



**RAOUL
WALLENBERG
INSTITUTE**

OF HUMAN RIGHTS AND HUMANITARIAN LAW

Outcome Report:

Expert Roundtable on Prospects for Accountability for Human Rights Violations in Afghanistan

6 - 7 February 2023

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Foreword

What are the prospects for accountability for human rights violations in Afghanistan? This was the question asked at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) expert round table in Lund, in February 2023.

During 43 years of armed conflict, the people of Afghanistan have lived through immense hardship and suffered severe human rights violations. This is true for all Afghans, but it has been and is particularly true for women, girls, and ethnic minority groups. All this with barely any consequences for the perpetrators in terms of accountability for the violations.

The world has never been strong on holding perpetrators of gross violations accountable. It took more than 50 years from the Nuremberg trials to the establishment of the International Criminal Court. In between, ad hoc tribunals filled the gaps concerning the wars in the former Yugoslavia and Rwanda. In recent years we have seen how various mechanisms in relation to Syria and Myanmar for example, have been established to gather information in real-time.

With baby steps, the international community has come to recognise the importance of holding those who commit serious crimes accountable for their actions. However, this is not enough. To address the legacy of conflict and ensure a just future for all, it is essential to take a comprehensive approach to accountability that goes beyond criminal justice and addresses the needs and rights of victims. It involves adopting victim-centred and gender-sensitive approaches that prioritise the needs and rights of victims, including their right to truth, justice, and reparations.

It is complex; however, there are lessons learned from elsewhere that can provide inspiration for measures in the Afghanistan context. These, as well as expanding the boundaries of existing international mechanisms, including the mandate of the UN Special Rapporteur on Afghanistan, could be explored before searching for new instruments.

All these and many more elements were discussed in Lund, with the aim of supporting the efforts to ensure that a comprehensive approach to accountability is adopted in Afghanistan. The RWI will stay committed to supporting these endeavours.



Morten Kjaerum, Director RWI

Lund, 27 February 2023

Executive Summary

This report outlines the outcomes from a two-day expert roundtable, organised by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund, Sweden, on 6-7 February 2023.

The roundtable was held under the Chatham House Rule, with the consequence that individual identification and, therefore, recognition for contributions is not possible. However, the Institute wishes to express its sincere appreciation to the 40 accountability experts, whereof the great majority were Afghans, who contributed their time, expertise, and perspectives to the discussions, as well as to the Swedish International Development Cooperation Agency (Sida) for funding the event.

The report describes the discussions and conclusions from each of the five sessions of the roundtable, including areas where opinions varied among attendees. The initial chapters elaborate on the first four thematic sessions: I) Defining accountability and lessons from other contexts; II) Mechanisms of accountability (existing and required); III) Documenting evidence; IV) What else should be done, referring to actions by the international community. The latter also highlighted actions to avoid.

The final chapter summarises the concluding session and ten areas which were identified as key for the next steps toward strengthened accountability for the Afghan people.

While the recommendations are not conclusive, our intention is that the outcomes can contribute to, and be considered in, future discussions on policy and support among states and other stakeholders aiming to support accountability for human rights violations in Afghanistan.

Background

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) started its current Afghanistan programme in 2021, funded by the Swedish International Development Cooperation Agency (Sida). The programme comprises research by Afghan Research Fellows, as well as a series of events wherein Afghan and international scholars and practitioners jointly analyse critical human rights issues in Afghanistan, with a view to developing analysis and proposals that may be useful for international engagement, including at the UN Human Rights Council (HRC).

As part of this programme, the Institute hosts the Special Rapporteur on the situation of human rights in Afghanistan, as Visiting Professor to support RWI as an expert, and to co-mentor the research fellows. The RWI programme also aims to support the mandate of the Special Rapporteur.

Further details about the programme can be found at <https://rwi.lu.se/afghanistan-programme/>

The *Expert Roundtable on Prospects for Accountability for Human Rights Violations in Afghanistan* was organised as the first of three international events in 2023, against the backdrop of the increasingly dire human rights situation in Afghanistan where not least women, girls, and minorities currently suffer grave human rights violations with widespread impunity.

The fact that accountability has also been withheld for past violations of human rights and international humanitarian law, over decades of external incursions and war, makes the need to break impunity even more urgent and arguably a prerequisite for reconciliation and a peaceful future for the country.

Yet, despite the involvement of several actors – notably the International Criminal Court (ICC), whose investigation in Afghanistan was recently re-opened, the Special Rapporteur on the situation of human rights in Afghanistan (SR) and other Special Procedures and Treaty Bodies, and the United Nations Assistance Mission in Afghanistan (UNAMA) – accountability for violations committed both before, during, and after August 2021 still remains a distant prospect.

There is also an ongoing debate on whether the international mechanisms and resources mandated by the United Nations for Afghanistan, match the gravity of the human rights situation, particularly for women and girls.

The roundtable aimed to contribute to such policy discussions, with reflections and perspectives of Afghan and international experts on accountability, who among them encompassed a wide range of backgrounds and experiences.

Agenda and Participants

The event was opened with a video message from the United Nations High Commissioner for Human Rights, Volker Türk, and a keynote from the RWI Director, Morten Kjaerum, followed by introductory notes from high-level experts among the attendees.

The roundtable began with a 30-second moment of remembrance for the victims of the 43-year war in Afghanistan.

The roundtable was organised under the Chatham House Rule, to ensure that participants could speak freely and express their honest opinions as individual experts, considering both security concerns, and the risk of self-censorship or adjustment to organisational positions.

Notwithstanding the Chatham House Rule framing, key conclusions were shared in a webinar for invited stakeholders on 10 February. It is hoped that this report will contribute to further discussions and the outcomes of the Roundtable will inform decision-making among states and other stakeholders supporting human rights and accountability in Afghanistan.

The majority of the 40 accountability experts participating were Afghans, representing different ethnic groups and professional backgrounds, while others came from international organisations, or experience working with countries with comparable challenges and processes to that of Afghanistan.

Particular consideration was given to the gender balance both among participants overall, and the discussants in each session, who were selected to give initial remarks to spark a wider discussion.

The agenda was organised into thematic sessions, which were ordered to gradually take discussions from a broad conceptual and historical framing of accountability through specific aspects, to the final concluding session, which laid the foundation for the presentation. The sessions covered issues of scope and understanding of accountability, international accountability mechanisms at different levels, information and evidence gathering, and support required from external actors.

Session I: Defining Accountability

Participants agreed that while the term accountability is clear (though in some languages, including Afghan ones, the word justice is more commonly used), there are varying views of how it should be applied in Afghanistan, particularly among external actors and individual states, and about which perpetrators should be held accountable - for what, to whom, and how. It was also noted that while it is a crucial component, accountability must not be limited to criminal justice for a few perpetrators. To be victim-centred it must encompass the full range of transitional justice measures including truth-seeking, reparations, institutional reform, and community-level reconciliation needed for durable peace in the country.

The group also concurred that accountability merely for recent violations, and for selected perpetrators, is not acceptable from a human rights perspective, although some considered it may be a first step. Indeed, limiting accountability to specific perpetrators or a recent or limited period would create different categories of victims – those who would be granted justice and a remedy, and those who would be denied it.

Regarding perpetrators, the group agreed that accountability should apply to all parties to the conflict in Afghanistan and not be limited to the current de facto authorities and the Islamic State – Khorosan Province (IS-KP).

Impunity for past violations was described as a wound that, until and unless addressed, will hinder reconciliation and inclusive development in Afghanistan. It was emphasised that impunity deepens resentment and leads to further crimes. To achieve reconciliation, speakers said, it is essential for Afghanistan to establish at some form of accountability both for past and present crimes.

Impunity was also emphasised as an obstacle to preventing human rights violations. It was pointed out that the culture of impunity, deep mistrust in the Afghan central state, and corruption, were obstacles to accountability in

Afghanistan. The group however noted that there is an opportunity to break the vicious cycle of impunity in Afghanistan because of a widespread feeling that it is essential to breaking the cycle of decades of violence and having "having nothing to lose".

Participants also noted that international mechanisms need to regain credibility with the Afghan people, as they were said to have failed to monitor the situation to an extent that could have prevented human rights violations.

Another conclusion from this session was that Afghan people, both those still living in Afghanistan and those in the diaspora, must be involved in the development of accountability mechanisms. This point was supported by lessons from other conflicts, where experiences of Myanmar, Sri Lanka, and Syria were shared and discussed. It was noted how people based inside and outside of the three countries are working to ensure that perpetrators of human rights violations will be held accountable. Accountability was also seen not only as something that can be demanded from the international community, but that is actively pursued at all levels, including locally.

It was recognised that accountability takes time, but also that it is important to send a clear signal that impunity is being challenged, and to take steps to reduce the suffering of Afghans in the short term.

The need for transparency and counter-corruption measures was noted as an issue that should continue to be stressed including its impact on human rights.

A final point, and a segway to the second session, was the need for a coordinated approach in analysing and planning, to strengthen accountability mechanisms. Again, it was stressed that it is important to have a comprehensive approach to accountability that goes beyond criminal justice and that focuses on victims, and includes women and gender perspectives throughout its development and implementation.

National-level accountability in accordance with international standards was ruled out as an option under the current leadership in Afghanistan.

Session II: Mechanisms of Accountability

The second session focused on current national and international mechanisms for Afghanistan.

The participants undertook a stocktake of existing mechanisms and assessed gaps or deficiencies in mandates and what resources are lacking. Special focus was on whether to prioritise strengthening existing mechanisms and mandates, and/or to create new ones.

The discussions covered the mandates and challenges of the International Criminal Court (ICC), the International Court of Justice (ICJ), United Nations Assistance Mission in Afghanistan (UNAMA), the UN Special Rapporteur on the situation of human rights in Afghanistan (SR), other Special Procedures, and the Treaty Bodies of the Human Rights Council.

Paths to accountability for gender-related crimes, including the crime of gender persecution under which individuals could be prosecuted at the ICC, were discussed in some detail. The ICJ was also raised as a court where states could bring claims against Afghanistan for violations of Convention on the Elimination of All Forms of Discrimination Against Women and/or the Convention on the Political Rights of Women.

The application of universal jurisdiction was discussed with it being noted that this is an important complement to prosecutions at the ICC and states were encouraged to pursue this option where there is evidence of international crimes having been committed.

National justice processes or inquiries, were also identified as important accountability mechanisms with several ongoing inquiries mentioned, notably in Australia. These processes are important for several reasons; not only do they bring individual perpetrators of crimes committed during the war in Afghanistan to account, but they are also a manifestation of states taking responsibility and countering any perception that justice is selective or one-sided. The participants noted that national processes should be victim-centred and should focus not only on criminal justice but also on reparations to affected individuals and communities.

Again, it was stressed that mechanisms should not be limited to current violations and perpetrators and should have a broad approach. In this regard, the following areas were mentioned: investigations must address violations against minorities; a grave crime focus is insufficient - community protection and victim support approaches are necessary complements; a victim-centred discussion is necessary to achieve lasting peace and reconciliation in the country; and while, as noted above, and measures should also aim to have an impact that improves the current human rights situation of Afghans.

Furthermore, the need for a process of national dialogue was stressed, to enable reconciliation as well as accountability. Accountability for minorities was discussed, in particular the situation of Hazaras. Seventeen attacks have been carried out since August 2021, killing and injuring more than 700 Hazaras, while exclusion and discrimination is widespread.

The discussion returned to the question of whether current mechanisms were sufficient in mandate, strength, and resources to cover the needs. It was noted that a more thorough understanding of the mandates, capabilities, and limitations of the existing mechanisms is needed, before any new mechanisms are created. For example, the ICC and the SR both have wide-reaching mandates that in principle, if more adequately resourced, could do more than they are able to currently. UNAMA with its robust human rights mandate is on the ground and must continue to play an important role. The importance of the mandate of the SR was stressed for its potential, with reference to the Human Rights Council resolution A/HRC/RES/51/20, which strengthened the SR's scope by adding a responsibility to document and preserve information relating to human rights violations and abuses. The need for the mandate to have sufficient resources was emphasised.

Session III: Documenting Evidence

In the third session, the experts discussed methods and challenges to collect, preserve and make useful evidence and supporting information for both legal procedures and broader victim-centred accountability initiatives, including to fulfil the right to truth.

The challenges faced in documenting violations were also discussed and it was noted by experienced human rights researchers that these are not new because during the 1990s, including before the Taliban, access to the country and to information was problematic, and even after 2001 difficulties continued. Impediments to informants and researchers in the current context were said to make information gathering slow, while access to communities is highly limited, both geographically and to vulnerable populations, leaving many violations undocumented. The group particularly stressed the need to further protect victims, witnesses, and sources, who are all currently at considerable risk.

It was noted that evidence of sexual and gender-based violence is especially hard to collect.

Open-source data was seen as a welcome reinforcement and addition to traditional sources, with the reservation that verification of this information is a challenge and time-consuming. It was said that while social media has improved the current situation in terms of data collection, it also created complications as it is difficult to verify data, given that much false information is spread. Overall though, information-technology was said to have helped both data collection and verification of the data through tools such as geolocation and satellite imagery. Nevertheless, traditional methods of data collection, especially personal testimony, remain crucial.

An urgent need to enhance efforts to preserve already collected information was raised. Several sources online were reported to have vanished already, with broken weblinks making resources inaccessible.

In relation to this, it was agreed that stakeholders involved in documentation need to work together and share information, while maintaining high standards of information privacy and security. In this context, questions were raised on how governmental and non-governmental organisations collected data in the past; where this data is currently located; and whether there is a way to compile the collected data to support accountability now. The discussants shared their experiences of data collection, storing data securely, protection of sources, and the challenges they had experienced in the process. However, the accessibility of the data was stated as a concern, as was the fact that it is not clear how much information gathered about past violations was retained, whether the data is currently held by institutions or individuals, and if it is accessible to researchers or other legitimate stakeholders. It was also mentioned that many civil society organisations that documented evidence in the past either stopped working or closed their websites when the Taliban came to power, thus hindering access. It was emphasised that the preservation of this data is essential, and concern was expressed that it could be destroyed or concealed. Lack of funding for civil society working on investigative reporting and fact-finding poses problems for the sustainability of data collection and preservation.

The group also discussed methods of research and documentation are required, depending on the avenue of accountability to be pursued.

Session IV: What More Should Be Done?

This session revolved around the question of what more should be done to support the work towards accountability and redress for victims and their families in Afghanistan. Included in the recommendations were to:

- Ensure a victim-centred approach, consult more, and widely with the Afghan population on their priorities, while ensuring their safety; include women meaningfully in every stage of the process;
- Prioritise mechanisms of redress for victims and their families including the right to truth and to reparations, alongside the paths of criminal justice;
- Support the secure preservation and archiving of evidence and information;
- Advocate for an even-handed approach to reconciliation, accountability and transitional justice, including in the HRC, the Security Council (UNSC) the ICC and possibly the General Assembly, taking into account both what is optimal and what is feasible;
- Advocate for inclusion of victims, especially women and minority groups, in a future peace process;
- Support the deeper analysis of each existing accountability mechanism, and any potential mechanisms, including their respective pros and cons and the synergies between them, for coherence, added value and resource efficiency. This analysis could be a baseline for decisions on strengthening existing mechanisms and whether a new mechanism, such as a Commission of Inquiry or an International, Independent Monitoring Mechanism, should be created, taking into account the gravity of the current human rights situation in Afghanistan;
- Consider lessons learned from other contexts such as Myanmar, Democratic People's Republic of Korea, Syria, Sri Lanka, and South Sudan in this analysis;
- Focus on structural aspects and root causes, such as discrimination on grounds of gender, ethnicity and religion;
- Support increased resources for the existing accountability and human rights mandates.

Furthermore, a number of steps were stressed as counter-productive, and therefore to be avoided, including:

- Knee-jerk reactions – insufficiently analysed steps aimed "to do something";

- Creating new mechanisms without a thorough analysis of demonstrable added value, including regarding resource implications and expectations that would be raised;
- Excluding certain perpetrators or the period before August 2021 as it would signal that only some victims will receive justice.

In the context of these points, discussants stated that they saw the capacity of the SR mandate as insufficient to match victims' expectations but also one with potential for innovation within the existing mandate, such as the conducting of thematic or incident-based inquiries, provided sufficient resources are available. In relation to UNAMA, some participants considered that there is a need to have a frank discussion about the implementation of its mandate. Regarding the ICC, concern was expressed about it limiting its scope of work to the Taliban and IS-KP.

Some participants emphasised that victims and their families in Afghanistan are demanding that those responsible for egregious human rights violations should be held criminally accountable, and that a strong new mechanism should be created to send a clear message to mark an end to the culture of impunity for those who would otherwise go unpunished and to bring justice to victims and families.

Others noted the importance of maintaining access to the country by the SR whose mandate includes but extends beyond accountability, with a view to working towards improvements in the human rights situation in the short and medium term, since criminal accountability is a distant prospect, albeit a very important one.

Challenges of political will in the Human Rights Council were also discussed. A hasty action of the Council might limit access to Afghanistan, as well as raising unrealistic expectations. Risks of a new mechanism included resources being spread more thinly and creating further challenges to the required coordinated approach.

Finally, increased collaboration between organisations working for accountability in Afghanistan recognised as necessary, including with and between, Civil Society Organisations (CSOs) need to collaborate to survive. It was noted that for CSO information to be of real use to international mechanisms such as the ICC and the SR, the methodology and principles of documentation and preservation need to be in line with international standards.

Session V: Conclusions and Recommendations

In this session, the most significant points from the four previous sessions were clustered into **ten key areas**. For each area, broad recommendations to the international community and relevant stakeholders were formulated, as set out below.

1. Increase the use and strengthen the capacity of existing and available tools or mechanisms. These included the SR, whose role could be strengthened both through interpretation of the mandate, increased

resources, or partnerships; the Treaty Bodies, and other Special Procedures; UNAMA, whose new mandate needs clarification and greater transparency; the ICC, which is prioritising areas of intervention but should consult victims more; and universal and national jurisdiction opportunities;

2. Explore innovative approaches to accountability, including addressing the crime of gender persecution; increasing the involvement of the ICJ; strategic application of Sharia principles that reinforce universal values set out in the Universal Declaration of Human Rights (UDHR), addressing structural injustice, and the possibility that a new mechanism or structure is needed at the international level. Here questions were raised about whether there was a need for a new mechanism or better coordination among the existing ones and was considered that further analysis is required;
3. Strengthen the capacity of Afghan actors and CSOs, recognising that they are the basis for much of the work including evidence gathering and strategy development. Emphasis was put on supporting and funding for their work inside and outside of the country, skill development, facilitating coordination among Afghans, and improving links with the UN system;
4. Ensure a holistic, victim-centred approach to accountability by understanding that it should go beyond criminal justice and include the needs of victims and support for families for wider forms of justice including truth (for example regarding the fate of those missing or disappeared), reparations, reforms, non-repetition of crimes etcetera;
5. Enhanced analysis of countries positions and the importance of gauging the level of political will, particularly in the strategies being undertaken to achieve improvements in Afghanistan.

Furthermore, the roundtable recommended stakeholders to consider, or focus on:

6. Risks of politicisation of work on justice and accountability for Afghanistan and ensuring efforts are seen to be impartial and independent;
7. The importance of national-level action, and the future role of national institutions. It was also emphasised that international mechanisms should cooperate not only at the national level but also at the subnational level;
8. The negative role of corruption and its direct impacts on the enjoyment of human rights;
9. Evidence gathering, verification, and fact finding, including understanding the different purpose of data collection, and the importance of archiving and specialisation;
10. Increasing resources, as an essential factor for the proper functioning of the mechanisms and the work of accountability.

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