application of international humanitarian law (IHL). For instance, the group never accepted the IHL distinction between “combatant” and “non-combatant.” As a result, it expanded the categories of people it thought it could legitimately target, during its insurgency phase and now during its counterinsurgency campaign, as the *de facto* authority in seeking to expel foreign forces and establish an Islamic government.¹³⁹

The Taliban’s rejection of international human rights discourse stems from its conception of the Islamic state. To the Taliban, there are two forms of state: the extractive state and the guiding state.¹⁴⁰ The extractive state, according to the Taliban’s Chief Justice, concerns taxation only while the guiding state ensures that people follow the right path.¹⁴¹ An Islamic state, as the Taliban sees itself, is a guiding state because its purpose is to ensure that its subjects follow the path decreed by their creator.¹⁴² The “path” that the Chief Justice refers to derives from the authoritative works of Hanafi jurisprudence of Islam as interpreted by Taliban-affiliated religious scholars.¹⁴³ Echoing the Chief Justice’s writing, the Taliban’s Supreme Leader explained his view on state-society relations in a speech given to the Taliban’s governors. The Supreme Leader stated that the Taliban would invariably enforce what Islam mandated and prohibited.¹⁴⁴ Between those two imperatives, the prerogative of the Islamic ruler—the Supreme Leader, in the case of Taliban—with the advice of the clerical class, would be enforced.

Islam as a religion covers every aspect of a believer’s life.¹⁴⁵ The Taliban’s notion of an Islamic state empowers and even compels it to legislate and police virtually all aspects of its citizens’ lives, leaving little to no room for individual rights or privacy. International human rights discourse cannot be reconciled with this notion of the state, putting the Taliban on an unavoidable collision course with modern-day international law. Acknowledging this incompatibility, the Taliban’s Supreme Leader told religious scholars in Kabul that, “even if the infidels use nuclear weapons against us, we will not listen to them.”¹⁴⁶

¹³⁹ For analysis of Taliban’s divergence from IHL see Ashley Jackson & Rahmatullah Amiri, *Insurgent Bureaucracy: How the Taliban Makes Policy*, U.S. INST. FOR PEACE, Nov. 2019, pp. 22-23

¹⁴⁰ ABDUL HAKIM HAQQANI, *ISLAMIC EMIRATE AND ITS SYSTEM* [AL-EMIRATE AL-ISLAMI’A WA NEZAMAHA] 20 (Office of Darul Ulum Shari’a, Apr. 2022).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Rahimi, *supra* note 131.

¹⁴⁴ A readout of the meeting was tweeted by the Taliban’s Spokesman on Twitter. @Zabehulah_M33, TWITTER (July 27, 2022, 9:54 AM), https://twitter.com/Zabehulah_M33/status/1552336538180149249?s=20&t=z9soJwMpslejUorw2Peww.

¹⁴⁵ “As a religion” as contrasted with a code of law, enforced by the state.

¹⁴⁶ Taliban Leader in Kabul: Even if there is a nuclear attack on us, we will not listen to the orders of foreigners, BBCPERSIAN (July 1, 2022), <https://www.bbc.com/persian/afghanistan-62006075>.

In the same speech, the Supreme Leader also connected the freedom from external intervention with the complete sovereignty and independence of Afghanistan under the Taliban.¹⁴⁷ This is consistent with the contention of this Article that Taliban subscribe to an absolute notion of state sovereignty under international law allowing them to constitute their preferred version of an Islamic state even if it contradicts with internationally guaranteed fundamental rights for the citizens of Afghanistan.

As stated early, however, the Taliban concedes that its government owes an obligation of no harm and no interference to other states under international law. However, having been enmeshed in the global and regional networks of terrorism since its inception, the Taliban does not seem able, for practical and ideological reasons, to completely break away from terrorist organizations. So far, the foreign policy wing of the Taliban has advanced two, rather weak, arguments in the hope of reconciling its stated commitment not to allow Afghanistan's territory to be used to harm other states with its robust relations with transnational terrorist groups. First, the Taliban has argued that it lacks the required intelligence to act against these groups, promising to take action if other states provide it with actionable intelligence showing that a person(s) within the territory of Afghanistan is actively harming a foreign state.¹⁴⁸ Second, the Taliban maintains that hosting members of a terrorist group in the country does not, by itself, constitute a violation of the Taliban's international obligations if the Taliban takes appropriate measures to stop these persons from actively using their guest status in Afghanistan to harm another state.¹⁴⁹

These arguments break apart when applied to the case of the Tahrik-e-Taliban Pakistan (TTP), a group that is actively fighting the state of Pakistan. It is virtually incontrovertible that the Taliban has hosted and supported the TTP while it attacked the Pakistani government.¹⁵⁰ The Taliban has responded to accusations of supporting the TTP by presenting a set of arguments that mirror the arguments advanced by the Pakistani government when it supported the Taliban's fight against the IRA and U.S./NATO in Afghanistan: the fluidity of border communities, historical cross-border bonds dating back to the fight against the Soviet Union, and the Taliban's

¹⁴⁷ *Id.*

¹⁴⁸ For example, Taliban have made a such promise to India. Shishir Gupta, *Taliban to act against Pak LeT/Jem terrorists in Afghanistan on specific intel*, HINDUSTAN TIMES (June 10, 2022), <https://www.hindustantimes.com/world-news/taliban-to-act-against-pak-let-jem-terrorists-in-afghanistan-on-specific-indian-101654831818094.html>.

¹⁴⁹ Al-Qaeda publications, before and after the killing of the Al-Qaeda leader in Afghanistan stated that the group no longer will be conducting operations against the United States from Afghanistan helping Taliban maintain the distinction between presence of Al-Qaeda link persons in Afghanistan and Afghanistan being used to threaten another country. See @asfandyarmir, TWITTER (Sept. 12, 2022, 1:38 PM), <https://twitter.com/asfandyarmir/status/1569425156690280458?s=20&t=MIhpcGIc73dKucbX-l-Yw> (Twitter thread in connection to the recent statement).

¹⁵⁰ See U.S. Institute for Peace, *Between the TTP and the Durand Line*, YOUTUBE (Feb. 17, 2022), <https://www.youtube.com/watch?v=qku0yx-uwNs&list=WL&index=4&t=1988s>.

need to preserve its capabilities and avoid opening new fronts as it fights threats that are more serious to the Taliban.¹⁵¹

The Taliban's untenable positions regarding its relationship to transnational terrorist groups have compelled foreign states to launch attacks against hostile targets within Afghanistan's territory, attacks which the Taliban maintains amount to violations of the country's sovereignty and which, according to Taliban, justify retaliatory actions.¹⁵² The increased frequency of these attacks—mostly in the form of airstrikes, the type that the U.S. in the past justified under the doctrine of preemptive self-defense—may further destabilize the Taliban's relations with other states, destroying the Taliban's hope of being formally accepted as Afghanistan's government and representing the Afghan state in the international community.

VII. WHAT MAY COME NEXT

Some of the Taliban leaders, particularly those who are the face of diplomacy, understand the immense cost of non-recognition and how their unrecognized status—in addition to UN and other states sanctions—have had crippling effects on the regime and the people (though they seem unmoved by the suffering of Afghan people). However, Taliban hardliners and top decision makers, including the Supreme Leader, who shape the overall direction of their regime and policies are primarily focused on transforming the country into their version of a “pure” Islamic society.

If the Taliban continues to resist the international community and the Afghan people's minimal demands to moderate laws and policies toward women, disrespect fundamental human rights of its citizens, scorn international obligations, neglect to build some form of domestic legitimacy, and maintain allyship with international terrorists, the Taliban will likely be denied *de jure* international recognition. Deeply rooted in the ideology of its top leadership, the Taliban has demonstrated that it does not perceive any need to obtain domestic legitimacy or to respect the fundamental human rights of Afghans prior to being admitted to the international legal system. Furthermore, the fundamental problem may lie with the Taliban's ideology and approach to governance and the way it understands the rights and responsibilities of a sovereign state under international law. If the Taliban does not evolve on this core issue—a real possibility supported by the group's history—its chance of receiving formal recognition is slim. The current level of international engagement and aid in

¹⁵¹ *Id.*

¹⁵² Eltaf Najafizada & Ismail Dilawar, *Rare Pakistan Airstrikes on Taliban Show Tension After U.S. Exit*, BLOOMBERG (April 19, 2022), <https://www.bloomberg.com/news/articles/2022-04-19/rare-pakistan-airstrikes-on-taliban-show-tension-after-u-s-exit#xj4y7vzkg>.

Afghanistan may significantly decrease. And Afghanistan may once again become a security and humanitarian crisis for the region, and the world.

Taliban recent decision to enforce their ban on Afghan women working for the UN agencies and other humanitarian organizations has brought the fundamental rigidity of the movement's core ideological commitments in sharp conflict with its international commitment to the basic norms of international law including its most fundamental document that is UN Charter. While the UN has sent mixed signals on how it would respond to the ban, for the time being, it has suspended its operation in country. The future remains uncertain.

While formal recognition of the Taliban seems unlikely, there are diverging trends when it comes to practical engagements with the group. Disappointed by the Taliban reversing its human rights commitments, especially regarding girls' education, the West may be veering toward disengaging the Taliban.¹⁵³ And frustrated by its lack of progress on recognition, sanctions, and the return of Afghanistan's foreign assets, the Taliban may also be discounting diplomatic solutions with the West. But the regional diplomatic trajectory may be different. Countries in the region, unconstrained by a domestic civil society, and uninterested in preserving a "rule-based international system"—a system that they believe is inconsistently upheld to the advantage of the United States and its allies¹⁵⁴—are ramping up engagement. Many of Afghanistan's diplomatic and consular offices in the region are now controlled by Taliban appointees. Among Afghanistan's neighboring countries, the Central Asian countries remain cautiously engaged; Pakistan, initially optimistic about the Taliban's return to power, may have lost excitement as both sides accused each of other harboring terrorism,¹⁵⁵ but it has recently hosted a trilateral meeting with Taliban and China suggesting that the issue of terrorism is not a inflexible redline for Pakistan in its relations with Taliban.¹⁵⁶ Iran is also seeking to capitalize on the situation, may try to deepen economic ties.¹⁵⁷ Whether the western block led by the United States and the regional block led by China can cooperate to maintain a common approach on Afghanistan is uncertain. How can UN navigate this increasingly divergent pulls as it is tasked with helping the Afghan population cope with the Taliban rule also remains uncertain.

¹⁵³ MOHAMMAD EHSAN ZIA & SANA TARIQ, *THE TALIBAN'S CRISIS OF DIPLOMACY* (2022).

¹⁵⁴ Robert Crews, *Shattering the Russian Colossus: Should the West "Decolonize" Russia?*, NEW PARADIGM (2023), <https://www.newglobalpolitics.org/shatteringtherussiancolossus/>.

¹⁵⁵ See @abdsayed, TWITTER (Mar. 15, 2023), <https://twitter.com/abdsayed/status/1636089258967441408?s=20> (Abdul Sayed, an expert on terrorism in Afghanistan and Pakistan, discusses a recent example of such trading of accusations on Twitter).

¹⁵⁶ Hussain, *supra* note 63.

¹⁵⁷ Aaron Y. Zelin, *Iran Formalizes Ties with the Taliban*, WASHINGTON INST. FOR NEAR E. POL'Y (Mar 3, 2023), <https://www.washingtoninstitute.org/policy-analysis/iran-formalizes-ties-taliban>.

CONCLUSION

The analysis presented here suggests that state practice points toward emerging criteria in international law regarding recognition of government. These criteria include the presence of gender prosecution or “gender apartheid”, ties with international terrorism, and lack of inclusive government. The strongest argument for disqualifying the Taliban as a government capable of representing Afghanistan is that the regime espouses principles, which, in their totality, are so fundamentally discriminatory that they violate *jus cogens* norms of international law. These violations are especially egregious with regard to the Taliban’s treatment of women. In many ways, the Taliban’s gender-based discriminations shares similarities to South Africa’s racial apartheid. As a result, the Taliban’s effective control over Afghanistan may not be enough to confer on it the status of a “government” under international law. This argument depends on the comparability of race-based discrimination with some fundamental forms of gender-based discrimination in a world where gender-based restrictions are not uncommon albeit not to the extent that the Taliban imposes.

While only a few UN officials and EU parliament members¹⁵⁸ have used the term “gender apartheid” to describe the situation in Afghanistan, the Taliban’s systemic discrimination against women has been widely condemned. This use of “gender apartheid” by activists and UN officials could provide the basis of turning Afghanistan under Taliban into the paradigmatic case defining gender apartheid under international law (in the same way South Africa developed international law’s definition of racial apartheid). Beyond the evolution of law related to “gender apartheid,” the International Criminal Court may have a strong case to prosecute Taliban leaders for the crime of gender persecution under the Rome Statute of the International Criminal Court, a precedent for the court.

Even if a *jus cogens* norm does not yet exist, other governments could still choose not to recognize the Taliban based on the regime’s ties to terrorism and its lack of an inclusive government. That said, the international community’s unanimous refusal to recognize the Taliban as the government of Afghanistan up until now due to the regime’s treatment of women could signal an evolution of international law and a new baseline for comparing all instances of gender apartheid. Thus, in the absence of another entity with a valid constitutional claim to the status of the Afghan government, Afghanistan will be presumed to lack a *de jure* government until a constitutional government is established or the Taliban minimally reforms its gender policies. But, because Afghanistan’s statehood remains intact, this conclusion does

¹⁵⁸ See Joint Statement of 2 February 2023--Women in Afghanistan have become victims of gender apartheid, EU PARLIAMENT (Feb. 2, 2023), <https://www.europarl.europa.eu/delegations/en/product/product-details/20230203DPU35201>.

not absolve the current *de facto* authorities in Afghanistan from their obligations under international human rights and humanitarian laws because those obligations stem from *control* and not the government's recognition.