



# THE LEGAL ANALYSIS OF THE TALIBAN'S TAKEOVER OF THE AFGHAN STATE IS REVIEWED FROM THE POINT OF VIEW OF INTERNATIONAL CRIMINAL LAW AND THE 1998 ROME STATUTE

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<b>Received:</b> 22 <sup>th</sup> February 2023 <b>Accepted:</b> 22 <sup>th</sup> March 2023 <b>Published:</b> 26 <sup>th</sup> March 2023	After two decades of bringing down Taliban rule and owning Afghanistan. In 2021, in countering the onslaught of psychological warfare of 9/11, the Joined Nations (USA) chose to take off from Afghanistan in order to anticipate a repeat of the failures of the Soviet Union, which would be much more fatal. Finance and people are taking on a heavy burden that has expanded because the widespreadness has provoked President Biden to sum up the choices made by his forerunner, Donald Trump. Atrocities against followers of the previous regime now haunt the source of internal conflict, after Ashraf Ghani fled abroad. The taliban's military activity and savagery in retaking cities in Afghanistan reinforce questions over the taliban's changing stance to be willing to compromise on sharing control gently using a fair component, which they have never provided support so far. Defense of the full application of sharia and the constant by the Taliban and the seizure of the authority of the great powers within the Local, which made the intermediate war, made the difference of deciding a long time.

**Keywords:** Taliban, take over, Afghanistan

## INTRODUCTION

In 2021, on August 17, 2021, Afghanistan was controlled by the Taliban group. The Taliban group's control is the aftermath of the withdrawal of U.S. and NATO forces after 20 years of plugging its militant forces in Afghanistan to counter terrorist groups that previously attacked the United States in the 2001 WTC incident. The withdrawal of American and NATO troops from Afghanistan was a breath of fresh air for the Taliban group because they could easily enter and seize the then Afghan government under president Ashraf Ghani. Previously, the United States began conducting military operations in Afghanistan with the aim of cracking down on the terrorist group Al-Qaeda under the leadership of Osaman Bin Laden who was accused of being the mastermind of the hijacking of two civilian aircraft that were later crashed into a twin building known as the WTC (World Trade Centre) on September 11, 2001 in New York city, United States. It must be understood that the position of all countries in the eyes of the International is of equal degree. Countries have their own sovereignty and must be upheld and valued by fellow world people. In this case, the United States in its series of military operations known as the Enduring Freedom military operation is also known to violate many boundaries of the rules and principles of international law, one of which is the principle of non-intervention. The principle of non-intervention is the principle mentioned in the UN Charter as a fence for other countries not to over-address the affairs of other countries. Even if the form of interference is positive, the position of the country must remain upheld and appreciated by the other country. Even Humanitarian legal principles cannot break through this principle of non-intervention.

The question arises in our minds as to why the Taliban want to take control of the Afghan state. Talking about the Taliban group is inseparable from the historical side of the group. This Taliban Islamist group in Afghanistan was originally born as a result of social, economic and political inequalities in the Afghan state which at that time was under the rule of president Burhannudin rabbani. The dilapidated leadership at that time made a man named Mullah Muhammad Omar have a strong stance to fight against the system of government that was happening in Afghanistan at that time. Muhhamad Omar started his actions and proganda through the mandrasah education agency in Afghanistan. Around 1994 Muhammad Omar created an organizational movement with the use of force of arms called the Taliban. The essence of the Taliban movement stems from the movement of the Afghan people from the dilapidated actions of the rulers of the Afghan state which are judged to be in full splendor and inconsistent with islamic sharia. The main mission of the Taliban is to apply islamic law within the Afghan state.

Basically, if we analyze the Taliban movement, according to the point of view of international law, it is a category of Belligerent or armed groups that carry out an insurgency against a legitimate government in a country. The Belligerent group as a subject of international law is subject to the rules of the game from international law in particular the Geneva

Convention on the law of international war. It is also undeniable that the Taliban group in its movement against the United States since its overthrow in 2001 has carried out many acts of terror such as suicide bombings that injure and kill innocent civilians. The Taliban's acts of terror carried out in the middle of the city were aimed at warning the United States and NATO of the existence of the group. When viewed from an International point of view it is a violation of international law and can be categorized as a subject of international law and can be confronted with the International Court of Justice (ICC). As a touchstone to be able to know that the Taliban can be said to be Belligerent, it can be used from the Hague Convention of 1907 (the Fourth Convention) namely:

- a. Having a clear leader and in terms of his leadership has responsibility for his subordinates
- b. Have a uniform.;
- c. Carrying weapons outright and ;
- d. Obey the customary laws of war.

The fourth principle needs to be highly considered and is the most important element for the belligerent group, namely that it must comply with the customary laws of war, one of which must protect the civilian or non-combat population. If we also understand about belligerent this is a group known as legitimate government rebels whose acts of terror or attacks are launched on vital objects of government , not places – public places. It is in relation to the Taliban group that it launched its actions against the legitimate government of Ashraf Ghani and to the United States military forces residing in Afghanistan ( 2001 – 2021 ) to hunt down the Al-Qaeda terrorism group.

Far from being a problem regarding the Taliban which is the subject of International criminal law, it shows that the Taliban are also a group that can be confronted before the International Criminal Court in accordance with the provisions of the Rome Statute of 1998. The Rome Statute proclaims the types of international crimes in Article 5 of the Rome Statute, namely

- a. Genocide
- b. War crimes
- c. Crimes against humanity
- d. Crimes of aggression

Referring to the provisions of article 5 every country in the world without exception is possible to be withdrawn and prosecuted in the International court for criminal cases (ICC) , the issue arising in relation to this matter is whether the country in conflict is the state that co-ratified the Rome Statute ? . Otherwise the country cannot represent or face the international tribunal directly, but it must be filed by another nagara through the UN Security Council. Although in the end Afghanistan fell back into the hands of the Taliban is a terrible thing too , according to the news that the author found that the Taliban will not use the force of arms against civilians. The Taliban also promised to change their style of government differently than they did in the past era , meaning the Taliban slightly relaxed its strict rules against women . As we know that the Taliban in the previous era did not allow women to have the same rights as men, one of which was the right to have an education. Through the background of the problems presented above by the author, the author feels interested in making a scientific paper with the title " LEGAL ANALYSIS OF THE TAKEOVER OF THE AFGHAN STATE BY THE TALIBAN IN REVIEW FROM THE POINT OF VIEW OF INTERNATIONAL CRIMINAL LAW AND THE ROMAN STATUTE " as for the reason why the author feels interested in making scientific writings regarding the title above because the author feels that there is an injustice in the point of view of the public in general seeing and judging This Belligerent group called the Taliban. The author tries to analyze with this act whether it enters the international criminal realm so that it can be prosecuted in the International Criminal Court through the provisions of the Rome Statute.

## **METHODOLOGY**

The author in this case conducts research using the Analytical – Juridical method. This method is carried out by examining a legal problem and then after research, an analysis is carried out using legal principles of theory - theories and legal provisions related to International Law, including the Rome Statute of 1998.

## **ANALYSIS AND RESULTS**

### **1. International Criminal Law**

International Criminal Law or in various foreign language literature is known as International Criminal Law (English) or International Straftprozessrecht (Netherlands). Its development began to be initiated by the most famous jurists of its time. International Criminal Law in 1965 began to be developed into the branch of law by Gerhard O.W Mueller and Edmund M Wise in a work entitled Comparative Law which was later continued by Bassiouni and Van Nanda. International Criminal Law is a set of rules that includes rules that contain something that is prohibited from being done and established by the international community. The quality of a crime event receives worldwide attention so that the world community unites thoughts and attention to form a rule that can become a reference or a guideline to uphold Human Rights and protect the interests of countries in the world without exception.

International Criminal Law according to George Schwarzenberger there are 6 (six) meanings, namely

- a. International Criminal Law in the sense of the territorial scope of national criminal law;
- b. International criminal law in the sense of international aspects established as provisions in national criminal law;

- c. International law within the meaning of international authority contained in national criminal law;
- d. International criminal law as the meaning of international cooperation in judicial mechanisms;
- e. International Criminal Law in the sense of recognizing national criminal law as a law that deserves to be implemented in the life of a civilized nation and society;
- f. International criminal law in the sense of the word materil

International Criminal Law can be found materially from several types of International conventions, one of which is the Geneva Convention which regulates war crimes. International Criminal Law in its development has several sources including:

- a. Custom (custom). This custom developed in a country and then in the next development the custom of the country was used as a reference in the practice of international legal relations.
- b. Convention (International Agreement). Born from a form of mutual agreement between countries considering that a certain event is very troubling and it must be mutually agreed that its enforcement must be carried out through a jointly established rule and procedure. This thinking departs from the idea that crimes that can interfere with the security of the international community should be a common concentration.

The question arises in our minds now how can we identify a form of crime as being categorized as the scope of international crime according to the author , there are special characteristics that include ;

- a. The act must be an act contained in a form of rule that is supranational in nature, but it is possible that it can also be derived from national law. In this case the crime is charged with an international element , what it means is to denounce global peace and security either directly or indirectly.
- b. It is accommodated by an international judicial body or the International Criminal Court. Further explanation means that there is a necessity for a form of cooperation between countries to carry out the handling of this international crime starting from the stage of arrest, investigation, prosecution, detention, until the last process of prosecuting the subject - the subject of the international crime.
- c. Attacks with the use of armed force aimed at civil society by the rulers of the country . This element was thick in the half after the 2nd World Debate, which began to emerge a judiciary – an ad-hoc judiciary set up to conduct trials against crimes – war crimes. Which in its development became the forerunner of the Rome Statute in 1998.

International Criminal Law differs from international civil law . International Criminal Law recognizes the existence of one rule that is used as a reference as a national criminal law and is applied to everyone who is the subject of international criminal law. Unlike the case with international civil law, which only relates international criminal law only to the form of civil relations that contain foreign elements, while for the rules, it is still used by a national law that ultimately does not recognize a unification of civil law that can be applied to all countries. This becomes a distinguishing characteristic and at the same time reminds us that crime is not and is not the same as a civil offense , because crime is directly in contact with human life that is not worth a price , will not be replaced by things of a civil nature.

Prior to the establishment of the types of international crimes or crimes regulated in the Rome Statute known today, the Draft International Criminal Code in 1954 established 13 (thirteen) which were categorized as forms of international crimes that included

1. Acts of aggression
2. Use of armed force against other countries
3. Conducting arms to carry out attacks on a country
4. Provide support for committing acts of terror in other countries
5. Violation of the treaty limiting the use of weapons
6. Annexation of foreign territories
7. Genocide
8. Violation of customs and laws of war
9. Consensus, helping, experimenting, and persuasion related to point 8 (Eight).
10. Piracy
11. Aperteid
12. Threats and use of force
13. Slavery

Then what about the principle used in carrying out this international criminal law the question is immediately raised , because basically all laws and rules must have the spirit to bring the rule of law to life . The principle of law becomes the basis and guideline in applying the law. The principles of international criminal law can be derived from mutual agreement or from international law and can also be derived from the national law of the country.

- a. The principle of international criminal law derived from international law, for example, pacta sunt servanda or treaty is as a law that binds the parties to a convention. Upfront the author has explained that the source of international law is sourced from international conventions. In addition to the principle of Pacta Sunt Servanda there is another principle derived from international law, namely that there is a legal system that is universal and in the form of unification accepted and also embraced by all

countries, the rule must be respected.

- b. The principles of international criminal law derived from national criminal law include the principle of legality or that no act can be punished if the act has no rules. The characteristics of this principle breathe the legal certainty that an act will not be ensnared and cannot be punished if the rule is not lawfully promulgated by an authorized body. A territorial principle that suggests that a national penal code is applicable and binding (enforceable) for both the citizen of that country and a foreigner within the country. The third is the principle of *ne bis in idem* or what we know because it is also adhered to by the Indonesian Criminal Code this principle explains and provides guidelines that a criminal act cannot be tried twice. For example, if a crime with an international element has already been tried by a state judiciary, the international judiciary or the judiciary of another country cannot try the person with the same case.

## **2. International Crimes According to the Rome Statute and the International Criminal Court (ICC) Jurisdiction**

International crime in its development all boils down and reaches a stopping point. Regarding the twists and turns of this international crime until this time the last at its peak with the formulation of the Rome Statute. This Rome Statute was the result of a diplomatic conference that took place in Rome on 15 – 17 July 1998. Which was attended by members of the United Nations – Nations. Through the Rome Statute of 1998, a permanent tribunal was also formed, which is different from before – namely the ICTY and ICTR which are only temporary and ad-hoc. This court is known as the International Criminal Court (ICC) which is domiciled in The Hague (Netherlands).

Speaking of the Rome Statute, it will not be separated from the ICC, it can be argued that the Rome Statute is its law or rule, while the ICC is an international judicial body to enforce the provisions in the Rome Statute so that they are interrelated with each other and not separated from one another. The ICC in this case has jurisdiction to crack down on legal subjects who violate the provisions of the law stipulated in the Rome Statute contained in Article 5 which includes the types of crimes

1. Genocide
2. Crimes Against Humanity
3. War Crimes
4. Crime of Aggression

The crimes mentioned above have their own explanations in the Statute. Genocide is described in the statute as an act intended to destroy all or part of a community be it a religious community, indigenous peoples, a certain ethnic group carried out by killing the group, an act aimed at preventing the birth of a new generation in the group, the neglect of a condition with the aim of exterminating the group as stated in Rome Statute Article 6. Crimes Against Humanity i.e. acts directed at civil society that are carried out in a widespread and systematic manner of attacks include acts of murder, torture, slavery, rape, imprisonment for no apparent reason and unclear procedures, forced removal or deportation of persecution of certain ethnicities on the basis of political and ethnic differences of race and religion contained in article 7 of the Statute. War Crimes refers to the provisions of the Geneva Convention of August 12, 1949 which in its acts included acts of murder, inhumane acts such as biological experiments, forcing a prisoner of war to work in the service of the state concerned, as set out in Article 8 of the Rome Statute.

The offences contained in the Rome statute were previously regulated in the previous ICC Statutes as in the ICTY and ICTR. However, the author analyzes the types of crimes only those that include crimes against humanity only, while for crimes against genocide, war crimes and invasions in the adoption of different international conventions such as the 11 December 1946 UN Declaration on Genocide and the 1949 Geneva Convention on War Crimes.

In the next turn the ICC has jurisdiction to prosecute and prosecute the perpetrators of crimes individually. It is wrong to think if the state in this case becomes a subject to criminal liability. In accordance with the provisions in Article 25 of the Rome Statute explains that a person is subject to criminal liability for those who

1. Committing crimes either done alone or together.
2. Carrying out orders and attempting the crime
3. Assisting or facilitating the implementation of the crime
4. Assisting in providing logistics that support the crime
5. Inciting acts of genocide.

These subjects that meet the above personal elements can be tried in the International Court of Justice. For additional information the ICC cannot prosecute or prosecute a person under the age of 18 at the time the crime took place. In addition, the ICC has the nature or resting on the principle of restorative justice which is contained in article 24 (1) which reads that no one can be subject to criminal liability according to the provisions of the article in this statute, if the occurrence of the crime was committed or occurred before this statute was formed. Any person who commits a criminal offence prior to the existence of this statute cannot be punished

by the provisions of this statute . This Rome Statute can only be enacted in 2002 after ratification by 60 participating countries, this is a provision regulated in the Rome Statute itself contained in Article 126.

The question now arises what if a country does not enter one of the countries that has ratified the provisions of the Rome Statute while there is a conflict of law within that country that violates the provisions of article 5 of the Statute. According to the Rome Statute itself if a state does not become a member or state party. The country cannot file a case before the International Court of Justice but must be the UNSC who submits the case to the Public Prosecutor of the Court for further action by the International Court of Justice.

In carrying out its function to carry out the enforcement of international criminal law in accordance with the provisions of the Rome Statute, it is also unable to act freely. It is a little confusing but that is how the International Court of Justice as a Subject of International Law must also comply with universally applicable provisions of International Law, one of which is the principle of non-intervention. The broad authority of the International Court of Justice may result in the loss of free sovereignty of the conflicting state therefore the International Court of Justice (ICC) has a Complementary nature as implied in Article 1 of the Statute i.e. it is ultimately expected that each state make its own rules to support the crimes listed in the Statute to be made within their respective states. The basic principle in this statute aims to provide an opportunity for national courts to carry out their national trials in the event of a crime of an international nature, if the state is unable to bring harm to justice the perpetrator (Unable and Unwillingness) then this is where the role of the ICC begins to be carried out. This court cannot accept a case if it is under examination and or being tried by a national court. So it remains here that the jurisdiction of the ICC is very even universal and coercive but in practice it cannot act arbitrarily – arbitrarily there is a procedure that rests on the principle of non-intervention that protects the sovereignty and honor of the national court , unless the national court can no longer run or the state does not dare or is unable to present the perpetrator.

### **3. Legal Analysis of the Takeover of the Sovereignty of the Legitimate Government of Afghanistan by the Taliban .**

The takeover of the legitimate government by the Taliban took the world by storm , after Joe Biden withdrew his troops outside Afghanistan quickly Taliban forces could easily take power in cities in Afghanistan, until finally being able to occupy the city of Kabul which is the seat of government of the Afghan state. For almost 20 years, they have been eliminated from Afghanistan due to the United States' invasion of the country , now they ( the Taliban ) can return to rule Afghanistan. The question arises in our minds whether it is a form of International crime referring to the provisions of the Rome Statute. According to the author, this is not a form of international crime, because it does not contain elements and types of criminal acts in accordance with the provisions of articles 5 – 8 of the Rome Statute. The takeover was carried out quickly and peacefully without any acts of violence by the Taliban group. Civil society did not fight back when Taliban troops entered the city of Kabul.

The author thinks that the events that occurred do not constitute a form of criminal act unless a series of actions to take over the government are carried out with a series of inhuman actions, especially actions that are categorized as crimes against humanity. With the non-inclusion of the elements of criminal acts so that logically it is also the domain of the ICC or the international criminal court. The author thinks that this is a conflict of state sovereignty if one day it is contested between the Ashfar Ghani government and the Taliban and is the domain of the ICJ or International Court of Justice i.e. the International Court of Justice which differs in function from the ICC. The ICJ is more about resolving conflicts related to the sovereignty of a country. According to the information data that has been presented by the author, cases that occurred at the time before the ratification of the Rome Statute cannot be submitted to the international criminal court.

However, if we look at the series of suicide bombings in the years leading up to 2021, these provisions violate the provisions on war habits in accordance with the Geneva Conventions of 1949. In 2019 a car bomb exploded in the city of Kabul near the US headquarters, in which it left 10 civilians dead and at least 42 others injured. This is a violation of the principles and customs of war , the Taliban are an armed group or insurgent against the government , the main purpose of the insurgency is aimed at the government not at civil society in general. Although in a series of government takeover actions there are no actions that fall into the category of being an international crime, but still other actions are still related to suicide bombings carried out as acts of terror that cause the death of civilians is a form of violation of war , so according to the author with the inclusion of the Taliban as a subject of international law, the Taliban can be held accountable criminally answer.

In this regard, article 28 of the Rome Statute describes the responsibilities based on the Command and other Superiors. In this case, the author feels more important if we refer to the provisions of article 28 letter (b) of the Statute, namely that it is stated that the superior is responsible for the subordinate in the case of :

- a. It is known by the superior that the subordinate wants to commit or is committing a crime.
- b. The crime that occurs is in the effective control of the superior concerned.
- c. The failure of the superior in carrying out a necessary and measurable (reasonable) action that is within his power to prevent and suppress or follow up through reporting to the competent authority.

However, if it is to be used on the basis of command according to the author, it is not a meaningful thing or can be said to be the same because it is considered that the element to attach criminal responsibility

to the basis of the command or superior is the same.

### **CONCLUSIONS AND OFFERS**

Come to the end of the writing of this scientific paper . According to the presentation of information that has been conveyed by the author upfront, the author can conclude that:

1. The Taliban's takeover of government against the legitimate Afghan government does not fall into the category of international criminal law , because there are no criminal elements that occur in the series of actions.
2. Nor does it fall into the jurisdiction of the ICC over the provisions of the Rome Statute of 1998. This conflict falls more into the realm of the International Court of Justice (IJC) or the International Justice Court.
3. Even so, there are also criminal acts that color the actions of the Taliban in wartime with the United States and the Government of Afghanistan, namely the position of the Taliban which is the Belligerent enters into the subject of International law which has been explained upfront that the Belligerent must be subject to the customary law of war or the 1949 Geneva Convention ( Law of War ) , violation of the law of war is a crime that enters into the criminal jurisdiction of the ICC according to the Rome Statute.

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