

**LEGAL PROTECTION OF WOMEN'S RIGHTS IN AFGHANISTAN
DURING THE TALIBAN REGIME OF 2021-2022 BASED ON CEDAW**



Arranged by:

Alya Ananda Safitri

19410720

INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY PROGRAM IN LAW

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**LEGAL PROTECTION OF WOMEN'S RIGHTS IN AFGHANISTAN
DURING THE TALIBAN REGIME OF 2020-2021 BASED ON CEDAW
THESIS**

Presented as the Partial Fulfillment of the Requirements to Obtain

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Arranged By :

ALYA ANANDA SAFITRI

Student Number : 19410720

**INTERNATIONAL PROGRAM
UNDERGRADUATE LEGAL STUDIES PROGRAM
FACULTY OF LAW
UNIVERSITAS ISLAM INDONESIA
YOGYAKARTA**

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Tim Penguji dalam Ujian Tugas Akhir/Pendadaran
Pada Tanggal.....

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Dosen Pembimbing Tugas Akhir,

Prof. Dr. Sefriani, S.H., M.Hum.
NIK. 934 00101

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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Has been Defended in the Presence of the Testing Team in
Final Assignment Exam / Awareness
On the date and Declared PASSED

Yogyakarta, February 6 2024

Awareness Team

1. Chief : Prof. Dr. Sefriani, S.H., M.Hum

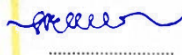
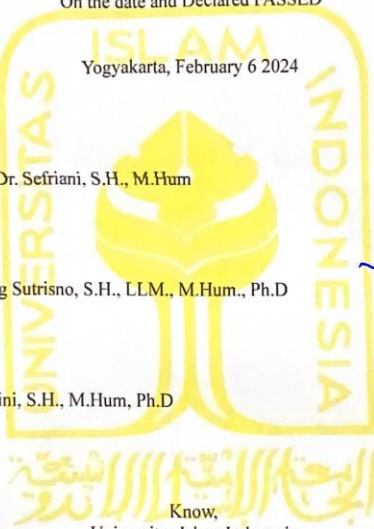
2. Member :

Prof. Nandang Sutrisno, S.H., LL.M., M.Hum., Ph.D

3. Member :

Dra. Sri Wartini, S.H., M.Hum, Ph.D

Signature



Know,
Universitas Islam Indonesia
Fakultas Hukum
Dekan,



BAR

Prof. Dr. Budi Agus Riswandi, S.H., M.H.

NIK.014100109

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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This bachelor degree thesis has been Examined and Approved by Language

Advisor

to be examined by the Board of Examiners at the Thesis Examination

Yogyakarta, January 9, 2024

Language Advisor,



Ruli Hapsari, S.pd., MA

ORIGINALITY STATEMENT
SURAT PERNYATAAN
ORISINALITAS KARYA ILMIAH BERUPA TUGAS AKHIR MAHASISWA
FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

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NIM : 19410720

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Yogyakarta, 10 Januari 2024

Yang Membuat Pernyataan



ALYA ANANDA SAFITRI

NIM: 19410720

CURRICULUM VITAE

1. Nama Lengkap : Alya Ananda Safitri
2. TTL : Jakarta, 28 Desember 2001
3. Jenis Kelamin : Perempuan
4. Golongan Darah : B
5. Agama : Islam
6. Alamat Terakhir : Candi Winangun, Sleman, DIY
7. Alamat Asal : Sunter karya selatan V, Jakarta Utara, DKI Jakarta
8. Email : alyaalubis@gmail.com
9. Identitas Orangtua :
 - a. Nama Ayah: Feryansyah Lubis
 - b. Pekerjaan Ayah : Wiraswasta
 - c. Nama Ibu : Chotifah Susanti
 - d. Pekerjaan Ibu : Ibu Rumah Tangga
10. Riwayat Pendidikan :
 - a. SD : SDN Jakasampurna 03
 - b. SMP : SMP Islam Boarding School Lembang
 - c. SMA : SMA Islam Boarding School Lembang
11. Organisasi :
 - a. Student Association of International Law UII 2020-2022
 - b. Fungsionaris Departemen Kreasi Mahasiswa LEM Universitas Islam Indonesia 2021-2022
 - c. Serkertaris Departemen External Affairs and Netwrok Srikandi Universitas Islam Indonesia 2021-2022
12. Pengalaman lainnya :
 - a. Anggota komisi A PERADILAN FH UII Tahun 2021
13. Hobi : Membaca Novel, dan Olahraga.

Yogyakarta, _____ 2023

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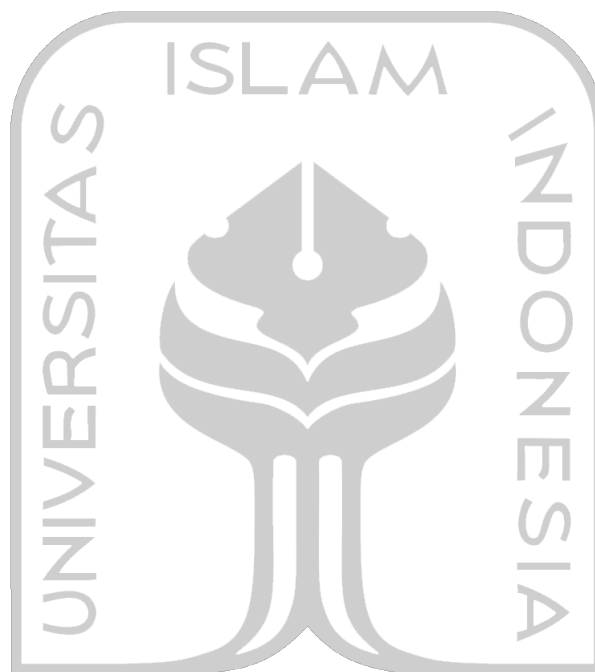
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“Cukuplah bagi kami Allah, sebaik-baiknya pelindung dan sebaik-baiknya penolong kami.”

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Skripsi ini penulis persembahkan bagai wujud cinta dan bakti kepada:



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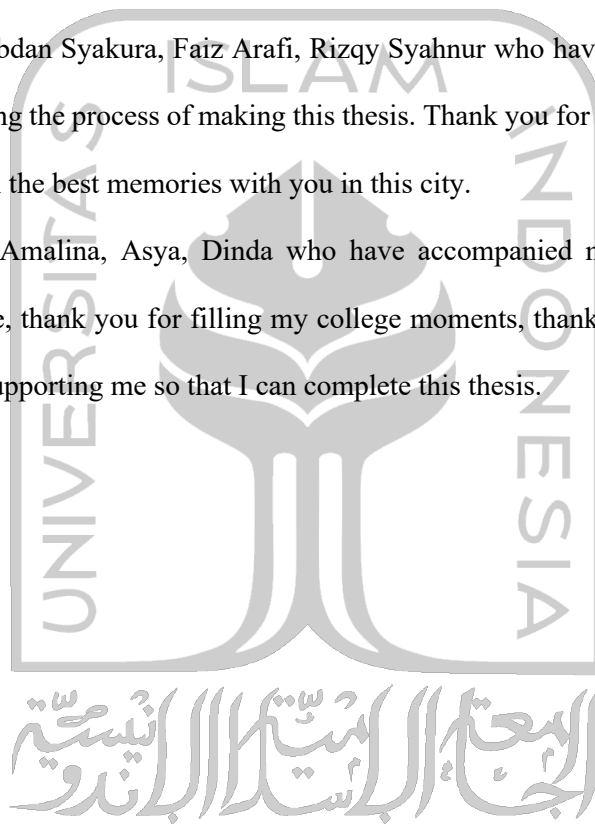


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ABSTRACT

This paper discusses women's rights in Afghanistan during the Taliban regime from 2021 to 2022. Having seized power in Afghanistan by the Taliban in August 2021, a wide range of regulations seem to discriminate against women. The discriminatory restrictive regulations enforced by the Taliban have prevented women and girls in Afghanistan from receiving the same rights as men, such as access to education, employment, and access to public facilities. This is clearly inconsistent with The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Given that Afghanistan ratified CEDAW in 2003, it guarantees the protection of women's rights, it means that Afghanistan has become a state party, then Afghanistan has the responsibility to comply with this convention.

This research uses the type of normative legal research - searching for material in the form of library materials or secondary data as sources in writing research. The approach used in this study is the conceptual approach and the statute approach. This research also uses a historical approach and a case approach.

The purpose of this study is to find out how the legal protection of women's rights during the Taliban regime considering that Afghanistan has ratified CEDAW. Furthermore, to find out whether Afghanistan can be held responsible for the restrictions on women's rights imposed by the Taliban. This study also explains the legal protection that Afghanistan has provided for women's rights based on the ratification of CEDAW, namely the Law on Elimination of Violence against Women (EVAW). The Islamic Republic of Afghanistan's Constitution also protects women's rights. However, the EVAW law has not been enforced at all since the Taliban took over. It indicates that Afghanistan can be held responsible.

Keywords:

Legal Protection, Women rights, State Responsibility, Taliban

CHAPTER I

INTRODUCTION

A. Background of Study

Every individual regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status has the same rights that are inherent in each of us, namely inalienable human rights.¹ Human rights confirm that all human beings are born free and equal in dignity and rights.² Even though the Universal Declaration of Human Rights has been formed, it does not mean that human rights violations have stopped. There are numerous cases of human rights violations across the globe, especially against women. As a result, an international legal instrument - the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was born.

This convention is motivated by women's experiences of discrimination all over the world, and it represents a global commitment that women's human rights are human rights.³ This convention establishes the principles of human rights, norms and standards of behavior, and obligations to which the Contracting States agree to adhere. As defined in Article 1, discrimination is understood as “any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field”. The Convention gives positive affirmation to the principle of equality by requiring States parties to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of

¹ What Are Human Rights?, Office of the United Nations High Commissioner for Human Rights, terdapat dalam <https://www.ohchr.org/en/what-are-human-rights>.

² Universal Declaration of Humans Rights, Article 1

³ Sri Nurherwati, Thaufiek Zulfahary, Kurang Optimalnya Implementasi CEDAW dalam Penghapusan Kekerasan terhadap Perempuan, Siaran Pers Komnas Perempuan, Jakarta, 24 Juli 2018

guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men” (article 3).⁴

Based on The Women, Peace and Security Index (WPS), Afghanistan ranks last out of 170 countries. The 2021 WPS Index assesses the well-being of women around the world by creating new index scores and rankings. WPS measures women's rights through levels of inclusion (in economic, social, and political), representation in the justice system, and security (at the household, community, and society levels).⁵

Afghanistan is the country where women feel the most unprotected in terms of security. WPS 2021 reveals a dangerous state of affairs in many areas, where women and girls have experienced severe restrictions on their possibilities outside the home and unusually high levels of violence. As a result, Afghan women and girls face significant challenges. With organized violence increasing, over 2017 Afghanistan's score decreased by 28%, and with the recent return of the Taliban, one can imagine the collateral damage. High levels of organized violence are significantly associated not only with high rates of domestic violence against women, but also with poor performance on inclusion, justice, and security of women in general.⁶ Hence regulations or solutions are needed to reduce discrimination and violence against women in Afghanistan, such as applying CEDAW to set in place mechanisms to fully realize women's rights.

⁴ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Office of the United Nations High Commissioner for Human Rights, terdapat dalam <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>. Diakses pada 10 maret 2023 pukul 21.40 WIB

⁵ 10 of the worst countries for women's rights, Concern Worldwide, terdapat dalam <https://www.concern.net/news/worst-countries-for-womens-rights>. Februari 2022, diakses pada 11 maret 2023 pukul 19.00

⁶ Georgetown Institute for Women, Peace and Security and Peace Research Institute Oslo, *Women, Peace, and Security Index 2021/22: Tracking sustainable peace through inclusion, justice, and security for women*, Washington, DC: GIWPS and PRIO, 2021, hlm. 4-5

On 14 August 1980, the Government of Afghanistan signed the CEDAW. However, the country's conflicts prevented ratification of the Convention until 2003. Given that the violations of women's human rights during the years of war, the Afghan government ratified CEDAW without reservation on March 5, 2003.⁷

In 1996, Afghanistan declared itself an Islamic emirate and began to enforce strict Islamic law as the Taliban which was an armed group that emerged in the 1990s from the Afghan civil war captured the capital and hanged the country's last communist president.⁸ Since then the Taliban managed to control most of the country until 2001. The Taliban was back in control of Afghanistan when the United States withdrew its remaining troops from Afghanistan as a result of the 2020 agreement between the US administration of Donald Trump and the Taliban.⁹ Twenty years after the US-led military campaign to topple the Taliban as a result of the September 11, 2001 attacks by Osama Bin Laden, the Taliban returned to power in August 2021.¹⁰

Following the Taliban's resurgence in 2021, they implemented Sharia laws, which are a set of Islamic regulations derived from the Quran. The Taliban has pledged to uphold women's rights in Afghanistan, but still within the framework of sharia law. This statement allows for various interpretations as it reflects on the Taliban's imposition of a stringent regime, which included restrictions on women's mobility and denial of education to females. Critics argue that the Taliban's imposition of restrictions on women, under the pretext of Islamic law, has actually gone beyond

⁷ Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/AFG/1-2, 2011

⁸ S. Dian, Awal Mula Taliban Menguasai dan Diperhitungkan di Afghanistan pada 1996, Tempo.co, terdapat dalam <https://dunia.tempo.co/read/1496690/awal-mula-taliban-menguasai-dan-diperhitungkan-di-afghanistan-pada-1996>. 2021.

⁹ Lindsay Maizland, The Taliban in Afghanistan, Council on Foreign Relations, terdapat dalam <https://www.cfr.org/background/taliban-afghanistan>. 2023

¹⁰ Clayton Thomas, *Taliban Government in Afghanistan: Background and Issue for Congress*, Congressional Research Service, November, 2021

the limits set by Shariah.¹¹ Zabihullah Mujahid as a Taliban spokesman said that there would be no discrimination against women and wanted to guarantee the international community that no one would be harmed. However, since the return to power of the Taliban in Afghanistan, the promises that have been made by the Taliban cannot be fully realized by the government. One form that the Taliban discriminates against women is that the Taliban insists that women in Afghanistan cannot be involved in government affairs. The policies applied to women in Afghanistan severely restrict the exercise of their rights.¹² Education, employment, public spaces as well as other basic freedoms are now inaccessible for women and girls. The first week since the Taliban came to power, many women protested in public and the Taliban's response was quite brutal, such as beating protesters, disturbing the protests, and torturing journalists covering the demonstrations. Over time, the protests continued and the response from the Taliban worsened and peaked on January 16 in Kabul, when Taliban members threatened, intimidated, and physically assaulted protesters, using pepper spray and electric shock devices.¹³

In the end of 2022 this regime banned women from studying in universities and working for NGOs. Even though there were many protesters, the Taliban quashed all the demands the protesters proposed due to the stricter rules on women that were upheld.¹⁴ Taliban armed squads at one point entered women's classrooms at universities and schools across Kabul and forced students to lift their long skirts and robes to reveal their clothes underneath. When students were

¹¹ Daniel Victor, What Is Sharia Law, and What Does It Mean For Afghan Women Under The Taliban, The New York Times, terdapat dalam <https://www.nytimes.com/article/shariah-law-afghanistan-women.html>. 2021

¹² Tsabitah Rizqi, Aji Wibowo, Violation of Women's Rights in Afghanistan during the Taliban Regime under the Cedaw Convention, Reformasi Hukum Trisakti Volume 4 Nomor 2 Mei 2022.

¹³ Afghanistan: Women Protesters Detail Taliban Abuse, Human Rights Watch, terdapat dalam <https://www.hrw.org/news/2022/10/20/afghanistan-women-protesters-detail-taliban-abuse>. Diakses pada 12 maret 2023, 21.30 WIB

¹⁴ *Taliban Restriction on Women's Rights Deepen Afghanistan Crisis*, Asia Report N°329, 2023

caught wearing Western-style pants, the armed squad beat them with electrical cables.¹⁵ The restrictions enforced by the Taliban on women in Afghanistan are not in line with the 2004 Afghan constitution that regulates the prohibition of discrimination between citizens, which reads: “Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man, and woman, have equal rights and duties before the law.”¹⁶ Furthermore, these restrictions are also not in line with CEDAW, even though Afghanistan is a state party to CEDAW. The country, therefore, must work towards equality between the genders and against gender discrimination. This research is conducted so that the problems currently being faced by Afghanistan related to the implementation of protecting women's rights can be used as lessons for the Indonesian state. The problems in Afghanistan can be a reflection for Indonesia. It is hoped that Indonesia will be able to review and improve existing laws and regulations which in turn the laws and regulations in the country can internalize CEDAW principles. Based on the explanation regarding the problems above, it is necessary for the author to investigate more about how **“Legal Protection of Women’s Rights in Afghanistan During the Taliban Regime of 2021-2022 Based on CEDAW.”**

B. Problem Statements

- 1) How is the Legal Protection of Women’s Rights in Afghanistan during the Taliban Regime of 2021-2022 Considering Afghanistan has ratified CEDAW?

¹⁵ Belquis Ahmadi, Taliban Escalate New Abuses Against Afghan Women, Girls, United States Institute of Peace, terdapat dalam <https://www.usip.org/publications/2022/10/taliban-escalate-new-abuses-against-afghan-women-girls>. 2022, diakses pada 12 maret 2023, 21.45 WIB

¹⁶ Article 22 of the Constitution of the Islamic Republic of Afghanistan, 2004

2) Can Afghanistan be held responsible Under CEDAW for the Restriction on Women's Rights Imposed by The Taliban?

C. Research Objective

The purpose of this study is to find out the legal protection of women's rights during the Taliban regime considering Afghanistan has ratified CEDAW. Furthermore, it is also to find out whether Afghanistan can be held responsible for the restrictions on women's rights imposed by the Taliban.

D. Originalities of Research

Based on the results of the search that has been done, there are several previous studies that have similarities with this current research. However, this research certainly has different problems from previous studies. Some previous studies that have been done are:

No.	Sources	Substances	Differences with Thesis
1.	<i>Perlindungan Hukum bagi Hak Asasi Perempuan Berdasarkan Convention on The Elimination of All Forms of Discrimination Against Woman</i> , Tiffany R. D. Sondakh, Lex Et Societatis Vol.	Problem formulation: 1. What are the forms of violation of women's rights? 2. How is the legal protection for women's human rights in the Convention on The Elimination of All Forms of	This journal article focuses on forms of violation of women's human rights by presenting cases from around the world and the protection of human rights provided by CEDAW for women. It also discusses human rights regulations in Indonesia.

	VI/No. 6/Agust/2018	Discrimination Against Women (CEDAW)?	
2.	Perlindungan Hukum Hak Asasi Perempuan Di Iran Berdasarkan Instrumen Convention On The Elimination Of All Forms Of Discrimination Against Women (Cedaw), Rachma R M Latuconsina, (thesis, 2021)	Problem formulation: 1. How to regulate women's human rights based on CEDAW 2. How is the Legal Protection of Human Rights for women in Iran based on CEDAW	This thesis focuses on the case in Iran so that the object under study is different
3.	Perlindungan Hak Perempuan Dalam Perspektif Keadilan Gender, Andi Kasmawati	Discussion: 1. women and gender 2. Convention on the Elimination of Discrimination Against Women in Indonesia 3. The Government's Role in Providing Protection of	This journal article focuses on gender perspectives and the setting of the CEDAW convention in Indonesia as well as the Indonesian government's efforts to protect women's rights and gender justice

		Women's Rights and Gender Justice	
4.	<p>Pelanggaran Hak Perempuan Di Afghanistan Selama Kekuasaan Rezim Taliban Berdasarkan Konvensi Cedaw, Tsabitah Rizqi Ekanoviarini, Reformasi Hukum Trisakti Vol. 4 No. 4 2022</p>	<p>Discussion:</p> <ol style="list-style-type: none"> 1. Forms of Human Rights Violations Against Women During the Power of the Taliban regime 2. Afghanistan's Responsibility for Violations of Women's Rights 	<p>This journal article focuses on explaining women's rights restricted by the Taliban in Afghanistan. It also mentions Afghanistan's form of responsibility for human rights violations. Different from this thesis which will focus on the protection of women's rights provided by CEDAW and whether Afghanistan can be held accountable for the restriction that was imposed by the Taliban</p>
5.	<p>Tanggung Jawab Negara Dalam Perlindungan Hak Asasi Manusia Menurut Hukum Internasional Oleh: Yanes S.</p>	<p>Problem formulation:</p> <ol style="list-style-type: none"> 1. How is the Legal Arrangement of State Responsibility in Protecting Human Rights According to International Legal Instruments? 	<p>This journal article discusses the Legal Arrangement of State Responsibility in the Protection of Human Rights According to International Legal Instruments and how the Implementation of State Responsibility in National Law.</p>

	Merentek2	2. How is the Implementation of State Responsibility in National Law?	
6.	State Responsibility of Afghanistan under Taliban Regime, M Yakub A Kadir, Siti Nurhaliza, Jurnal Media Hukum, Vol. 30, No.1, June 2023	<p>Discussion:</p> <ol style="list-style-type: none"> 1. The status of Taliban under the International Law 2. The Implementation of Article 10 of CEDAW towards Taliban Responsibility 3. CEDAW Committee response to Violation in Afghanistan 	<p>This journal article focuses on discussing the status of the subject of the Taliban according to international law and how the implementation of CEDAW article 10 is related to the responsibility of the Taliban. This is different from this thesis which focuses on legal protection of women's rights and also the responsibilities of Afghanistan.</p>
7.	State Responsibility of Myanmar Government Toward Rohingya	<p>Problem Formulation:</p> <ol style="list-style-type: none"> 1. Are there human rights violation committed by the Myanmar government toward Rohingya 	<p>It discusses the responsibility of the state in which the case studies are the government of Myanmar and Rohingya. This is different from this thesis which discusses the case of the Taliban regime in Afghanistan.</p>

Case in the Perspective of International Human Rights Law	ethnic? 2. What is the state responsibility that should be conducted by Myanmar government to Rohingya ethnic?	
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The obvious difference among those studies is the country being investigated. This current research study aims to examine the Legal Protection of Women's Rights in Afghanistan during the Taliban Regime of 2021-2022 based on CEDAW. There are other studies that have a different point of view such as only discussing the theory of international human rights and the theory of state responsibility in international law in general without a specific case study.

E. Definition of Terms

1. Legal Protection

According to Satjipto Rahardjo, legal protection is providing security to human rights being violated so that people can enjoy their rights that have been granted by law. Terminologically, legal protection is from a combination of two terms - "protection" and "law". Merriam-Webster Dictionary defines "protection" as the act of protecting. Then, "law" can be interpreted as regulations or customs that are officially considered binding, which are confirmed by the ruler or government. Referring to this definition, legal protection can be interpreted as an effort to protect by the government or authorities with several existing regulations that aim to ensure legal subjects

get their rights. According to Philipus M. Hadjon, legal protection is the protection of dignity, as well as the recognition of human rights possessed by legal subjects based on legal provisions of arbitrariness or rules that can protect one thing from another.¹⁷ There are two kinds of legal protection, - preventive legal protection and repressive legal protection. Preventive legal protection means prevention of disputes, while repressive legal protection aims to resolve disputes.¹⁸ The legal protection referred to in this research is repressive legal protection.

2. Women's Rights

The right to live a life free from violence and discrimination and equality rights in the field of education and employment.

3. State Responsibility

In terms of the Draft Articles, state responsibility is incurred when two elements are proved. The first is that there must be conduct consisting of an act or omission, which is attributable to the state under international law. The second is that the conduct must constitute a breach of an international obligation of the state. It is clear, therefore, that state responsibility is dependent on the link between the state and the wrongful act — the conduct of a private actor must qualify as an 'act of a state'.¹⁹ According to Peter Salim there are 3 terms - accountability, liability, and responsibility. Accountability is usually related to payment or financial issues; liability is a legal responsibility that is manifested in the form of civil responsibility; while responsibility is often

¹⁷ Mahrus ali, *Perlindungan Hukum Terhadap Korban Kejahatan*, Ctk. Pertama, UII, Yogyakarta, 2020, hlm. 1.

¹⁸ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia: Sebuah Studi tentang Prinsip-Prinsipnya, Penerapannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*, Bina Ilmu, Surabaya, 1987, hlm. 2.

¹⁹ Danwood Chirwa, *The Doctrine of State Responsibility as a Potential Means Holding Private Actors accountable for Human Rights*. Melbourne Journal of International Law 2004.

associated with cases of human rights violations. Responsibility itself can be defined as an obligation to repair the consequences of an action.²⁰

In terms of CEDAW, there is The Committee on the Elimination of Discrimination against Women which has the task of monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. States that ratify the Convention are legally obliged to:

- a) Eliminate all forms of discrimination against women in all areas of life;
- b) Ensure women's full development and advancement in order that they can exercise and enjoy their human rights and fundamental freedoms in the same way as men; and
- c) Allow the CEDAW Committee to scrutinize their efforts to implement the treaty by reporting to the body at regular intervals.

State that has ratified the treaty (State parties) are obligated to provide periodic reports to the Committee on how they implement the rights of the Convention.²¹

4. Taliban Regime

Taliban is an armed group that emerged in the 1990s from the Afghan civil war. In 1996 to 2001 Afghanistan was led by one of mujahidin Islamic movements.²² In 2021 the Taliban retake control of Afghanistan after foreign troops withdrew from Afghanistan following an agreement between the United States and the Taliban. The Taliban regime in this research refers to the Taliban regime that started in 2021.

²⁰ Sefriani, *Hukum Internasional Suatu Pengantar*, Jakarta: Rajawali Pers, 2016, hlm 251-252.

²¹ Introduction to the Committee, terdapat dalam [²² Kadek Surya, *Aneksasi Afghanistan Terhadap Taliban Tahun 2021*, e-Journal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum \(Volume 4 Nomor 3 November 2021\), hlm. 915-916.](https://www.ohchr.org/en/treaty-bodies/cedaw/introduction-committee#:~:text=The%20Committee%20on%20the%20Elimination,human%20rights%20treaty%20for%20women, diakses pada 1 september 2023</p></div><div data-bbox=)

F. Theoretical Review

1. Non-Discrimination Principle

Both women and men are given protection from discrimination based on gender by the UDHR in line with article 2 of UDHR “*Everyone is entitled to all the rights and freedoms... without distinction of any kind*”. This article emphasizes that all human beings are entitled to the same rights and freedoms and that any form of discrimination is unacceptable. The implementation of the principle of non-discrimination in the UDHR is reflected in several other human rights treaties and agreements, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights through United Nations General Assembly Resolution Number 2200A (XXI) which has legally binding force. These documents reaffirm the importance of the principle of non-discrimination as a human right and call for its protection and promotion.²³

CEDAW Article 1 also defines “discrimination against women” as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁴ The definition of article 1 is related to differences in treatment based on sex such as differences between women and men, exclusion of women and restrictions on rights imposed on women. The difference in treatment which aims to undermine or exclude on the basis of gender is what CEDAW views as discrimination.²⁵ In

²³ Wahyuningsih, *Prinsip Kesetaraan dan Non Diskriminasi Dalam Konvensi ICESCR dan ICCPR*, Jurnal Hukum Prioris, Volume 2, Nomor 1, September 2008, hlm. 23.

²⁴ Convention on the Elimination of All Forms of Discrimination against Women, article 1

²⁵ Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, The Norwegian Centre for Human Rights, Research Notes 03/2004, hlm. 8.

CEDAW there are already specific steps to eliminate discrimination against women as a manifestation of women's rights in the international sphere, one of which is described in Article 2.

The UNESCO Convention against Discrimination in Education (CADE, 1960) and Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) provide a statement regarding the right to education and have the same goal of promotion and development of the right of every person to education, without discrimination or exclusion. The CADE defines discrimination as “For the purposes of this Convention, the term ‘discrimination’ includes any distinction, exclusion, limitation or preference, which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education...”. CADE refers to the Universal Declaration of Human Rights on the principle of non-discrimination. This principle is important because vulnerable or disadvantaged groups may not be able to get equal access to education.²⁶

2. Equality Principle

The Universal Declaration of Human Rights 1948 provides the fulfillment of equal rights for women and men. Equality means there is no discrimination. As contained in article 1 of the Universal Declaration of Human Rights that humans are born free and equal in dignity and rights. The principle of equality requires equal treatment, in which the same situation must be treated equally, and with debate, different situations are treated differently. Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) says that “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all

²⁶ Unesco, *UNESCO Convention against Discrimination in Education (1960) and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A comparative analysis*, 2006, hlm. 12.

economic, social and cultural rights outlined in the present Covenant”. The article emphasizes that the state must ensure that the rights of women and men are equal in the economic, social, and cultural fields.²⁷

The overall object and purpose of the CEDAW is to eliminate all forms of discrimination against women to achieve women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention have a legal obligation to respect, protect, promote, and fulfill this right to non-discrimination for women, as well as to ensure the development and advancement of women in order to improve their position to one of de jure and de facto equality with men.²⁸

3. Imputability Doctrine

There is an obligation to uphold human rights, namely mutual respect for the rights of others. Therefore, the protection and enforcement of human rights is one of the obligations of the state and its citizens. In protecting and upholding human rights, the government has to respect, protect, enforce, and advance them.²⁹ In the Declaration of Human Rights Defenders, it is emphasized that the main responsibility and duty to promote and protect human rights and basic freedoms lies with the State. Then in Article 2, it is explained that the main responsibility and task of the state is to take the necessary steps in various fields to ensure that all people under its jurisdiction, individually or collectively, can enjoy all these rights and freedoms in practice.³⁰

²⁷ Wahyuningsih, *Loc. Cit*

²⁸ General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc A/59/38, annex I

²⁹ Knut D. Asplun, Eko Riyadi, dan Suparman Marzuki (ed), *Hukum Hak Asasi Manusia*, PUSHAM UII, Yogyakarta, 2008, hlm. 271.

³⁰ *Declaration on Human Rights Defenders* adopted by the General Assembly of the United Nations on 9 December 1998

Article 1 of ARSIWA's general principles stipulates that state responsibility as a result of wrongful acts that violate international law is the responsibility of the state itself. State responsibility arises when international violations occur and acts of violation happen such as negligence. Article 1 of the Draft Article of Responsibility of States for Internationally Wrongful Acts (2001) has formulated that "Every internationally wrongful act of a State entails the international responsibility of that State".³¹ Article 2 letter (f) CEDAW says that "To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" for state parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.³² Therefore, Afghanistan in this case is not in line with CEDAW because Afghanistan as a state party has not carried out its obligations per the articles above.

There are three criteria to be met in order for the state to be held responsible. The first is that there must be binding international obligations. In this case, Afghanistan, which has ratified CEDAW, is considered to have fulfilled this element because States have obligations and duties under international law when they become parties to international agreements. International ratification is legally binding so when a state ratifies a human rights treaty, the state is expected to make domestic measures and laws per its treaty obligations and duties.³³ Second, there are international obligations that have been violated due to particular actions or omissions committed by a country. If the country is proven to have committed this element based on a binding provision (internationally wrongful act), then the country's actions will result in international responsibility.

³¹ Article 1, Draft Article on Responsibility of States for Internationally Wrongful Acts, Year 2001.

³² Article 2, Convention on the Elimination of All Forms of Discrimination against Women, Year 1979.

³³ Terdapat dalam <https://www.un.org/esa/socdev/enable/convinfofaq.htm>. Diakses pada 19 maret 2023, pukul 17:46 WIB.

Therefore, a country can be held accountable for its unlawful actions.³⁴ Third, there is damage or loss caused by an act or omission committed by a country. Malcolm N. Shaw implicitly stated that a country must fulfill the three elements above if it wants to be held responsible.

G. Research Method

1. Type of Research

This research uses the type of normative legal research by researching secondary data. Normative legal research is a research process that examines law as norms, rules, legal principles, legal principles, legal doctrine, legal theory and other literature to answer the legal issues under study.³⁵ The research of “Legal Protection to Women’s Rights in Afghanistan During Taliban Regime on 2021-2022 Based on CEDAW” is carried out by searching for materials based on library materials or secondary data as the research sources.

2. Approach

The approach used in this study is the conceptual approach and the statute approach which is done by employing the doctrines that have grown up in the science of law and by examining all laws related to legal issues. By studying the views and doctrines in the science of law, the researcher will find ideas related to legal concepts, and legal principles that are relevant to the issues being studied. This research also uses a historical approach and a case approach. The former is carried out by examining the background of the subject under study and the development of

³⁴ Neni Ruhaeni, *Perkembangan Prinsip Tanggung Jawab (Bases Of Liability) dalam Hukum Internasional dan Implikasinya terhadap Kegiatan Keruangankasaan*, Jurnal Hukum IUS QUIA IUSTUM NO. 3 VOL. 21 JULI 2014: 335 - 355, hlm. 339.

³⁵ Muhaimin, *Metode Penelitian Hukum*, Ctk. Pertama, Mataram University Press, Ntb, 2020, hlm. 48.

regulations regarding the issues at hand. The latter aims to study the application of legal norms or rules in legal practice.

3. Object of Research

The objects of this research are:

- a) CEDAW
- b) Afghanistan constitution concerning legal protection of women's rights in Afghanistan during the Taliban regime in 2021-2022.

4. Sources of Research Data

- a) Primary Legal Materials

Convention on the Elimination of All Forms of Discrimination against Women, The Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Constitution of Afghanistan.

- b) Secondary Legal Materials

The secondary legal materials in this study consist of draft laws and regulations, literature/books, articles, journal articles, and previous research results which provide an explanation of primary legal materials and are relevant to the issues to be discussed. Peter Mahmud explained that secondary legal material is in the form of all legal publications which are not official documents. Publications about law include textbooks, legal dictionaries, legal journals, and comments on court decisions³⁶

- c) Tertiary legal material

non-legal materials such as the Merriam-Webster.

³⁶ *Ibid.*

CHAPTER II

HUMAN RIGHTS PRINCIPLES AND STATE RESPONSIBILITIES UNDER INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE AND LEGAL PROTECTION

A. Human Rights Theory

1. State Obligation under Human Rights

All human rights treaties and other documents reflect the idea that it is the primary duty of states and their authorities or agents to respect, protect, fulfill, and promote all human rights. Respecting a right involves abstaining from any actions that hinder the exercise of that right. It is the responsibility of states to guarantee that human rights are upheld by their own governmental bodies and officials, as well as by individuals, companies, and other entities not affiliated with the state that operate within their jurisdiction.³⁷ Protecting the right entails implementing laws that establish processes or procedures with the goal of preventing the violation of that right by either government officials or individuals or groups not affiliated with the government. States have a duty to protect people and organizations from human rights violations.³⁸ Fulfilling a right involves implementing proactive actions to develop institutions and processes, which may involve allocating resources, to enable people to fully enjoy and get advantages from that right. States have a duty to actively promote and enable the achievement of basic human rights.³⁹ States have a duty to ensure that human rights are promoted and implemented so that individuals can fully exercise and enjoy those rights. Human rights legislation establishes the rights and responsibilities of individuals, as well as the obligations of governments, to advance and safeguard the human rights

³⁷ Samantha Besson, *The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution*, 2015. Hlm. 248.

³⁸ <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=The%20obligation%20to%20protect%20requires,enjoyment%20of%20basic%20human%20rights.>

³⁹ *Ibid.*

and fundamental freedoms of individuals or groups. Article 1 of the United Nations Charter provides that one of the purposes of the United Nations is to “promote and encourage respect for human rights and for fundamental freedoms.”⁴⁰

Article 2 number (1) of the Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to promote and Protect Universally Recognized Human Rights and Fundamental Freedoms states⁴¹:

“Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.”

The Universal Declaration of Human Rights (UDHR) lists rights but does not clarify who is responsible for carrying out the accompanying duties. The Declaration appears to presuppose that states are the principal entities accountable for carrying out obligations. The document also suggests that the responsibility for preserving human rights may extend to individuals and institutions below the state level, as well as organizations above the state level. Indeed, the proclamation clause of the preamble states that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”⁴²

⁴⁰ Guidance notes for UNODC Staff, *Promotion and Protection of Human Rights*, 2011.

⁴¹ Article 2 number (1), *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 1998.

⁴² Global Citizenship Commission, *the Universal Declaration of Human Rights in the 21st Century*, Open Book Publishers, hlm. 71

According to international treaty law, the state is obliged to include provisions in international instruments that have been agreed upon through the ratification process, into positive law so that all obligations contained in these international instruments are implemented in the state legal system to help protect human dignity and rights. The expectations and claims that people in the state have towards the state are called “human rights”. States which have ratified international human rights covenants and conventions are known as 'States Parties'. These states have obligations under international law to protect human dignity and human rights. In simple terms, these covenants and conventions, once ratified by a state, create obligations that bind that state under international law.⁴³

The obligation of the state to respect and guarantee the rights that are recognized in international instruments, and which have been agreed upon, is a principle that has been universally applied (principle of *pacta sunt servanda*). All international and national legal instruments provide fundamental guarantees for the human rights of every human being without any discrimination. Consequently, if the contents of the international agreement are violated, the country that commits the violation must be held accountable.

States have an obligation to uphold the human rights of their citizens through many means. First, the state has an obligation to oversee particular institutions that are directly constrained by human rights, such as the legal system. Second, states possess a certain level of authority over additional organizations and frameworks that are subject to restrictions imposed by human rights. Third, states possess superior authority to enforce actions against individuals who infringe upon rights, surpassing any other institution within society. Fourth, states have the potential to pose a

⁴³ David Rutherford, *States' Obligations Under International Human Rights Conventions: the Implications for Government Sport Policy*, Commonwealth Secretariat 2018, hlm. 7-9.

significant danger to human rights. Fifth, states have the ability to provide protection against threats originating from within their own jurisdiction by dividing their authorities.⁴⁴

International human rights law requires states to refrain from acting in a way that violates human rights, but also to protect individuals from human rights violations committed by state and non-state actors. Therefore, there is a legal framework that regulates state responsibility for human rights violations by armed non-state actors. In this case, both Afghanistan and the Taliban as non-state actor to act to respect human rights.⁴⁵

2. Equality Principle

The principles of human rights were developed by humans as a way to ensure that the dignity of each person is properly and equally respected, that is, so that humans can fully develop and use human qualities such as intelligence, talents and conscience and satisfy spiritual and other needs. The idea of human rights is built on the principle of equality. This principle emphasizes that the dignity of all human beings is equal. The various differences that exist in humans do not make human positions unequal. This is reflected in the principle of “equal pay for equal work” in the Universal Declaration of Human Rights which is considered equal rights to equal work.⁴⁶

Referring to the opinion of Judge Tanaka, a Japanese jurist, professor of law and politician who served as the last Minister of Education of the Empire of Japan and the second postwar Chief Justice of Japan, he explained that the principle of equality⁴⁷ “does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as

⁴⁴ David Rutherford, *Loc. cit*

⁴⁵ Tatyana Eatwell, *State Responsibility For Human Rights Violation Committed In the State's Territory by Armed Non-state Actors*, The Geneva Academy of International Humanitarian Law and Human Rights, December 2018, p-11.

⁴⁶ Andrey Sujatmoko, *Hukum HAM dan Hukum Humaniter*, Ctk. pertama, Jakarta: Rajawali Pers, 2015, hlm. 11.

⁴⁷ Stephanie Farrior, *Equality and Non-Discrimination Under International Law*, volume II, the Library of Essays on International Human Rights, 2015.

sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.” The principle of equality necessitates that people who are equal should be treated equally, and differences should be looked at to see if they are fair and help achieve de facto equality, not just formal equality. This approach is precisely adopted in the field of international human rights law. As human beings, the entitlement to equitable acknowledgment of their rights among persons does not require advocacy as it has been established as a fundamental right. However, since a long time ago, women have had to fight hard to get this right. Equality is expressly stated in the Preamble to the UN Charter, in the Declaration of Human Rights, and in 1966 in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.⁴⁸

The World Conference on Human Rights urges the full and equal enjoyment by women of all human rights and that this be a priority for Governments and the United Nations. The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms. In particular, steps should be taken to increase cooperation and promote further integration of objectives and goals between the Commission on the Status of Women, the Commission on Human Rights, the Committee for the Elimination of Discrimination against Women, the United Nations Development Fund for Women, the United Nations Development Program and other United Nations agencies.

Inequality usually occurs because of a lack of progress in gender justice and equity holds back social and economic development. However, gender equality and women's empowerment are key goals in their own right and are central to all other development goals. Gender outcomes are not

⁴⁸ Wahyuningsih, *Prinsip Kesetaraan dan Non Diskriminasi Dalam Konvensi ICESCR dan ICCPR*, Jurnal Hukum Prioris, Volume 2, Nomor 1, September 2008, hlm. 21.

just about employment rates, education outcomes, financial inclusion or representation in governance institutions, they are about equitable decision-making power, shared control over assets and income, personal safety, mobility, equitable interpersonal relations and having voice and agency. They are about transforming the relationship between men and women so that women as well as men are able to claim and exercise their human rights.⁴⁹

3. Non-Discrimination Principle

Non-discrimination principle is the behavior of respecting equality regardless of race, ethnic group, religion, skin color, social status, et cetera.⁵⁰ The act of prohibition toward discrimination is a part of the principle of equality. If everyone is considered equal, there should not be any kind of discrimination over every individual. In the 1948 Universal Declaration of Human Rights, every country agreed that the fulfillment of rights that were given to men are equal to what were given to women. International community agreed that women and men got equal protection. It refers to the declaration that boldly prohibits every kind of discrimination including the kind of discrimination that is based on gender.⁵¹

It is well acknowledged that "discrimination" is not synonymous with "different treatment" or distinction. Instead, it is a differentiation made with regard to a person based on his classification into a specific group or category rather than taking into account his unique abilities.⁵² If a classification is made to deprive a person's interests just because they belong to a certain group, it may constitute discrimination.

⁴⁹ Pamela Abbott, Gender Equality and Mena Women's Empowerment in the Aftermath of the 2011 Arab Uprisings, Arab Transformation Project (2017), hlm. 8.

⁵⁰ Nur Kholis, *Asas Non Diskriminasi Dalam Contempt of Court*, Jurnal Legality, hlm 219
<https://ejournal.umm.ac.id/index.php/legality/article/view/7797/6341>

⁵¹ Wahyuningsih, Op. Cit, hlm 23

⁵² See particularly, UN Docs. E/CN.4/Sub. 2/288. E/CN.4/Sub. 2/370 and E/CN. 4/sub. 2/200.

The development of an international norm prohibiting discrimination against women is one of the conditions that the commission must meet in order to improve the status of women worldwide. Such a norm provides a standard by which states are expected to treat their nationals equally and to define the situations in which discrimination should be prohibited. UN member states have contributed significantly to the development of international human rights standards by preparing various declarations, conventions, and other international measures.⁵³ Diverse international instruments prohibit discrimination for various reasons. Clauses adopted over the years say a lot about the evolution of global society. The United Nations Charter, with its progressive goal of equality, mentions only race, sex, language, and religion (Arts. 1, 55). Be contrary to the most recent international instruments impinging on non-discrimination: adopted under the auspices of the European community, discrimination is prohibited on the basis of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation (Art. 13 of the Consolidated Version of the Treaty establishing the European community, as amended. This clause was added by the 1997 Treaty of Amsterdam).⁵⁴

Article 1 CEDAW “discrimination against women” means a distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” The definition is aimed at women to maximize their individual and collective potentials, and not simply at according women identical treatment to men. It is concerned with affording women maximum opportunities for growth in all areas. The

⁵³ Margaret E. G, *Promoting Nondiscrimination Against Women: The UN Commission on the Status of Women*, Wiley on behalf of The International Studies Association.

⁵⁴ Rhona K. M. Smith, *International Human Rights*, second edition, New York: Oxford University Press, 2005.

inclusion of the words 'all forms' in this convention indicates that the Convention is intended to be comprehensive.⁵⁵ Article 1's definition of discrimination against women helps us greatly in understanding the close relationship between equality and non-discrimination. But it is also important because it is a legal definition that states are obligated to make part of their national normative framework when they ratify the Convention.⁵⁶ CEDAW also establishes that State Parties must prohibit all discrimination in law or in practice and guarantee women effective protection against all acts of discrimination practiced by any person, organization or company.⁵⁷

There are other important aspects in CEDAW's definition of discrimination. First, it establishes that discrimination can exist in different forms: distinctions, exclusions, or restrictions. This alerts us to the variety of discriminatory practices that can be encountered, even sometimes in the form of "rights" or "protections". Another important aspect of the definition is that it recognizes that discriminatory acts include those that have either the "purpose" or the "effect" of violating the human rights of women. This means that it prohibits not only those acts that intentionally discriminate such as laws that provide that married women cannot freely dispose of their property, but also those acts that, without having the intent to do so, result in discrimination against women. Finally, the Convention's definition prohibits discrimination in all fields. The last phrase "or any other field" clearly includes the private or family field where violations of women's human rights possibly occur. It also means that discrimination against any woman based on other conditions such as race, class, disability, sexual identity, or orientation is prohibited.⁵⁸

⁵⁵ Sindiso Ngaba, *Agenda: Empowering Women for Gender Equity*, 1995, No. 27, *Reproductive Rights* (1995), pp. 81-89, Taylor & Francis, Ltd. on behalf of Agenda Feminist Media.

⁵⁶ Martha I. Morgan, *equity or Equality for Women? Understanding CEDAW's Equality Principles*, IWRAP Asia Pacific, 2009, hlm. 9

⁵⁷ *Ibid.* hlm. 13.

⁵⁸ *Ibid.* hlm. 11

In the view of the CEDAW Committee, articles 1 to 5 and 24 CEDAW form the general interpretative framework for all of the Convention's substantive articles. Three obligations are central to this general interpretative framework:⁵⁹

- a) To ensure that there is no direct or indirect discrimination in law and that women are protected against discrimination;
 - b) To improve the de facto position of women through concrete and effective policies and programs; and
 - c) To address prevailing gender relations and the persistence of gender-based stereotypes.
- 1) Non-Discrimination in Education

Education is a fundamental human right to help men and women lift themselves out of poverty, reduce inequality, and ensure sustainable development. Education in itself is an empowering right and one of the most powerful tools through which economically and socially disadvantaged children and adults can lift themselves out of poverty and fully participate in society.⁶⁰ The right to education is regulated in many standard-setting instruments, ranging from the Universal Declaration of Human Rights, the Right to education proclaimed by the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948 in Article 26 (1), to various conventions, declarations, recommendations, frameworks and programs of action. Among the UN instruments, there is the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).⁶¹

⁵⁹ Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the Human Rights Treaty Bodies*, Intersettia, 2005

⁶⁰ <https://www.unesco.org/en/right-education/need-know>

⁶¹ United Nations, *UNESCO Convention against Discrimination in Education (1960) and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A comparative analysis*, France, 2006, hlm. 7.

There are four important elements of the right to education, namely: availability, accessibility, acceptance, and adjustment.

- a) Availability - There must be an adequate number of operational educational institutions and programs within the State's authority. The requirements for their functioning are contingent upon various factors, such as the developmental context in which they operate. For instance, all institutions and programs are expected to necessitate buildings or similar structures for protection against the elements, sanitation facilities that cater to both genders, access to safe drinking water, well-trained teachers who receive competitive salaries, teaching materials, and so forth. Additionally, certain institutions may also require amenities like a library, computer facilities, and information technology;
- b) Accessibility - educational institutions and programs have to be accessible to everyone without discrimination within the jurisdiction of the State party. Accessibility has three overlapping dimensions: Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any of the prohibited grounds; Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighborhood school) or via modern technology (e.g. access to a "distance learning" program); Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of Article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;

- c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by Article 13 (1) and such minimum educational standards as may be approved by the State;
- d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

The above elements are illustrated by General Comment 13 on the Right to Education (Article 13 ICESCR), elaborated by the UN Committee on Economic, Social and Cultural Rights (CESCR) in collaboration with UNESCO in 1999.⁶²

The Convention against Discrimination in Education (CADE) expresses another fundamental principle, that of equality of educational opportunities, enshrined in UNESCO's Constitution. This is of critical importance in face of growing disparities in education and the need to ensure equality, equity and inclusion. The Convention expresses the fundamental principle of non-discrimination, prohibiting any discrimination, distinction, exclusion, limitation or preference, "based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth." The Convention sets forth another fundamental principle, equality of opportunity in education, enshrined in the UNESCO Constitution. This is extremely important in the face of growing disparities in education and the need to ensure equality, equity and inclusion.⁶³

⁶² General Comment 13 on the right to education (Article 13 of the Covenant), adopted by the Committee on Economic, Social and Cultural Rights at its twenty-first session in 1999. E/C. 12/1999/10, 2 December 1999 (par. 1)

⁶³ UNESCO, The Convention against Discrimination in Education: ten reasons why this Convention is crucial to ensure the right to education for all children, youth and adults, 2020.

Most educational leaders are aware of inequality of opportunity for women in higher education. The Newman Task Force (1971) found in their study that the discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.

To discriminate is to deny freedom of choice; it is to make decisions affecting the lives of individuals without their consent and frequently without their knowledge. Women are becoming sensitive to such restrictions, and are asking for the right to pursue higher education on the basis of their interest and achievement instead of their sex. They do not now have that freedom of choice. Some women are rejected by social pressures that define how women should behave. Some are rejected by their own social conditions and attitudes regarding women's roles. Denial of the full potential is, or should be, of concern to educators everywhere.⁶⁴

B. Legal Protection

1. Legal Protection in General

Legal protection or in Dutch known as *rechtsbescherming* can be interpreted as providing the access to justice for justice seekers. Legal protection for community disputes with the government was also a form of respect for human rights that was basically based on the need for a clean and responsible governance condition.⁶⁵ Philipus M. Hadjon also provides an explanation regarding legal protection for the people which in Dutch reads: “*rechtbescherming van de burgers tegen de*

⁶⁴ K. Patricia, *Educational Horizons*, WINTER 1973-74, Vol. 52, No. 2, *Realizing Human Potential: Focus on Women I* (WINTER 1973-74), pp. 72-76. Phi Delta Kappa International.

⁶⁵ Enny Agustina, *Legal Protection for Justice Seeker Through State Administrative Court*, 2019. <http://dx.doi.org/10.4108/eai.20-1-2018.2282072>

overheid” and in English “legal protection of the individual in relation to acts of administrative authorities.”⁶⁶

According to Satjipto Rahardjo, legal protection is providing protection to human rights that are harmed by others. This protection is extended to the community, enabling them to fully enjoy all the rights that are granted upon them by the law. In simpler terms, legal protection refers to the actions undertaken by law enforcement authorities to ensure a sense of security, both mentally and physically, by addressing disruptions and potential threats originating from any party.⁶⁷

Satjipto Rahardjo highlighted the essential role of the law within society, emphasizing its function to integrate and coordinate interests that can collide with each other. The law achieves this by imposing boundaries and protection to ensure the limitation and protection of these interests.⁶⁸ According to Philipus M. Hadjon legal protection is defined as the protection of dignity, as well as recognition of human rights owned by legal subjects based on legal provisions or rules that can protect one thing from another.⁶⁹

In the context of crime victims, legal protection relates to 3 things, namely:

- a) Fulfillment of the rights of crime victims as regulated in laws and regulations;
- b) Fulfillment of the rights of crime victims by law enforcement officials at every stage of the criminal justice system;
- c) The imposition of criminal sanctions on the perpetrators of crimes.

⁶⁶Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia: Sebuah Studi tentang Prinsip-Prinsipnya, Penerapannya oleh Pengadilan dalam Lingkungan Pengadilan Umum dan Pembentukan Peradilan Administrasi Negara*, Bina Ilmu, Surabaya, 1987, hlm. 2

⁶⁷ Satjipto Rahardjo

⁶⁸ *ibid.*

⁶⁹ Philipus M. Hadjon, *Loc. Cit.*

2. Preventive and Repressive Legal Protection

According to Philipus M. Hadjon, legal protection is divided into two means, namely preventive legal protection means and repressive protection means. The preventive protection aims to prevent disputes from occurring so that legal subjects are given the opportunity to object or give opinions before the government makes a decision.⁷⁰ Nurdjana also explained that preventive efforts are preventive measures so that violations of applicable norms do not occur, namely by trying to avoid the convergence of the intention and opportunity factors so that the situation of security and public order is maintained, safe, and under control.⁷¹

Repressive legal protection aims to resolve disputes. The protection is in the form of sanctions such as imprisonment, fines and additional penalties imposed in the event of a dispute. The second principle underlying this legal protection is the principle of the rule of law which is associated with the recognition and protection of human rights. The recognition and protection of human rights takes center stage and can be linked to the objectives of the rule of law.⁷²

The foundation for the principle of legal protection against government actions is rooted in the notion of acknowledging and protecting human rights. This is derived from the historical development in the Western context, where the emergence of concepts related to recognizing and protecting human rights is aimed at establishing boundaries and defining the responsibilities of both society and the government.

⁷⁰ *Ibid.*

⁷¹ <https://www.hukumonline.com/berita/a/upaya-preventif-dan-represif-dalam-penegakan-hukum-lt63e0813b74769/?page=2>

⁷² Philipus M. Hadjon, *Loc. Cit.*

3. Legal Protection Under International Human rights Law

Legal protection is the most important thing in a state of law because in the formation of a state, laws will also be formed to regulate every citizen. Law is basically a reflection of human rights, so that the law containing justice is determined by the human rights contained and regulated or guaranteed by the law itself. Law is no longer seen as a mere reflection of power but also should protect the rights of citizens. Laws based on human values reflect norms that respect human dignity and recognize human rights themselves. Norms that contain noble values that uphold human dignity and guarantee human rights are tools to enable citizens to freely develop their talents for the proper fulfillment of their duties. This possibility is organized by the state by forming rules or regulations of law which is an important task of the state.⁷³

With the inclusion of human rights values contained in the UDHR, government systems around the world inevitably change to follow the principles in the UDHR and form a society that respects human rights values as part of the constitution which is the highest juridical basis in state life.⁷⁴ Therefore, with the acceptance of human rights as a universal concept in the world, it automatically becomes a state responsibility for UN member countries to implement human rights principles without ignoring domestic values of each member country. Hence, on June 23, 1993, the World Conference on Human Rights approved the Vienna Declaration and Plan of Action, which states that the human rights of women are an inalienable, integral and indivisible part of human rights.

Gender-based crimes, sexual offenses, and harassment in all forms, including those rooted in cultural prejudices and international trafficking, are inconsistent with the inherent value and

⁷³ Anggun Lestari, *Perlindungan Hukum Preventif Terhadap Kekerasan Perempuan Dan Anak Dalam Perspektif Hukum Hak Asasi Manusia*, Marwah: Jurnal Perempuan, Agama dan Jender, Vol. 16, No. 2, 2017, Hal. 112 – 126.

⁷⁴ Bahder Johan, *Negara hukum Dan Hak Asasi Manusia*, Bandung: Mandar Maju, 2014, Hlm. 207-208.

dignity of every individual and must be eradicated. It is crucial to make concerted efforts to eliminate all instances of violence against women in both private and public spheres, while also addressing any conflicts that may arise between women's rights and the detrimental consequences of certain traditional or customary practices. Additionally, any infringements upon women's human rights during times of armed conflict constitute violations of the fundamental principles of international human rights and humanitarian law. Such violations encompass acts such as murder, systematic rape, sexual slavery, and forced pregnancy.⁷⁵ These cases become one of the legal bases for the formulation of the convention on the elimination of all forms of discrimination against women (1979) and are strengthened by the general recommendation of CEDAW No.19/1992 on violence against women. Thus, CEDAW is one of the legal protections provided by international law to ensure the effective protection of women against discrimination.

In Afghanistan, the legal protection of human rights is a protection that has been regulated in the constitution of Afghanistan in 2004 article 6 which states⁷⁶: *“The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balanced development of all areas of the country.”* Furthermore, article 7 also states⁷⁷: *“The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights...”*

The protection of human rights is not only meaningful as a pro-active state guarantee that protects human rights in various regulatory policies, but the state has a role where it must react

⁷⁵ Anggun Lestari, *Loc. Cit.* hlm. 116.

⁷⁶ Article 6, *the Constitution of Afghanistan*, 2004.

⁷⁷ Article 7, *the Constitution of Afghanistan*, 2004.

quickly in dealing with human rights violations. If human rights are neglected or violated in a state intentionally and the suffering caused cannot be overcome fairly, then the state is not fulfilling its role to protect human rights.⁷⁸

C. State Responsibility

1. State Responsibility under International Law

State responsibility, as defined by the Dictionary of Law, refers to the duty of a state to provide reparation due to its failure to fulfill a legal obligation under international law. This implies that when a state fails to meet its legal obligations under international law, it is obligated to offer reparations as a form of compensation.⁷⁹ The law of state responsibility deals with examining whether there is a wrongful act for which the wrongdoing state is to be held responsible, determining the legal consequences and how such international responsibility may be implemented. Peter Malanczuk said that the term ‘responsibility’ is used interchangeably with the term ‘liability’, but the use of terminology in this respect in the literature is by no means uniform. Often ‘liability’ simply means the obligation to pay compensation. But ‘liability’ may also refer to obligations of states arising from harmful consequences of hazardous activities which, as such, are not prohibited by international law.⁸⁰

James Crawford, an eminent international law scholar, defines state responsibility as “The legal consequences from an internationally wrongful act that can be attributed to a state include

⁷⁸ Muhamad Sadi Is, *Hukum Pemerintahan Dalam Perspektif Hukum Positif Dan Hukum Islam* (Jakarta: Kencana, 2021), p. 277.

⁷⁹ Elizabeth A. Martin ed., *A Dictionary of Law*, Oxford University Press, New York, 2002, p. 477.

⁸⁰ Peter Malanczuk, *Modern Introduction to International Law*, seventh edition revised, 2002, p. 254.

the obligation to cease the wrongful conduct, provide reparations, and ensure that such misconduct will not be repeated in the future.”⁸¹

According to international law expert, Malcolm N. Shaw, state responsibility can be understood as the legal outcomes that ensue from an internationally wrongful act. These definitions emphasize the state's duty to cease the wrongful behavior, offer compensation, and prevent future violations. Malcolm further underlines that state responsibility arises when a state violates its international legal obligations and incurs legal consequences as a result.⁸²

Karl Zemanek outlined that in line with the relative nature of international rights and obligations, a defining feature of international law as a decentralized system, state responsibility arises when there is a breach of a subjective international right held by another state. However, with the introduction of the United Nations Charter and the acknowledgment of peremptory norms (jus cogens) in the Vienna Convention on the Law of Treaties, obligations owed to the international community as a whole started to emerge.⁸³

State responsibility arises when international violations occur and as a result of such violative acts of omission. Article 1 of the Draft Article of Responsibility of States for Internationally Wrongful Acts (2001) has formulated that “Every internationally wrongful act of a State entails the international responsibility of that State.”⁸⁴ What is meant by the above article is an act that violates a treaty obligation that concerns the interests of a state. Any wrongful act committed by an organ or an agency of the State leads to breach of an obligation which leads to the State’s

⁸¹ James Crawford, "The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries" (Cambridge University Press, 2002).

⁸² Malcolm N. Shaw, *International Law*, Cambridge University Press, 2008

⁸³ Karl Zemanek, “Causes and Forms of International Liability” in Bin Cheng and E. D. Brown (eds.), *Contemporary Problems of International Law: Essays in honour of George Schwarzenberger on his eightieth birthday* (1988).

⁸⁴ Article 1, *Draft Article of Responsibility of States for Internationally Wrongful Acts* (2001).

responsibility regarding the same. The scope of the same has broadened, as the International Court of Justice gives priority to the interest of the community at large now more than ever.⁸⁵ In article 2 of the ILC Draft on the general principle, elements of an internationally wrongful act of a State that there is an internationally wrongful act of a State when conduct consisting of an action or omission:

- 1) is attributable to the State under international law; and
- 2) constitutes a breach of an international obligation of the State.

Five circumstances may preclude wrongfulness and are listed in the ILC's Articles on State Responsibility (Arts. 21- 25). There are distinct legal consequences in the case that a state's responsibility is engaged. The State is required to cease the unlawful conduct and to make reparation for the injury caused by its wrongful conduct.⁸⁶

According to Malcolm N. Shaw, there are 3 essential characteristics of a state responsibility:⁸⁷

- 1) The existence of an international legal obligation in force as between two particular states;
- 2) There has occurred an act or omission which violates that obligation and which is imputable to the state responsible;
- 3) That loss or damage has resulted from the unlawful act or omission.

State responsibility refers to the responsibility under international law in general. State responsibility was originally conceived as a set of international rules governing the international obligations of States in relation to other States. The primary obligation of a State is to pay compensation or make reparation for injuries suffered by citizens of another State. In traditional

⁸⁵ IRALR, *State Responsibility in International Law*, 2021. Dapat diakses pada <https://www.iralr.in/post/state-responsibility-in-international-law>

⁸⁶ Sucharitkul, Sompong. Loc. Cit

⁸⁷ Malcolm N. Shaw, *International Law*, (New York: Cambridge University Press, 2008), h. 781

international law, State responsibility is the classic way to deal with violations of customary international law.⁸⁸

Reparation means recompense given to one who has suffered legal injury at the hands of another; to make amends, provide restitution, or give satisfaction or compensation for a wrong inflicted; it also refers to the thing done or given to the injured party.⁸⁹ Victims possess the entitlement to receive compensation. The compensation here refers to measures to redress violations of human rights by providing a range of material and symbolic benefits to victims or their families as well as affected communities. The compensation provided should be satisfactory, efficient, timely, and commensurate with the seriousness of the violations and the resulting damage.⁹⁰ Article 31 draft ILC states regarding reparation that: The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act and injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.⁹¹

According to Ian Brownlie, the term "reparation" encompasses a wide array of actions, including compensatory payments or restitution, apologies, the punishment of accountable individuals, preventive measures against future breaches of obligations, and other forms of intangible accountability (satisfaction). Reparation' will be used to refer to all measures which a plaintiff may expect to be taken by a defendant state: payment of compensation (or restitution), an

⁸⁸ Sucharitkul, Sompong. "State responsibility and international liability under international law." *Loy. LA Int'l & Comp. LJ* 18 (1995): 821.

⁸⁹ <https://rb.gy/o3hco>

⁹⁰ <https://www.ohchr.org/en/transitional-justice/reparations>

⁹¹ Article 31, *Draft Article of Responsibility of States for Internationally Wrongful Acts* (2001).

apology, the punishment of the individuals responsible, the taking steps to prevent a recurrence of the breach of duty, and any other forms of satisfaction.⁹²

In Article 34, there are list forms of reparation; full reparation for the injury caused by the internationally wrongful act is in the form of restitution, compensation, and satisfaction, either singly or in combination.⁹³

a) Restitution

Restitution is defined in Article 35 as reestablishing. “A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”⁹⁴

b) Compensation

In general, compensation means to make an appropriate and counterbalancing payment to somebody for some sort of loss or detriment. This conveys the etymological meaning of compensation being an equivalent for something else which is also reflected in the various usages of the term ‘compensation’ in international law.⁹⁵ In Article 36, it is explained that⁹⁶: The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. The compensation shall cover any financially accessible damage including loss of profits insofar as it is established.

⁹² Ian Brownlie, 1991, *Principles of International Law*, Fourth Edition, Oxford University Press, Oxford, p. 460

⁹³ Article 34, *Draft Article of Responsibility of States for Internationally Wrongful Acts* (2001).

⁹⁴ Article 35, *Draft Article of Responsibility of States for Internationally Wrongful Acts* (2001).

⁹⁵ <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1025#:~:text=In%20general%2C%20compensation%20means%20to,%27compensation%27%20in%20international%20law.>

⁹⁶ Article 36, *Draft Article of Responsibility of States for Internationally Wrongful Acts* (2001).

c) Satisfaction

One form of reparation is referred to as satisfaction, which encompasses actions that a state held accountable must undertake according to established international norms or agreements between disputing parties, excluding restitution and compensation.⁹⁷ According to Ian Brownlie, satisfaction is defined as the effort of the perpetrators to fulfill their obligation by making changes to rectify the harm in accordance with customary law or the agreement reached by the involved parties. It is important to note that satisfaction is distinct from restitution or compensation. Satisfaction is a remedy for acts that violate the honor of the state. It is achieved through diplomatic discussions and is effectively accomplished by means of a formal apology or the assurance of non-recurrence of the transgression.⁹⁸

2. State Responsibility under Islamic Law

Government, governance, and people cannot be separated. The powers, duties, responsibilities are all accountable. From the Islamic perspective, they are accountable in this world and the world after. Those men in power are highly responsible for the good and the bad management of this world.⁹⁹ Allah says:¹⁰⁰ “Corruption has appeared throughout the land and sea by [reason of] what the hands of people have earned so He [i.e., Allah] may let them taste part of [the consequence of] what they have done that perhaps they will return [to righteousness].” In the view of the Quran, justice also is a responsibility. That is why the Prophet was told:¹⁰¹ “If you judge, judge between them with justice.”

⁹⁷ Stoica, V, *Remedies before the International Court of Justice: A Systemic Analysis* (pp. 145-156). Cambridge: Cambridge University Press. 2021.

⁹⁸ Rhona K. M. Smith, *Loc. Cit.*

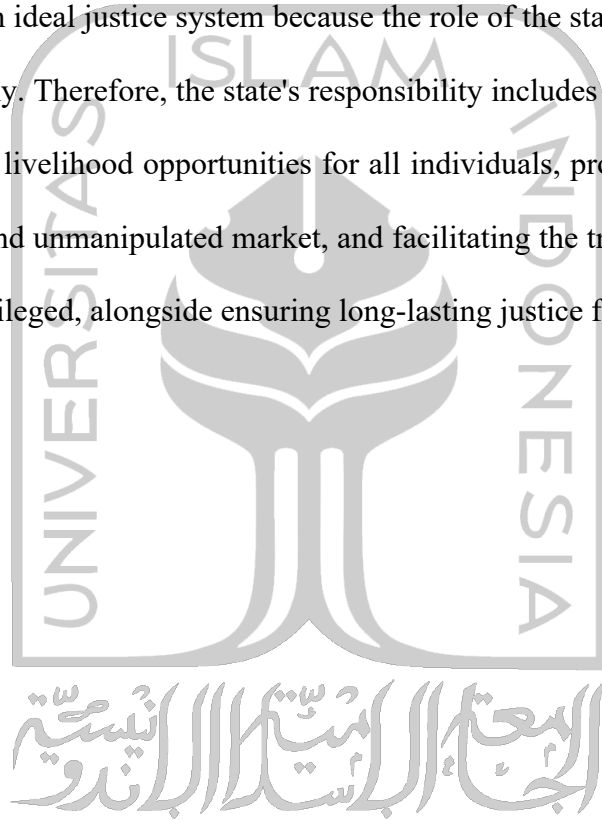
⁹⁹ Ismail bin Mohamad Yunus, *Good Governance According to Islamic Perspective*, Fiat Justisia Jurnal Ilmu Hukum, Volume 11 Number 3, July-September 2017

¹⁰⁰ Al-Qur'an Surah Ar-rum Verse: 41

¹⁰¹ Al-Qur'an Surah Al-Maida Verse: 42

In the Islamic context, the relationship between authority and responsibility is described in a hadith of the Prophet:¹⁰² “Whosoever of you sees an evil, let him change it with his hand; and if he is not able to do so, then [let him change it] with his tongue; and if he is not able to do so, then with his heart — and that is the weakest of faith.” (HR Al-Bukhari dan Muslim).

In the context of the role of the state, Abbas Mirakhor requires the state to be present in the form of implementing an ideal justice system because the role of the state is closely related to the Islamic political economy. Therefore, the state's responsibility includes ensuring equitable access to natural resources and livelihood opportunities for all individuals, promoting equality in every aspect, fostering a fair and unmanipulated market, and facilitating the transfer of wealth from the affluent to the underprivileged, alongside ensuring long-lasting justice for future generations.¹⁰³



¹⁰² Hadith Arbain No.34

¹⁰³ Havis Arafik, *The Role of the State in the Islamic Economic System: A Review of Abbas Mirakhor's Thought*, Islamic Banking: Jurnal Pemikiran dan Pengembangan Perbankan Syariah, Volume 7 Nomor 1 Edisi Agustus 2021

CHAPTER III

LEGAL PROTECTION AND STATE RESPONSIBILITY OF AFGHANISTAN UNDER TALIBAN REGIME

A. Legal Protection of Women's Rights in Afghanistan During the Taliban Regime of 2021-22

Considering Afghanistan Has Ratified CEDAW

The principle of legal protection for the people against government actions rests on and stems from the concept of recognition and protection of human rights because historically in the West, the development of the concepts of recognizing and protecting human rights aimed to restrict and impose responsibilities on both society and the government. In line with this, A.J Milne said: "A regime which protects human rights is good, one which fails to protect them or worse still does not acknowledge their existence is bad."¹⁰⁴ Setiono provides an explanatory concept that legal protection is an action or effort to protect the public from arbitrary actions that are not in line with the rule of law carried out by the government or authorities. Therefore, order and tranquility can be achieved, enabling human beings to enjoy their dignity.¹⁰⁵

Legal protection is all efforts made consciously by every person and government institution, even the private sector which aims to seek security, control, and fulfillment of the welfare of life in accordance with existing human rights.¹⁰⁶ Louis Henkin in his writing said: "human rights are claims asserted and recognized "as of right". Not claims upon love, or grace or brotherhood or charity: one does not have to earn or deserve them. They are not merely aspirations or moral assertions but increasingly, legal claims under some applicable law.

¹⁰⁴ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia: Sebuah Studi tentang Prinsip-Prinsipnya, Penerapannya oleh Pengadilan dalam Lingkungan Pengadilan Umum dan Pembentukan Peradilan Administrasi Negara*, Bina Ilmu, Surabaya, 1987, hlm. 38.

¹⁰⁵ Setiono, *Rule of Law (Supremasi Hukum)*, Surakarta. Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret, 2004, Hlm. 3

¹⁰⁶ Irwan S. Harahap, *Perlindungan Hukum Terhadap Anak Korban Kejahatan Seksual Dalam Perspektif Hukum Progresif*, Jurnal Media Hukum, Vol. 23 No. 1 Juni 2016.

Women's rights, which are human rights, are basic, God-given rights that humans have during life and afterward, and cannot be revoked at will without clear, and correct legal provisions. So, it is necessary to protect these rights for individuals and protection for the community. In order to achieve this goal, the implementation of protection of the rights that guaranteed by CEDAW must not be separated from the basic principles of women in the CEDAW. Basically, CEDAW has three main principles:

1. Equality Principle

The principle of equality between men and women, or gender equality, entails the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers, and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. States parties are called upon to use exclusively the concepts of equality of women and men or gender equality.¹⁰⁷

The CEDAW Convention promotes the substantive equality model and consolidates two central approaches to equality: Equality of opportunity in terms of access to the resources of a country, to be secured by a framework of laws and policies, and supported by institutions and mechanisms for their operation; Equality of results upon access and opportunity, toward achieving real change for women.¹⁰⁸ Substantive equality under the Convention requires the state to put in place laws, policies, and measures, including through affirmative action, to improve the status of women. State parties to CEDAW have a responsibility to ensure the practical realization of rights, and are thus obliged to show results. Therefore, the state parties to adopt temporary special

¹⁰⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*.

¹⁰⁸ IWRAP Asia Pacific, *Substantive Equality*, terdapat dalam <https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/substantive-equality/>

measures to accelerate the achievement of equality of opportunity for both men and women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. These can be in the form of temporary special measures that address the special needs of women.¹⁰⁹

2. Non-Discrimination Principle

The formulation of this principle has actually been stated in various international instruments, but never given a clear definition of what is meant by discrimination. The CEDAW convention provides a clearer understanding of what is meant by discrimination, especially discrimination against women and holds both state and non-state actors accountable in the case of any violation of rights. The definition of discrimination against women can be seen in Article 1 of this Convention. The CEDAW convention also explains the factors that are very influential in the emergence of discrimination, namely due to prejudices and habits based on stereotypical roles of men and women contained in Article 5 of the CEDAW Convention. This factor prevents women from achieving the same rights as men.

CEDAW promotes affirmative action, which is based on the principle that equality should be achieved in both law and practice. It is not sufficient to merely recognize the principle of universal equality, but positive measures should also be taken to ensure the realization of genuine de facto equality, in other words, equality of outcomes and equality of effects. This is premised on the idea that non-discrimination does not mean identical treatment in every instance.

In accordance with Article 22 of the constitution of Afghanistan, in particular the international convention on the Elimination of All Forms of Racial Discrimination, the Government of the

¹⁰⁹ PLD, *CEDAW South Asia: Core Concept*, terdapat dalam <http://cedawsouthasia.org/about-cedaw/core-concepts/#:~:text=There%20are%20three%20foundational%20principles,the%20implementation%20of%20CEDAW%20rests>

Islamic Republic of Afghanistan has reaffirmed to eliminate all forms of discrimination as drafted under Anti-Discrimination Law with the following objectives:¹¹⁰

- a) To combat discrimination against the rule of law and create a society free of discrimination;
- b) To preserve human dignity and equal opportunity for all;
- c) To protect the fundamental rights and freedoms of all citizens;
- d) To identify cases of discrimination and then formulate a strategy to combat and avoid future discrimination.

In August 2009 a new law (EVAW-Law – Elimination of Violence against Women) entered into force by presidential decree that defined and penalized various types of violence against women, including rape, battery, forced marriage, preventing women from acquiring property.¹¹¹ According to EVAW Law, issues such as violence against women, discrimination against women as well as prohibition from the rights of access to education, employment, and health services have been criminalized which is contained in Article 35 that states:¹¹² *“If a person prohibits a woman from the right of education, work, access to health services or exercising other rights provided by law, considering the circumstances the offender shall be sentenced to short term imprisonment not exceeding 6 months.”*

However, in EVAW Law, no article regulates women's rights in political and public life as in CEDAW article 7 which explains that:¹¹³ *“shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly*

¹¹⁰ Convention on the Elimination of All Forms of Discrimination against Women, *Replies of Afghanistan to the list of issues and questions in relation to its third periodic report*, CEDAW/C/AFG/RQ/3, P-12 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/010/95/PDF/N2001095.pdf?OpenElement>

¹¹¹ Gabija Leclerc, Rosamund Shreeves, *Women's rights in Afghanistan: An ongoing battle*, European Parliamentary Research Service, P 5

¹¹² Article 35 of Law on Elimination of Violence against Women, 2009.

¹¹³ Article 7, Convention on the Elimination of All Forms of Discrimination against Women

elected bodies.” Although in EVAW Law there are no regulations regarding non-discrimination against women in the fields of political and public life, Article 83(6) of the Constitution of Afghanistan specified that at least two female delegates must be elected to the House of Representatives in each province. In parallel, Article 84 provided that 50 % of the people appointed by the President to the Senate had to be female to promote female participation in government.¹¹⁴

3. State Obligation Principle

State obligation forms a crucial component of the framework that defines both non-discrimination and equality. Within the context of CEDAW, this obligation includes four essential elements: respecting, protecting, promoting, and fulfilling human rights. The binding nature of the treaty and the scope of state obligation are outlined in the Preamble and Articles 2–4 of the Convention. A significant aspect of this obligation is the concept of due diligence, which requires the state to take necessary measures to prevent, investigate, and penalize instances of discrimination carried out by private entities. The responsibility for fulfilling all state obligations is distributed among the three branches of government—the legislature, executive, and judiciary.

The concept of State Obligation is evident in multiple articles of the Convention. The CEDAW Convention states several obligations that must be upheld by the state to ensure that women's rights are protected in all legal, political, social, economic and cultural domains. These obligations are explicitly highlighted in Articles 2, 3, 4, 5, and 6, emphasizing the state's responsibility to ensure gender equality in various spheres.¹¹⁵ State obligation consists of two interconnected aspects: (1) incorporating and implementing CEDAW standards and norms within their domestic jurisdiction, and (2) reporting their progress and challenges related to CEDAW's realization at the domestic

¹¹⁴ Gabija Leclerc, Rosamund Shreeves, *Loc. Cit.*

¹¹⁵ I Gede Pasek, Pengaturan Tentang Penghormatan dan Perlindungan Terhadap Hak Asasi perempuan Dalam CEDAW, Bahan Ajar Hukum Internasional Fakultas Hukum Universitas Udayana 2016, hlm. 20, terdapat dalam https://simdos.unud.ac.id/uploads/file_pondidikan_1_dir/a322ea3827a0b19ff70da38e2ab48693.pdf

level to the UN treaty body. Consequently, each state party is required to provide both initial and periodic reports to the treaty body, detailing their fulfillment of the CEDAW commitments.

Basically, from these principles, there are several rights guaranteed by CEDAW to protect women's human rights. The first right guaranteed by CEDAW is the right to political and public life for women, which guarantees them to be equal to men. This includes the right for women to vote in any contested political election, vote, or referendum. It also guarantees the right for women to be elected in all political or bureaucratic positions. In addition, CEDAW also guarantees women the right to participate in the policy formulation process within their sphere of government, hold or hold public office, and perform functions at all levels of government bureaucracy. Women are also guaranteed the right to participate in socio-political organizations and non-governmental organizations. This includes the opportunity for women to represent their country at the international level and join international organizations without discrimination.¹¹⁶

The next right guaranteed by CEDAW is the right to obtain, change, or maintain citizenship. In addition, CEDAW also guarantees women that the state provides equal rights regarding the citizenship of their children. Furthermore, women are also entitled to equal rights in the field of education, which includes access to education and career direction at all levels and categories in all regions. Not only that, the state must also guarantee women's right to be able to access subjects, teachers, scholarships, educational programs, and access to physical education on an equal basis with men. The most important right is to eliminate stereotypes and discrimination related to the role of women in education.¹¹⁷

¹¹⁶ OHCHR, Convention on the Elimination of All Forms of Discrimination against Women, t.t., hlm. 3, terdapat dalam <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>.

¹¹⁷ Ibid. hlm. 4.

Then, CEDAW also guarantees the elimination of discrimination and promotes equality for women in all fields of work. Therefore, CEDAW guarantees women's right to work, employment opportunities and freedom of profession, income equality, social security, and the elimination of discrimination against women in the work environment. CEDAW also encourages the elimination of termination of employment for women on discriminatory grounds and provides protection for pregnant women. To support these rights, CEDAW also guarantees access to health for women without discrimination.¹¹⁸ In the legal and social sector, CEDAW itself guarantees equal rights before the law, both in a civil and criminal capacity. In addition, the treaty guarantees the elimination of discrimination against women in the sphere of marriage and family. This gives women the right to choose a spouse, the rights and responsibilities as a wife and parent, and to decide on family matters, such as child spacing and the division of wealth.¹¹⁹

The Government of the Islamic Republic of Afghanistan is dedicated to advancing and expanding women's rights in all areas, in line with its national and international commitments. “Protection of women's rights within an Islamic framework” refers to upholding and following fundamental rights outlined in Chapter Two of the country's Constitution, as specified by international treaties to which Afghanistan is a party. The government is obligated to actualize and adhere to these rights. Therefore, the protection of women’s rights is embedded in the strategy of the Afghan High Peace Council as an indicator of the support provided for women’s rights in negotiations under the constitution of Afghanistan. In Afghanistan, the legal protection of human rights is a protection that has been regulated in the constitution of Afghanistan in 2004 Article 6 which states¹²⁰: “*The state shall be obligated to create a prosperous and progressive society based*

¹¹⁸ Ibid. hlm. 6.

¹¹⁹ Ibid. hlm. 9.

¹²⁰ Article 6, *the Constitution of Afghanistan*, 2004.

on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balanced development of all areas of the country.” Furthermore, Article 7 also states¹²¹: “The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights...”, Article 24 also states¹²²: “Liberty is the natural right of human beings. This right has no limits unless affecting others freedoms as well as the public interest, which shall be regulated by law. Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity.”

Furthermore, the National Peace and Reconciliation Strategic Plan's Chapter Two emphasizes that the government will not compromise the achievements made over the last 16 years in any peace talks and is determined to preserve and extend all accomplishments, particularly concerning Human Rights and Women's Rights.¹²³ In Afghanistan, women are organizing to push for the promotion and protection of their rights as guaranteed in the Afghan constitution and Afghanistan's international human rights obligations.¹²⁴

With the EVAW Law, for the first time, rape was then a statutory offence in Afghanistan and domestic violence was also recognized as a crime. In this law there are 7 protected rights for the victims of violence, namely¹²⁵:

1. Prosecuting the offenders of violence based on provisions of the law;
2. Having access to shelter or other safe place (s) with the consent of the victim;

¹²¹ Article 7, *the Constitution of Afghanistan*, 2004.

¹²² Article 24, *the Constitution of Afghanistan*, 2004.

¹²³ Convention on the Elimination of All Forms of Discrimination against Women, *Replies of Afghanistan to the list of issues and questions in relation to its third periodic report*, C No. 13

¹²⁴ Cheshmak Farhoumand-Sims, CEDAW and Afghanistan, Volume 11 Issue 1 Gender and Islam in Asia, *Journal of International Women's Studies*, November 2009, P-153, terdapat dalam <https://core.ac.uk/download/pdf/48828409.pdf>

¹²⁵ Article 6 of Law on Elimination of Violence against Women (EVAW), 2009

3. Having free access to emergency health services;
4. Having advocate or legal aid provider;
5. Compensation to damage resulted from the act of violence;
6. Confidentiality of relevant matter; and
7. Other rights which have been stipulated in the legislative documents for the victim.

There is also a protection mechanism to prevent violence which is the obligation of the ministry of women affairs in article 8 paragraphs 3, and 4¹²⁶:

1. Providing protection for the victims of violence in protection centers (shelter), or if protection center is not available, other safe places, as well as monitoring and evaluating them;
2. To conduct seminars, workshops, conferences and other training programs for the staff of governmental and non-governmental institutions, organizations and local residents in order to increase public awareness, identification of violence cases and their consequences, and find solutions;

Along with the EVAW law, some measures were taken by the former government to protect women. These efforts encompassed the appointment of special prosecutors and the establishment of courts to combat violence, setting up the Ministry of Women's Affairs, providing for divorce through the creation of family courts, and enacting the Personal Status Law.¹²⁷ This could have led to an improvement in the lives of many Afghan women, but there was very little enforcement of the law. Hardly any of the judges, state prosecutors or defense lawyers accepted this law. With the Taliban coming to power in 2021, the EVAW-Law was not officially revoked but it is not

¹²⁶ Article 8 of Law on Elimination of Violence against Women (EVAW), 2009

¹²⁷ Fahima Sirat, *Violence Against Women: Before and After the Taliban*, Oxford Human Rights Hub, terdapat dalam <https://ohrh.law.ox.ac.uk/violence-against-women-before-and-after-the-taliban/>

being enforced at all because the current regime does not have a comparable legal framework or judicial system in place. Instead of ensuring protection for women, the state is not subject to regulations related to the protection of women which are already listed in the constitution and laws of the country.¹²⁸ And what is very unfortunate is that the ministry of women's affairs no longer exists and was replaced by the Ministry for the Propagation of Virtue and the Prevention of Vice by the time the Taliban took over Afghanistan.

One of the most illustrative examples of the systematic discrimination and failure to protect basic rights against women and girls in Afghanistan today is the relentless issuance of edicts, decrees, declarations and directives restricting their rights, including their freedom of movement, attire and behavior, and their access to education, work, health and justice. Between September 2021 and May 2023, more than 50 edicts were issued, including:¹²⁹

1. 18 September 2021: education restricted for girls beyond grade six
2. 23 December 2021: instructing drivers (men) not to accept to drive women without “proper hijab” or to women without a mahram for travel more than 72 kilometers
3. 27 March 2022: limiting access of women and girls to parks, banning women from boarding domestic and international flights without a *maharam*
4. 7 May 2022: requiring women to observe “proper hijab”, preferably by wearing a *chadari* (a non-fitted black garment with face covering) or not leaving home without reason (“the first and best form of observing hijab”)
5. 21 May 2022: female television presenters required to cover their face

¹²⁸ *EVAW-Law (Elimination of Violence against Women), Afghanistan*, terdapat dalam <https://medicamondiale.org/en/service/glossary/evaw-law-elimination-of-violence-against-women#:~:text=In%202009%20a%20new%20law,also%20recognised%20as%20a%20crime.>

¹²⁹ Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls: Human Rights Council, 2023

6. 1 June 2022: all girls in fourth to sixth grades required to cover face while commuting to school
7. 23 August 2022: women government workers asked to stay home from work
8. 10 November 2022: women prohibited from using gyms
9. 11 November 2022: women prohibited from entering parks in Kabul; a written announcement later published in Faryab banned access of women to public baths, gyms, sports clubs and amusement parks
10. 20 December 2022: right of women to attend university “suspended”
11. 22 December 2022: all forms of education beyond grade 6 banned for girls
12. 24 December 2022: right of women to work with national and international non-government organizations “suspended”
13. 4 April 2023: Afghan women banned from working in the United Nations

When a country ratifies a treaty or convention, that country has a legal obligation to international law. It must comply with all the obligations that are set down in a treaty and generally cannot avoid it without good reason. Even state parties cannot use the excuse that their domestic law prevents them from fulfilling their obligations under international treaties. If a state anticipates that its domestic law will prevent it from complying with the requirements of a treaty, yet still desires to ratify the treaty—perhaps because it adheres to most other aspects or plans to amend its domestic laws eventually—then the appropriate approach is to ratify the treaty with a reservation. However, ideally, a state should refrain from ratifying a treaty until its domestic laws and policies are in complete alignment with the international legal obligations set forth in the treaty.¹³⁰ When it comes to significant human rights agreements, State Parties have the responsibility to

¹³⁰ Natalie Baird, *To Ratify or Not To Ratify? An Assessment Of the Case For Ratification Of International Human Rights Treaties In the Pacific*, Melbourne Journal of International Law Volume 12

periodically report to and be examined by UN human rights organizations. If a State fails to adhere to the treaty's provisions, it would be considered a violation of international law.¹³¹

In this case, The Taliban are obliged under international law to fully respect women's rights. Afghanistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2003. The ratification was an important milestone for women's rights not only in Afghanistan but across the Muslim world. Afghanistan made history by becoming the first Muslim state to ratify CEDAW without reservations. By ratifying the Convention, Afghanistan committed itself to fulfilling the objectives of the Convention by, for example, incorporating the principles of equality of men and women in their legal system, abolishing and replacing all discriminatory laws, establishing tribunals and other public institutions to protect women against discrimination, and eliminating all acts of discrimination against women by persons, organizations, and enterprises.¹³² The Taliban inherits Afghanistan's obligations under that convention, including to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women."¹³³ As explained above, Afghanistan is obliged to ensure that its domestic laws comply with the treaty provisions. Each State must create legislation that incorporates the articles of Conventions that have been ratified. This process can differ according to each State's legal system because the most important requirement to ratifying a treaty or convention is to give domestic effect to the treaty's provisions.¹³⁴

¹³¹ Australian Human Rights Commission, how States commit to human rights treaties, fact sheet 6 https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS6_States.pdf

¹³² Cheshmak Farhoumand-Sims, *CEDAW and Afghanistan*, Journal of International Women's Studies Vol. 11 #1 November 2009

¹³³ Human Rights Watch, *How the International Community Can Protect Afghan Women and Girls*, terdapat dalam <https://www.hrw.org/news/2021/09/02/how-international-community-can-protect-afghan-women-and-girls>

¹³⁴ https://law.unimelb.edu.au/_data/assets/pdf_file/0004/168716

In the end of 2003, discussion was carried out for the new draft of Afghanistan Constitution for the first time since 1964. A heated debate took place over Article 22 of Afghanistan's constitution, which states that men and women are equal before the law. With pressure from women's rights advocates and international donors, that article got enough support to be included in the constitution. Unfortunately, the implementation of Article 22 has remained elusive.¹³⁵

The adoption of Article 22 of the constitution as well as the opening created by the new Afghan government's ratification of international human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2003 provided an avenue and opportunity to draft a law on violence against women as a criminal offense for the first time. Thus in 2009, The Elimination of Violence against Women (EVAW) law came into force.¹³⁶

Afghanistan is required by CEDAW to ensure women have access to legal protection and are not subject to legal discrimination. The commitment to uphold international treaty obligations is acknowledged in Article 7 of the Afghan Constitution. EVAW (Elimination of Violence Against Women) serves as a means to enforce Afghanistan's domestic law. The Afghanistan National Peace and Development Framework (ANPDF) establishes inclusiveness and gender equality benchmarks. Apart from that, Afghanistan also signed the Sustainable Development Goals (SDGs), which seek to “leave no one behind” in achieving gender equality.¹³⁷ Nevertheless, the complete implementation of this law remains challenging. Women are frequently discouraged by police, prosecutors, and judges from reporting complaints and are often urged to resolve issues

¹³⁵ Human Rights Watch, *“I Thought Our Life Might Get Better” Implementing Afghanistan’s Elimination of Violence against Women Law*, terdapat dalam:
https://www.hrw.org/sites/default/files/media_2021/07/afghanistan0821_web.pdf

¹³⁶ Human Rights Watch, *“I Thought Our Life Might Get Better” Implementing Afghanistan’s Elimination of Violence against Women Law*, terdapat dalam:
https://www.hrw.org/sites/default/files/media_2021/07/afghanistan0821_web.pdf

¹³⁷ Aiyub Kadir, Siti Nurhaliza, *State Responsibility of Afghanistan under Taliban Regime*, Jurnal Media Hukum Volume 30, No. 1, June 2023

within their families through mediation instead. Additionally, women facing abuse encounter significant barriers such as family pressure, financial dependency, social stigma, and fear of reprisals, including potential custody loss, which hinder them from registering cases.¹³⁸

Afghanistan itself initially had an institution that aimed to protect women's rights and promote women's empowerment under the Ministry of Women's Affairs. However, with the return to power of the Taliban in Afghanistan in 2021, the Ministry of Women's Affairs was disbanded and merged into the Ministry for the Propagation of Virtue and the Prevention of Vice with the support of the moral and sharia police in it. This led to a different system for reporting violence against women and protecting women. On the other hand, Afghanistan initially also had a non-governmental organization that worked to protect women's human rights, protect women from domestic violence, and assist in the recovery and counseling process for women victims of domestic violence, namely Women for Afghan Women (WAW). WAW also provides protection shelters for women who are victims of domestic violence in several regions in Afghanistan. However, the Taliban forced WAW to close all shelters and women's empowerment centers throughout Afghanistan.¹³⁹

At the international level, when a country ratifies a human rights treaty, it takes on specific responsibilities, including the obligation to report on its progress. These treaties create separate expert committees tasked with overseeing the treaty's implementation. These committees play a crucial role in evaluating whether states are fulfilling their treaty obligations by requiring them to submit regular reports. The exact reporting requirements may differ depending on the treaty, but

¹³⁸ Human Rights Watch, *Afghanistan: Justice System Failing Women*, terdapat dalam: <https://www.hrw.org/news/2021/08/05/afghanistan-justice-system-failing-women>

¹³⁹ Ruchi Kumar & Hikmat Noori, “*Farzana survived rape, addiction and losing her children. Then the Taliban came – now she is missing*”, The Guardian, 2023, terdapat dalam <https://www.theguardian.com/global-development/2023/feb/24/afghanistan-taliban-domestic-violence-women-missing>

typically, after ratification, states are required to submit an initial report within one to two years, followed by periodic updates at regular intervals.¹⁴⁰

In March 2003, the Islamic Republic of Afghanistan ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). In December 2011, the country submitted its first combined initial and second periodic report to the CEDAW Committee. Following in 2016, it prepared a written report on the implementation of Recommendations No. 11 and No. 23 and submitted it to the CEDAW Committee due to responding to The CEDAW Committee in August 2013.¹⁴¹ Then at the end of 2018, a state party's report was submitted.

The systematic discrimination against women and girls in Afghanistan was carried out by the Taliban by issuing decrees that restrict their rights, including their freedom of movement, attire and behavior, and their access to education, work, health and justice.¹⁴² According to research undertaken by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the broader restrictions on women's rights made it almost impossible for women and girls to gain access to justice. Female defense lawyers are excluded from the justice sector, indicating a gender bias within the legal profession. This exclusion can further impede women's access to fair legal representation and justice. In late 2022, the Taliban took several decisions that further restricted the rights of women and girls. On December 20, the Ministry of Higher Education issued a letter referring to a Cabinet decision suspending university education for women until a "proper sharia environment" is created that fits Afghan culture. Then on January 28, the Ministry of Higher Education gave instructions to private universities and higher education facilities not to

¹⁴⁰ Natalie Baird, *To Ratify or Not To Ratify? An Assessment Of the Case For Ratification Of International Human Rights Treaties In the Pacific*, Melbourne Journal of International Law Volume 12

¹⁴¹ Committee on the Elimination of Discrimination against Women, *third periodic report submitted by Afghanistan under article 18 of the Convention, due in 2017*, CEDAW/C/AFG/3

¹⁴² Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, Fifty-third session, 19 June–14 July 2023.

register female students for entrance exams until further notice, thus preventing them from studying at private colleges.¹⁴³

With the above explanation, Afghanistan has tried to fulfill its obligation to fulfill the enforcement of legal protection of women's rights as stipulated in CEDAW. Basically, protecting and upholding human rights is the duty of the state, therefore the state or government that has the power to bear this responsibility.¹⁴⁴ But it is obvious that the Taliban violates the rights guaranteed by CEDAW by depriving women of their rights. Legal protection for women's rights in Afghanistan is still unclear or it could be said that the government has failed to provide protection; moreover, Afghanistan is currently undergoing a transition of government power.

B. Afghanistan Responsibility under CEDAW for the Restriction on Women's Rights Imposed by the Taliban

Articles 2 and 3 of CEDAW establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under Articles 5- 16.¹⁴⁵ The chapeau of Article 2 reads: *"States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women..."* The first obligation of States parties referred to in the chapeau of article 2 is the obligation to "condemn discrimination against women in all its forms". States parties have an immediate and continuous obligation to condemn discrimination. They are obliged to proclaim their total opposition to all forms of discrimination against women to all levels and branches of Government, to their population and to the international community, and their determination to

¹⁴³ General Assembly Security Council, *The situation in Afghanistan and its implications for international peace and security*, Report of the Secretary-General, General Assembly Seventy-seventh session

¹⁴⁴ M, Yakub A. Kadir, *Loc. Cit*

¹⁴⁵ Division for the Advancement of Women, *CEDAW General Recommendation No. 19: Violence against Women*, No. 10.

bring about the elimination of discrimination against women. The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.¹⁴⁶

The meaning of Immediate and Continuous Obligation to Condemn Discrimination is that States parties have an obligation to condemn all forms of discrimination against women without delay. That whenever discrimination occurs or there are reports of discrimination, the state must take prompt action to condemn and express its disapproval. The proclamation of total opposition to all forms of discrimination means that state parties are required to express strong opposition to all forms of discrimination against women. This opposition must be communicated to the various levels and branches of their governments, their citizens, and the international community. In doing so, States reaffirm their commitment to protecting women's rights and promoting gender equality. Vice president of Afghanistan, Mr. Amrullah Saleh in his opposition to the Taliban said that any deal with the Taliban should absorb them into the existing democratic system, rejecting anything that resembles a return to their time in power, when they ruled with an iron fist and banned women from public life.¹⁴⁷ This shows that Afghanistan takes prompt action to condemn all forms of discrimination against women and express its disapproval.

The main element of the chapeau of article 2 is that states should make forward movement, from the evaluation of the situation to the formulation and initial adoption of a comprehensive range of measures to develop such measures on an ongoing basis, taking into account their effectiveness and any new or emerging issues, to achieve the objectives of the Convention. Such

¹⁴⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, p-4

¹⁴⁷ Mujib Mashal, *Afghan Vice President, Staunch Opponent of Taliban, Survives Blast*, terdapat dalam <https://www.nytimes.com/2020/09/09/world/asia/afghanistan-vice-president-attack.html>

measures should comprise constitutional and legislative guarantees, including alignment with domestic legal provisions and amendment of conflicting legal provisions. This means that Afghanistan now needs to evaluate its situation under Taliban control and develop a comprehensive action plan and policy mechanisms to monitor and implement it, which provides a framework for the practical realization of the principle of formal and substantive equality between women and men. Although Afghanistan has constitutional and legislative guarantees, there are many practices on the ground that contradict these guarantees of women's rights protection.¹⁴⁸

Article 2 of CEDAW mandates states parties to fulfill their legal obligations by respecting, protecting, and ensuring women's right to non-discrimination and equality. This involves refraining from enacting discriminatory laws or policies, protecting women from discrimination by private actors, and eliminating practices that perpetuate gender stereotypes.¹⁴⁹ The obligation to fulfill requires taking various measures to achieve gender equality both in law and in practice. Additionally, Article 3 of CEDAW establishes the obligation of states to proactively address gender inequality in all areas, including politics, socio-economics, and culture. States are required to create an enabling environment and conditions that promote the development and advancement of women, aiming to eradicate structural inequality and secure rights, freedoms, and protections for women.¹⁵⁰

In monitoring the enforcement of CEDAW, there is the Committee on the Elimination of Discrimination against women. State parties have several obligations, one of which is allowing the

¹⁴⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, no 24.

¹⁴⁹ Elfia Farida, *Implementasi Prinsip Pokok Convention on The Elimination Of All Discrimination Against Women Di Indonesia*, MMH, Jilid 40 No. 4 Oktober 2011.

¹⁵⁰ Women's Resource Centre, *Principle of Equality - Article 3: Reimagining Equality in the Era of Neo-Liberalism*, diakses pada 27 Juli 2023, terdapat dalam: <https://www.wrc.org.uk/blog/principle-of-equality-article-3-cedaw#:~:text=Article%203%20of%20CEDAW%20sets,for%20women%20by%20preventing%20disadvantage>

CEDAW Committee to scrutinize their efforts to implement the treaty by reporting to the body at regular intervals. In accordance with the Optional Protocol to the Convention, The Committee is mandated to accept communications from individuals or groups who submit claims of rights being breached according to the Convention. Additionally, it can begin investigations into instances of serious or organized breaches of women's rights. These steps are not mandatory and are applicable only if the involved State has agreed to them.¹⁵¹ Therefore, Afghanistan has the opportunity to report to the committee regarding women's rights issues by submitting claims of violations of rights that are protected by the convention which will encourage inquiries into situations of violations of women's rights carried out by the Taliban.

As referred to general principle in Article 1 of ARSIWA, it is known that every internationally wrongful act of a State results in that State bearing international responsibility. The term “international responsibility” in Article 1 covers the relations which arise under international law from the internationally wrongful act of a state, whether such relations are limited to the wrongdoing state and one injured state or whether they extend also to another state or indeed to other subjects of international law, and whether they are centered on obligations of restitution or compensation or also give the injured state the possibility of responding by way of counter-measures. Article 2 specifies the conditions required to establish such an act. First, the conduct must be attributable to the state under international law. Second, the conduct must constitute a breach of international legal obligation in force for that state at the time.¹⁵²

¹⁵¹ United Nation, “*Introduction to the Committee*” diakses pada 27 Julis 2023, terdapat dalam: <https://www.ohchr.org/en/treaty-bodies/cedaw/introduction-committee#:~:text=The%20Committee%20on%20the%20Elimination,human%20rights%20treaty%20for%20women>.

¹⁵² James Crawford, *The International Law Commission's Article on State Responsibility*, Cambridge University Press, 2002 <http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf>

An “act of the State” here involves some actions or omissions by the Taliban. Therefore, Afghanistan can be held responsible for the Taliban's treatment in violation of CEDAW. Since CEDAW is one of the cores of international human rights treaty, the transfer of government power does not affect the bindingness of an international treaty because the effect of a human rights treaty is to protect the population in a region and human rights treaties have different characteristics than other international treaties. Based on Article 30¹⁵³, the Taliban as the government of Afghanistan is responsible for internationally wrong actions and has the following obligations:

- 1) Stop the act, if the act is still continuing;
- 2) To give appropriate guarantees and non-repetition guarantees, if circumstances require it.

Articles 31 and 34 of the draft ILC about the Responsibility of States for Internationally Wrongful Acts say that the state is responsible for providing full reparation toward injury by the internationally wrongful. So, Afghanistan is responsible for giving reparation related to the discriminatory restrictive regulations that have caused material and moral damage by the internationally wrongful act of a State.¹⁵⁴

Despite the dramatic changes taking place in Afghanistan, Taliban as the government of Afghanistan still have a legal obligation to defend women's human rights under international human rights law. This obligation remains intact despite changes in leadership, and it applies regardless of a nation's political, economic, or cultural systems. Afghanistan, having signed the CEDAW agreement in 2003, must eliminate gender discrimination in politics, public life, and all regulated sectors. The current governing authority, the Taliban, is also under obligation to protect and maintain human rights, as these commitments persist through transitions of power. A key aspect of these rights is ensuring women's access to education, as dictated by CEDAW. States are

¹⁵³ Article 30, *Responsibility of States for Internationally Wrongful Acts* 2001

¹⁵⁴ *Ibid*, Article 31

required to provide equal educational opportunities, encompassing access, training, curriculum, and educational resources (as defined in Article 10 of CEDAW). However, Afghan women and girls continue to encounter biases, particularly in the realm of education. It's noteworthy that Afghanistan's official religion is Islam, and according to Article 45 of the Afghan constitution, the state must develop a unified educational curriculum grounded in national culture, academic standards, and Islamic teachings. This also extends to creating curricula for religious subjects in schools, encompassing the diverse Islamic sects present in Afghanistan.¹⁵⁵



¹⁵⁵ M. Yakub A. Kadir, *Loc. Cit.*

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

I. Conclusions

1. Legal protection of women's rights in Afghanistan is provided by the state through several articles in the Islamic Republic of Afghanistan's Constitution, one of which is Article 22. In 2009, Afghanistan also had a law that regulates the Elimination of Violence against Women. Considering that this country has ratified CEDAW it has a responsibility to adopt the convention into national law. There are 7 rights of the victims of violence that are protected in this law. By imposing the discriminatory restrictive regulations, the Taliban violated women's human rights as stated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) such as discrimination in the form of prohibiting women and girls from going to school and university, imposing restrictions on women to work and limiting access for women and girls in public facilities. The conduct of Taliban has violated the provisions of several International Instruments, such as the Universal Declaration of Human Rights relating to the fundamental protection of human rights; the Convention on the Elimination of All Forms of Discrimination Against Women; and the 1966 International Covenant on Economic, Social and Cultural. Especially with the replacement of the Ministry of Women in Afghanistan, EVAW law is no longer valid and the Ministry of Women, which has the responsibility for implementing prevention and protection mechanisms for the Elimination of Violence against Women, is no longer running. Afghanistan has tried to fulfil the enforcement of legal protection in accordance with CEDAW, however, with the seizure of power by the Taliban, which currently holds

the power of the Afghan government, legal protection for women's rights is no longer effectively enforced.

2. Based on the existing facts and circumstances, it can be understood that the Taliban's treatment of women in Afghanistan has been placed in a weak position that complicates the situation and conditions. The policies applied by the Taliban regime to women in Afghanistan have limited the space for them to fully exercise their rights, resulting in difficulty and loss of access to their fundamental rights. Therefore, according to the United Nations general Assembly in its report, Taliban has been considered the government since it took control Afghanistan. So, Taliban as the government of Afghanistan can be held responsible. Even though there is a transfer of governmental power, CEDAW is still binding as CEDAW is a core international human rights treaty. As a result, the Taliban as the new government of Afghanistan must continue to respect the provisions of CEDAW. If they violate it, there is an obligation to be responsible.

II. Recommendations

This thesis presents facts related to the responsibility of Afghanistan for cases of discrimination against women committed by the Taliban. Based on these facts, several recommendations can be given to urge the Afghan government:

1. Evaluation. This means that Afghanistan now needs to evaluate its situation under Taliban control and develop a comprehensive action plan and policy mechanisms to monitor and implement it;
2. Submit claims of violations of rights protected under the Convention to the CEDAW Committee;

3. Immediately take all necessary measures to end discrimination, eliminate violence, and protect all individuals residing within Afghanistan, in an equal and non-discriminatory manner. Immediately prevent, investigate and prosecute all human rights violations and crimes committed by the Taliban.



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FAKULTAS
HUKUM

Gedung Fakultas Hukum
Universitas Islam Indonesia
Jl. Kaliurang km 14,5 Yogyakarta 55584
T. (0274) 7070222
E. fh@uii.ac.id
W. law.uii.ac.id

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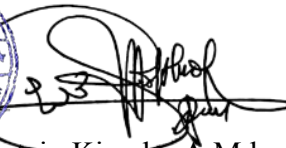
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No Mahasiswa : 19410720
Fakultas/Prodi : Hukum
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