

THE TALIBAN AT THE ICJ: REPRESENTATION OF DE FACTO GOVERNMENTS BEFORE THE COURT

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I. INTRODUCTION

In September 2024, Australia, Canada, Germany, and the Netherlands announced their intention to take Afghanistan to the ICJ for systematic gender discrimination in violation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹ This proposed case will rely on Article 29 of CEDAW,² which provides that disputes concerning the interpretation or application of the Convention are to be resolved by negotiation, arbitration, or if “unable to agree on the organization of the arbitration,” by the ICJ. It is one of the most recent examples in a series of cases brought by countries seeking to protect and promote human rights by enforcing obligations *erga omnes partes*, despite a lack of direct injury to the

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1. Patrick Wintour, *Taliban to be Taken to International Court Over Gender Discrimination*, THE GUARDIAN, Sep. 25, 2024, https://www.theguardian.com/world/2024/sep/25/taliban-to-be-taken-to-international-court-over-gender-discrimination?CMP=share_btn_url.

2. Convention on the Elimination of All Forms of Discrimination Against Women, art. 29, Dec. 18, 1979, 1249 U.N.T.S. 13.

applicant State.³ If it proceeds, the case will be the first time CEDAW is used as a basis for jurisdiction before the ICJ.⁴

This case is therefore particularly significant. Despite the Taliban's assurances to the international community when it seized control of Afghanistan in August 2021 that they would respect the rights of women and girls, escalating restrictions have, inter alia, banned women from secondary education, closed NGOs that employ women, required women to travel with a mahram (male guardian), and prevented women from raising their voices in public.⁵ These restrictions have led to an institutionalized and systematic system of gender discrimination.⁶

3. See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgement, 2022 I.C.J. 477 (July 22) (concerning Myanmar's alleged violations of the Genocide Convention against the Rohingya population in Rakhine State); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application Instituting Proceedings, (Dec. 29, 2023), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> (concerning Israel's alleged violations of the Genocide Convention against the Palestinian population in the Gaza Strip); Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. and Neth. v. Syria), Joint Application Instituting Proceedings, (June 8, 2023), <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-app-01-00-en.pdf> (concerning Syria's alleged violations of the Convention against Torture against the Syrian population); Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Application Instituting Proceedings, (Mar. 1, 2024), <https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf> (concerning Germany's alleged breaches of international law as a result of Germany's support of Israeli military actions in Gaza).

4. Kyra Wigard, *A Groundbreaking Move: Challenging Gender Persecution in Afghanistan at the ICJ*, EJIL:TALK! (Sep. 30, 2024), <https://www.ejiltalk.org/a-groundbreaking-move-challenging-gender-persecution-in-afghanistan-at-the-icj/> (recounting that the Democratic Republic of the Congo previously sought to bring a claim under CEDAW in its dispute against Rwanda, but the Court found that the conditions in Article 29, requiring States to engage in negotiation and arbitration before proceeding to the ICJ, were not satisfied).

5. *Id.*; see also Belquis Ahmadi & Scott Worden, *The Taliban Continue to Tighten Their Grip on Afghan Women and Girls*, U.S. INST. PEACE (Dec. 8, 2022), <https://www.usip.org/publications/2022/12/taliban-continue-tighten-their-grip-afghan-women-and-girls> (discussing various Taliban restrictions being placed on women and girls in Afghanistan); *The Taliban Say They Will Close All NGOs Employing Afghan Women*, ASSOCIATED PRESS, Dec. 30, 2024, <https://apnews.com/article/afghanistan-taliban-ngo-women-closure-1fde989369785f8df0e83c81d48626f1> (discussing the Taliban's closure of NGOs in Afghanistan employing women and other restrictions on Afghani women and girls).

6. See Haroun Rahimi & Mahir Hazim, *International Law and the Taliban's Legal Status: Emerging Recognition Criteria?*, 32 WASH. INT'L L.J. 229, 241 (2023) (emphasizing that the "Taliban's outrageous and systemic discrimination against women (both

Within the country, avenues for justice are “virtually non-existent,”⁷ leaving very few options to challenge this “widespread, systematic and all-encompassing” attack on the rights of women and girls.⁸ This case, therefore, is an important step towards reinforcing global human rights frameworks and addressing gender discrimination at one of the highest levels of international law.⁹

The potential case before the ICJ faces a number of challenges. Chief among them are issues of attribution and representation,¹⁰ stemming from the question of whether the Taliban can represent Afghanistan before the ICJ. This does not have a straightforward resolution, in large part due to the international community’s lack of recognition of the de facto authorities of the Taliban.¹¹ While a case cannot be referred to the ICJ until the parties proceed through CEDAW’s

during their first rule and today) is unprecedented by modern standards.”); *see also* Press Release, Office of the High Comm’r for Hum. Rts., New Morality Law Affirms Taliban’s Regressive Agenda, Experts Call for Concerted Action (Aug. 30, 2024), <https://www.ohchr.org/en/press-releases/2024/08/new-morality-law-affirms-talibans-regressive-agenda-experts-call-concerted> (voicing concern over the escalation of the Taliban’s oppressive regime).

7. Press Release, Office of the High Comm’r for Hum. Rts., International Community Must Not Normalise Taliban Rule in Afghanistan (Aug. 14, 2024), <https://www.ohchr.org/en/press-releases/2024/08/international-community-must-not-normalise-taliban-rule-afghanistan>.

8. Rep. of the Special Rapporteur on the Situation of Human Rights in Afghanistan and the Working Group on Discrimination against Women and Girls, Situation of Women and Girls in Afghanistan, ¶ 97, U.N. Doc. A/HRC/53/21 (June 15, 2023); *see also* Karima Bennouna, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUM. HUM. RTS. L. REV. 1 (2022) (discussing the challenges of addressing systematic abuses by the Taliban and the role of the international legal framework to respond to gender apartheid).

9. *See* Wigard, *supra* note 4 (referring to the proposed case against the Taliban as a “groundbreaking move” to address the systematic repression of women and girls in Afghanistan).

10. *See id.* (discussing the procedural challenges that are likely to arise in the ICJ proceedings, noting that an “immediate issue that would present itself is who represents Afghanistan.”).

11. *See id.* (highlighting that “a number of states, including Germany, claim that [they do] not recognise the Taliban government.”). *See also* Rahimi & Hazim, *supra* note 6 (discussing the barriers to conferring the status of government on the Taliban under international law); Ahmad Ali Shariati, *Gender Persecution and Gender Apartheid in Afghanistan: Seeking the Appropriate Legal Basis for International Accountability*, EJIL:TALK! (Apr. 10, 2024), <https://www.ejiltalk.org/gender-persecution-and-gender-apartheid-in-afghanistan-seeking-the-appropriate-legal-basis-for-international-accountability/> (outlining the potential avenues for international legal accountability for the Taliban).

negotiation and arbitration requirements, which will take at least six months,¹² this commentary addresses the question of the Taliban's status, analyzing how international legal principles of representation and attribution may be applied in the context of the proposed case.

II. STANDING OF THE TALIBAN AS REPRESENTATIVES OF AFGHANISTAN

Only States may be parties to disputes before the ICJ.¹³ As the international community has refused to recognize the Taliban as the legitimate government of Afghanistan on a *de jure* basis,¹⁴ the preliminary issue of who represents the State must be addressed. Parallels can be drawn to previous ICJ decisions and to the ICC's investigation in Afghanistan in order to answer this question.

A. *Representation by De Facto Governments at the ICJ*

Under international law, it is generally accepted that the ability of an authority to exercise effective control over a territory and its population is the criterion by which to determine who qualifies as the government of a State.¹⁵ Using this effective control model, the Taliban, as the *de facto* authority in Afghanistan, would be the representative government in a case at the ICJ.¹⁶ This is reinforced by the fact that, in the absence of an alternative government in Afghanistan, it is the Taliban who would be called on to comply with the Court's decision and so should have the corresponding ability to assert the State's rights in the proceedings.¹⁷ While recent practice suggests that States also consider

12. See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 2, at art. 29 (specifying that "[i]f within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.").

13. Statute of the International Court of Justice, art. 34(1).

14. Rahimi & Hazim, *supra* note 6, at 234; *Taliban's Attempt to Grab Afghanistan's Seat At UN Fails*, AFGHANISTAN INT'L (Dec. 15, 2022), <https://www.af-intl.com/en/202212155105>.

15. Siegfried Magiera, *Governments*, MAX PLANCK ENCYC. PUB. INT'L L. (2007), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1048?prd=EPIL>.

16. Seyfullah Hasar, *Representation of Afghanistan before the International Court of Justice*, EJIL: TALK! (Oct. 16, 2024), <https://www.ejiltalk.org/representation-of-afghanistan-before-the-international-court-of-justice/>.

17. See *id.* (arguing that there are "additional reasons for a State to be represented by a *de facto* authority like the Taliban in international judicial proceedings, particularly from the perspective of the proper functioning of the judicial process and compliance with any resulting decision.").

the legitimacy of a regime when making recognition decisions,¹⁸ this practice appears to largely be a question of political recognition, as opposed to one that effects a determination of standing before international adjudicative bodies.¹⁹ As a result, the lack of international recognition should not have any bearing on the representation decision in the proposed case against Afghanistan.

Viewing the Taliban as Afghanistan's representative, despite the lack of *de jure* international recognition, would be consistent with the approach taken by the ICJ in the case brought by Rwanda concerning Myanmar's obligations under the Genocide Convention. In relevant part, the Court had to consider whether the military junta, who had taken control of the country, should represent Myanmar, despite the fact that individuals from the National Unity Government, formed by exiled members of the elected parliament, had previously appeared as agents of the State before the Court.²⁰ Despite the United Nations General Assembly's lack of recognition of the junta's credentials, they were considered to be Myanmar's representatives in the proceedings due to their effective control of the country.²¹ Importantly, the President of the Court noted in oral proceedings that "the parties to a contentious case before the Court are States, not particular governments."²² While this is not a perfect analogue to the situation of the Taliban, as, currently, there is no internationally recognized alternative government in Afghanistan,²³ the principles espoused by the Court in the Myanmar case indicate that it is control, not recognition, that is the relevant consideration when answering such questions, supporting the conclusion that the Taliban would have standing to appear as representatives of Afghanistan before the ICJ.

18. See Rahimi & Hazim, *supra* note 6, at 233 (noting that current practice suggests that recognizing States have considered constitutional legitimacy and democratic legitimacy when making recognition decisions).

19. Hasar, *supra* note 16 (citing Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219 (2013)).

20. Marc Weller, *Is the ICJ at Risk of Providing Cover for the Alleged Genocide in Myanmar?*, EJIL: TALK! (Feb. 11, 2022), <https://www.ejiltalk.org/is-the-icj-at-risk-of-providing-cover-for-the-alleged-genocide-in-myanmar/>.

21. See Hasar, *supra* note 16 (discussing the ICJ's decision to allow the junta to represent Myanmar, despite the UN General Assembly's lack of acceptance of the junta's credentials).

22. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Public Sitting, 11 (Feb. 21, 2022), <https://www.icj-cij.org/index.php/node/106120>.

23. See Hasar, *supra* note 16 (noting that "in the case of Afghanistan, there is no internationally recognised alternative to the Taliban").

B. *The Approach to the Taliban at the ICC*

A similar question regarding the Taliban's capacity to act as the State was considered by the ICC in the context of its investigations into the situation in Afghanistan, with the Pre-Trial Chamber adopting an approach to representation that may be instructive for a case proceeding before the ICJ. While the ICC is concerned with the criminal responsibility of individuals, requests to suspend investigations to defer to proceedings being conducted by national courts, under Article 18(2) of the Rome Statute, can only be made by States.²⁴ After the Prosecutor commenced an investigation into the situation in Afghanistan, a deferral request was made by the Government of Afghanistan.²⁵ In September 2021, in response to the Taliban's takeover, the Prosecutor requested that the Chamber authorize a resumption of the investigation as a result of the change in circumstances in the country.²⁶

In this case, the Court was required to engage with the "question of which entity actually constitutes the State authorities of Afghanistan since 15 August 2021"²⁷ In order to make a decision about the triggering of procedure under Article 18(2), there needed to "be no uncertainty as to the representation and competent authorities of the concerned State."²⁸ This did not have a clear answer, as "issues relating to a State's representation . . . are complex matters of international and constitutional law, as such not suitable to be addressed, or trivialised, by way of general, sweeping and unsubstantiated assertions."²⁹

In its initial decision on the issue, the Chamber decided that information for the purposes of identifying who should represent

24. See Rome Statute art. 18(2) (stating that "[w]ithin one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.").

25. Situation in the Islamic Republic of Afghanistan, ICC-02/17-139, Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's Letter Concerning Article 18(2) of the Statute (Apr. 15, 2020).

26. Situation in the Islamic Republic of Afghanistan, ICC-02/17-196, Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, ¶ 5 (Oct. 31, 2022).

27. Situation in the Islamic Republic of Afghanistan, ICC-02/17-165, Decision Setting the Procedure Pursuant to Rule 55(1) of the Rules of Procedure and Evidence Following the Prosecutor's 'Request to Authorise Resumption of Investigation under Article 18(2) of the Statute', ¶ 16 (Oct. 8, 2021).

28. *Id.* at ¶ 16.

29. *Id.* at ¶ 18.

Afghanistan to respond to the Prosecutor's application should come from the UN Secretary-General and the Bureau of the Assembly of States Parties because of their institutional mandates.³⁰ It is an approach that echoes those taken by other international adjudicative bodies similarly tasked with determining which State authority has standing to appear, such as in investment arbitration proceedings involving Venezuela; such proceedings typically defer to the decisions of other bodies to answer this question, rather than attempting to resolve it themselves.³¹ It was, however, unsuccessful, as the Bureau responded that, "due to its nature and functions, it does not hold the type of information requested"³² and the Legal Counsel for the UN emphasized that the Secretary-General does not "engage in acts of recognition of Governments, which is a matter for individual Member States."³³ As a result, this process failed to resolve the question of appropriate representation before the ICC.

In a subsequent decision, in order to ensure that a lack of conclusive determination as to the status of Afghanistan's government before the Court did not prevent the ICC from proceeding in the case, the Chamber made a determination themselves.³⁴ In doing so, the Court referred to its previous practices in relation to the situations in Darfur and Mali, noting that it had not stopped communications "with States on the basis of changes of governments."³⁵ It also relied on similar cases considered by the ICJ, particularly those of Niger and Myanmar, where a new government was able to make submissions in proceedings concerning their States, despite the change in power and lack of

30. *Id.* at ¶ 19.

31. See Niko Pavlopoulos, *Contested Governments and State Representation before International Courts and Tribunals*, EJIL: TALK!, (Sep. 29, 2021), <https://www.ejiltalk.org/contested-governments-and-state-representation-before-international-courts-and-tribunals/> (discussing approaches to resolving controversies over the identity of a State representative in various arbitration proceedings).

32. Situation in the Islamic Republic of Afghanistan, ICC-02/17-169-AnxII, Transmission of Communications Submitted by the United Nations and the Bureau of the Assembly of States Parties pursuant to Pre-Trial Chamber II's Decision ICC-02/17-165 of 8 October 2021, Bureau Response (Nov. 5, 2021).

33. Situation in the Islamic Republic of Afghanistan, ICC-02/17-169-AnxI, Transmission of Communications Submitted by the United Nations and the Bureau of the Assembly of States Parties pursuant to Pre-Trial Chamber II's Decision ICC-02/17-165 of 8 October 2021, United Nations Response (Nov. 5, 2021).

34. Situation in the Islamic Republic of Afghanistan, ICC-02/17-182, Order Setting the Schedule for the Filing of Submissions in the Proceedings Pursuant to Article 18(2) of the Rome Statute and Rule 55(2) of the Rules of Procedure and Evidence, ¶ 14 (Feb. 24, 2022).

35. *Id.* at ¶ 15.

international recognition.³⁶ While the Chamber acknowledged that no State has formally recognized the Taliban as Afghanistan's government, it highlighted that "multiple States, the United Nations and other international organisations have engaged with, conducted talks and cooperated with them" and, in numerous circumstances, have officially referred to them "as the 'Afghanistan de facto authorities' or the 'de facto government' of Afghanistan, therefore regarding members of that group as the interlocutors of Afghanistan."³⁷ Implicitly relying on the effective control model, for the purposes of the complementarity proceedings, the Court was satisfied that it was the Taliban, as the government of Afghanistan, who should represent the State.³⁸

The ICC does not yet appear to have engaged directly with the Taliban, due to concerns that establishing any form of direct relationship would constitute a step towards recognizing the Taliban as the legitimate government of Afghanistan.³⁹ Although the investigation into this situation requires the cooperation of the Taliban, as the de facto authority in Afghanistan, the Court has avoided communicating with the Taliban, instead sending letters through the UN and the UN Assistance Mission in Afghanistan.⁴⁰ Additionally, a December 2022 filing from the State indicates that the Embassy of the Islamic Republic of Afghanistan in The Hague, led by an Ambassador appointed prior to the Taliban takeover,⁴¹ has been the representative interacting with the Court in these proceedings.⁴² While this situation has demonstrated the procedural challenges that arise from the need to transmit communications through the Embassy for "onward communication to the

36. *Id.* at n.24 (citing the following proceedings: *Gam. v. Myan.*, *supra* note 22; Frontier Dispute (Burk. Faso/Niger), Order of 14 September 2010, 2010 I.C.J. 631 (Sep. 2010); Frontier Dispute (Burk. Faso/Niger), Judgement, 2013 I.C.J. 44 (Apr. 16)).

37. *Id.* at ¶ 17.

38. *Id.* at ¶ 16.

39. See Rahimi & Hazim, *supra* note 6, at 237 (noting that "many international organizations have been even more reluctant to recognize the Taliban as compared to individual states.").

40. *Id.* at 237 (citing Situation in the Islamic Republic of Afghanistan, ICC-02/17-187, Order Seeking the Assistance of the United Nations and the United Nations Assistance Mission in Afghanistan (Apr. 7, 2022)).

41. See *The Ambassador*, EMBASSY OF THE ISLAMIC REPUBLIC OF AFGHANISTAN – THE HAGUE, <https://www.afghanistanembassy.nl/the-ambassador/> (last visited Feb. 13, 2025) (referring to Ambassador Mohammad Asif Rahimi).

42. Situation in the Islamic Republic of Afghanistan, ICC-02/17-203, Response to the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II Entitled 'Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation' of 31 October 2022 (ICC-02/17-196) (Dec. 15, 2022).

competent Afghan authorities,”⁴³ it demonstrates the possibility for a similar approach to be taken in a case before the ICJ, without formally recognizing or legitimizing the Taliban as the *de jure* government of Afghanistan through direct interaction.

III. REPRESENTATION THROUGH PRINCIPLES OF ATTRIBUTION

As an alternative, for the purposes of a potential case before the ICJ, the Taliban would have legal capacity to represent Afghanistan under the principles of State responsibility and the rules of attribution, despite the lack of formal recognition by the international community.⁴⁴ The position that the actions of Taliban, as the *de facto* authority of Afghanistan, are attributable to the State is supported by the ILC’s Commentary to the Articles on State Responsibility for Internationally Wrongful Acts, which provides that that a “general *de facto* Government . . . is itself an apparatus of the State, replacing that which existed previously” and that “the conduct of the organs of such a Government is covered by article 4 rather than article 9.”⁴⁵ This position is supported by Australia, Canada, Germany, and the Netherlands, along with 22 other States who announced their support for the proposed case, who have stated that “the Taliban *de facto* authorities remain responsible to uphold and fulfill the international legal obligations of Afghanistan, including on the elimination of discrimination of women and girls under CEDAW.”⁴⁶

The lack of international *de jure* recognition of the Taliban regime does not change this, as “[f]rom the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.”⁴⁷ On this basis, for the purposes of proceedings concerning State responsibility, the Taliban would be

43. Situation in the Islamic Republic of Afghanistan, ICC-02/17-196, Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, ¶¶ 11, 15 (Oct. 31, 2021).

44. See Hasar, *supra* note 16 (noting that “regardless of its non-recognition by some other States or the illegitimacy of its origin, the Taliban, as its *de facto* Government, can represent Afghanistan at least for the purposes of State responsibility.”).

45. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 49, U.N. Doc A/56/10.

46. *Joint Statement Regarding the Convention on the Elimination of All Forms of Discrimination Against Women*, GLOB. AFFAIRS CAN. (Sep. 26, 2024), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/un-onu/statements-declarations/2024-09-26-women-femme.aspx?lang=eng.

47. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 45, at 51.

able to represent Afghanistan before the ICJ. Considering the issue of representation through this lens may in fact be preferable, as it would allow the Court to avoid making a generalized decision about the legitimacy of the Taliban and to instead rely on a context-specific determination about representation for the purposes of State responsibility only.⁴⁸

IV. POLITICAL CONSEQUENCES OF TALIBAN REPRESENTATION AT THE ICJ

The proposed case against Afghanistan comes at a “critical juncture in the international community’s posture toward the Taliban de facto authorities.”⁴⁹ While the 26 countries supporting the ICJ case do not recognize the Taliban as the legitimate government in Afghanistan,⁵⁰ any decision made by the ICJ carries important political consequences, particularly in light of the UN Security Council’s attempts to promote increased international engagement with the Taliban.⁵¹

Cases involving unrecognized governments have been brought before international courts and tribunals, and these matters have been resolved without legitimizing these regimes or resulting in recognition by the international community.⁵² Most notably, in the Myanmar case, as discussed above, the ICJ’s emphasis on proceedings being brought against States, not governments, demonstrates the fact that the institution of proceedings does not automatically equate to the recognition

48. See Hasar, *supra* note 16 (noting that adjudicative bodies may prefer applying the principles of State responsibility to resolve the representation question “for the reason that it may save them from possible criticism for making a sweeping recognition decision on who the government of a State is with effects going beyond the proceedings before them”).

49. Jayne Huckerby, *Suing the Taliban at the ICJ Over Abuses of Afghan Women Isn’t a Panacea. Countries Must Do More Now.*, JUST SECURITY (Jan. 3, 2025), <https://www.just-security.org/105879/suing-taliban-icj-abuses-afghan-women/>.

50. See GLOB. AFFAIRS CAN., *supra* note 46 (emphasizing that the proposed case “is without prejudice to our firm position that we do not politically recognize the Taliban de facto authorities as the legitimate representation of the Afghan population.”).

51. S.C. Res. 2721, ¶ 3 (Dec. 29, 2023).

52. See Pavlopoulos, *supra* note 31 (discussing proceedings involving contested governments before international adjudicative bodies). See also *Bringing a Case Before the International Court of Justice for the Rights of Afghan Women and Girls*, OPEN SOC’Y JUST. INITIATIVE, 3 (Apr. 2024), <https://www.justiceinitiative.org/uploads/77b7185d-7ba6-4ef9-8fa5-a7155234b0de/Q&A-Litigating-for-the-Rights-of-Afghan-Women-and-Girls-Before-the-ICJ-Final.pdf> (listing examples of ICJ cases involving countries with unrecognized governments).

of a de facto authority.⁵³ This position is echoed in proceedings filed by Ethiopia and Liberia against South Africa in 1960, and by the United States against Iran in 1980, despite the applicant States in both instances seeking to delegitimize the governments of the respondent States.⁵⁴

Indeed, a decision by the ICJ that the Taliban, as the de facto authorities in Afghanistan, can represent Afghanistan before the ICJ, may continue to hinder the Taliban's attempts to gain recognition as the legitimate government. The international community's refusal to normalize relations with Afghanistan is, in part, due to its failure to fulfill its human rights treaty obligations, including those relating to discrimination of women and girls under CEDAW.⁵⁵ There is no obligation for States to recognize a de facto government, and States may in fact be under a duty to refuse to recognize as lawful a situation created as a result of a serious breach of a jus cogens norm.⁵⁶ A finding that Afghanistan is violating its international obligations under the leadership of the de facto Taliban regime may in fact operate as a barrier to recognizing the legitimacy of the Taliban in Afghanistan.⁵⁷

However, despite the potential value of an ICJ case as a mechanism to address the violations of the rights of women and girls in Afghanistan, there are some risks that come with bringing proceedings in response to the actions of the Taliban. Importantly, the international community has previously relied on the need to protect the rights of women as the basis for foreign intervention, such as the United States' invasion in 2001, speaking for, rather than with, Afghan women and girls.⁵⁸ Additionally, despite claims about the non-recognition of the Taliban regime at an international level, United Nations officials, at the request of the Taliban, have previously excluded women from

53. See *Gam. v. Myan.*, *supra* note 22, at 11 (the President of the Court noted in oral proceedings that "the parties to a contentious case before the Court are States, not particular governments.").

54. OPEN SOC'Y JUST. INITIATIVE, *supra* note 52, at 3.

55. See GLOB. AFFAIRS CAN., *supra* note 46 (noting that "Afghanistan's failure to fulfil its human rights treaty obligations is a key obstacle to the normalization of relations.").

56. Rahimi & Hazim, *supra* note 6, at 233; *Articles on the Responsibility of States for Internationally Wrongful Acts* [2001] 2 Y.B. Int'l L. Comm'n art. 41(2).

57. OPEN SOC'Y JUST. INITIATIVE, *supra* note 52, at 3.

58. See Huckerby, *supra* note 49 (noting that "[f]oreign intervention in Afghanistan has long used women's rights as a cover for coercion (e.g., the post-9/11 invasion in 2001 was framed in part as an effort to emancipate women); at the same time, the international community has too often spoken over or for — rather than with or at the direction of — Afghan women.").

meetings in Qatar to discuss Afghanistan.⁵⁹ As a case concerning obligations under CEDAW will likely involve questions of the interaction between religion and women's rights,⁶⁰ it is "essential that women, who have been victims of the Taliban's crimes, are given an active and meaningful role,"⁶¹ and care is taken to avoid recognizing the Taliban in the process.⁶²

IV. CONCLUSION

The announcement made by Australia, Canada, Germany, and the Netherlands concerning the proposed proceedings against Afghanistan before the ICJ is an important step towards protecting and promoting the rights of women and girls in the country. However, the case also raises fundamental issues regarding the legal capacity of the Taliban to represent the State in an international dispute, in light of the international community's lack of recognition of the regime. Resolving this issue may involve looking to previous cases involving changes of government during ICJ proceedings, the ICC's response to the situation in Afghanistan, or an application of the principles of State responsibility. Regardless of the avenue pursued, it is likely that the Court will accept the Taliban's standing as agents for the State. If care is taken to avoid legitimizing the Taliban regime, this potential case offers a powerful avenue to highlight and address the significant and widespread ill-treatment of women and girls in Afghanistan.

59. *See id.* (noting that "this summer, when it came to the third U.N. convening of meetings in Doha, Qatar, to discuss Afghanistan, U.N. officials excluded women at the insistence of the Taliban.").

60. *See id.* (noting that the proposed case before the ICJ "will very likely turn on a substantive question about the relationship between religion and women's rights").

61. Rachel Reid, *Afghanistan in Front of the World Court? What Can Be Expected from a Legal Challenge to the Emirate's Violations of Women's Rights*, AFG. ANALYSTS NETWORK (Oct. 3, 2024), <https://www.afghanistan-analysts.org/en/reports/international-engagement/afghanistan-in-front-of-the-world-court-what-can-be-expected-from-a-legal-challenge-to-the-emirates-violations-of-womens-rights/>. *See also*, Afghan Women's Coalition for Justice, *Afghan Women's Coalition for Justice Statement* (Sep. 25, 2024), <https://www.law.upenn.edu/live/files/13203-afghan-womens-coalition-for-justice-statement> (emphasizing the importance of participation of Afghan women and girls in international processes).

62. *See Reid, supra* note 61 (discussing concerns raised by Afghan women that the proposed case might contribute to the Taliban's de facto recognition).