

# The Security Landscape of Human Protection from the International Law Perspectives on Case of the New-Taliban-Afghanistan State

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## *Abstract*

*Post-cold war security in international relations is identified as security in the global contemporary. Contemporary global issues are closely related to issues that are no longer dominated by East-West relations, such as the threat of nuclear war, ideological competition between Liberal-Democracy and Marxism-Leninism, crisis diplomacy, and so on. In the perspective of liberalism, peace and security are important for the international system, being considered by international law and organizations. However, recent developments in Afghanistan and Ukraine mark a challenge to this idea and challenge the consistency of peace and security under international law. This study uses EUD (Explore, Understanding and Doing) method to analyse the security context and the juridical-normative research to understand the international law that contributes to the aspect of security. The security landscape in the perspective of International Law is fragile against minorities and the vulnerable groups because gaining power, in relation of effective control doctrine in international law, does not necessarily associate to the security of human protection as the case happened in the new-Taliban-Afghan State.*

**Key words:** *Human Security, Recognition, New-Taliban-State, Effective control doctrine, International Law, Security* Abstrak

## *Abstrak*

*Keamanan pasca perang dingin dalam hubungan internasional diidentikkan sebagai keamanan dalam kontemporer global. Isu-isu global kontemporer erat kaitannya dengan isu-isu yang tidak lagi didominasi oleh hubungan Timur-Barat, seperti, ancaman perang nuklir, persaingan ideologi antara Liberal-Demokrasi dan Marxisme-Leninisme, diplomasi krisis, dan sebagainya. Dalam perspektif liberalisme, perdamaian dan keamanan penting bagi sistem internasional, menjadi pertimbangan hukum dan organisasi internasional. Namun, perkembangan terakhir di Afghanistan dan Ukraina menandai tantangan dari ide ini serta menggugat konsistensi perdamaian dan keamanan di bawah hukum internasional. Penelitian ini menggunakan metode penelitian Eksplorasi, Memahami, dan Pengerjaan (EUD) untuk menganalisa konteks keamanan dan pendekatan yuridis-normatif untuk memahami hukum*

*internasional yang berkontribusi kepada aspek dari keamanan. Lanskap keamanan dalam perspektif Hukum Internasional rapuh terhadap kelompok minoritas dan rentan karena mendapatkan kekuasaan, terkait dengan doktrin kontrol efektif pada hukum internasional, tidak harus berhubungan dengan perlindungan keamanan manusia seperti yang terjadi pada kasus pemerintahan baru Taliban di Afghanistan.*

**Kata Kunci:** *Keamanan Manusia, Pengakuan, Negara-Pemerintahan Taliban, doktrin kontrol efektif, Hukum Internasional, Keamanan*

Security after cold war in international relation is identified as security in global contemporary.<sup>1</sup> Contemporary global issues are closely related to the nature of topics which are no longer dominated by East-West relations, such as, the threat of nuclear war, ideological competition between Liberal-Democracy and Marxism-Leninism, crisis diplomacy, and so on. The international community is now concerned with global issues related to the “New World Order”. Some analysts view the end of cold war is the victory of the liberal capitalism.<sup>2</sup> It has many competitors, namely Neo-Maoism of Peru, Islamic fundamentalism, and the rise of ethic nationalism. Nationalism and transnationalism will be the challenge for the new world politics.<sup>3</sup> The Global Trend to 2030 indicates that the current security is uncertain and complex, which are categorized into five categories: general, economy, technology, society, and external relations.<sup>4</sup> In liberalism perspective, peace and security is important for international system on which the international law and organization take into consideration. However, the latest development in Afghanistan and Ukraine marks the challenge of this idea as well as contesting the consistency of the peace and security under the international law. The law has significant impact to maintain the value of peace as stated in the UN Charter. Bertrand Ramcharan, a visiting professor of International Law at Lund University who was the Acting UN High Commissioner for Human Rights from 2003-2004, argued that radical changes have to be taken place in the context of international law.<sup>5</sup> Associating with the security, he underlines the context of a new international law of security and protection. This paper aims to explore the situation in Afghanistan after Taliban gaining its power in the context of International Law of security and protection, to view the security environment.

<sup>1</sup> Amarasari, Indah. (2017). “Keamanan Nasional dalam Konteks Isu-isu Global Kontemporer: Sebuah Tinjauan Hubungan Internasional”. Jurnal Keamanan Nasional, Vol 3 No. 1. <https://doi.org/10.31599/jkn.v3i1.19>

<sup>2</sup> Nye, J.S. (1992). What New World Order? Foreign Affairs, 71(2), 83-96. <https://doi.org/10.2307/20045126>

<sup>3</sup> Ibid.

<sup>4</sup> European Strategy and Policy Analysis System. (March 2015). ‘Global Trends to 2030: Can the EU meet the challenges ahead?’

<sup>5</sup> Bertrand Ramcharan. 2015. “A New International Law of Security and Protection.” UN Chronicle. Last modified 2015. Accessed on 10 July 2022. <https://www.un.org/en/chronicle/article/new-international-law-security-and-protection>

## Method

The method uses in this study is library research in order to identify the challenges of security from the international law perspective by using the angle of human protection. The urgency of the international law becomes the security phenomenon is taken from the UN Charter under Chapter VII on which the Security Council can take enforcement measures to maintain or restore international peace and security. Such measures range from economic sanctions to international military action. Such measures is justified through a security perspective analysis on global impact of a particular situation and the security situation internationally. The Charter in relation to peace and security and the global impact analysis are utilized in selecting and analysing the literatures.

As a concept, security is explored to give a border on the discussion of security for the purpose of this paper. The stage of analysis of security is taken from EUD (Explore, Understand and Do) method<sup>6</sup> to understand the complex and uncertain security landscape of human protection. First stage is exploring the security as context taken in this paper. Following after the first stage, understanding the International Law in relation to the case of Afghanistan is employe through judicium-normative analysis. Last, doing the security on the situation of the new-Taliban-Afganistan state in connection to International Law.

### Exploring The concept of Security and the Current Global Complex Challenges

Security is a very subjective concept because it related to the feeling of being secure as stated by Krieger:<sup>7</sup>

*Security is a term that describes how people feel – not whether they are justified in feeling the way they do. In this senses security depends on the perception people have of their position in their environment, not on the objective view of that environment.*

In international relations, the security is interpreted as “a term which denote the absence of threat to scare values. In principle security can be absolute, that is to say freedom from threat is the equivalent of complete security.”<sup>8</sup>

After the cold war, the new approach to security emerges, and to some extent, replacing the traditional concept of security, which is associated with militaristic approach and considered to be narrow set of international system perceptions.<sup>9</sup> The

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<sup>6</sup> Prof Berg, Bibi Van den. 2021. “Exploring, Understanding and Doing Interdisciplinary Education: A Three-Step Approach to guide Lecturers and Students through Interdisciplinary Analysis of Complex Security Challenges”. International Journal of Humanities Social Sciences and Education (IJHSSE) Volume 8, Issue 6, June 2021, PP 20-29

<sup>7</sup> Kreiger (ed), The Oxford Companion to Politics of the World, Oxford University Press, New York, 1993, hlm. 820-822.

<sup>8</sup> Evans and Newnham, The Penguin Dictionary of International Relations, the Penguin Group, London, 1998, hlm 490-491.

<sup>9</sup> A. Collins (ed), Contemporary Security Studies. Oxford University Press, Oxford 2007, p. 54-56.

most significant security concept in contemporary world is the idea on widening the concept of security into two ways, which are through threat to security and adding new level of relevant security measures. Buzan and Weaver highlighted as follows:<sup>10</sup>

*Security is taken to be about the pursuit of freedom from threat and the ability of states and societies to maintain their independent identity and their financial integrity against forces of change, which they see as hostile. The bottom line of security is survival, but it also reasonably includes a substantial range of concerns about the conditions of existence.*

The existence of security is connected to the global complex security challenges. The security challenges identified as the wicked problems because “they often have multiple, interlinked and changing causes because stakeholders disagree about the most appropriate solution and because addressing them means spending scarce resources and impacting the lives of human beings.”<sup>11</sup> Taken the example on terrorism, the questions merge to such as : “are acts of terrorism driven by religious ideas, social exclusion, political aspirations and/or by psychological mechanisms such as identity searches and disconnection?”<sup>12</sup> In relations to the factors, scholars are questioning the problem on the possibility in context of prevention or sanctioning. According to Prof Bibi, “the multiple causes, uncertainty about proper strategies in light of scarce recourses and the impact on citizens makes modern-day terrorism a wicked problem.”<sup>13</sup> In term of interconnected, the challenges implies to affect countries around the globe, but the source of the risk may be local. The scholar gave an example of a complex security challenge that has a global impact is when a nuclear power plant somewhere on the globe has a serious meltdown.<sup>14</sup> This is the same case with refugee, war and/or national conflict may influx people outside the country, which may trigger the security globally, as the same case happened when Taliban going their power. UNHCR estimates around 2.6 million of Afghan people were hosted as refugee in 98 different countries.<sup>15</sup> Afghan regufee marks as third-largest displaced population in the world after Syrian refugees and displaced Venezuelans. The vast majority of refugees from Afghanistan are living in Pakistan and Iran, which continue to host more than 1.3 million and 780,000 registered Afghan refugees respectively.<sup>16</sup>

<sup>10</sup> Buzan, Barry, Weaver O., and Wilde, JD., Security: A New Framework Analysis. London: Lynne Rienner Publisher, London, 1998., p. 4.

<sup>11</sup> Rittel, H. W. J.& Webber, M. M. (1973). Dilemma’s in a general theory of planning. Policy Sciences, 4(2), 155-169

<sup>12</sup> Prof Berg, Bibi Van den. Op. Cit.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> UNHCR. (2022). Afghan Refugee Crisis Explained. It can be retrived at <https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/>

<sup>16</sup> Ibid.

In 2002, Susanne Schmeidl analysed that the Afghan refugees pose a security dilemma which constitute a threat to human state and societal security.<sup>17</sup> Duration of migration seemed to be more relevant than the size of the migration, and regional and international policy needed to be taken into account the human security aspects on which it cannot be sacrificed for the sake of the national security only.<sup>18</sup> The new era of security indicates a broad concept of security needing an agenda which is substantially broader as compared to military security. It includes human security, economic security, societal security, and environmental security. There are four levels in looking at security: (1) International security or global security for world level; (2) National (state) security for level nation; (3) Public security and order for societal level; (4) Human Security as an integrated aspect of security at national, regional, international and global.<sup>19</sup>

Human security is a concept that merged the issue of security and development, but its broader meaning has also been criticized as rhetoric to win native populations' hearts over through military tactics.<sup>20</sup> Despite the rhetoric critics, the nexus between violent extremism and poverty, bad governance and conflict are evidently raising. The direct link between them is still struggling to be proven due to its analytical method. However, based on the "biographical interview information, case studies, or more sophisticated econometric analyses of the comparative population," the result leads to a condition where: "terrorists are rarely characterized by poverty or lack of education".<sup>21</sup>

Based on the General Assembly Resolution 66/290, it is highlighted that human security is "an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people". It has principles on "people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people."

People centered means "human security places the individual at the 'centre of analysis.' Consequently, it considers a broad range of conditions which threaten survival, livelihood and dignity, and identifies the threshold below which human life is intolerably threatened".<sup>22</sup> Furthermore, for the principle of multi-sectoral, it means "human security entails a broadened understanding of threats and includes causes

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<sup>17</sup> Susanne Schmeidl. (2002). "(Human) Security Dilemmas: Long Term Implications of the Afghan Refugee Crisis." *Third World Quarterly* vol 23, No. 1: 7-29.

<sup>18</sup> Ibid.

<sup>19</sup> Baylis, John. "International and Global Security in the Post-Cold War Area"; on *The Globalization of World Politics: An Introduction to International Relations* Third Edition, New York: Oxford University Press, 2008, p. 300.

<sup>20</sup> Briscoe, Ivan, and Dr. Bibi Van Ginkel. (2013). *The Nexus between Development and Security: Searching for Common Ground in Countering Terrorism*. ICCT Policy Brief. The Netherlands.

<sup>21</sup> Berrebi, Claude. 2009. "The Economics of Terrorism and Counterterrorism: What Matters and Is Rational-Choice Theory Helpful?", p. 160. In *Social Science for Counterterrorism: Putting the Pieces Together*. Santa Monica: RAND Corporation.

<sup>22</sup> Ibid.

of insecurity relating for instance to economic, food, health, environmental, personal, community and political security”. Comprehensive principle refers to “stress the need for cooperative and multi- sectoral responses that bring together the agendas of those dealing with security, development and human rights”. The next one is the contex-specific concept in human security. It “acknowledges that insecurities vary considerably across different settings and as such advances contextualized solutions that are responsive to the particular situations they seek to address”. The last one is on prevention-oriented that addressed dual function on protection and empowerment.

The interpretation method uses the developed definition and threat in human security that has been established (Figure 1).

**Figure 1: The Type of Human Security**

Type of Security	Definition	Threat
Economic Security	An assured basic income	Poverty, unemployment, indebtedness, lack of income
Food Security	Physical and economic access to basic food	Hungers, Famines, and the lack of physical and economic access to basic food
Health Security	Protection from disease and unhealthy life styles	Inadequate healthcare, new and recurrent diseases including epidemics, and pandemics, poor nutrition, and unsafe lifestyles
Environmental Security	Healthy physical environment	Environmental degradations, natural disasters, pollutions, and resource depletions
Personal Security	Security from physical environment	From the state (torture), other states (wars), group of people (ethnic tension), individuals or gangs (crime), industrial, workplace, or traffic accidents
Community Security	Safe membership in the group	From the group (oppressive practices), between groups (ethnic violence), from dominant groups (e.g indigenous people vulnerability)
Political Security	Living in society that honors basic human rights	Political or state repression, including torture, disappearance, human rights violations, detentions and imprisonments.

Source from *Kaji Ulang Indeks Keamanan Manusia*, drafted by Edy Prasetyono Ph.D., Riefqi Muna Ph.D., Mahmud Syaltout Ph.D supported by Bappenas and UNDP.

In the case of Afghanistan, after twenty years of Schmeidl's research, the refugee issue is still pertinent in the context of human security and humanitarian law, especially after the Taliban has successfully ruled the country. The fear of "Talibanisation" and terrorist attack in the host country trigger stigma and xenophobia to Afghan refugees, which was occurred on the 2002 Afghan Refugee,<sup>23</sup> happen to the current Afghan refugees evidently flee to Uganda.<sup>24</sup> Nilofar Sakhi identifies the human insecurity after the Taliban takeover as follows;<sup>25</sup>

"...With the collapse of the republic system installed in Afghanistan following the 2001 Bonn Agreement and subsequent Taliban takeover this past August, the country now faces a humanitarian, identity, and human rights crisis. Protracted conflict and continued instability, combined with the recent political upheaval and humanitarian and economic crises, have caused fear and frustration among a large segment of the population. A perceived – or in this case real – loss of power and freedom impedes people from utilizing humanitarian and development programs to effectively build their human capital and agency, resulting in a loss of security. The harsh restrictions imposed by the Taliban since the group took over Kabul have already caused fear, grievance, and a loss of motivation among the educated class, youth, and women.

Additionally, the break of connectivity with domestic and international markets, along with the cessation of foreign aid and investment into the country, have damaged productive activity. More than 120,000 people have been evacuated from Afghanistan, including qualified professionals in the social, economic, and political sectors. This brain drain will affect organizational development and the Taliban's ability to rule. People are in dire need of basic humanitarian services. According to the World Food Programme, 14 million Afghans are suffering from severe hunger. The U.N. High Commissioner for Refugees reports that 500,000 people have been displaced in Afghanistan, and health and food security are the foremost concern. According to UNICEF, 10 million children across the country require humanitarian assistance to survive. Even before the Taliban takeover in May 2021, 11 million people were experiencing acute food insecurity, and food shortages have only gotten worse in the months since..."

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<sup>23</sup> Susanne Schmeidl. Loc. Cit.

<sup>24</sup> DW. (2021). "Arrival of Afghan refugees in Uganda raises security concerns". DW. Last modified 2021. Accessed on 15 July 2022. <https://www.dw.com/en/arrival-of-afghan-refugees-in-uganda-raises-security-concerns/a-58979994>

<sup>25</sup> Nilofar Sakhi. (2021). "The Humanitarian and Human Security Crises in Afghanistan." Mei@75 Peace Prosperity and Partnership. Last modified 2021. Accessed on 15 July 2022. <https://www.mei.edu/publications/humanitarian-and-human-security-crises-afghanistan>

## **Understanding The Challenges of Security on The State Recognition Principle and International Humanitarian Law**

International humanitarian law or generally called the law of war or the law of armed conflict, regulates relations between states, international organizations and others, including the subject of international law in times of armed conflict. This humanitarian law is a general term for rules that aim to humanize people involved in armed conflicts, together forming the rules of IHL and international human rights.<sup>26</sup>

International humanitarian law or for short (IHL) is a branch of public international law that consists of rules aimed at protecting persons who are not parties to or no longer participate in hostilities and limit the means and methods of warfare. In other words, IHL consists of international treaty law and customary rules specifically intended to resolve humanitarian problems that arise directly from armed conflicts, both international and non-international conflicts.<sup>27</sup>

Humanitarian law has two branches, namely the law of Geneva and the Law of The Hague. Geneva law is the governing body that protects victims of armed conflict, such as military personnel, or other parties such as wounded combatants or prisoners of war and civilians who do not or are no longer participating directly in combat. Whereas The Hague law is a body of rules that stipulates the rights and obligations of belligerent parties in the conduct of hostilities, and which limits the means and methods of war.<sup>28</sup>

International humanitarian law (IHL) is a compromise between two underlying principles, namely military and humanitarian needs. These two principles form all the rules of IHL, according to the principle of military necessity, the parties to a conflict can only use the means and methods necessary to achieve the legitimate military objectives of the conflict and which are not prohibited by IHL. The degree and type of power that can be used by the parties is limited to what is needed to overcome the enemy as quickly as possible with the least loss of life and resources.

Meanwhile, the principle of humanity prohibits conflicting parties from causing unnecessary suffering or destruction to achieve the legitimate goals of an armed conflict. In international humanitarian law there are several principles, namely:<sup>29</sup>

1. Humanitarian Principles;
2. The Principle of Military Interest;
3. Proportional Principle;
4. The Principle of Distinction;

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<sup>26</sup> Gary D Solis, *The Law of Armed Conflict International Humanitarian Law In War*, New York: Cambridge University Press, 2010, hlm. 22

<sup>27</sup> ICRC, *International Humanitarian Law*, Inter-Parliamentary Union (IPU) and International Committee of the Red Cross (ICRC), 2016, hlm. 10

<sup>28</sup> ICRC, *Op. cit.*, hlm. 10

<sup>29</sup> Moch. Arief Setiawan, *Hukum Humaniter Internasional*, [http://moch-arief-fisip12.web.unair.ac.id/artikel\\_detail-158426-Prinsip%20Hukum%20Internasional-Hukum%20Humaniter%20Internasional.html](http://moch-arief-fisip12.web.unair.ac.id/artikel_detail-158426-Prinsip%20Hukum%20Internasional-Hukum%20Humaniter%20Internasional.html)



5. Principles of Use of Armaments;
6. Principle Minimum requirements for the implementation of HHI;
7. Jus ad bellum and Jus in bello principles;
8. The principle of responsibility in the implementation and enforcement of International Humanitarian Law.

International humanitarian law seeks to protect civilians in times of conflict by regulating hostile behavior, namely how parties to armed conflicts carry out their military operations. HHI draws on three basic principles, among others:

1. The principle of distinction, namely the parties must always distinguish between civilians and civilian objects on the one hand, and combatants and military objectives on the other. A party to an armed conflict can only direct its attacks against combatants and military objectives. Direct attacks against civilians and civilian objects are prohibited. Indiscriminate attacks are also prohibited; they refer to attacks that are not directed at a specific military objective, use methods or means of warfare that cannot be directed at a specific military objective, or use methods or means of combat; effects that cannot be limited as required by HHI.
2. The principle of proportionality is directed to an event of injury to civilians and loss of life and property to civilians. Never be excessive action allowed in relation to military interests. The principle or principle of proportionality in armed conflict is a basic rule in determining the balance of the use of weapons with the achievement of the objectives of the use of armed violence.<sup>30</sup>
3. The precautionary principle is when the parties must always take care to save civilians and civilian objects during military operations. This could include double-checking that a target is indeed military in nature or effectively warning the civilian population ahead of an attack.<sup>31</sup>

Based on the type of armed conflict that occurred in Afghanistan, it was a non-international armed conflict or Non-international Armed Conflict, where the hostilities occurred between the Taliban insurgent group and the armed forces of the Afghan government. The demands, therefore, fall under the scope of IHL and not national one. The armed conflict in Afghanistan is currently governed by customary rules and treaties that apply to armed conflicts of a non-international character.<sup>32</sup> Prior to the current armed conflict, violence in Afghanistan had moved through at least three phases since 2001.

The first of these phases covered the situation leading up to the US-led invasion of Afghanistan in October 2001, in which there was violence or armed conflict between the Taliban government and Northern Alliance forces, at that time the armed conflict

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<sup>30</sup> Denny Ramdhany, *Konteks dan Politik Terkait Hukum Humaniter Internasional Kontemporer*, Jakarta: PT Raja Grafindo Persada, 2015, hlm. 210

<sup>31</sup> ICRC, *Op. cit.*, hlm 12

<sup>32</sup> Bellal Annysa, *From Words To Deeds: A Research Of Armed Non-State Actor Practice And Interpretation Of International Humanitarian And Human Rights Norms*, Research Brief: Geneva Academy of International Humanitarian Law and Human Rights & Geneva, 2019, hlm. 5

was non-international in nature. The second phase began with the US-led attack on the Taliban on October 6, 2001, which was an international armed conflict governed by customary law and international humanitarian treaty rules. The third phase is the occupation of Afghanistan by the US and other foreign forces which is a form of occupation and is also considered an international armed conflict by Article 2 general to the four Geneva Conventions (General Article 2).

There is no consensus among legal authorities on exactly when this occupation ended. Nonetheless, then armed violence in Afghanistan certainly had sufficient intensity to give rise to non-international armed conflict to date. Two treaty arrangements generally apply to such conflicts: Article 3 common to the four Geneva Conventions (General Article 3) and the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Supplementary Protocol II).

The State of Afghanistan has also ratified four Geneva Conventions in 1956 and complied with two Additional Protocols in June 2009, with Additional Protocol II entering into force for that country on 24 December 2009. This section examines General Article 3 and later of Additional Protocol II which applied to the armed conflict in Afghanistan which is an international armed conflict. The application of this legal obligation also applies to all Non-State Armed Actors (ANSA) involved as parties to the conflict.<sup>33</sup> General Article 3 is applicable when an armed conflict of a non-international nature occurs in the territory of one of the High Contracting States. This characteristic is emphasized in the jurisprudence contained in the Tadic case tried by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which demands that two criteria be met: First, there must be a 'protracted' state of armed violence, and each ANSA must have a level of organization to be considered a party to the conflict under national law. In the case of Afghanistan, as noted above, Afghanistan is a party to the Geneva Conventions, and for most of the last decade violence between the Afghan government and organized armed groups such as the Taliban has been of such intensity that armed conflict has occurred in the region and Article 3 General of the Convention Geneva can be applied.<sup>34</sup>

## **"Doing" Security on the case ofThe New-Taliban-Afghanistan State**

The Taliban group emerged in the early 1990s in northern Pakistan when Soviet troops withdrew from Afghanistan. As a predominantly Pashtun movement, the Taliban became widely known in Afghanistan in 1994.<sup>35</sup> The Taliban movement was born by a figure named Mullah Muhammad Omar as well as a leader in the group,

<sup>33</sup> Ibid., hlm. 6-7

<sup>34</sup> Annyssa Bellal, Ibid., hlm. 8

<sup>35</sup> Siapakah Kelompok Taliban, [https://www.bbc.co.uk/indonesian/indepth/story/2009/06/090624\\_talibanhistory.shtml](https://www.bbc.co.uk/indonesian/indepth/story/2009/06/090624_talibanhistory.shtml), Diakses 19 September 2021

the birth of the Taliban movement was motivated by many internal and external factors. The internal factors were their anger towards the division of the Ummah, conflicts, and wars between Shi'ites and Sunnis, demoralization and also rampant corruption after the fall of communist rule. The external factor was pressure from Pakistan which wants to see its allies, Hekmatyar and Ahmad Shah Massoud, take control of power in Afghanistan.<sup>36</sup>

It is alleged that this group also first appeared at a religious seminar funded by Saudi Arabian funds that preached hardline Sunni Islam. The promise of the Taliban in the Pashtun region that laid between Pakistan and Afghanistan is that if they come to power they will restore peace and security and implement a stricter version of Islamic Sharia. The main goal of this organization was to establish an Islamic state in Afghanistan. When the group ruled Afghanistan from 1996-2001, the Taliban enforced strict sharia law. Their initial popularity was due to their success in tackling corruption, enforcing the law and making the roads and maintain safe in their controlled for trade from southwest Afghanistan, the Taliban rapidly expanding their influence.

In September 1994, the Taliban Group established a government in Kandahar and organized their campaign of armed force into the surrounding provinces and cities. The Taliban, then, quickly expanded their influence. In September 1995 they captured the province of Herat which borders Iran. In 1996 the Taliban succeeded in capturing the capital Kabul and hanging the regime of the last communist president in Afghanistan, Najibullah Ahmadzai, in a public square.<sup>37</sup>

Massive support mainly from ethnic Pashtuns and other conservative groups helped the Taliban successfully seize the capital Kabul in 1996. The victory was attended by 1,200 religious figures and was the largest in modern Afghan history. The Taliban control parts of the territory and enforce effective authority through shura and elected governors. Since 1996 and at least when they came to power, they had sound reasons for establishing a government and were supported by the majority of the population, especially when in December 1999 they succeeded in ending the hijacking of Air India jets. Observers believe that the Taliban have changed sides and are starting to turn themselves against international terrorism and demonstrate international responsibility.<sup>38</sup>

When the Taliban government was officially in power from 1996-2001, the Taliban formed the government of the Islamic Emirate of Afghanistan, with Islamic law as the basis of the state.<sup>39</sup> The Taliban government in power at that time was given

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<sup>36</sup> Z.A Maulani, *Perang Afghanistan Perang Menegakkan Hegemoni Amerika Di Asia Tengah*, Jakarta: PT Delancang Seta, 2002, hlm. 9

<sup>37</sup> Sejarah Taliban di Afghanistan dan Kondisi Terkininya, <https://tirto.id/sejarah-taliban-di-afghanistan-konflik-dan-kondisi-terkininya-giLe>, Diakses 18 September 2021

<sup>38</sup> Rudiger Wolfrum & Christiane E. Philipp, "The Status Of The Taliban: Their Obligations And Rights Under International Law", *Max Planck Yearbook of United Nations Law*, Vol 6, 2002, hlm. 567

<sup>39</sup> Z.A Maulani, *Op. cit.*, hlm. 10

recognition by three countries, namely Pakistan, the United Arab Emirates and Saudi Arabia.<sup>40</sup> The Taliban group in power at that time was overthrown by the United States military action after the September 11, 2001 attacks occurred. The action is called Operation Enduring Freedom Afghanistan.<sup>41</sup> This action was motivated by US suspicion of the Taliban group being involved in the events behind the tragedy of the September 11, 2001 attacks, because at that time the Taliban protected the leader of Al-Qaeda, namely Osama Bin Laden who was the main accused of the bombing of the WTC building in the US in September 2001.<sup>42</sup>

In Operation Enduring Freedom Afghanistan, the US collaborated with the Northern Alliance or commonly known as the Northern Alliance, as well as the North Atlantic Treaty Organization (NATO), which aimed at destroying the Afghan terrorist training camps, removing the Taliban regime from the power of religious fundamentalists who gained power by force, and create a democracy in Afghanistan.<sup>43</sup>

When the United States succeeded in carrying out its operations and the United States at that time withdrew its troops from Afghanistan, the Taliban had made a change again, namely to seize the government in Afghanistan on August 15, 2021. At first, the Taliban carried out occupations of villages and suburbs in Afghanistan and claimed control of important areas so that other countries began to withdraw their citizens from Afghanistan. The war between the Afghan army and the Taliban was getting more intense on July 29, 2021 The Taliban began to attack the capital of Helmand province, Lashkar Gah. After that the group first succeeded in capturing the provincial capital of Zaranj in the province of Nimroz then were captured one by one until 23 provinces as of August 15, 2021. The Taliban's entry into Kabul marked the group's return to power after it was toppled by a US-led coalition invasion in 2001.<sup>44</sup>

On September 7, 2021, the Taliban finally announced the formation of an interim government in Afghanistan, led by Mohammad Hasan Akhund. Since the Taliban control large swathes of territory, including the capital, it is worth understanding the main issue, namely whether they qualify as a new, recognizable government in Afghanistan.<sup>45</sup>

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<sup>40</sup> Taliban Dalam Analisis Hukum Internasional, <https://mediaindonesia.com/opini/430539/taliban-dalam-analisis-hukum-internasional>, Diakses 12 september 2021

<sup>41</sup> Yessi Juniar Rahmad, "Peran International Committee Of Red Cross (ICRC) Menangani Korban Konflik Bersenjata Internasional Di Afghanistan Tahun 2013-2016" eJournal Ilmu Hubungan Internasional, Vol 7, No 1, 2019, hlm. 510

<sup>42</sup> Muhnizar Siagian & Tiffany Setyo Pratiwi, "Narcoterrorism di Afghanistan: Keterlibatan Taliban dalam Ancaman Keamanan Non tradisional", Jurnal ICMES, Vol 2, No 2, 2018, hlm. 165

<sup>43</sup> Yessi Juniar Rahmad, Ibid, hlm 510

<sup>44</sup> Kronologi Runtuhnya Pemerintah Afghanistan: Hengkangnya Pasukan As Hingga Jatuhnya Kabul Oleh Taliban, <https://www.kompas.com/global/read/2021/08/16/075549770/kronologi-runtuhnya-pemerintah-afghanistan-hengkangnya-pasukan-as-hingga?page=all>, Diakses 17 September 2021

<sup>45</sup> Taliban announces new government in Afghanistan <https://www.aljazeera.com/news/2021/9/7/taliban-announce-acting-ministers-of-new-government>, Diakses 3 Januari 2022

Although the government or ruler of a country would always change, all these changes actually do not really need recognition from other countries if the transformation of the government considers to be constitutional or legal.<sup>46</sup> The problem is when the change or replacement of the government of a country is carried out unconstitutionally, such as through revolution, insurrection, coup d'état and others.<sup>47</sup> Recognition of this government is important because it is not possible for a country to enter into an agreement or official relationship with other countries that do not recognize its government.<sup>48</sup> However, the recognition of this government has not been clearly regulated in international law. This is different from the recognition of a country which has been regulated in Article 1 of the 1933 Montevideo Convention, which consists of:<sup>49</sup>

1. Defined territory;
2. Permanent population;
3. Government;
4. Capacity to enter into relations with other states.

The recognition of a new government is certainly very different from the recognition given to a new country. Between recognition of the state and recognition of the government there are differences between the two subjects. Recognition of the state means acknowledging that one entity has fulfilled the state criteria. Recognition of the government shows that the intended power has effective control over a region or country. The fundamental difference is that recognition from the government certainly has the consequence of accepting the government as one united entity in the state, whereas recognition of the state can be given without accepting a particular regime governing the state.<sup>50</sup>

Regarding state recognition, the factual situation would also be tested according to general criteria, namely those stipulated in the 1933 Montevideo Convention, which is already generally accepted. The consideration could obviously be different if the new government takes place unconstitutionally.<sup>51</sup> In his book, according to Sefriani, this government recognition means an attitude, statement or policy to accept a government as the legitimate representative of a country and the parties that would be recognized to govern the state and to carry out international relations with them.<sup>52</sup> The existing arrangements, furthermore, are insufficient to accommodate the main

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<sup>46</sup> Huala Adolf, "Aspek-aspek Negara Dalam hukum Internasional", Jakarta: Rajawali Pers, 1996, hlm. 73-74

<sup>47</sup> Sefriani, *Hukum Internasional Suatu Pengantar*, Depok: Rajawali Pers, 2019, hlm. 155

<sup>48</sup> Boer Mauna, *Hukum Internasional Pengertian Peranan dan Fungsi dalam Era Dinamika Global*, Bandung: P.T. Alumni, 2008, hlm. 80. 72

<sup>49</sup> Pasal 1 Konvensi Montevideo 1933

<sup>50</sup> Peter Malanczuk, *Akehurst's Modern Introduction To International Law (Seventh Revised Edition)*, New York: Routledge, 2002, hlm. 82

<sup>51</sup> Malcolm N. Shaw, *Hukum Internasional*, Bandung: Penerbit Nusa Media, 2013, hlm. 445

<sup>52</sup> Sefriani, *Op. cit.*, hlm. 167

problem, namely regarding the recognition of the new government that comes from unconstitutional actions.

However, to overcome the inadequate international regulation regarding the recognition of a new government, in practice, if a new government can effectively control the state over the territory and population, the recognition could no longer be postponed, which arguably known as the Effective Control Doctrine. Many experts view to be recognized as a government, the effective control need to be seen, which is to able to become an official authority and also be able to represent the country. This was also emphasized by the International Committee of the Red Cross or ICRC in its comments to the Geneva Conventions:<sup>53</sup>

“Under international law, the key condition for the existence of a government is its effectiveness, that is, its ability to exercise effectively functions usually assigned to a government within the confines of a State’s territory, including the maintenance of law and order. Effectiveness is the ability to exert State functions internally and externally, i.e. in relations with other States.”

It can be interpreted that the main condition for the existence of a government is the effectiveness of the government, namely the ability of the government to carry out its functions as a government effectively which is usually given to the government within the boundaries of a country.

However, there have been many views that the Effective Control Doctrine is a doctrine that includes the recognition of illegal changes in a government. The United Kingdom has on a number of occasions adopting this approach, which was announced by the Deputy Minister of Foreign Affairs in 1970 that the test of the new government laid on the acceptance of the permanent population and effective control over large parts of the country. This attitude finally prompted certain policies to give recognition to the Chinese Communist Government and the Hungarian Government formed by Russia in 1956 after the failure of the uprising.<sup>54</sup>

Tinoco Arbitration<sup>55</sup> is an interesting example of the concept of “effective control”. In 1919, the Tinoco government in Costa Rica was overthrown and the new government rejected certain obligations signed by Tinoco with respect to the British state. Chief Justice Taft mentioned the issue of recognition or non-recognition related to the Tinoco government. The judge ruled that because the government in question had exercised effective control over the country, it was a legitimate government

<sup>53</sup> ihl-databases.icrc.org, Commentary of Article 2: Application of The Convention, 2016 - 234.

<sup>54</sup> Malcolm N. Shaw, Op. cit, hlm. 446

<sup>55</sup> The “Tinoco Regime” came to power through a coup in Costa Rica in 1917. It lasted for two years. So far, the Tinoco regime has been recognized as legitimate by several countries, but not by major powers such as Great Britain (the plaintiff). During his reign, the Tinoco regime entered into several contracts (including oil concessions) with the British government. When the regime fell in 1919, Britain filed a lawsuit against Costa Rica (the defendant) to enforce the contract and collect the obligations of the Tinoco regime.

despite the fact that a number of countries, including the UK, did not recognize it.

This means that if the acknowledgment of the government itself is rejected on the grounds of the invalidity or disorder of the origin of the government, and not because of the lack of effective government control in the country, the absence of such recognition will lose some of the weight of the proof. In other words, if the level of authority or effectiveness of the control exercised by the new government is uncertain, it means that recognition by other countries might be considered as an important factor.<sup>56</sup> But if the new government is really strong or it has effective control in a country, the absence of recognition from other countries would not be necessary affecting the legal character of the new government. The Effective Control Doctrine indicates the importance of factuality in any situation. It is emphasized again that if the recognition of the new government is rejected on the grounds of the impropriety of the origin of the new government, the impact would be less than if the recognition is rejected due to the absence of effective controls.<sup>57</sup> In the doctrine of effective control, these are factors appear to consider for recognising a new government:<sup>58</sup>

1. Effectiveness of control;
2. Stability;
3. Ability and willingness to fulfil obligations; and
4. People's support (people's approval to the government).

The rationale behind these elements is to ensure that the new government is internally stable before it is recognized and establish relationships with other countries which imply the responsibilities and obligations of that government and that effective control over territory is fundamental for a will to exist as a legitimate government, including for the case of Afghanistan.

### **1. Effectiveness of control**

The new government created by the Taliban must have effective control over a territory and population in order to become an official authority and also be able to represent the country, namely Afghanistan. A study by the BBC in 2017 showed that the Taliban had previously held complete control over a number of districts. But research also shows that they are active in many other parts of the country, increasing weekly or monthly attacks in some areas, exhibiting much higher strength than previously thought.<sup>59</sup>

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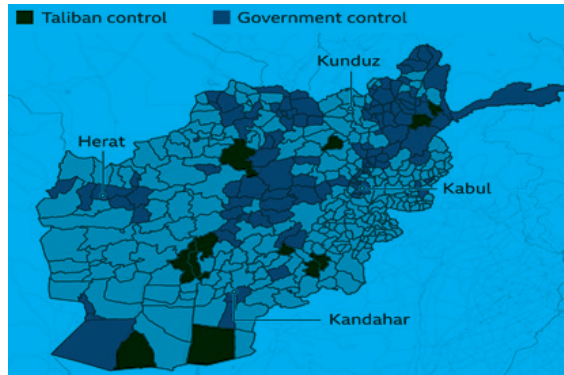
<sup>56</sup> Malcolm N. Shaw, *Op.cit.*, hlm. 446

<sup>57</sup> Malcolm N. Shaw, *Ibid.*, hlm. 447

<sup>58</sup> "Coup in Egypt or Not? The Implications Under International Law", <http://www.tutufoundationusa.org/tag/effective-control-doctrine>, Diakses 2 September 2021

<sup>59</sup> Areas of Taliban Control In 2017, <https://www.bbc.com/news/world-asia-57933979>, Diakses 5 Januari 2022 Memetakan Kemajuan Taliban di Afghanistan

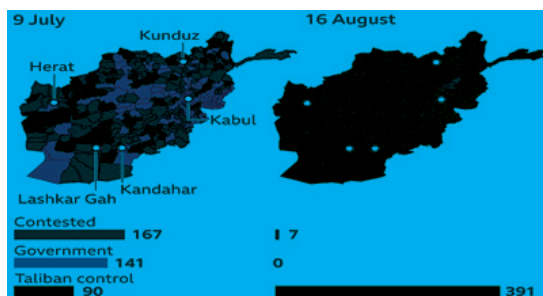
**Picture of Taliban’s control in 2017<sup>60</sup>**



In 2017 about 15 million people or half of the population in Afghanistan reportedly lived in areas controlled by the Taliban or where the Taliban group had an open presence.<sup>61</sup> As of September 2018, 14 districts in Afghanistan were under the control of the Taliban group, while other districts are still being disputed between the Taliban group and the Afghan government. The area under control includes parts of Farah province and most of Helmand province, such as Dishu. B. Roggio, A. Gutowski.

As of November 2018, the Afghan government was estimated to only control 72% of the country’s territory.<sup>62</sup> In July 2021, the Taliban group seized a district in western Afghanistan, which also served as the border between Afghanistan and Iran.

**Taliban’s control of 90 Districts in Afghanistan as of 16 August 2021<sup>63</sup>**



The Taliban are also constantly accelerating their hold on Afghan territory. In the past week, the Taliban have invaded a number of areas in Afghanistan bordering five

<sup>60</sup> Ibid.

<sup>61</sup> Memetakan Kemajuan Taliban di Afghanistan, <https://www.bbc.com/news/world-asia-57933979> Diakses 5 Desember 2022

<sup>62</sup> Taliban control of Afghanistan on the rise, US inspector says, <https://edition.cnn.com/2018/11/01/middleeast/afghanistan-report-taliban-gains-control-intl/index.html>

<sup>63</sup> The information can be accessed at <https://www.bbc.com/news/world-asia-57933979>



countries, namely Iran, Tarjikistan, Turkmenistan, China and Pakistan.<sup>64</sup>

The Taliban took some areas from the government by force. Elsewhere, the Afghan National Army retreated without firing. Even though the new clashes had been going on for several weeks, since August 6 the Taliban have finally made faster progress across the country, and managed to take control of the provincial cities in Afghanistan. At the Presidential Palace in Afghanistan, which was occupied, the Taliban flag was immediately installed. On September 7, 2021, the Taliban finally announced the formation of an interim government in Afghanistan, led by Mohammad Hasan Akhund.

## **2. Stability**

Effective control over a territory is one of the fundamental things for the stability of a regime or government in a country. If we look at September 2018, 14 districts in Afghanistan have been under the control of the Taliban, although other districts are still being disputed between the Taliban and the Afghan government. But at that time the Afghan government was estimated to only control 72% of the country's area.<sup>65</sup> This indicated the power of the Taliban to get rid of other parties to take power and stability of the country, including enemies to make them enough to be said to have stability and immortality in maintaining the existence of their government.

## **3. Ability and willingness to fulfil obligations**

The Taliban group has asked for support from countries around the world for its newly formed government, the group has also promised to maintain good relations with the international community. The Taliban group emphasized that Afghanistan's interests are aligned with the interests of the international community.<sup>66</sup>

One of the leaders and political leaders of the Taliban, Mullah Abdul Ghani Baradar, said his group would be inclusive for his new government in Afghanistan responding to the concerns of some parties that the current Taliban government would be the same as the previous Taliban government in the 1996-2001 period. They also said that the new Taliban government seeks to change and improve the lives of Afghans and confidently take responsibility for the Afghan people, provide security, as it is essential for economic growth.<sup>67</sup> The Taliban was also trying to show a more moderate attitude towards its citizens and especially towards women in Afghanistan promising women able to work, get an education, participate in social and political

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<sup>64</sup> Taliban Menguasai Wilayah Perbatasan Di Afghanistan, <https://dunia.tempo.co/read/1481627/taliban-menguasai-wilayah-perbatasan-di-afganistan/full&view=ok>, Diakses 5 Januari 2022

<sup>65</sup> edition.cnn.com, Op. cit

<sup>66</sup> Menimbang Janji Taliban Kepada Masyarakat Internasional, [https://parstoday.com/id/news/world-i105016-menimbang\\_janji\\_taliban\\_kepada\\_masyarakat\\_internasional](https://parstoday.com/id/news/world-i105016-menimbang_janji_taliban_kepada_masyarakat_internasional), Diakses 7 Januari 2022

<sup>67</sup> Tunjuk Dua Wanita Jadi Utusan Khusus Di Afghanistan, <https://dunia.tempo.co/read/1544779/as-tunjuk-dua-wanita-jadi-utusan-khusus-di-afghanistan>, Diakses 7 Januari 2022

activities.<sup>68</sup> Apparently, the attitude was to attract international supports over the new Taliban government because currently, after gain supports as government with effective control, the girls over six grades are not allowed to go to school.<sup>69</sup>

During conflict, the Taliban regularly issued statements of responsibility on their website or through social media Twitter. They also released public statements on issues such as the protection of civilians and civilian objects, victim reports and answers to UNAMA reports claiming to have a victim data collection agency.<sup>70</sup> After the new government established, however, the Amnesty International reported that Survivors of gender-based violence abandoned following Taliban takeover.<sup>71</sup> The Taliban also claimed that they were implementing an internal disciplinary mechanism, as one of their agencies allegedly investigated cases of civilian victims to Military Courts and punished those who were guilty according to Sharia Law and also insisted on holding a reconciliation meeting with the families of the victim.<sup>72</sup> These statements remains uncertain until now especially with cases related to massive human rights violation against Hazaras.<sup>73</sup>

#### **4. People's support (people's approval to the government)**

The existence and integrity of the government certainly cannot be separated from the support of its people. One of the success factors of the Taliban group when they came to power from 1996 to 2001 was the huge support from the majority of the population, especially from ethnic Pashtuns and other conservative groups who had helped the Taliban group successfully seize the capital Kabul.<sup>74</sup> The Taliban's victory started from the many citizens' support for the group, even January 2, 2022 the Afghan people protested in Kabul and demanded the international community to recognize the government formed by the Taliban, namely the government of the Islamic Emirate.<sup>75</sup> According to the former Prime Minister of Afghanistan, Gulbuddin Hekmatyar, the leadership of the Taliban today could stop the bloodshed that had

<sup>68</sup> Mantan PM Afghanistan: Semua Kelompok Etnis Dukung Pemerintahan Taliban, <https://international.sindonews.com/read/519672/40/mantan-pm-afghanistan-semua-kelompok-etnis-dukung-pemerintahan-taliban-1629727686>, Diakses 7 Januari 2022

<sup>69</sup> Aljazeera, 22 March 2022, "The Taliban closes Afghan girls' schools hours after reopening", can be accessed at <https://www.aljazeera.com/news/2022/3/23/taliban-orders-girls-schools-shut-hours-after-reopening>

<sup>70</sup> UNAMA & OHCHR, Afghanistan: Annual Report 2016: Protection of Civilians in Armed Conflict, 2017, hlm. 75

<sup>71</sup> The Amnesty International Report, "Afghanistan: Survivors of gender-based violence abandoned following Taliban takeover - new research", can be accessed at <https://www.amnesty.org/en/latest/news/2021/12/afghanistan-survivors-of-gender-based-violence-abandoned-following-taliban-takeover-new-research/>

<sup>72</sup> UNAMA & OHCHR, op.cit.

<sup>73</sup> Human Rights Watch on World Report 2022, "Afghanistan: Events of 2021", can be accessed at <https://www.hrw.org/world-report/2022/country-chapters/afghanistan>

<sup>74</sup> Rudiger Wolfrum & Christiane E. Philipp, Loc. cit., hlm. 567

<sup>75</sup> Warga Afghanistan Serukan Dunia Akui Pemerintah Taliban, <https://www.voaindonesia.com/a/warga-afghanistan-serukan-dunia-akui-pemerintahan-taliban/6378926.html>, Diakses 7 Januari 2022

been going on in Afghanistan and led the war-torn country out of the current crisis bringing peace and stability to a war-torn country and collectively work for its reconstruction and progress.<sup>76</sup> In term of supports, ideally, it could not only be gained from the majority, but also the minority and how the new government treat them. It was noted the new-Taliban-Afghanistan state failed to give protection to them.<sup>77</sup>

## **Conclusion**

By exploring the concept of security and trying to understand the international law in the case of ne-Taliban-Afghanistan state through normative judicial approach, it can be concluded that doing the security in the context of the new-Taliban-Afghanistan state and International law is meant to overcome the loopholes of human protection aspects. Considering the justification and/or application international law only can disadvantage human security, in this respect particularly minorities and vulnerable groups, and regional and international concern.

The practice in the New-Taliban Afghanistan state indicates that the lack of support to the minority and vulnerable group would induce the possibility of certain power to take into action for taking opportunity given under the principle of effective control doctrine, particularly in the context of people support. It would not be hard for the group to gain internal support as long as the majority of the people are supporting the group. The ability and willingness to fulfill obligations should also take into account the human security aspects, which relate to obligation to fulfill, respect, and protect human rights acknowledged under International Human Rights Law. As Afghanistan is the state party to Geneva Convention, it is relevant if Taliban should be responsible to the their actions for gaining powers. An activist views that it would be a grave mistake to recognize Taliban governance as the group demonstrated no changes in respecting minorities and vulnerable groups particularly women.<sup>78</sup> International community should start to develop human security engagement through a new international law of security and protection. This, therefore, suggests the consistency actions by member states at the UN, especially major powers like US and its allies, such as for what happened in Iraq,<sup>79</sup> otherwise the similar problems will occur repeatedly in the future and weakening the international system as it starts already in Ukraine.

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<sup>76</sup> international.sindonews.com, Op. cit.

<sup>77</sup> Human Rights Watch, Ibid.

<sup>78</sup> Nilofar Sakhi. Loc. Cit.

<sup>79</sup> Gerry Simpson. (2005). "The War In Iraq And International Law". Melbourne Journal of International Law Vol 6: 1-30.

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