

# Accountability for Human Rights Violations and Violations of International Humanitarian Law

## Advanced Final Draft

**Strategic Study**

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## Executive Summary

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Afghanistan was in a near continuous state of armed conflict between 1978 and 2021. Grave human rights violations and violations of international humanitarian law marked these years, including atrocities on an enormous scale. This was not one war, but a series of conflicts with some recurring political actors alternately in power or in opposition. As with any conflict, the roots of Afghanistan's wars reach back decades, and the historical legacy of severe abuses going back to the 19<sup>th</sup> century continues to affect Afghanistan's current human rights crisis.

Since the Taliban takeover of the country in August 2021, grave human rights violations have continued, particularly against women and girls. Through dozens of decrees the Taliban have systematically banned or limited Afghan women and girls' rights to education, right to work, and freedom of movement and assembly. Other abuses under the Taliban include arbitrary detention, torture, and enforced disappearances—all of which have a long history in Afghanistan.

Throughout all this time, there has been almost complete impunity for all state actors—of varied ideologies—that have held power, and for all armed forces, including those of foreign states, that took part in the conflict. Cycles of violence have fed off each other, particularly in the post-1978 years, as those in power have replicated many of the same patterns of abuse and retribution against their foes as they had experienced when out of power, ensuring unstable transitions and fuelling grievances that have led to further violence.

The aims of this report are to provide a survivor-centered and gender-focused approach to an analysis of previous and ongoing efforts to achieve accountability, including a variety of international mechanisms, to analyse why they failed, and propose ways that some progress could be achieved. Its specific objectives are:

- to assess the current legal and institutional frameworks promoting accountability in Afghanistan, on the national and international levels;

- to identify challenges and obstacles hindering effective accountability mechanisms;
- and to propose recommendations for strengthening accountability structures and find a path forward.

The report begins with a discussion of previous efforts at transitional justice and accountability, the politics that lay behind them, and why they largely failed. It then provides a summary of key human rights issues that have marked Afghanistan's modern history and continue to have an impact on perceptions of injustice. This historical account does not delve into every perceived violation but instead outlines the major patterns and how they resonate today.

The report discusses Afghanistan's obligations under international law, and then explores the range of accountability options outside Afghanistan, including the International Criminal Court, International Court of Justice, various UN procedures, universal jurisdiction, investigations undertaken in various national jurisdictions, and other mechanisms.

In addition, the report includes a more detailed discussion of accountability options specifically for violations against women and girls. Throughout the course of the Afghan conflict since 1978, Afghan women have been utilised as weapons of war. The report also discusses specific accountability approaches focused on women and girls, including investigations of the crime of gender persecution, and calls for the recognition of gender apartheid as a crime against humanity.

Under international human rights law, Taliban as the authorities maintaining effective control of the country has an obligation to all international treaties of which Afghanistan is party. The report also examines the limited possibilities for accountability under the current Taliban de facto authorities.

States are obligated to investigate, prosecute, and punish perpetrators of acts defined as crimes under international law by its officials and armed forces. International mechanisms such as the International Criminal Court, the International Court of Justice, and various UN bodies can provide some measure of accountability, but have some limitations including jurisdiction, lack of capacity, and political unwillingness. Moreover, as they are unable to address the totality of the widespread and largescale crimes and abuses, spanning decades, other informal, restorative, bottom-up, civil-society led efforts may fill the gap. This report looks into a range of transitional

justice processes that might provide some measure of accountability, including reparations and compensation; documentation, memorializing, and oral history; and people’s tribunals.

The pursuit of justice and accountability for the grave human rights violations and atrocity crimes committed in Afghanistan over decades remains a critical concern for Afghan survivors, affected communities, and the relatives of victims. As the human rights situation in Afghanistan continues to deteriorate under the de facto rule of the Taliban—one of the alleged perpetrators who have committed numerous severe human rights violations with impunity over the last three decades—exploring accountability mechanisms outside the country is increasingly vital.

## Introduction

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During every phase of the conflict in Afghanistan, different armed factions, both Afghan and foreign, and state actors committed likely crimes against humanity, war crimes, and serious human rights violations. These have included large-scale massacres and summary executions of tens of thousands of Afghans; indiscriminate bombing and rocketing that killed countless civilians; systematic torture and enforced disappearances; mass rape and other atrocities. States of varying ideologies imposed repressive measures that denied Afghans their fundamental rights. Serious human rights abuses also preceded the outbreak of armed conflict and, since the Taliban takeover of the country in August 2021, grave human rights violations have continued. Gender-based crimes and discrimination and violence against women, now heightened in scale under the Taliban, have a long history in Afghanistan under different regimes.

Afghans interviewed for this report all said that all parties bore responsibility, from “*the PDPA—both Khalq & Parcham factions, all mujahidin groups and the Taliban...*” as well as foreign actors including “*the USSR, the US and Pakistani military.*” In the forty-six years since the war began, there has been no serious effort, international or domestic, to investigate these crimes or hold those responsible accountable.

No single report can account for the magnitude of the harm done that has affected generations. An Afghan born 50 years ago who is alive today will have lived through six violent changes of

government brought about through coups, invasions, and war. No family has been left untouched by these upheavals. Many Afghans are victims of multiple phases of the war; some have been perpetrators, and some have been both.

As one participant said: *“All of the Afghanistan population are victims/survivors. Every Afghan has faced violation and suffering. Every household in Afghanistan has lost at least one member of the family during the war.”* Another added: *“Over the last nearly five decades, possibly millions of people have been victims of the wars”* in Afghanistan.

Afghanistan’s patriarchal social structure has long entrenched norms that have limited women’s rights to education, employment, and political participation. In the decades before the war began, very few girls went to school, even in the cities. Small advances in women’s rights, notably education for girls, often propelled by foreign occupation, led to improvements but also provoked backlashes; restrictions on these rights are now embedded in the Taliban’s policies.

Even before the war, Afghanistan was one of the world’s poorest countries, dependent on foreign aid for much of its modern history. Decades of war and predatory governance have further devastated its economy and environment.

Efforts to pursue transitional justice through various mechanisms, mostly after 2001, added to the documentation of abuses but achieved little accountability. Since the Taliban takeover, while such efforts continue, they are largely dispersed outside the country and struggle to find traction as Afghanistan fades from the headlines and other crises dominate global politics.

This report has several aims, among them to assure a survivor-centered and gender focused approach to an analysis of previous efforts to achieve accountability and why they failed. It explores the range of accountability options outside Afghanistan, including the International Criminal Court, International Court of Justice, various UN procedures, universal jurisdiction, and other mechanisms. In addition, the report includes a more detailed discussion of accountability options specifically for violations against women and girls. It examines the limited possibilities for accountability under the current Taliban de facto authorities. Finally, it looks into other transitional justice processes that might provide some measure of accountability.



## Methodology

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To explore the question of accountability—why efforts so far to achieve it have failed and what might be done to foster a viable process—the Raoul Wallenberg Institute brought together a number of Afghan experts who have worked in this field for years. We would also like to acknowledge the work done by others in this field, some of which is cited in this report, notably the June 2024 report by the Afghan organization, Rawadari, *Avenues for Justice for Afghan Victims of Human Rights Violations*.<sup>1</sup>

**Library and Online Research:** The sources include books, articles, and published reports focused on previous documentation of human rights violations and violations of IHL in Afghanistan by NGOs, the UN, and state entities; documents on previous efforts to institute transitional justice processes in Afghanistan; and archives on Afghanistan’s political history.

**Interviews and questionnaires:** The team carried out a limited number of interviews with individuals through questionnaires and by telephone with 14 Afghans who are or had been human rights activists, officials with the former government concerned with human rights, or researchers and advocates with nongovernmental and humanitarian organizations working in Afghanistan currently living outside or inside Afghanistan. The number of interviews is small and not intended to be representative. Rather they are emblematic of various perspectives on the history of the conflict and its narratives of victims and perpetrators, and they suggest ways that different approaches to accountability could possibly end Afghanistan’s cycles of repression and violence.

The report provides recommendations for national and international actors and relevant stakeholders. These recommendations aim to provide possible pathways toward justice and accountability in Afghanistan.

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<sup>1</sup> Rawadari, *Avenues for Justice for Afghan Victims of Human Rights Violations*, May 16, 2024, <https://rawadari.org/160520241795.htm/>.

## Recommendations

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### To Member States:

- Support—both politically and financially—a UN-mandated international investigation and accountability mechanism for past and current human rights violations and abuses by all parties to the conflict in Afghanistan, including for gender persecution and other gender-specific crimes; abuses against ethnic and religious communities; violations of international humanitarian law; and economic and financial crimes in Afghanistan, including corruption and land grabbing, that have contributed to substantial human rights abuses. The focus of these investigations should include Afghan and international actors who were involved in Afghanistan since 1978. Any such mechanism should include the participation of diverse groups (victims and survivors of human rights abuses and IHL violations from every period, women, children, minorities, marginalized communities, older people, people with disabilities, internally displaced people) in order to ensure that they reflect the affected population’s needs.
- Collaborate with and support the work of the International Criminal Court and ensure that it has the resources and cooperation needed to investigate and prosecute those responsible for war crimes and crimes against humanity, including persecution on the grounds of gender;
- Ensure the full funding of the work of the Special Rapporteur on the Situation of Human Rights in Afghanistan, including sufficient dedicated resources geared toward documentation and analysis of allegations of human rights abuses;
- Support documentation efforts by UNAMA, whose mandate is essential for monitoring human rights abuses in Afghanistan and preserving a critical record of abuses.
- Initiate and collaborate with accountability processes involving national forces in domestic jurisdictions. Such investigations should include outreach to Afghan survivors and witnesses and reparations for victims; the US, UK, Australia, and other countries who have fought in Afghanistan and have been found responsible for IHL violations or other misconduct should provide or expand compensation schemes to victims and survivors.

- Support and enforce universal or other extraterritorial jurisdiction at the state level in order to investigate and prosecute crimes under international law committed by all sides in the Afghan conflict, including gender-based crimes as well as financial and economic crimes;
- Support efforts by member states to bring a case before the International Court of Justice for gender-based crimes under the Taliban Afghanistan's failure to uphold its CEDAW obligations under their rule;
- Support the recognition of gender apartheid and its codification as a crime against humanity;
- Support truth-telling, memorialization, and other non-judicial forms of justice in Afghanistan, whether led by civil society organizations or national entities, as crucial components of a holistic justice and reconciliation process, ensuring that all aspects of the past are addressed;
- In providing humanitarian assistance, adopt special measures to address the needs of those most affected by the conflict, including internally displaced women, war widows, children, and disabled people;
- Urge that national processes examining the war in Afghanistan, such as the US Afghanistan War Commission, include questions on accountability in their investigations of the involvement of foreign military forces in Afghanistan for the past 20 years;

**To the United Nations:**

- Mandate an international investigation and accountability mechanism for past and current violations by all parties to the conflict in Afghanistan, including for gender persecution and other gender-specific crimes; abuses against ethnic and religious communities; violations of international humanitarian law; and economic and financial crimes in Afghanistan, including corruption and land grabbing, that have contributed to substantial human rights abuses. The focus of any such investigation should include Afghan and international actors who were involved in Afghanistan since 1978;
- Enhance UNAMA's monitoring and reporting function; ensure UNAMA's cooperation with other mechanisms, including the ICC, particularly with regard to information on abuses contained in its database.
- Make public the 2005 OHCHR report mapping pre-2002 human rights abuses. The report includes information about perpetrators, the conditions and causes of the violations, and their impact on affected populations. Its release is important for shedding light on past

abuses, promoting transparency, and validating and recognizing the experiences of victims.

- Support truth-telling, memorialization, and other non-judicial forms of justice, whether led by civil society organizations or national entities, as crucial components of a holistic justice and reconciliation process, ensuring that all aspects of the past are addressed.
- Conduct a comprehensive study, utilizing an intersectional approach, on the impact of decades of violent conflict on Afghan women and girls. This should include conflict analysis through a gender lens (the lived experiences of Afghan women and girls); investigation of Sexual and Gender-based Crimes (SGBV) through various phases of the Afghan conflicts; an analysis of Afghan women's homegrown resistance; women-led awareness raising program on SGBV; and ways forward to advance gender justice in Afghanistan;
- Maintain or impose targeted sanctions such as travel bans and asset freezes on individuals responsible for grave human rights abuses or IHL violations. Refrain from broad economic sanctions that would worsen Afghanistan's economic crisis; find ways to ease current sanctions-related harm to banking and liquidity.

**To the International Criminal Court:**

- Expedite the Afghanistan investigation and avoid further delays. Reaffirm the court's mandate to address the most serious abuses by all parties to the conflict and reverse the decision to deprioritize certain alleged crimes or lines of inquiry pursued in the preliminary examination and widen the scope of the investigation to include the former government of the Afghan Republic and US military and CIA forces.
- Determine the eligibility of the Afghanistan situation for support from the ICC's Trust Fund for Victims and press for it to be prioritised accordingly.
- Enhance outreach to and communication with Afghan survivors and families of victims.

**To International and Afghan Civil Society Organizations:**

- Explore the possibility of publishing the AIHRC conflict mapping report documenting alleged crimes committed between 1978 and 2001. This report likely includes information about perpetrators, the conditions and causes of violations, and their impact on affected populations. Its release is important for shedding light on past abuses, promoting transparency, and validating and recognizing the experiences of victims.

- Collaborate to expand on the AIHRC report to document alleged crimes from the 2001-2024+ period;
- Establish an online registry system for war victims in Afghanistan whereby Afghans inside and outside the country can access, submit information and register as war victims.
- Continue to monitor the human rights situation and document abuses according to international standards and share information with mandated bodies including the ICC and the Special Rapporteur on the situation of human rights in Afghanistan.
- Undertake and publish research on thematic issues related to human rights and accountability in Afghanistan.

## I. PAST ACCOUNTABILITY EFFORTS AND WHY THEY FAILED

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### (Post)-Bonn: A Transition Without Justice

Afghanistan has experienced decades of protracted violent conflict involving national and international, state and non-state actors. Some parties to the conflict took on roles as state or non-state actors at different phases of the conflict. The shifting nature of the war has complicated efforts to pursue accountability and may be one reason why Afghanistan has not had strong organizations by and for the relatives and survivors of past atrocities.

As in any conflict, there are conflicting narratives about victims and heroes of different phases of the conflict. Several participants noted this, with one saying: *“So the commander who is violator of human rights is a hero for his ethnic group, then he is a war criminal for another group or groups.”* Another observed that there is *“a narrative that tries to erase realities and absolve mujahidin or Taliban from any responsibility as they were fighting ‘invasions’”. Equally, there are efforts to silence any criticism of problematic figures from the Republic era and there are active efforts by major governments, mainly the US government, to disallow any investigation of allegations of abuse by their military in Afghanistan.”*

One of the principal objectives of transitional justice is to prevent a recurrence of the atrocities associated with past conflicts or the repression and abuses of former regimes. In Afghanistan, the failure to ensure some measure of justice in the past has also contributed to the conflict and instability in Afghanistan. Addressing legacies of past crimes can help address grievances that fuel conflict. There have been very few efforts that have yielded results in instituting international accountability measures of any scale beyond documentation and some cases tried under universal jurisdiction. National measures have also been few. The failure to address past injustices has undermined efforts to build accountable state institutions and has helped entrench structural violence in the form of corruption, abuses of power, discrimination, land grabs and other economic crimes.

The 2001 transition in Afghanistan provided an opportunity to institute a transitional justice process, but the way it took place made any genuine accountability impossible. The Bonn Agreement and political process that followed recognised former mujahidin and militia leaders as representative political actors, all of whom assumed new positions that gave them access to patronage and the economic boons of reconstruction. As allies of the US, they faced no prospect of justice for past crimes, and the overriding view among officials in the US and UN was that it was better not to “rock the boat.” All major international actors involved in Afghanistan’s state-building process saw transitional justice as potentially destabilizing.

More important, the post 2001 transition launched a new phase in the conflict, introduced new powerful figures, and new abuses. Although there were some calls early on for accountability, notably the Afghanistan Independent Human Rights Commissions *A Call for Justice* report, and the action plan that followed (see below), no one in power wanted too much scrutiny over ongoing military or police operations. As the Taliban gained ground and the insurgency widened after 2006, both the Afghan government and international forces downplayed concerns over torture and civilian casualties as unfortunate consequences of a necessary war. It was the brutality of Taliban assassinations and bombings, and after 2015, attacks on civilians by ISKP, that prompted calls in the last years of the war for an international accountability mechanism.

The pursuit of justice and accountability for the grave human rights violations and atrocity crimes committed in Afghanistan over decades remains a critical concern for everyone, particularly Afghan survivors, affected communities, and the relatives of victims. As the situation within Afghanistan continues to deteriorate under the de facto rule of the Taliban—one of the alleged perpetrators who have committed numerous severe human rights violations with complete impunity over the last four decades—exploring accountability mechanisms outside the country becomes increasingly vital.

A brief summary of measures taken since 1978 to document abuses and hold the perpetrators accountable follows.

## Documentation and Accountability Efforts

After the Soviet Union installed Babrak Karmal as president in January 1980, his government began registering disappearances from the Taraki-Amin period. In three weeks, after over 25,000

had been registered, the registration was halted “when it was discovered that the number of missing persons was much higher than foreseen,” and would likely fuel more unrest.<sup>2</sup>

The only former PDPA official from this period to face trial was Assadullah Sarwary, the head of the intelligence agency, AGSA, under Taraki; the agency was responsible for mass arrests, torture, and disappearances in the 1978–79 period. In 2005, Sarwary was charged with conspiracy against the Rabbani government in 1992, arresting people who subsequently disappeared, and mass killing. On February 26, 2006, after a flawed and hasty trial, he was found guilty of all charges and sentenced to death. In early 2007, after an appeals court ruled that the evidence was insufficient, Sarwary was sentenced to 20 years imprisonment, beginning with the first day he was taken into custody, June 25, 1992.<sup>3</sup> He was released in January 2017.

The 2001 transition opened up new possibilities for documentation. In 2004 the Afghanistan Independent Human Rights Commission (AIHRC) conducted a national consultation that focused on Afghans’ experiences of the war. It was published as “A Call for Justice” in January 2005. Seventy percent of those interviewed said that they or their family members had suffered war crimes or human rights violations during different phases of the war.

Parallel to the “Call for Justice” report, the UN Office of the High Commissioner for Human Rights (OHCHR) prepared a report mapping the main human rights abuses and violations of international humanitarian law in the 1978-2001 period. However, senior UN officials in New York and at UNAMA raised concerns that the report was controversial and could create security problems; they pressed OHCHR not to release it. It. In the twenty years since, OHCHR has never published it.<sup>4</sup>

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<sup>2</sup> UN Commission on Human Rights, ‘Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories’, Report on the Situation of Human Rights in Afghanistan Prepared by the Special Rapporteur, Felix Ermacora, in Accordance with Commission on Human Rights Resolution 1985/38, 17 February 1986, E/CN.4/1986/24 (<http://www.refworld.org/docid/482996d02.html>).

<sup>3</sup> For details on the trial, see Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, Afghanistan Analysts Network, February 2013, [https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf).

<sup>4</sup> The report can be found here: Kate Clark, “War Crimes in the First Two Decades of the Afghan Conflict: Republishing the UN Mapping Report,” Afghanistan Analysts Network, August 15, 2024, <https://www.afghanistan-analysts.org/en/reports/rights-freedom/war-crimes-in-the-first-two-decades-of-the-afghan-conflict-republishing-the-un-mapping-report/>.



Following publication of the Call for Justice report, the AIHRC and UNAMA developed a proposal, called the Action Plan for Peace, Reconciliation and Justice. It included five measures: commemoration and building memorials; (2) vetting human rights abusers from positions of power; (3) truth seeking through documentation; (4) reconciliation; and (5) establishing a task force to make recommendations for an accountability mechanism. However, after its adoption in 2007, the Action Plan was largely ignored by the Afghan government and its donors.

In 2008, the AIHRC began work on a new report to map the major human rights violations and war crimes of the 1978-2001 conflict. The conflict mapping report involved more than four years of field research and drafting, but as it neared completion the AIHRC came under increased pressure from government officials not to publish, purportedly again due to security risks. Although it was shared with President Karzai and subsequently with President Ghani, it has never been published. The pushback showed the extent to which disclosing evidence of atrocities in Afghanistan's contested history has remained a dangerous act.

## Amnesty Laws

Although states are obligated to refrain from amnesties for those who violate international crimes, Afghanistan has seen a number of such amnesties. According to one participant, such *“amnesties encouraged individuals to continue their crimes without fear...undermining international treaties and conventions.”*

- Following the withdrawal of Soviet forces from Afghanistan, on November 28, 1989, the Supreme Soviet adopted an amnesty for its forces' actions in Afghanistan.
- In 2006, the Afghan Parliament introduced the National Reconciliation, General Amnesty and National Stability Law which provided a blanket amnesty to all former fighters for acts committed after 1978. The law took effect in December 2008.<sup>5</sup>
- In September 2016, the Afghan government offered total immunity to the *Hizb-e Islami Gulbuddin* (HIG) faction in a peace deal.<sup>6</sup>

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<sup>5</sup> Islamic Republic of Afghanistan, National Reconciliation General Amnesty and National Stability Law, 2007 Article 2.3.

<sup>6</sup> The group had been accused of numerous violations of IHL, including indiscriminate rocket attacks on Kabul.

## II. HUMAN RIGHTS VIOLATIONS AND VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: HISTORICAL CONTEXT

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Afghanistan was in a state of prolonged armed conflict for over 43 years between 1978 and 2021. This was not one war, but a series of conflicts with some recurring political actors alternately in power or opposition. As with any conflict, the roots of Afghanistan's wars reach back decades, and the historical legacy of severe abuses going back to the 19<sup>th</sup> century continues to affect Afghanistan's current human rights crisis.

Two patterns stand out: 1. A longstanding power struggle through the twentieth century and beyond between those who saw a benefit in closer collaboration with foreign powers and influences, be they Turkey (in Amanullah's case), the Soviet Union, or the West, and those whose power derived from traditional sources that were threatened by these foreign interactions has long defined the conflict and fuelled deep social divisions that resonate today. 2. Cycles of violence have fed off each other, particularly in the post-1978 years, as those in power have replicated many of the same patterns of abuse and retribution against their foes as they had experienced when out of power, fuelling further violence.

A brief breakdown of the specific phases of the conflict follows.<sup>7</sup>

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<sup>7</sup> <https://www.amnesty.org/en/search/Afghanistan/?sort=date-asc>; Human Rights Watch, whose reports are listed, references for this section include *inter alia* reports by The Afghanistan Justice Project, [https://www.opensocietyfoundations.org/uploads/291156cd-c8e3-4620-a5e1-d3117ed7fb93/ajpreport\\_20050718.pdf](https://www.opensocietyfoundations.org/uploads/291156cd-c8e3-4620-a5e1-d3117ed7fb93/ajpreport_20050718.pdf); Amnesty International, whose reports on Afghanistan date from 1979, reports on Afghanistan date from 1984, <https://www.hrw.org/asia/afghanistan>; the United Nations Mapping Report on Afghanistan, <https://www.afghanistan-analysts.org/en/resources/human-rights/republishing-the-un-mapping-report/>; and reports by UN Special Rapporteurs of Afghanistan since 1984: <https://digitallibrary.un.org/search?ln=en&p=Report%20on%20the%20situation%20of%20human%20rights%20in%20Afghanistan&f=&c=Resource%20Type&c=UN%20Bodies&sf=&so=d&rg=50&fti=0>.

## The Roots of Conflict

Afghanistan assumed its current boundaries under Abdul Rahman Khan (1880–1901), a despotic ruler who built the country’s first professional army and state bureaucracy and consolidated his power through a sophisticated network of spies. He displaced and disproportionately taxed ethnic and tribal groups in order to neutralize suspected threats to his power, and suppressed many uprisings against his rule, some orchestrated by his relatives.<sup>8</sup> In 1896 he forcibly incorporated Nuristan into Afghanistan, making its inhabitants convert to Islam.<sup>9</sup>

Abdul Rahman Khan’s repression of the Hazaras, who rose up against him in the 1890s, was brutal and sweeping in scope. Until 1891, Afghanistan’s Hazarajat region in the central highlands had enjoyed some autonomy within the state. In 1891, local frustration with abuse by officials posted to the region erupted in an uprising against the government.<sup>10</sup> In response, Abdul Rahman Khan mobilized the army and tribal militias to crush it.<sup>11</sup> Much of the Hazara population was either killed, raped, displaced, or taken captive as slaves, and the land distributed to Ghilzai and Durrani tribes.<sup>12</sup> Many Hazaras consider this to have amounted to a genocide. Hazaras continued to suffer political marginalization and discrimination in the decades that followed. Forced displacement was a technique Abdur Rahman used against other groups from whom he feared rebellion, including some Pashtun tribes he relocated to northern Afghanistan, evicting a number of Uzbek and Tajik communities.

Afghanistan gained independence in 1919 under Amanullah Khan. Afghanistan’s first constitution, enacted in 1923, outlawed torture and slavery, and made elementary education compulsory; the first primary schools for girls opened in Kabul. Amanullah’s support for education for girls and for encouraging Western dress and the unveiling of women sparked a backlash from conservative religious leaders. In 1929 he was overthrown and his reforms abandoned.<sup>13</sup> A civil war followed and in 1933, Zahir Shah assumed the throne.

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<sup>8</sup> M. Hassan Kakar, *A Political and Diplomatic History of Afghanistan, 1863-1901*, Brill, January 1, 2006.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> He reportedly called on his forces to “extirpate these irreligious people.” Niamatullah Ibrahimi, “Shift and Drift in Hazara Ethnic Consciousness: The Impact of Conflict and Migration,” *Crossroads Asia Working Papers* 5, September 27, 2012.

<sup>12</sup> Ibid.

<sup>13</sup> Thomas Ruttig, “Who Was King Habibullah II? A query from the literature,” *Afghanistan Analysts Network*, September 16, 2016, <https://www.afghanistan-analysts.org/en/reports/context-culture/who-was-king-habibullah-ii-a-query-from-the-literature/>.

In 1964, Zahir Shah promulgated a new constitution that created an elected parliament and granted women the right to vote and hold office. It allowed for political parties, but most real power remained with the monarchy. Afghanistan held national elections in 1965 and 1969. New political publications appeared but censorship rules limited what they could print.<sup>14</sup>

Education for all children lagged, with only 4 percent of children in school by 1975, a small fraction of them girls.<sup>15</sup> The university student population grew to about 3300 in this period, including for women, and provided an unprecedented opportunity for Afghans from different parts of the country to organize politically.<sup>16</sup> The Islamist Muslim Students Organization (*Sazman-i Jawanan-i Musulman*) was founded in the late 1960s and drew inspiration from the Egyptian Muslim Brotherhood. In 1972 it renamed itself Jamiat-e Islami. The Marxist-Leninist People's Democratic Party of Afghanistan (PDPA) had established itself in 1965 but split into two factions, Khalq and Parcham. A Maoist group, Shola-e Javid (Eternal Flame) also emerged in this period. Both the Islamists and leftists actively recruited, and tensions between them ran high.<sup>17</sup>

In 1973 the king's cousin, Mohammed Daoud Khan, aided by the PDPA's Parcham faction, seized power and proclaimed himself president. He declared a one-party system of government and built a new intelligence agency that soon cracked down on Islamists, arresting many and driving others into exile in Pakistan. The assassination of a Parcham leader on April 17, 1978, widely blamed on Daoud, provoked widespread protests.<sup>18</sup> After Daoud arrested the PDPA leadership, on April 28, 1978, PDPA officers in the military launched a coup, killing Daoud and his family.

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<sup>14</sup> David B. Edwards, "The Birth of the Muslim Youth Organization," *Before Taliban: Genealogies of the Afghan Jihad*, University of California Press, 2002.

<sup>15</sup> "Education in Afghanistan," Encyclopaedia Iranica, <https://www.iranicaonline.org/articles/education-xxvii-in-afghanistan>.

<sup>16</sup> David B. Edwards, "The Birth of the Muslim Youth Organization," *Before Taliban: Genealogies of the Afghan Jihad*, University of California Press, 2002.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

## 1978-1992

After seizing power, Khalq leaders Nur Muhammad Taraki and Hafizullah Amin launched an effort to re-engineer Afghan society by radically transforming land tenure and laws governing education, marriage, and inheritance. They expanded education for women and girls, and replaced sharia law with secular law. The brutality with which the regime imposed these changes sparked widespread resistance and mutinies in the military. As the conflict spread, the government responded with mass detentions and the enforced disappearance of between 50,000 and 100,000 perceived opponents of the regime, including intellectuals, Maoists and other leftists, royalists, and ethnic and religious leaders; it ranks as one of the largest instances of enforced disappearance in the twentieth century. The PDPA's new intelligence agency, *De Afghanistan Gato Satunki Edara* (AGSA, the Administration for the Protection of the Interests of Afghanistan), headed by Assadullah Sarwary, was responsible for most arrests. PDPA forces also carried out reprisals against civilians, including the massacre of nearly 1,000 villagers in Kerala in Kunar province in April 1979, and indiscriminate attacks, including the aerial bombardment of Herat in March 1979.

The Soviet Union invaded Afghanistan on December 24, 1979, assassinated Amin, and installed Babrak Karmal, from the rival Parcham wing of the PDPA. Under the Soviets the PDPA established a new intelligence agency, the *Khidamat-e Ittila'at-e Dawlati* (State Information Services), or KhAD, modelled on the Soviet KGB. It engaged in pervasive surveillance of the population; thousands of dissidents were detained and tortured, and protests were put down with brutal force. In the countryside, indiscriminate bombing and mines killed countless civilians and drove millions into Pakistan and Iran as refugees. Militia forces loyal to the PDPA carried out reprisals against civilians.

Mujahidin groups based in Pakistan, who had the support of Pakistani military and intelligence agencies, had considerable control over the Afghan refugee population. Some maintained secret detention facilities in Pakistan and Afghanistan where they held, tortured, and forcibly disappeared or killed Afghan refugees who opposed them or who worked for foreign NGOs.

## 1992-2001

After the Soviets withdrew in 1989, the Afghan state they had supported held on until April 1992, when—having lost the financial support of the now-dissolved Soviet Union—the

Najibullah government collapsed. Between April 1992 and September 1996, former mujahedin and militia forces fought each other in Kabul, and all major factions—Hizb-e Islami, Jamiat-e Islami, Hizb-e Wahdat, Shura-e Nazar, Ittihad-e Islami, and Junbish-e Milli—engaged in widespread atrocities against civilians, including rape. In one particularly egregious example, in February 1993, former mujahedin and militia forces attacked the Afshar neighbourhood of West Kabul, killing many Hazara civilians and raping women and children. Outside Kabul, the country was fragmented with cities and districts divided among various commanders.

The Taliban emerged in 1994, forming out of other mujahedin groups and gaining military support from Pakistan. After taking control of Kabul in September 1996, they instituted a highly repressive administration based primarily on their intelligence agency and their religious police (*amr bilma'ruf wa 'an al-makar*). They instituted extreme restrictions on women and girls, closing schools for girls and banning employment for women other than in health care. They expanded the use of corporal punishment under sharia law. As the Taliban encountered resistance in their efforts to consolidate control they responded with reprisals against civilians. There were several large massacres in this period by both Taliban forces and their opponents, collectively known as the United Front or more commonly, the Northern Alliance: In May 1997, when the Taliban failed to take control of Mazar-e Sharif, Northern Alliance forces took 3,000 of them prisoner and summarily executed all of them. The Taliban seized Mazar-e Sharif in August 1998, and carried out reprisals, killing an estimated 2,000 civilians, most of them Hazaras. In 1999-2001 the Taliban carried out operations in Bamiyan that included a series of massacres, notably in Yakawlang, where they executed some 130 men.

## 2001-2021

In response to the September 11, 2001, attacks on the US, the US provided arms and financial support to forces opposed to the Taliban and launched airstrikes against Taliban forces. Following the capture of Kunduz from the Taliban in November 2001, hundreds of Taliban prisoners were either shot or asphyxiated in overcrowded container trucks and buried in mass graves in the desert area of Dasht-i Laili.

On December 5, 2001, representatives from many of the anti-Taliban factions met at a UN conference in Bonn, Germany, and signed the “Bonn Agreement” to create a transitional administration in Afghanistan and a roadmap to elections. The US-led invasion paved the way

for a massive international effort to rebuild Afghanistan. Former mujahedin and militia faction leaders assumed powerful positions in the new government, as the US continued to pursue its counterterrorism mission against the Taliban and al Qaeda. In June 2002, a Loya Jirga (Grand Assembly) in Kabul dominated by the Northern Alliance ratified the new administration, led by President Karzai. Through 2002, Northern Alliance militias carried out hundreds of revenge killings, as well as landgrabs and rapes in Pashtun areas.

In the years that followed, US forces and the Afghan government's forces working with them detained thousands of men and boys as terror suspects. Many were captured in night raids, a tactic that was controversial because of the number of civilians killed and wrongfully detained and because targeting was often based on faulty intelligence or political rivalries. Detainees were routinely subjected to ill-treatment and torture in so-called "black sites" run by the US CIA in Afghanistan and other countries. Afghans along with men from other countries were subjected to "rendition"—secretly and extrajudicially transferred from one country to another or to Guantánamo for incommunicado detention and abusive interrogation. Some died under torture in US custody.

By late 2003, a Taliban resurgence was evident. Over the next years the group launched attacks on Afghan government forces and international troops; they also targeted foreign institutions, political gatherings, and other civilian facilities in suicide attacks, and carried out assassinations of prominent political figures. Taliban IEDs also killed many civilians.

As the conflict intensified, growing numbers of civilian casualties from airstrikes and night raids undermined local support for the Afghan government particularly in battleground provinces. US, UK, and Australian forces were implicated in war crimes against Afghan civilians. Torture, particularly by the intelligence agency, the National Directorate of Security (NDS), and police, was routine. The Kandahar police are believed to have forcibly disappeared an estimated 2,200 detainees, with most buried in mass graves in desert areas of the province.<sup>19</sup>

In 2014, NATO withdrew its combat forces from Afghanistan, leaving only a training mission, Resolute Support, as the US unilaterally continued its military operation. Within a year of the NATO withdrawal, the Taliban were estimated to control or heavily influence half of

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<sup>19</sup> Azam Ahmed and Matthieu Aikins, "America's Monster: How the U.S. Backed Kidnapping, Torture and Murder in Afghanistan," *New York Times*, May 22, 2024, <https://www.nytimes.com/2024/05/22/world/asia/afghanistan-abdul-raziq.html>.

Afghanistan's districts. In 2015 the Islamic State of Khorasan Province (ISKP, also called ISIS-K) emerged in Kunar and Nangarhar provinces as a rival to the Taliban, and frequently targeted Afghanistan's Shia Hazara community and other religious minorities. The Ghani government failed to protect mainly Hazara communities from these attacks. Suicide bombings by both the Taliban and ISKP caused thousands of civilian casualties in major cities, especially Kabul, between 2016 and 2021, among the most deadly of which were the following:

- On 16 July 2016, two suicide bombings at Deh Mazang square in Kabul killed at least 80 civilians and injured hundreds, predominantly Hazaras, who had gathered as part of the “Enlightenment Movement” to protest the government’s plans to route power lines away from the less developed, Hazara majority areas of the central highlands. The bombings were claimed by ISKP.
- On 31 May 2017, a suicide truck bomb exploded near the German embassy in Kabul, killing over 150 people and injuring over 400. The Taliban were believed responsible.
- On 30 January 2018 the Taliban detonated a van disguised as an ambulance in Kabul, killing over 100 and injuring more than 200.

On February 29, 2020, the US signed the Doha Agreement with the Taliban, committing the US to a full troop withdrawal.

## 2021-Current

The Taliban took power in August 2021. Since taking power, the Taliban have imposed policies severely restricting rights—particularly those of women and girls. They have banned women from some forms of employment and prohibited girls and women from attending secondary school and university. They have imposed restrictions infringing on women’s freedom of movement and banned them from some public places, including parks. The Taliban have also carried out broad censorship and have detained and tortured journalists and activists, as well as those they accuse of having links with resistance groups. Taliban forces have carried out hundreds of revenge killings of captured members of the former government’s security forces and of those they accuse of being associated with ISKP.



Groups affiliated with the Islamic State have continued to carry out bombings of mosques and other facilities targeting the Hazara-Shia community. Despite claiming to provide almost complete security in Afghanistan, the Taliban have failed to protect Hazara communities from these attacks and to adequately investigate them.

### Corruption, Land Grabbing and Economic Crime

Since 2007, Transparency International's Corruption Perception Index has continuously ranked Afghanistan among the most corrupt countries.<sup>20</sup> Under the Islamic Republic of Afghanistan (2001–2021), corruption grew exponentially, jeopardizing stability, rule of law, and the process of state building.<sup>21</sup> The judiciary and law enforcement were ranked among the most corrupt institutions;<sup>22</sup> According to some reports, Taliban courts grew more popular because locals perceived them as less corrupt and more accessible.<sup>23</sup> Entrenched, systematic and widespread corruption is regarded as a contributing factor in the abrupt fall of the previous Afghan government and return of the Taliban to power.<sup>24</sup>

The widespread practice of land grabbing in Afghanistan was one of the worst examples of corruption. In the absence of any accountability, warlords and other powerful individuals appropriated public and private land by force to construct villas and develop townships and other profitable businesses. Among the land grabbers were ministers, parliamentarians, and governors. A massive land grab in the Sherpur neighbourhood of Kabul in 2003 became synonymous with the culture of economic crime and impunity.<sup>25</sup>

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<sup>20</sup> 2007 was the first year Afghanistan was included. Transparency International, "Corruption Perception Index: Afghanistan 2012," <https://www.transparency.org/en/cpi/2012/index/afg>.

<sup>21</sup> Gardizi, M. et al, Corrupting the state or state-crafted corruption? 2010, 20, <http://www.refworld.org/pdfid/4c21cd102.pdf>.

<sup>22</sup> Integrity Watch Afghanistan, National Corruption Survey 2016: Afghan Perceptions and Experiences of Corruption, 2016.

<sup>23</sup> Human Rights Watch, *'You have no right to complain': education, social restrictions, and justice in Taliban-held Afghanistan*, 2020; Jackson, A. and Weigand, F., *Rebel rule of law: Taliban courts in the west and north-west of Afghanistan*, 2020

<sup>24</sup> Special Inspector General for Afghanistan, "Why the Afghan Government Collapsed," November 2022, <https://www.sigar.mil/pdf/evaluations/SIGAR-23-05-IP.pdf>.

<sup>25</sup> Saeed, H, *Transitional Justice and Socio-Economic Harm: Land Grabbing in Afghanistan*, 2022, Routledge; ARAZI, *A five-year strategic plan to prevent further land grab*, 2014; UNAMA, *The Stolen Lands of Afghanistan and its People: the Legal Framework (Part 1 of a 3 Part Series)*, 2014

Despite the harmful repercussions of corruption and land grabbing as economic-state crimes in Afghanistan,<sup>26</sup> perpetrators of such acts have never been held accountable, much like those responsible for other serious crimes committed throughout Afghanistan’s violent conflicts. Given the gravity and pervasiveness of such crimes, they are serious human rights violations that may constitute crimes against humanity of at least forcible transfer, murder, and inhumane acts.<sup>27</sup> Any future accountability mechanism for gross human rights violations in Afghanistan must also address financial and economic crimes, in particular corruption and land grabbing.

Since 2021, many Afghan warlords and former corrupt state officials have fled to other countries, some of which have put into effect the principle of Universal Jurisdiction and/or other laws and regulations allowing them to look into economic crimes. An initiative undertaken by the US Department of State is a welcome step. On 11 December 2023, the US Department of State sanctioned former Afghan Speaker of Parliament Mir Rahman Rahmani and former Afghan Parliament Member Ajmal Rahmani “for their involvement in significant corruption.”<sup>28</sup> In a separate statement, the US Department of Treasury’s Office of Foreign Assets Control (OFAC) declared that it had sanctioned the Rahmani family and 44 related businesses for their extensive involvement in transnational corruption.<sup>29</sup> In southwest Germany, the municipality of Ehningen was able to stop the Rahmani family from starting a construction business because of the US government sanctions.<sup>30</sup> Robust accountability measures may one day follow such actions.

## Other Harmful Legacies of the Conflict

Forty-six years of war have left a legacy of toxins in Afghanistan’s environment that represent an ongoing threat to the health and lives of Afghans, especially children. Soviet forces released thousands of munitions when bombing the countryside during their 9-year occupation. In the

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<sup>26</sup> Saeed H., The economic-state crime of corruption and land grabbing in Afghanistan, Forthcoming book chapter in the Routledge Handbook of State Crime.

<sup>27</sup> Ibid.

<sup>28</sup> It further stated that the “transnational corruption scheme spanned the globe as the Rahmani’s stole millions of dollars from U.S. government-funded fuel contracts.” US Department of the Treasury, “Treasury Targets Transnational Corruption,” December 11, 2023, <https://www.state.gov/leveraging-tools-to-promote-accountability-and-counter-global-corruption/>

<sup>29</sup> Executive Order (E.O.) 13818, which builds on the US Global Magnitsky Human Rights Accountability Act and targets those who commit grave human rights violations and corruption, is the basis for the designation of these sanctions. <https://home.treasury.gov/news/press-releases/jy1973>

<sup>30</sup> Khaama Press, ‘US sanctions halt Rahmani family’s project in Germany’. 23 December. 2023, <https://www.khaama.com/us-sanctions-halt-rahmani-familys-project-in-germany/>

period that followed, various Afghan forces fired thousands of rockets into Kabul, and shelled cities and neighborhoods. US forces dropped over 85,000 munitions in 20 years, including cluster bombs. Military bases disposed of chemical waste in waterways or in open-air burn pits which have been linked to skin ailments and respiratory diseases.<sup>31</sup> There has been no accountability for the harm caused to the Afghan population nor credible, systemic efforts to remove these toxins.

Afghanistan is among the countries most contaminated with landmines and explosive remnants of war (ERW), which as of 2024 were the second leading cause of civilian casualties, mostly children.<sup>32</sup>

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<sup>31</sup> Lynzy Billing, “How America’s War Devastated Afghanistan’s Environment,” *New Lines Magazine*, September 25, 2023, <https://newlinesmag.com/reportage/how-americas-war-devastated-afghanistans-environment/>; Eric Bonds, “Legitimizing the environmental injustices of war: toxic exposures and media silence in Iraq and Afghanistan,” *Environmental Politics*, Volume 25, 2016, 395–413. <https://doi.org/10.1080/09644016.2015.1090369>.

<sup>32</sup> “Afghanistan: Unearthing hope from a legacy of mines,” United Nations Office for the Coordination of Humanitarian Affairs, April 3, 2024, <https://www.unocha.org/news/afghanistan-unearthing-hope-legacy-mines>; “Decades on, Soviet Bombs Still Killing People in Afghanistan,” Voice of America, December 15, 2019, [https://www.voanews.com/a/south-central-asia\\_decades-soviet-bombs-still-killing-people-afghanistan/6181095.html](https://www.voanews.com/a/south-central-asia_decades-soviet-bombs-still-killing-people-afghanistan/6181095.html).

### III. AFGHANISTAN'S OBLIGATIONS UNDER INTERNATIONAL LAW

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Under customary international law, the *jus cogens* nature of international crimes constitutes an obligation *erga omnes* (toward all), which is non derogable. Among legal obligations arising from the status of such crimes are the duty of the State to prosecute or extradite, the non-applicability of statutes of limitations, and the non-applicability of any immunity.<sup>33</sup> Therefore, States have the obligation not to grant immunity to violators of such crimes;<sup>34</sup> amnesty and statutory limitations shall not be accorded to these crimes.<sup>35</sup> In addition, the concrete international obligation to prosecute some international crimes could be inferred from international treaty law and State practice.<sup>36</sup> Thus, the duty to prosecute international crimes obliges competent authorities to prosecute international crimes committed in Afghanistan.

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<sup>33</sup> Bassiouni, M. Cherif. "International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"." *Law and Contemporary Problems* 59.4 (1996): 63-74; Bassiouni, M. Cherif. "Searching for peace and achieving justice: The need for accountability." *Law & Contemp. Probs.* 59 (1996): 9-28.

<sup>34</sup> Bassiouni, M. Cherif. "International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"." *Law and Contemporary Problems* 59.4 (1996): 63-74, Roht-Arriaza, Naomi. "State responsibility to investigate and prosecute grave human rights violations in international law." *Calif. L. Rev.* 78 (1990): 449. Roht-Arriaza, Naomi, ed. *Impunity and human rights in international law and practice*. Oxford University Press on Demand, 1995, Orentlicher, Diane F. "Settling accounts: the duty to prosecute human rights violations of a prior regime." *Yale Law Journal* (1991): 2537-2615.

<sup>35</sup> Bassiouni, M. Cherif. "Searching for peace and achieving justice: The need for accountability." *Law & Contemp. Probs.* 59 (1996): 9-28.

<sup>36</sup> Article 12 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); UN Committee against Torture, Report of the Committee against Torture: Twenty-fifth session (13-24 November 2000) Twenty-sixth session (30 April-18 May 2001), A/56/44, para. 97 (2001); Article 12 UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance (2006). Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly (2006), Economic and Social Council, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Resolution 1989/65 (1989) Article 24 International Convention for the Protection of All Persons from Enforced Disappearance (2006).

## Complementarity and Accountability under the De Facto Authorities

Preserving a State's right to exercise its jurisdiction and retain its sovereignty was considered an overarching rationale behind the complementarity principle in the Rome Statute and the jurisdiction of the ICC.<sup>37</sup> Under this principle, Afghanistan is vested with primary jurisdiction,<sup>38</sup> while the ICC's jurisdiction is acknowledged when admissibility provisions including unwillingness and inability are met. Such obligation is in conjunction with the territorial jurisdiction of Afghanistan over all international crimes committed in its territory. However, the primary question that arises is to what extent Afghanistan's justice system is able to conduct genuine criminal proceedings for prosecuting international crimes and human rights violations.

## Rebuilding a Collapsed Justice System after 2001

In 2001, Afghanistan's formal justice system was considered a collapsed system. It was incapable of exercising even basic functions of legal order.<sup>39</sup> Building the human and physical capacities of Afghanistan's formal justice system became a cornerstone of Afghanistan's internationally supported reconstruction after 2002.<sup>40</sup> Drafting new legislation, training and building the professional capacity of judges, prosecutors, prison staff, and police became priorities for funding.<sup>41</sup> The Penal Code was amended in 2017 to address international crimes with acts constituting crimes against humanity, war crimes, and genocide criminalised.<sup>42</sup> The government of the Republic claimed it was pursuing genuine investigations and prosecutions in

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<sup>37</sup> Benzing, Markus. "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity." *Max Planck Yearbook Of United Nations Law Online* 7, No. 1 (2003): 591-628. El Zeidy, Mohamed M. "The Principle of Complementarity: A New Machinery To Implement International Criminal Law." (*Mich. J. Int'l L.* 23 2001) P 869.

<sup>38</sup> Bergsmo, Morten, Olympia Bekou, and Annika Jones. "Complementarity after Kampala: Capacity Building and the ICC's Legal Tools." *Goettingen J. Int'l L.* 2 (2010): 794-795. Pejic, Jelena. "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness." *Colum. Hum. Rts. L. Rev.* 29 (1998): Pages 291, 309, and 311.

<sup>39</sup> Rubin, Barnett R. *Afghanistan from the Cold War through the War on Terror*. Oxford University Press, 2013, P 40.

<sup>40</sup> Tondini, Matteo. *State building and justice reform: post-conflict reconstruction in Afghanistan*. Routledge, 2010.

<sup>41</sup> Wardak, Ali. "State and non-state justice systems in Afghanistan: the need for synergy." *U. Pa. J. Int'l L.* 32 (2010): 1305. Donors also equipped legal offices, and funded the digitalisation and distribution of printed laws and related substantive legal materials to legal and judicial personnel. Wardak, Ali. "A Decade and a Half of Rebuilding Afghanistan's Justice System: An Overview." Leiden: Van Vollenhoven Institute (2016).

<sup>42</sup> Afghanistan Penal Code (2017), Article 232 -343

respect of such crimes,<sup>43</sup> although no such investigations were made public. A dedicated International Crimes Office responsible for the investigation and prosecution of crimes against humanity, war crimes, and genocide was established in 2019 to address international crimes.<sup>44</sup>

### Unavailable Judicial System after August 2021

This judicial system essentially collapsed following the Taliban takeover in August 2021. It no longer had the means to hold perpetrators of international crimes accountable due to the mass departures and dismissals of its professional judicial cadre, the dissolution of special courts and prosecution offices, the annulment of laws, and the loss of other material resources. In addition, the Taliban eliminated the formal investigative process for criminal proceedings and the previous procedures for handling legal cases and exercising judicial powers.<sup>45</sup> It lacks independence; key Taliban figures such as governors, police commanders, and local commanders hold significant influence over judicial decisions, affecting the fairness of criminal proceedings. The shortage of qualified judges and lack of laws protecting the courts' neutrality means that biases and personal preferences can sway rulings, especially in cases involving women or former government employees. There is also no reliable monitoring mechanism for the legal and judicial institutions to prevent violations. Without proper checks and balances in place, the system is prone to unchecked abuses.<sup>46</sup> Despite the international obligation to prosecute international crimes and respond to atrocities in Afghanistan, these deficiencies have significantly undermined the judiciary's ability to do so.

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<sup>43</sup> The Government of the Islamic Republic of Afghanistan, Written Submissions to the Appeals Chamber, No: ICC-02/17 Date: 2 December 2019 Para 6.

<sup>44</sup> Afghanistan National Report to the UN Human Rights Council, 13 November 2018, Para. 10.

<sup>45</sup> Rawadari, Justice Denied: An Examination of the Legal and Judicial System in Taliban-Controlled Afghanistan, June 2024.

<sup>46</sup> Ibid.

## IV. ACCOUNTABILITY OPTIONS UNDER THE DE FACTO TALIBAN AUTHORITIES

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*Whatever rights existed during the former government are now nonexistent.*—Participant

The prospect of holding human rights offenders accountable under the current Taliban *de facto* authorities is discouraging. Since taking power, the Taliban have dismantled the existing institutional setup and in its place set up exclusionary institutions with narrow focus and questionable effectiveness, suggesting a lack of political will to hold human rights abusers to account.

Talban authorities have dismantled the former legal system that was designed to implement the Afghan state's human rights obligations. They abrogated the country's 2004 Constitution including its chapter on the basic rights of citizens as well as Afghanistan's Elimination of Violence Against Women law. They abolished the Afghanistan Independent Human Rights Commission, Ministry of Women's Affairs, and the country's elected bodies. They have completely overhauled the judiciary, removing all female and non-Hanafi judges and appointing an exclusively madrasa-trained, Hanafi, pro-Taliban ulema cadre of jurists. They have removed specialized courts dealing with juvenile offenses and cases of violence against women and undone the adversarial criminal justice system including the role of the attorney general and the right of the accused to a defense attorney.

The Taliban assert that they will protect only those rights recognized in sharia, according to Hanafi jurisprudence as interpreted by pro-Taliban ulema. They have been unwilling to clarify what these sharia-approved rights are and how exactly they differ from the human rights Afghanistan is obligated to uphold. In the absence of a constitution, the *de facto* authorities rule

by decree. They have enacted some rules that purport to protect sharia-recognized rights: a decree that enumerates a small set of rights for women; a general amnesty that promises immunity to those who were involved in fighting the Taliban insurgency; and several decrees that define some rights of detainees.

### The Women’s Rights Decree

In 2021, the Taliban Emir issued a decree enumerating six rights for women, mostly about marriage and inheritance:<sup>47</sup>

- The consent of adult women is required in marriage—provided that the marriage is between two parties of similar social status (*kofv*) and there is no risk of corruption or moral affliction (*fitna*) present in the marriage. No one can coerce women into marriage.
- A woman is not property but a free and dignified person, no one can give her to someone else by force or as a consideration in a settlement.
- After the husband passes, upon completion of the Shari’ term (four months and ten days or childbirth), neither the husband’s brother nor anyone else can force the widow into marriage. The widowed woman in matters of marriage and determination of her own destiny has the discretion (*ikhtiar*) [to conclude her own contract of marriage]—provided that the marriage is between two parties who are of similar social status “*kofv*” and there is no risk of corruption or moral affliction (*fitna*) present in the marriage.
- It is the right of a widow to receive dowry “*mahr*” from her new husband.
- The widow has a right to receive inheritance and is entitled to a specific share of her husband’s, children’s, father’s, and her other relatives’ inheritance. No one can deny the widow her [inheritance] rights.

The decree also instructs the judiciary to address women’s claims, especially widows, in connection to the rights mentioned above and any other oppression (*zulm*) they may experience. In May 2024, the de facto judiciary published an infographic reporting that it had processed 26,449 “women’s rights” cases on property and inheritance.<sup>48</sup>

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<sup>47</sup> OG 01432 p. 46.

<sup>48</sup> [https://x.com/SupremeCourt\\_af/status/1790353871283343555](https://x.com/SupremeCourt_af/status/1790353871283343555)



## General Amnesty

Shortly after taking power the de facto authorities announced a general amnesty for those who had worked for the former government or international forces. Since then, they have repeatedly invoked this amnesty, warning their forces not to carry out reprisals against their enemies. Despite this, UNAMA and human rights groups have documented hundreds of cases of reprisal killings mostly targeting members of the former government's armed forces.<sup>49</sup> Taliban authorities have denied large-scale violations of the amnesty, claiming the number is small, and their courts have announced a few cases in which violators have been punished with dismissal or reassignment.

The general amnesty also limits the prospect of domestic accountability for human rights violations that occurred before August 2021. In this way, it resembles the amnesty adopted under the Republic in 2008 (see section I), the legality of which could have been reviewed by the former Supreme Court, although it never was. There is no similar check on the power of the de facto authorities who issued the Taliban's general amnesty.

Both amnesties exclude private causes of actions (*haqq al-nas*) from their scope. Even though it was not a realistic option under the IRA, and it does not seem like one under the Taliban, a person who has sustained a pecuniary or bodily injury could still bring a claim for compensation before the courts even if the actions that caused the injury fall within the scope of the amnesty. However, criminal accountability would not be available to the victim. Given the de facto authorities inflexible commitment to Hanafi jurisprudence, it is unclear whether the victims could pursue *qisas* (court-authorized retribution for intentional bodily injury including murder). The complexity arises from the fact that under Islamic jurisprudence, *qisas* has a dual identity as a public offense and a private cause of action, and jurists do not agree as to which one dominates. If the de facto judiciary concludes that the private identity of *qisas* prevails, it is possible that victims of intentional bodily injury could request the court to authorize retribution against the offender or impose a fixed amount of money in lieu of retribution. Such a bodily punishment, however, would violate Afghanistan's international obligations to outlaw cruel and inhumane punishment.

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<sup>49</sup> [https://unama.unmissions.org/sites/default/files/english\\_-\\_unama\\_hrs\\_-\\_update\\_hr\\_situation\\_afghanistan\\_april-june\\_2024.pdf](https://unama.unmissions.org/sites/default/files/english_-_unama_hrs_-_update_hr_situation_afghanistan_april-june_2024.pdf) "Between 1 April and 30 June, UNAMA Human Rights documented at least 60 instances of arbitrary arrest and detention, at least 10 instances of torture and ill-treatment, verbal threats and at least five killings of former government officials and former ANDSF members (four by unknown perpetrators, one by the de facto authorities)." p. 5

## Decrees on Mistreatments of Detainees and Procedural Rights

The de facto authorities have also issued decrees that deal with mistreatment of detainees and procedural rights of the accused. One such decree prohibits bodily punishments such as beating without court authorization.<sup>50</sup> The decree is from 2020, but the Ministry of Justice republished it, suggesting that it is still valid. UNAMA has also documented many instances of the Ministry of Promotion of Virtue and Prevention of Vice and Hearing of Complaint (MPVPV) violating this prohibition (and its own bylaws). In only a few instances have the offenders been dismissed from their positions and their cases referred to the courts.<sup>51</sup>

A February 2022 decree imposes limits on pre-trial detentions (up to ten days) without court authorization and bans torture.<sup>52</sup> A January 2023 decree establishes the principle of speedy trial, requiring courts to finalize cases within a set deadline prioritizing cases where the accused is in custody.<sup>53</sup> Despite these standards, UNAMA and human rights groups have documented numerous instances of arbitrary detention and torture.<sup>54</sup>

## De Facto Institutions of Accountability

Three institutions have the power to hold members of the de facto authorities accountable under the specific decrees discussed above as well as for violations of any rights under sharia. As part of the official Accountability Program, the military deputy of MPVPV described the respective jurisdiction of these:<sup>55</sup>

- Complaints from the general public against [other] members of the public, which are the responsibility of the Supreme Court.

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<sup>50</sup> OG 01432 p. 38.

<sup>51</sup> [https://unama.unmissions.org/sites/default/files/moral\\_oversight\\_report\\_english\\_final.pdf](https://unama.unmissions.org/sites/default/files/moral_oversight_report_english_final.pdf) p. 20.

<sup>52</sup> OG 01432 p. 58.

<sup>53</sup> Primary courts are to finalize cases within 1.5 months, appeal courts are to decide the appeals between 20 days and a month.

<sup>54</sup> In one example, an education rights activist was held without a trial for seven months and subjected to abuse.

<https://www.amnesty.org/en/documents/asa11/7484/2023/en/>

<sup>55</sup> <https://www.afghanistan-analysts.org/en/reports/political-landscape/how-the-emirate-wants-to-be-perceived-a-closer-look-at-the-accountability-programme/> p. 22

- Complaints from the general public against officials of the Islamic Emirate, which are the responsibility of the Ministry of Virtue and Vice.
- Complaints from Emirate employees against [other] Emirate officials, which are the responsibility of the military court.

### Ministry of Promotion of Virtue and Prevention of Vice and Hearing of Complaint

Any citizen who has a complaint against a member of the de facto authorities can file a complaint with the MPVPV, either via its website or complaint boxes available in public offices. According to the Law of Hearing Complaints, the MPVPV should follow up with the superior of the accused. If the complaint is not satisfactorily resolved, the MPVPV can report this to the Emir.

As of mid- 2023, the complaints department had received 10,875 such complaints from the general public, 7,915 of which were resolved, 1,669 forwarded to its Department of Analysis and Evaluation,<sup>56</sup> and 605 directed to other relevant authorities, according to the Ministry.<sup>57</sup> UNAMA has acknowledged the complaint-handling function and provides a few documented examples where the MPVPV's intervention helped protect the rights of Afghans (for example, the MPVPV reportedly stopped the sale of a girl by her father and disciplined two officials whose abuse of members of the public had gone viral).<sup>58</sup> However, UNAMA also raises serious questions about the effectiveness of the complaint handling mechanism to address public complaints, especially from female complainants since the ministry lacks any female staff.<sup>59</sup>

### Military Courts

The de facto military courts initially operated outside the normal judiciary, however, the Emir later decreed merging them into the judiciary, with the head of military courts now one of three deputies of the de facto Chief Justice.<sup>60</sup> Even after this merger, Tai'ziri punishments issued by

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<sup>56</sup> This is a department under the MPVPV which is tasked with analyzing and evaluating the complaints received.

<sup>57</sup> <https://www.afghanistan-analysts.org/en/reports/political-landscape/how-the-emirate-wants-to-be-perceived-a-closer-look-at-the-accountability-programme/> pp. 22-23

<sup>58</sup> [https://unama.unmissions.org/sites/default/files/moral\\_oversight\\_report\\_english\\_final.pdf](https://unama.unmissions.org/sites/default/files/moral_oversight_report_english_final.pdf) p. 18

<sup>59</sup> [https://unama.unmissions.org/sites/default/files/moral\\_oversight\\_report\\_english\\_final.pdf](https://unama.unmissions.org/sites/default/files/moral_oversight_report_english_final.pdf) p. 19

<sup>60</sup> OG 01432 p. 88.

the military courts are deemed final and not subject to appeal to the de facto Court of Discernment (the second court of appeal within the de facto judiciary). The military court is responsible for claims made by any member of the de facto authorities against another; members of the public cannot bring claims *directly* before the military courts. Ostensibly, internal oversight bodies such as the MPVPV or the Military Clearance Committee<sup>61</sup> could also refer to a violation to the military courts. It is not clear whether there is a distinction between armed and civilian members of the de facto authorities when it comes to the courts' jurisdiction, which could indicate continuing tension in the transition from an armed insurgency to a de facto government.

### High Directorate of Supervision and Prosecution of Decrees and Edicts

An addition to the de facto authorities' oversight system is the High Directorate of Supervision and Prosecution of Decrees and Edicts ("High Directorate"), which was established by decree in March 2023. It replaces the former government's Attorney General's Office. According to Article 2(2) of the law that established it, one of the objectives of the High Directorate is to "safeguard individual and public sharia rights." It also exercises oversight over the investigative bodies of the de facto authorities to ensure the "legality" of their activities.<sup>62</sup> The High Directorate is empowered to take measures to prevent the "detention of persons without cause and the imposition of unlawful restrictions on their rights" and "prevent torture."<sup>63</sup> Article 8 empowers the High Directorate to exercise oversight over detention facilities in order to ensure compliance with the law. It has the authority to hear complaints from inmates and detainees, interview them, and conduct site visits.<sup>64</sup>

The High Directorate also monitors social media and media for violations of the de facto authorities' laws in order to take appropriate action.<sup>65</sup> Article 11 of the law empowers the High

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<sup>61</sup> This Committee has been set up to investigate and remove "undesirable elements" from the rank of Taliban. By the end of 2021, the Committee had claimed it had removed 2000 "undesirable" individuals from the ranks. Individuals were removed for various reasons including abuse of power. The Committee has said that it referred many those who are removed to the military courts. <https://www.bbc.com/persian/afghanistan-59781416>

<sup>62</sup> Article 7(1)

<sup>63</sup> Article 7(2)

<sup>64</sup> Article 8.

<sup>65</sup> Article 10.

Directorate to issue administrative decisions against violators and refer violations that are criminal in nature to the relevant authorities. The High Directorate is supposed to produce quarterly reports to submit to the Emir. Ostensibly to ensure independence, the High Directorate is to “receive instructions directly from the person of the Leader.”<sup>66</sup>

Despite having a seemingly robust mandate to curb abuse by the de facto authorities, the High Directorate does not yet seem fully functional. UNAMA’s recent report says that its impact on the mandate of de facto MPVPV remains to be seen.<sup>67</sup>

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<sup>66</sup> Article 21.

<sup>67</sup> [https://unama.unmissions.org/sites/default/files/moral\\_oversight\\_report\\_english\\_final.pdf](https://unama.unmissions.org/sites/default/files/moral_oversight_report_english_final.pdf)

## V. WOMEN’S RIGHTS AND GENDER JUSTICE

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### Violations of Women’s Rights and Gender-Based Crimes

Throughout the course of the Afghan conflict since 1978, Afghan women have been utilized as weapons of war, as “pawns in men’s power struggles.”<sup>68</sup> Despite their inactive role in the fighting, they have been subjected to a range of human rights violations by all parties to the conflict. Interview participants for this research unequivocally stated that Afghan women have been the primary victims. One participant stated: “Women and girls have remained war victims throughout the war as they are continuously exposed to all forms of discrimination, abuse and violence in different periods in Afghanistan.” Yet, the violent conflicts in Afghanistan have hardly been studied and analysed through the lens of women and girls’ lived experiences, except the last three years where a homegrown resistance of Afghan women started to challenge the male-dominated narrative.

Since their takeover of Afghanistan in August 2021, the Taliban have decreed dozens of restrictions on the fundamental rights of women and girls that include but are not limited to education, work, freedom of expression and freedom of movement. Other violations include, inter alia, the abolition of legal protections and accountability mechanisms for gender-based violence; shutting down shelters and other services to victims of domestic violence; sending victims back to abusers, punishing men for not controlling women and girls, releasing abusers, and undoing survivors’ divorces. Furthermore, the Taliban have resorted to repression of peaceful protests with arbitrary arrest, detention, torture, and corporal punishment.<sup>69</sup> The psychological toll of these multiple rights deprivations on women and girls are especially apparent in the reported increase in young women and girls’ suicides. With the Taliban’s policies only worsening over its three years in control, transgenerational harm will continue to reverberate.

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<sup>68</sup> Amnesty International, November 1999, *Women in Afghanistan: Pawns in men’s power struggles*, <https://www.amnesty.org/en/documents/asa11/011/1999/en/>

<sup>69</sup> For an in-depth assessment of the situation of women and girls under the Taliban rule, see *Situation of women and girls in Afghanistan: Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls*, U.N. HUMAN RIGHTS COUNCIL, A/HRC/53/21 (June 15, 2023).

During the first Taliban rule, like now, Afghan women were deprived of almost all their basic human rights. A plethora of decrees were issued by the Taliban prohibiting women from working outside the home, with the exception of the health sector, stopping girls' education, restricting women's freedom of expression, movement and association, and enforcing a rigorous dress code. Although these restrictions primarily impacted educated and professional women in urban areas, they were imposed countrywide. Some called the "institutionalized regime of discrimination against women" in the 1990s the international crime of gender-based persecution.<sup>70</sup>

Gender-based crimes and discrimination and violence against women, though heightened in scale under the Taliban, have a long history in Afghanistan under different regimes.

During the period 1978-2001, hundreds of thousands of women and children were victims of indiscriminate bombing and landmines. Like men, women have been victims of deliberate and arbitrary killings, disappearances, and torture.<sup>71</sup> Although the PDPA promised women equal rights, mandatory education, and protection from forced, arranged, and underage marriages, many Afghans objected, especially in rural areas, to the imposition of such practices often carried out with repression and violence. Millions of women were left to provide for the family as the main breadwinners were either killed, injured, or vanished during the war. Afghanistan is thought to have at least two million widows, many of them war widows.<sup>72</sup>

The situation of Afghan women deteriorated further during the civil war under the mujahideen. Already during their tenure in Pakistan, many mujahideen groups, backed by General Zia-ul-Haq's regime, which adhered to their strict interpretation of Islam, used their control over refugee camps to impose their particular interpretation of women's roles.<sup>73</sup> Upon seizing control of Kabul, the mujahideen imposed a mandatory hijab and a ban on female news reporters on

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<sup>70</sup> Widney Brown and Laura Grenfell, 2003, The international crime of gender-based persecution and the Taliban, Melbourne Journal of International Law, Vol 4, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3396224](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3396224)

<sup>71</sup> Amnesty International, November 1999, Women in Afghanistan: Pawns in men's power struggles, <https://www.amnesty.org/en/documents/asa11/011/1999/en/>

<sup>72</sup> Afghanistan Analyst Network, 4 June 2023, The Daily Hustle: Being a widow in Afghanistan, <https://www.afghanistan-analysts.org/en/reports/economy-development-environment/the-daily-hustle-being-a-widow-in-afghanistan/>

<sup>73</sup> ICG, Women and Conflict in Afghanistan, October 2013, <https://www.crisisgroup.org/asia/south-asia/afghanistan/women-and-conflict-afghanistan>

television among their first decrees.<sup>74</sup> Women were ordered not to “leave their homes unless absolutely necessary” and not to “walk gracefully or with pride.”<sup>75</sup> The armed groups used traditional norms as “weapons of war, engaging in rape and sexual assault against women as an ultimate means of dishonouring entire communities and reducing people’s capacity to resist military advances.”<sup>76</sup>

During the period 1992-1995, armed mujahidin troops raped many women, as young as 13 or 15 years old, which was seen by their leaders as a method of intimidating the population and rewarding their soldiers. They also took women hostage to sell into prostitution or exploit for sex.<sup>77</sup> Many Afghan women were targeted on the basis of their religious or ethnic identity. Afghan women have reported to have had the highest levels of sexual insecurity under the mujahideen rule.<sup>78</sup> A research participant stated: “during [the] civil war women and girls were exposed to rape, forced marriages, abductions and disappearances.”

Following the attacks of September 11<sup>th</sup>, the condition of Afghan women under the Taliban became one of the cornerstones of the US-led NATO intervention in Afghanistan. There was a notable development in the social, political, and legal standing of Afghan women. The 2004 constitution guaranteed gender equality, Afghanistan ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 2003, and in 2009 the president decreed the Elimination of Violence Against Women law. Afghanistan also developed an action

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<sup>74</sup> Sima Samar, 2019, Feminism, Peace, and Afghanistan, <https://jia.sipa.columbia.edu/news/feminism-peace-and-afghanistan>

<sup>75</sup> Anand Gopal, 6 September 2021, The Other Afghan Women, <https://www.newyorker.com/magazine/2021/09/13/the-other-afghan-women>

<sup>76</sup> Amnesty International, November 1999, Women in Afghanistan: Pawns in men’s power struggles, p. 2, <https://www.amnesty.org/en/documents/asa11/011/1999/en/>

<sup>77</sup> Due to this situation, some fathers felt compelled to kill their own daughters before they were taken by the mujahideen groups or commanders; some young women committed suicide.

<sup>78</sup> Amnesty International, November 1999, Women in Afghanistan: Pawns in men’s power struggles, <https://www.amnesty.org/en/documents/asa11/011/1999/en/>; Aisah Ahmad, June 2006, Afghan Women: The State of Legal Rights and Security, [https://www.jstor.org/stable/pdf/42909150.pdf?refreqid=fastly-default%3Aecccba923f24594aa7b77976166cbd9d&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www.jstor.org/stable/pdf/42909150.pdf?refreqid=fastly-default%3Aecccba923f24594aa7b77976166cbd9d&ab_segments=&origin=&initiator=&acceptTC=1); Huma Ahmed-Ghosh, May 2003, A History of Women in Afghanistan: Lessons Learnt for the Future or Yesterdays and Tomorrow: Women in Afghanistan, <https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1577&context=jjws>



plan on UN resolution 1325. A protective legal framework provided the opportunity for women, particularly in urban areas, to participate in all spheres of public life.<sup>79</sup>

However, given the amount of money and other forms of support that donor countries provided under the guise of women’s empowerment, these opportunities were rarely realized by the majority of Afghan women who reside in rural areas of the country. Donor support for government and civil society initiatives were often focused on “quick-impact, high-visibility” programs, with little attention to sustainability and accessibility, particularly for rural women.<sup>80</sup>

Threats and attacks against women from all sides further shrank the possibility of meaningful women’s participation in the public, political and social spheres. Due to security threats, girls’ school enrolment in areas drastically decreased by 2014, despite an initial increase in girls’ school enrolment in 2002.<sup>81</sup> Afghan women journalists and public officials came under threat in targeted attacks across Afghanistan, which increased during the intra-Afghan peace negotiations.<sup>82</sup> Numerous female leaders in public positions as heads of Women’s Rights Directorates, top police officials, educators, and supreme court judges were killed in attacks between 2001 and 2021.<sup>83</sup> Additionally, death and injuries of Afghan women as a result of suicide attacks and arial bombings increased.<sup>84</sup> Rural women in particular have suffered immensely as a result of the US-led war, bearing the brunt of the violence.<sup>85</sup>

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<sup>79</sup> AIHRC, Women’s Rights and Peace Process, June 2021, <https://www.aihrc.org.af/media/files/Womens%20Rights%20and%20Peace%20Process%20Discussion%20Paper.pdf>

<sup>80</sup> ICG, Women and Conflict in Afghanistan, October 2013, <https://www.crisisgroup.org/asia/south-asia/afghanistan/women-and-conflict-afghanistan>

<sup>81</sup> AIHRC, March 2020, Report on girls’ access to education in Ghazni and Faryab provinces.

<sup>82</sup> HRW, Afghanistan: Taliban Target Journalists, Women in Media, 1 April 2021, <https://www.hrw.org/news/2021/04/01/afghanistan-taliban-target-journalists-women-media?ref=securitypraxis.eu>

<sup>83</sup> The Guardian, 26 September 2006, Taliban kill top Afghan woman, <https://www.theguardian.com/world/2006/sep/26/afghanistan.gender>; BBC, Top Afghan policewoman shot dead, 28 September 2008, <http://news.bbc.co.uk/2/hi/europe/7640263.stm>

<sup>84</sup> HRW, 2018 World Report, Afghanistan 2017, <https://www.hrw.org/world-report/2018/country-chapters/afghanistan?page=2#49dda6>

<sup>85</sup> Anand Gopal, 6 September 2021, The Other Afghan Women, <https://www.newyorker.com/magazine/2021/09/13/the-other-afghan-women>

Despite their long history and widespread occurrence in Afghanistan over the years, comparatively few gender-based crimes committed have been investigated or prosecuted, highlighting the urgent need for accountability.

## Accountability for Gender-Based Crimes

### A. Gender Persecution as a Crime Against Humanity

There is a reasonable basis to believe that the Taliban’s discriminatory edicts, policies, and practices vis-à-vis women and girls violate the Rome Statute of the International Criminal Court (ICC). In particular, the Taliban’s policies and actions may amount to the crime against humanity of gender persecution under Article 7(1)(h) of the Rome Statute. In his June 2024 report, the Special Rapporteur on the human rights situation in Afghanistan called the systematic and discriminatory denial of fundamental rights of women, girls, and LGBTQI+ people the crime against humanity of gender persecution.<sup>86</sup> Several international organizations have also demonstrated in their analysis that, by enforcing these rights deprivations on the basis of gender, the Taliban is committing gender persecution.<sup>87</sup>

In order to impose their policies and decrees depriving women, girls and LGBTQI+ persons of their fundamental rights to education, employment, freedom of movement and expression, among others, the Taliban have used detention, torture, and enforced disappearances to punish those contravening their imposed rules and regulations. Human rights organisations have documented cases of sexual violence against detainees; the UN special rapporteur has noted receiving reports of such abuse.<sup>88</sup> The murder of a girls’ schoolteacher, or the torture of

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<sup>86</sup> The phenomenon of an institutionalized system of discrimination, segregation, disrespect for human dignity and exclusion of women and girls: Report of the Special Rapporteur on the situation of human rights in Afghanistan, UN Human Rights Council, A/HRC/56/25, 18 June 2024

<sup>87</sup> See generally The Taliban’s war on women: The crime against humanity of gender persecution in Afghanistan, AMNESTY INTERNATIONAL (Mar. 2023); <https://www.amnesty.org/en/documents/asa11/6789/2023/en/>; Institute for Gender, Law and Transformative Peace and MADRE, Gender Persecution in Afghanistan: A Crime Against Humanity, Part one March 2023, <https://www.madre.org/wp-content/uploads/2023/04/Afghanistan-Report-2023.pdf> and Part two January 2024: <https://www.madre.org/wp-content/uploads/2024/03/Afghanistan-Gender-Persecution-2024.pdf>; HRW, Afghanistan Under the Taliban: The Crime Against Humanity of Gender Persecution, September 2023, [https://www.hrw.org/sites/default/files/media\\_2023/09/Gender%20Persecution%20final\\_060923.pdf](https://www.hrw.org/sites/default/files/media_2023/09/Gender%20Persecution%20final_060923.pdf)

<sup>88</sup> Human Rights Watch, “*Even If You Go to the Skies, We’ll Find You*” LGBT People in Afghanistan After the Taliban Takeover, January 26, 2022, <https://www.hrw.org/report/2022/01/26/even-if-you-go-skies-well-find-you/lgbt-people-afghanistan-after-taliban-takeover>; Report of the Special Rapporteur on the situation of human rights in Afghanistan, “The phenomenon of an

someone who protests policies that eliminate girls' schools are clear deprivations of the rights to life and to be free from torture. Because they are committed on the basis of gender, they are also meant to deprive a targeted group of additional fundamental rights, namely to education, assembly and expression. These facts fulfil the legal elements of gender persecution.

The ICC should investigate these violations and hold the perpetrators accountable. In its analysis, it must apply an intersectional lens because of the combined effects of discrimination based on gender and other intersecting identities, particularly ethnicity and religion. By understanding and charging the Taliban's acts as gender persecution, accountability mechanisms can unearth the discrimination driving their crimes, while also highlighting their violations of fundamental economic, social, cultural and political rights. States can also investigate and prosecute gender persecution under universal jurisdiction.

## B. Criminalization of Gender Apartheid

The characterization of the situation of women under Taliban rule as "gender apartheid" is not a new phenomenon. Indeed, the term "apartheid" was first used in the late 1990s in reference to the Taliban's systematic discrimination against women and girls during the group's first time in power.<sup>89</sup> Although activists and experts have employed gender apartheid framing, it is neither legally recognized as a criminal offense or prohibited act under international criminal law, nor is it considered a violation of human rights under international human rights law. While apartheid on the basis of race is considered a crime against humanity, for instance under Article 7(2)(h) of the Rome Statute, gender apartheid lacks proper legal footing.

The situation of women and girls under Taliban rule warrants adapting the definition of the crime against humanity of apartheid, under Article 7(2)(h) of the Rome Statute, to also encompass gender.<sup>90</sup> Gender apartheid could thus be defined as "inhumane acts committed in the context of

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institutionalized system of discrimination, segregation, disrespect for human dignity and exclusion of women and girls Report of the Special Rapporteur on the situation of human rights in Afghanistan,"

<sup>89</sup> See Civil and Political Rights, Including Religious Intolerance: Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18, E/CN.4/1999/58, U.N. ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS (Jan. 11, 1999).

<sup>90</sup> See, e.g., Situation of women and girls in Afghanistan: Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, U.N. HUMAN RIGHTS COUNCIL, A/HRC/53/21, ¶ 95 (June 15, 2023).

an institutionalized regime of systematic oppression and domination by one group over another group or groups, based on gender, and committed with the intention of maintaining that regime.”<sup>91</sup> A key aspect in the process of codification of gender apartheid as a crime under international law is an inclusive definition that would encompass all targeted groups recognized under customary international law and gender persecution, including LGBTQI+ persons.

Besides the Rome Statute, gender apartheid should also be classified as a crime against humanity under Article 2 of the Draft Articles on the Prevention and Punishment of Crimes Against Humanity, currently undergoing review by the UN General Assembly.<sup>92</sup> An increasing number of experts both inside and outside the UN, including the UN special rapporteur on Afghanistan, have called for codifying gender apartheid as a crime under international law.

Institutionalized gender-based discrimination and oppression violate the UN Charter and international human rights law and cannot be justified by the Taliban’s purported cultural or religious bases.<sup>93</sup> Appropriately framing the current situation of Afghan women and girls as “gender apartheid” also underscores an obligation for states to address these grave violations.<sup>94</sup> While it is vital to make gender apartheid a crime under international law, it will not be retroactively applied to crimes occurring now. It is thus critical to guarantee accountability for gender persecution, a charge that currently could be applied to crimes the Taliban have committed to impose and implement systematic gender discrimination, such as the denial of basic rights like education.

### C. Initiating a CEDAW Case at the ICJ

The ICJ thus provides an important platform for subjecting the Taliban’s gender-based violations to judicial scrutiny. For more on this see section VI below.

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<sup>91</sup> Draft articles on prevention and punishment of crimes against humanity: Recommendations from the Working Group on discrimination against women and girls, UN Human Rights Council, A/ HRC/WG.11/40/1, 15 February 2024, <https://www.ohchr.org/sites/default/files/documents/issues/women/wg/a-hrc-wg11-40-11-aev.pdf>

<sup>92</sup> See, e.g., *Gender apartheid must be recognised as a crime against humanity, UN experts say*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Feb. 20, 2024), <https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say>.

<sup>93</sup> *Id.* at ¶ 96; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, at 16.

<sup>94</sup> Situation of women and girls in Afghanistan: Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, U.N. HUMAN RIGHTS COUNCIL, A/HRC/53/21, ¶ 96 (June 15, 2023).

## D. Recognizing Afghan Women and Girls as Prima Facie Refugees

The crime against humanity of gender persecution could also provide a ground for humanitarian protection. Article 1A(2) of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) defines a refugee as having a “well-founded fear of persecution” on the basis of race, religion, nationality, membership in a specific social group, or political opinion.<sup>95</sup> It does not include “gender” among the identified grounds nor does it explicitly define persecution. The United Nations High Commissioner for Refugees (UNHCR) has developed a series of guidelines and amicus briefs on gender persecution in the context of refugee status.<sup>96</sup> A 2022 UNHCR amicus memo defines persecution as acts “involv[ing] serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm.”<sup>97</sup> UNHCR encourages states to create laws and processes that take gender into account when defining refugees.

Referring to the situation in Afghanistan, UNHRC has stated that with discrimination and violence against women pervasive following the Taliban takeover, protection solely on the basis of gender may be granted.<sup>98</sup> Acknowledging that the cumulative effect of discriminatory measures against Afghan women and girls amounts to persecution on the basis of gender, a number of European countries, including Sweden, Denmark, and Finland, decided to grant protection to Afghan women on the grounds of their “membership to a particular social group defined by gender.”<sup>99</sup> Other states should follow this example.

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<sup>95</sup> Convention relating to the Status of Refugees, Art. 1A (2).

<sup>96</sup> See HCR/GIP/02/01, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002

<sup>97</sup> It states that additional types of harm could be cumulatively considered persecution, and that this depends on other factors, including age and gender. Based on jurisprudence pertaining to refugees in different countries, UNHCR emphasizes that the “severity of the measures and sanctions” against persons and their effects must be taken into account when determining whether an act qualifies as persecution. UNHCR, Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan, 25 May 2023, p. 2.

<sup>98</sup> It acknowledged that in such situations, a state may permit acts of violence, neglect to offer protection due to discriminatory laws or practices, or take up persecutory measures themselves. UNHCR, Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan, 25 May 2023.

<sup>99</sup> UNHCR, Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan, 25 May 2023. See also: Swedish Migration Agency, Legal Position on the Protection Needs Assessment for Nationals from Afghanistan, RS/089/2021; <https://lifos.migrationsverket.se/dokument?documentSummaryId=47090>; Denmark, Refugee Appeals Board, The Refugee Board Grants Asylum to Women and Girls from Afghanistan, 30 January 2023, <https://fln.dk/da/Nyheder/Nyhedsarkiv/2023/30012023>.

## VI. ACCOUNTABILITY OPTIONS OUTSIDE AFGHANISTAN

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The pursuit of justice and accountability for grave human rights violations and atrocity crimes committed in Afghanistan over the past four decades remains a critical concern for Afghan survivors, affected communities, and the relatives of victims. As the situation remains dire under the de facto rule of the Taliban—one of the alleged perpetrators who have committed numerous severe human rights violations with impunity over the last three decades—exploring accountability mechanisms outside the country is increasingly vital. This section aims to provide a broad overview of the potential mechanisms that could deliver justice, combat impunity, and deter future crimes in Afghanistan. These include:

- International judicial bodies, such as the International Criminal Court (ICC) and the International Court of Justice (ICJ).
- Regional judicial bodies, like the European Court of Human Rights (ECHR).
- United Nations mandates, such as special procedures and treaty-based mechanisms.
- Domestic investigations, including those under universal jurisdiction.
- Civil litigation and indirect accountability methods.

This section examines each of these in terms of their applicability, challenges, strengths and limitations, and potential impact on advancing accountability. Given the complexity and multidimensional nature of conflicts in Afghanistan, a diverse but integrated range of accountability mechanisms, both judicial and non-judicial, may provide the most effective strategies to combat impunity and deliver justice.

Specific challenges hinder accountability efforts. These include:

- Jurisdictional restrictions can limit territorial, subject-matter, and temporal limits;
- Political resistance, such as the US hostility toward the ICC;
- Operational hurdles, such as difficulties in gathering evidence, can limit the scope of investigation and victims/survivors' participation;
- Resource constraints that can impede effective investigations.

As one participant asked, “*Would the UN investigate itself, or would they be willing to address abuses by the US, UK, France, Australia, Holland etc? Would a Western-based organization be willing to hold the Taliban and Massoud under the same levels of scrutiny?*”

This section will address these obstacles and propose potential solutions to overcome them.

## International Criminal Court (ICC)

### Jurisdiction and Scope

The International Criminal Court (ICC), established by the Rome Statute in 1998, is a permanent court that holds jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression perpetrated after its establishment in July 2002. Afghanistan's accession to the Rome Statute on 1 May 2003 allows the ICC to investigate and prosecute atrocity crimes committed on its territory, providing a legal framework for addressing some of the extensive human rights abuses that have plagued Afghanistan for decades.<sup>100</sup>

### Current ICC Investigations

The ICC investigation's scope for Afghanistan is:

*In relation to alleged crimes committed on the territory of Afghanistan since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties since 1 July 2002.*<sup>101</sup>

*Background:* In 2017, after a decade of preliminary examination, the former ICC Prosecutor, Fatou Bensouda, requested the Pre-Trial Chamber II (PTC) to investigate alleged war crimes and crimes against humanity attributed to the Taliban, the affiliated Haqqani Network, the US military and CIA, and the Afghanistan Republic's national security forces. Other groups, such as

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<sup>100</sup> States Parties to the Rome Statute. (2004). The International Criminal Court. <https://asp.icc-cpi.int/states-parties/asian-states/afghanistan>.

<sup>101</sup> Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18(2) of the Statute authorizing the Prosecution to resume investigation”. (2023). The International Criminal Court. <https://www.icc-cpi.int/court-record/icc-02/17-218>

the Islamic State–Khorasan Province (ISKP) and Hezb-e Islami Hekmatyar, were also mentioned.<sup>102</sup> The PTC did not authorise the request, but an Appeal Chamber in March 2020 did.<sup>103</sup>

In March 2020, the Afghanistan Republic utilised its right under Article 18 of the Statute to defer the investigation on the grounds that its domestic institutions were already investigating the allegations. The deferral was in force until the Republic’s collapse on 15 August 2021. Following the Taliban takeover, the current ICC Prosecutor, Karim Khan, sought and received authorisation from the PTC on 31 October 2022 to resume the investigation.<sup>104</sup>

## Focus of Investigations

In September 2021, when Karim Khan requested the PTC II to resume the Court’s Afghanistan investigation, he announced plans to prioritise incidents involving ongoing atrocity crimes committed by the Taliban and the ISKP and deprioritise those against the US Army, its CIA, the Afghan former government’s security forces. The reason he provided was the "gravity, scale and continuing nature of alleged crimes" by ISKP and the Taliban, as well as his office resource limitations.<sup>105</sup> While this decision reflected a complex balancing act between practical limitations and the pursuit of justice, human rights groups criticised the decision for taking a position that essentially exempted the nationals from a powerful country—and a harsh critic of the ICC—and its allies from scrutiny.<sup>106</sup> Considering the scale of atrocities in Afghanistan, the ICC’s limited approach creates the perception of selective justice and a hierarchy among victims, which could

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<sup>102</sup> Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp. (2017). The International Criminal Court. <https://www.icc-cpi.int/court-record/icc-02/17-7-red>

<sup>103</sup> Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan. (2020). The International Criminal Court. <https://www.icc-cpi.int/court-record/icc-02/17-138>

<sup>104</sup> Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation. (2022). The International Criminal Court. <https://www.icc-cpi.int/court-record/icc-02/17-196>

<sup>105</sup> Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan. (2021). The International Criminal Court. <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>

<sup>106</sup> Afghanistan: ICC Prosecutor’s statement on Afghanistan jeopardises his Office’s legitimacy and future. (2021). Amnesty International. <https://hrij.amnesty.nl/afghanistan-icc-prosecutors-statement-on-afghanistan-jeopardises-his-offices-legitimacy-and-future/>



increase mistrust against international institutions perceived as biased toward the global north.<sup>107</sup> According to one participant, the ICC’s approach has “*ignored the war crimes committed by warlords, former security forces and international forces in Afghanistan and has failed to provide a redress to the families of victims [of] past atrocities.*”

## Challenges and Constraints

The ICC faces multifaceted challenges in its efforts to investigate and prosecute crimes in Afghanistan:

- *Jurisdictional Limitations:* The Rome Statute limits the ICC's jurisdiction to international crimes committed within the territories of state parties or by their nationals after Afghanistan's accession to the Rome Statute in 2003. This focus may inadvertently marginalise other victims outside those parameters.
- *Political Challenges:* Geopolitical dynamics have complicated the ICC's efforts. The US's antagonistic stance towards the ICC has undermined the Court's ability to function impartially and effectively.<sup>108</sup> The Taliban's status as de facto authorities without international legal recognition complicates diplomatic relations and legal proceedings, as engaging directly with the Taliban risks implying legitimacy while relying on representatives of the former Republic could undermine perceptions of neutrality and belies political realities. The ICC must navigate these complexities amid the Taliban's strict adherence to sharia law, which they claim supersedes international law, further challenging the Court’s authority.
- *Complementarity Principle:* The ICC's complementarity principle requires deference to national jurisdictions willing and able to prosecute crimes. Under the Taliban's de facto rule, Afghanistan could challenge the admissibility of cases under Article 19 of the Statute. Though unlikely, if they were willing to investigate the allegations, they could delay the investigation.

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<sup>107</sup> Clark, Kate. (2021). Creating a Hierarchy of Victims? ICC may drop investigations into US forces to focus on Taleban and ISKP. Afghanistan Analysts Network. <https://www.afghanistan-analysts.org/en/reports/rights-freedom/creating-a-hierarchy-of-victims-icc-may-drop-investigations-into-us-forces-to-focus-on-taleban-and-iskp/>

<sup>108</sup> Under the Trump administration, the US conducted a hostile campaign against the ICC, sanctioning Bensouda and her colleagues. Executive Order 13928 of June 11, 2020. (2020). White House. <https://www.govinfo.gov/content/pkg/FR-2020-06-15/pdf/2020-12953.pdf>

- *Lack of Cooperation:* The absence of a comprehensive legal framework for cooperation between Afghanistan and the ICC significantly impairs the Court's operations. Effective investigations depend on robust legal mechanisms for evidence collection, witness protection, and suspect extradition. The de facto authorities have shown little inclination to cooperate with ICC investigations. Additionally, the US's hostile position toward the ICC and its Bilateral Immunity Agreements (BIAs) with other countries, exempting its nationals from ICC jurisdiction, further erodes cooperation with the Court.
- *Logistical Hurdles:* Logistical obstacles complicate the collection of evidence, communication with survivors and witnesses, and the protection of witnesses. Advances in technology for evidence gathering and remote communication could improve the ICC's ability to collect and analyse data.
- *Resource Constraints:* Stringent resource limitations constrain the Court's ability to effectively pursue all cases within its jurisdiction, compelling it to prioritise certain cases over others, potentially leaving many victims without recourse to justice. Current investigations in Ukraine and Palestine highlight the challenges of addressing multiple conflicts simultaneously.
- *Lengthy Proceedings:* The ICC's proceedings, including gathering evidence, securing witness testimony, and ensuring due process, are lengthy, which can delay justice for victims and affected communities. Afghanistan has been in their focus since 2006.
- *Confidentiality Restrictions:* These are designed to protect sensitive information, the integrity of the process, and safety of witnesses, but limit public access to case details and create frustration for those seeking transparency. Balancing these remains a significant challenge.

## Potential Impact of ICC Involvement

Despite these challenges, the ICC's role in Afghanistan remains crucial. By focusing on some of the most egregious crimes, the ICC can contribute to breaking the cycle of impunity in Afghanistan. Through its investigations and potential prosecutions, the ICC not only has jurisdiction to address past and ongoing atrocities but also to reinforce international legal norms in a country long marred by conflict and instability. It may also break new ground in addressing the Taliban's systemic violence, particularly against women and girls, which may constitute crimes against humanity of gender persecution under Article 7(1)(h) of the Rome Statute. Additionally, targeted attacks by ISKP and discriminatory policies by the Taliban against the

Hazara Shia community could potentially be classified as crimes against humanity, and even genocide under Articles 7 and 6, respectively.<sup>109</sup>

## International Court of Justice (ICJ)

### Role and Jurisdiction

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Its primary function is to settle legal disputes between states, such as the case South Africa brought against Israel, or the case Gambia brought against Myanmar.<sup>110</sup> Both Israel and Myanmar were accused of violating the UN Convention on the Prevention and Punishment of the Crime of Genocide as an international treaty.<sup>111</sup>

### Basis for Bringing a Case Against Afghanistan

Afghanistan, as a party to several international treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is legally bound to uphold the rights enshrined in these agreements.<sup>112</sup> Since taking power in August 2021, the Taliban have institutionalised the systematic erosion of women's and girls' rights in Afghanistan, constituting multiple violations of CEDAW.<sup>113</sup> Article 29 of CEDAW allows for disputes concerning the interpretation or application of the Convention to be referred to the ICJ, provided the involved states have accepted the Court's jurisdiction. Afghanistan's ratification of CEDAW includes acceptance of Article 29, thereby opening a pathway for an ICJ case.<sup>114</sup>

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<sup>109</sup> Mehdi, J. Hakimi. (2023). *Relentless Atrocities: the Persecution of Hazaras*. 44 *Michigan Journal of International Law* 157.

<sup>110</sup> The ICJ can also provide advisory opinions on legal questions referred by authorised international agencies.

<sup>111</sup> Arnpriester, Natasha et al. (2024). *Bringing a Case Before the International Court of Justice for the Rights of Afghan Women and Girls*. Open Society Justice Initiative. <https://www.justiceinitiative.org/uploads/77b7185d-7ba6-4ef9-8fa5-a7155234b0de/Q&A-Litigating-for-the-Rights-of-Afghan-Women-and-Girls-Before-the-ICJ-Final.pdf>

<sup>112</sup> View the acceptance of procedures and the ratification status by country or by treaty. (n.d.). Office of the High Commissioner for Human Rights. [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN)

<sup>113</sup> Bennett, Richard. (2024). *The phenomenon of an institutionalized system of discrimination, segregation, disrespect for human dignity and exclusion of women and girls*. The United Nations Human Rights Council. <https://documents.un.org/doc/undoc/gen/g24/075/00/pdf/g2407500.pdf?token=YDmnsZ3zXNMZ8jnzUt&fe=true>

<sup>114</sup> For further discussion on the feasibility of bringing a CEDAW case at the ICJ, see *Bringing a Case Before the International Court of Justice for the Rights of Afghan Women and Girls: Q&A Briefing*, Open Society Justice Initiative (Apr. 2024), <https://www.justiceinitiative.org/uploads/77b7185d-7ba6-4ef9-8fa5-a7155234b0de/Q&A-Litigating-for-the-Rights-of-Afghan-Women-and-Girls-Before-the-ICJ-Final.pdf>.

## Challenges and Constraints

Bringing a case before the ICJ is fraught with challenges, including but not limited to:

- *Geopolitics*: Only states can bring a case before the ICJ. A case against Afghanistan would need to be brought by another state or a coalition of states that are also parties to the conventions in question, such as CEDAW. Currently, 149 countries have accepted the ICJ's jurisdiction under CEDAW; any could file a case against Afghanistan for breaching its obligations under the convention. Geopolitical considerations can influence such decisions by states. Despite advocacy by some civil society organisations, at the time of writing no state has yet brought a case to the ICJ against Afghanistan.
- *Non-Recognition of the Taliban*: Even though the ICJ's proceedings have made clear that bringing a case against a state does not equate to recognition, some have raised questions about whether pursuing legal action against Afghanistan at the ICJ might appear to inadvertently confer legitimacy on Taliban rule.<sup>115</sup>
- *Compliance and Enforcement*: Even if the ICJ issues a ruling against Afghanistan, the ICJ cannot enforce it; compliance would largely depend on international pressure and the Taliban's willingness to adhere to the ruling.<sup>116</sup> So far, the Taliban have not compromised on their extreme positions in response to any external pressure.

## Strategic Benefits and Potential Impact

An ICJ case against Afghanistan could address the Taliban's failure to protect the rights of women and girls as mandated by CEDAW.<sup>117</sup> The ICJ can issue a range of orders, including:

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<sup>115</sup> A pertinent example is The Gambia's case against Myanmar. In 2019, The Gambia filed a lawsuit at the ICJ accusing Myanmar of committing genocide against the Rohingya people, despite the complexities surrounding Myanmar's political situation and the international community's stance on the non-recognition of Myanmar's military government. This case was significant in illustrating that the ICJ can proceed without conferring legitimacy on a government, as the ICJ focuses on the state's obligations under international law rather than the political recognition of its government. However, despite non-recognition of the Taliban's de facto government, human rights groups have raised concern about some countries' normalisation of relations with the Taliban. Arnpriester, Natasha et al. (2024). Bringing a Case Before the International Court of Justice for the Rights of Afghan Women and Girls. Open Society Justice Initiative. <https://www.justiceinitiative.org/uploads/77b7185d-7ba6-4ef9-8fa5-a7155234b0de/Q&A-Litigating-for-the-Rights-of-Afghan-Women-and-Girls-Before-the-ICJ-Final.pdf>; "Reports of judgments, advisory opinions and orders, application of the convention on the prevention and punishment of the crime of genocide (the Gambia v. Myanmar) request for the indication of provisional measures," (2020). International Court of Justice. <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>

<sup>116</sup> Abbasi, Fereshta et al. (2024). An Avenue to Justice for Afghan Women. The Cambridge Journal of Law, politics, and Art.

<sup>117</sup> For further discussion on the feasibility of bringing a CEDAW case at the ICJ, see *Bringing a Case Before the International Court of Justice for the Rights of Afghan Women and Girls: Q&A Briefing*, OPEN SOCIETY JUSTICE INITIATIVE (Apr. 2024),

- *Declaratory Judgments:* The Court could declare that Afghanistan, under the Taliban, has violated its obligations under CEDAW.<sup>118</sup>
- *Specific Orders:* The Court could order the Taliban to cease discriminatory practices, repeal oppressive laws, and ensure compliance with international standards.<sup>119</sup>
- *Provisional Measures:* The ICJ could issue urgent interim measures to prevent further harm while the case is being decided.<sup>120</sup> In January 2020, the ICJ ordered Myanmar to take all necessary measures to prevent acts of genocide against the Rohingya Muslims. It also ruled in January 2024 that Israel should “protect against further, severe and irreparable harm to the rights of the Palestinian people.”

Pursuing an ICJ case offers several strategic benefits, including:

- *International Attention and Pressure:* Filing a case could draw global attention to the plight of Afghan women and girls, increasing diplomatic pressure on the Taliban.
- *Legal and Moral Authority:* An ICJ ruling against Afghanistan under the Taliban would provide a strong legal and moral basis for further international action toward the Taliban.
- *Complementary to Other Mechanisms:* An ICJ case could complement other accountability mechanisms, as evidence gathered can be used in other legal forums, including the ICC.<sup>121</sup>

## Regional Judicial Bodies

### Overview of Regional Judicial Bodies

Regional judicial bodies play a critical role in enforcing human rights standards and providing recourse for victims of violations within specific geographical regions. Afghanistan is not a member state of any regional human rights system, but the European Court of Human Rights

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<https://www.justiceinitiative.org/uploads/77b7185d-7ba6-4ef9-8fa5-a7155234b0de/Q&A-Litigating-for-the-Rights-of-Afghan-Women-and-Girls-Before-the-ICJ-Final.pdf>.

<sup>118</sup> How the Court Works. (n.d.). The International Court of Justice. <https://www.icj-cij.org/how-the-court-works>

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

(ECHR) has jurisdiction over member states that carried out military operations in Afghanistan.<sup>122</sup>

## ECHR: Potential Application to Afghanistan

The ECHR oversees the implementation of the European Convention on Human Rights. At least one case was brought by an Afghan citizen against one member of ECHR in the case *Hanan v. Germany*.<sup>123</sup>

### Hanan v. Germany (ECHR)

- *Overview:* The case stems from a 2009 German airstrike in Kunduz that killed dozens of civilians, including two sons of Abdul Hanan, the applicant. The airstrike targeted fuel tankers that Taliban insurgents had hijacked. The German government argued that its forces ordered the airstrike out of concern that the tankers could be used for an attack on international forces. Hanan first brought the case to a German domestic court, and then in 2016 to the ECHR.<sup>124</sup>
- *Court Decision:* In 2021, the ECHR ruled that Germany had not violated Article 2 of the Convention, the right to life, and that Germany's investigative efforts, which included military and prosecutorial reviews, were adequate given the challenging context of a military operation in Afghanistan.
- *Implication:* Though the ECHR did not rule in favour of Hanan, it affirmed that the ECHR has jurisdiction over alleged violations committed by its member states in Afghanistan.

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<sup>122</sup> Under Article 1 of the Convention, parties to the Convention shall secure the rights and freedoms defined in the Convention to everyone “within their jurisdiction.” In 2011, the ECHR expanded its interpretation of its jurisdiction to include ‘extraterritorial situations’ such as Afghanistan, Iraq, and Kosovo where member states were operating. The UK has argued against the court’s jurisdiction over these operations. [https://brill.com/view/journals/eclr/5/1/article-p151\\_010.xml?language=en](https://brill.com/view/journals/eclr/5/1/article-p151_010.xml?language=en)

<sup>123</sup> The ECHR has also ruled in a number of cases of Afghans seeking asylum in Europe, including a 2010 case, *N. v Sweden*, in which an Afghan woman successfully argued that she would face persecution if returned to Afghanistan. <https://www.coe.int/en/web/impact-convention-human-rights/-/afghan-woman-facing-gender-based-persecution-saved-from-expulsion>

<sup>124</sup> Thomas Ruttig, “The Incident at Coordinate 42S VF 8934 5219: German court rejects claim from Kunduz airstrike victims,” Afghanistan Analysts Network, December 15, 2013.

## Challenges and Constraints

The ECHR offers a potential avenue for holding its member states accountable for human rights violations committed by their military forces in Afghanistan. However, there are several challenges and constraints in utilising this mechanism:

- *Jurisdictional Limitations:* The concept of extraterritorial jurisdiction is complex. While the ECHR has established that member states can be held accountable for actions taken in areas under their effective control outside their territories, proving such jurisdiction can be legally challenging.<sup>125</sup> The applicant must demonstrate that the state exercised sufficient authority and control over individuals or areas in Afghanistan to trigger ECHR obligations.
- *Admissibility Criteria:* The ECHR requires that the applicant has exhausted all domestic remedies in the accused member state before bringing the case. This process can be lengthy and fraught with obstacles, especially if domestic legal systems are slow or reluctant to acknowledge and investigate alleged abuses by their military forces in Afghanistan.
- *Lack of Evidence:* Most of the human rights violations committed in Afghanistan were not documented properly. Collecting and verifying evidence years after incidents occurred, especially for individual applicants, is extremely difficult.
- *Enforcement:* Enforcing ECHR's rulings depends heavily on the political will and cooperation of the state in question.<sup>126</sup> Political interests and national security concerns can sometimes hinder compliance, reducing the Court's effectiveness in ensuring accountability.

## Strategic Use and Potential Impact

Despite these constraints, the ECHR could serve as a crucial legal venue for individuals to seek justice and for holding EU member states accountable for violations committed by their military forces in Afghanistan. Its mandate to address a broad spectrum of human rights violations,

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<sup>125</sup> Ibid.

<sup>126</sup> Execution of ECHR judgments and decisions. (n.d.). Council of Europe. <https://www.coe.int/en/web/civil-society/execution-of-echr-judgments-and-decisions#:~:text=Responsibility%20for%20carrying%20out%20the,European%20Convention%20on%20Human%20Rights.>

including those that might not meet the ICC’s stringent criteria of international crimes could complement the ICC’s efforts.

The potential impact of ECHR rulings extends beyond individual accountability, as its intervention can lead to policy reforms, changes to military practices, and greater adherence to human rights standards. In this way, the ECHR plays a pivotal role in the EU legal landscape, ensuring scrutiny of human rights violations by EU member states and promoting accountability.

## United Nations Mechanisms

### Overview

The United Nations (UN) has a range of mechanisms to address human rights violations, providing a framework for accountability and justice at the international level. Many UN entities have a human rights mandate and can act directly or assign subsidiary mechanisms to implement it.<sup>127</sup> These include the UN Human Rights Council (UNHRC), the Office of the High Commissioner for Human Rights (OHCHR), and Human Rights Treaty Bodies. By collecting data and conducting analyses, these entities can advocate for accountability, guide policy decisions, and inform international responses to the situation, including for criminal accountability. In addition, the UN General Assembly (UNGA) can issue resolutions and establish monitoring or investigative mechanisms. The UN Security Council can also issue resolutions and impose sanctions.

- *UNHRC*: The UN intergovernmental human rights body has or can establish mechanisms to monitor human rights situations and investigate violations. These mechanisms include investigative missions as well as permanent processes like the Universal Periodic Review (UPR)<sup>128</sup> and Special Procedures.

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<sup>127</sup> D’Alessandra, Federica. (2023). UN accountability Mandates in International Justice. *Journal of International Criminal Justice*, Volume 21, Issue 3. <https://academic.oup.com/jicj/article/21/3/551/7328884>

<sup>128</sup> The UPR process provides a review of the human rights record of all UN member states. It provides an opportunity for states to demonstrate their commitment to human rights and receive recommendations for improvement. In April 2024, Afghanistan had its latest review. It took place while no state recognised the de facto Taliban regime; Afghanistan’s seat at the UN is still held by the former republic government. Normally the UNHRC would provide recommendations, but in this case it was not clear to whom they should address them. NGOs and human rights groups submitted reports in which they shared their concerns about the human situation in Afghanistan.



- *Special Procedures*: These are independent experts appointed by the UNHRC to monitor and report on specific human rights themes or country situations. These include Special Rapporteurs, Independent Experts, and Working Groups.
- Fact-finding mechanisms include Fact Finding Missions (FFM), Commissions of Inquiry (CoI) and International, Impartial, and Independent Mechanisms (IIIM) and can be established by the UNHRC, UNSC or UNGA. CoIs are temporary bodies that investigate human rights situations. They collect information and evidence, document violations, and make recommendations. IIIMs operate independently but are less visible than the others in terms of public reporting. Their findings primarily inform legal processes aimed at fostering criminal accountability.
- *UN Treaty Bodies*: These are committees of independent experts responsible for monitoring the implementation of core international human rights treaties by states that have ratified them, e.g. the Committee on the Elimination of Discrimination against Women (CEDAW) or the Committee against Torture (CAT). Treaty bodies receive and review state parties' regular reports and NGO shadow reports and provide recommendations. Some treaty bodies may also receive individual complaints and initiate inquiries.<sup>129</sup>
- *OHCHR*: It is the principal UN office responsible for promoting and protecting human rights, monitoring and reporting human rights situations, coordinating human rights activities across the UN system, and supporting the work of the UN Human Rights Council and other human rights mechanisms. It is led by the United Nations High Commissioner for Human Rights, who is appointed by the UN Secretary-General and approved by the General Assembly. The High Commissioner is the principal human rights official in the UN system. Its headquarters is in Geneva. It has regional and field offices.
- *UN General Assembly*: In some cases, the UNGA has established investigatory and monitoring mechanisms such as an IIIM. On December 24, 2021, the UN General Assembly's Third Committee passed resolution 76/228 on the situation in Syria, condemning the continued widespread and systematic gross violations of human rights and violations of international humanitarian law by Syrian authorities and armed groups

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<sup>129</sup> These human rights treaty bodies may consider individual complaints or communications from individuals under certain circumstances, depending on whether the concerned state is a party to the relevant optional protocol. See United Nations High Commissioner for Human Rights, "Complaints procedures under the human rights treaties," <https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties>.

and calling on member states to establish a new entity on missing persons to help coordinate and build on existing efforts to address the situation.

- *UN Security Council (UNSC)*: The UNSC can also advance accountability as part of its mandate to maintain international peace and security. It can deploy a number of mechanisms to do so, including through special envoys, economic sanctions, arms embargos, financial penalties and restrictions, travel bans, the severance of diplomatic relations, blockades, or even collective military action.
  - It established the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, in response to mass atrocities committed in both conflicts.
  - In 2000, it called for the establishment of a special court in the Sierra Leone conflict.
  - In 2006 the Security Council called for the establishment of the Special Tribunal for Lebanon.

Acting under Chapter VII of the Charter of the United Nations, the Security Council may refer a situation to the ICC, empowering the ICC to investigate crimes under the Rome Statute without any consent requirement by the States involved. However, in 2005 and again in 2011, the Council passed the associated costs from the UN to the ICC and member states, despite the Rome Statute specifying that the UN should finance any such referrals.<sup>130</sup>

- In 2005 and 2011 the Security Council referred the situations in Darfur and Libya to the ICC.

In recent years, Council members have been less able to agree such referrals:

- The UNSC has not referred the situation in Myanmar to the ICC, despite recommendations to do so by the High Commissioner for Human Rights and the Human Rights Council's Independent International Fact-Finding Mission on Myanmar.<sup>131</sup>
- Due to opposition from Russia and China, the UNSC has not referred the situations in the Democratic People's Republic of Korea or Syria to the ICC.

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<sup>130</sup> "In Hindsight: The Security Council's Quest for Accountability," Security Council Report, December 27, 2018, <https://www.securitycouncilreport.org/monthly-forecast/2019-01/in-hindsight-the-security-councils-quest-for-accountability.php>; Human Rights Watch, "UN Security Council: Address Inconsistency in ICC Referrals," October 16, 2012, <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>.

<sup>131</sup> Akshaya Kumar, "The UN Security Council's Astonishing Silence on Myanmar Atrocities," Human Rights Watch, September 2, 2024, <https://www.hrw.org/news/2024/09/05/un-security-councils-astonishing-silence-myanmar-atrocities>.

- o The US and UK have opposed calls to refer the situation in Israel/Palestine to the ICC.
- o In addition, US insistence that all UNSC referrals to the ICC contain an exemption clause to prevent the ICC from exercising jurisdiction over US nationals has entrenched a dangerous double standard in the Council’s approach.<sup>132</sup>

### Current UN Mechanisms in Place for Afghanistan

- *Special Rapporteur on the Situation of Human Rights in Afghanistan:* The current mandate was established in October 2021 and has been renewed annually. Prior to this, four special rapporteurs held the mandate for Afghanistan from 1984 to 2005. The current mandate is wider than normal as it is empowered to document and preserve information about human rights abuses and violations, and has additional support staff.
- *Other Special Procedure Mandate Holders:* In 2023, mandated by the HRC, the Working Group on Discrimination against Women and Girls joined the UNSR for Afghanistan in the preparation and presentation of a thematic report on the situation of Afghan women and girls. The Working Group on Disappearances has raised concerns about recent and past enforced disappearances in Afghanistan. Other mandate holders regularly join the Special Rapporteur on Afghanistan in making joint statements and communications.
- *OHCHR:* OHCHR is mandated to report annually to the UNHRC on the situation of human rights in Afghanistan and was requested to present at the 57<sup>th</sup> session a “stocktaking of accountability options and processes for human rights violations and abuses in Afghanistan.” OHCHR is mandated to provide support for Special Procedures, including the UNSR for Afghanistan.
- *UNAMA:* UNAMA, now known as Special Political Mission, was established by United Nations Security Council Resolution 1401. UNAMA’s Human Rights Service (HRS) is mandated by the UN Security Council to monitor, report, and advocate on the human rights situation in Afghanistan. It plays a pivotal role in documenting and preserving information on human rights abuses in Afghanistan. Its on-the-ground presence enables the collection of firsthand information. The HRS also provided technical assistance on

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<sup>132</sup> “The Security Council’s Appalling Record of Referring Situations to the ICC,” *Justice in Conflict*, May 23, 2014, <https://justiceinconflict.org/>.

human rights to the Republic and continues to provide it to the de facto authorities. UNAMA has reported regularly on human rights concerns, and from 2009 it began compiling regular quarterly and annual reports on the protection of civilians, from 2011 biannual reports on treatment of conflict-related detainees, and from 2009 on women's rights. UNAMA also contributes to the UN-led Country Task Force on Monitoring and Reporting with the aim to promote accountability and protection of children in the armed conflict. UNAMA has an extensive database of its documentation of human rights abuses and violations.

#### *UNSC sanctions*

- A number of the Taliban senior officials are on the Security Council sanctions list, established under UNSC resolution 1988,<sup>133</sup> due to allegations of their involvement in terrorist activities dating to 1998. These sanctions include asset freezes and travel bans on 135 designated individuals. Since gaining power in 2021, the Taliban de facto authorities have repeatedly requested the UN to remove their people from the UN sanctions list. Security Council members have been divided on maintaining travel ban exemptions that had been put in place years earlier to allow some Taliban officials to travel internationally for peace talks and other meetings. In June 2022 the exemptions for two senior education officials were not extended because of the Taliban's bans on secondary and higher education for women and girls.<sup>134</sup>

## Constraints

- *Legal and Jurisdictional Limitations:* Although Afghanistan is a party to several core international human rights treaties,<sup>135</sup> it has not accepted optional protocols that allow for

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<sup>133</sup> Resolution 1988 had a number of antecedents going back to UNSC 1267 (1999), with some names recurring on all lists.

<sup>134</sup>“UN fails to reach agreement to extend Taliban travel ban waiver,” Al Jazeera, August 20, 2022, <https://www.aljazeera.com/news/2022/8/20/divided-un-council-fails-to-approve-more-top-taliban-travel>.

<sup>135</sup> Afghanistan is a signatory to six core international human rights documents, including the International Covenant on Civil and Political Rights (since 1983), the International Covenant on Economic, Social and Cultural Rights (since 1983), the International Convention on the Elimination of All forms of Racial Discrimination (since 1983), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (since 1987), the Convention on the Rights of the Child (since 1994), the Convention on the Elimination of All Forms of Discrimination Against Women (since 2003), and the Convention on the Rights of Persons with Disabilities (since 2012).

individual complaints, reducing the potential for international oversight and accountability. Moreover, the complex legal landscape under the Taliban's de facto rule further complicates the enforcement of international human rights standards.

- Although limited by Afghanistan's non-ratification of optional protocols, UN treaty bodies can still exert pressure by reviewing state compliance with core human rights treaties and issuing recommendations.

## Universal Jurisdiction

### Overview

Universal jurisdiction is a principle in international law that allows states to claim criminal jurisdiction over an alleged perpetrator, regardless of where the alleged crime was committed and irrespective of the nationality of the perpetrator or the victim. This principle is mainly applied to the most serious crimes of international concern, such as genocide, crimes against humanity, and war crimes.<sup>136</sup> It is a critical tool in the global fight against impunity, ensuring that perpetrators of grave offences can be held accountable even if they are outside the territory where the crimes were committed.

Some countries have incorporated universal jurisdiction into their national laws, allowing their courts to prosecute international crimes if the alleged perpetrator is on their soil. Germany and Belgium do not require the alleged perpetrator to be present in their territories. In addition to these two countries, the Netherlands and Switzerland have established precedents in utilising the universal jurisdiction principle. While contributing to the fight against impunity for international crimes, these countries are ensuring that they do not become safe havens for those who have perpetrated them.<sup>137</sup>

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<sup>136</sup> The legal basis for universal jurisdiction is found in various international treaties and customary international law. Some of the key treaties that support the application of universal jurisdiction include: The Geneva Conventions which mandate states to prosecute or extradite individuals responsible for grave breaches; the Convention Against Torture which requires states to prosecute or extradite alleged torturers found in their territory; and the International Convention for the Protection of All Persons from Enforced Disappearance, which obligates states to exercise jurisdiction over acts of enforced disappearance. Bassiouni, M. Cherif. (2001). *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*. Virginia Journal of International Law, 42(1), 81-162.

<sup>137</sup> Langer, Maximo. (2015). *Universal Jurisdiction is Not Disappearing, The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction*. Journal of International Criminal Justice 13, 245-256.

## Potential Application to Afghanistan

The principle of universal jurisdiction is relevant to Afghanistan, where the domestic legal system has been unable to address widespread human rights violations and war crimes. Throughout the conflict, millions of Afghans, including potential perpetrators and victims, have been displaced, with some residing in countries that apply universal jurisdiction.

- *The UK:* In March 2022 the Metropolitan Police War Crimes Team arrested an Afghan national on allegations of committing murder as a crime against humanity in Afghanistan in 2015. The suspect's identity remains confidential. This case is under investigation under Section 51 of the International Criminal Court Act 2001, a UK domestic legal statute.<sup>138</sup> In 2005, a UK court sentenced an Afghan citizen to a 20-year prison sentence for torture and hostage-taking in Afghanistan in the early 1990s. After serving nine years, he was deported back to Afghanistan. This individual had been a military commander with the Hezb-e Islami faction.<sup>139</sup>
- *The Netherlands:* In June 2024, a Dutch appeals court acquitted an Afghan-Dutch citizen, reversing a Hague primary court's decision that had sentenced him to imprisonment for torture committed in the 1980s when he served as the general commander of Pul-e Charkhi prison in Kabul.<sup>140</sup> The appeals court said that the primary court had failed to establish a nexus between the victims and the conflict at that time.<sup>141</sup> Previously, the Netherlands investigated five other cases from the 1980s, resulting in two convictions, two acquittals (for lack of sufficient evidence), and one closure due to the suspect's death.<sup>142</sup> The latter investigation led to the disclosure of a "death list" of 5,000 victims (out of tens of thousands of others) forcibly disappeared in 1978-79. This discovery, publicly shared in 2014, provided closure to the victims' families and relatives, who were

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<sup>138</sup> Universal Jurisdiction Annual Review. (2024). Trial International. [https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024\\_digital.pdf](https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf)

<sup>139</sup> Clark, Kate. (2016). Afghan War Criminal Zardad Freed: No protection for witnesses. Afghanistan Analysts Network. <https://www.afghanistan-analysts.org/en/reports/rights-freedom/afghan-war-criminal-zardad-freed-no-protection-for-witnesses/>

<sup>140</sup> Verdict. (2024). Court of Appeal The Hague. <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:934>

<sup>141</sup> *ibid*

<sup>142</sup> Qaane, Ehsan. (2020). Afghan War Crimes Trials in The Netherlands: Who are the suspects and what have been the outcomes?. Afghanistan Analysts Network. <https://www.afghanistan-analysts.org/en/reports/rights-freedom/afghan-war-crimes-trials-in-the-netherlands-who-are-the-suspects-and-what-have-been-the-outcomes/>

able to hold mourning ceremonies and create an association to pursue justice for themselves and the victims of other atrocities.<sup>143</sup>

- *Germany*: In July 2019, the Munich Higher Regional Court convicted a former Afghan military officer of war crimes committed in 2013 and 2014 in Afghanistan, namely the torture of Taliban detainees during interrogation and the desecration of the body of a Taliban commander.<sup>144</sup>

## Challenges and Constraints

- *Jurisdictional Complexities*: Countries applying the principle of universal jurisdiction have varying legal requirements. Most require the presence of alleged perpetrators within their territory to initiate proceedings. Accountability under universal jurisdiction is limited to international crimes.<sup>145</sup>
- *Lack of Evidence and Documentation*: Collecting credible evidence and corroborating witness testimony becomes increasingly difficult as time passes, weakening the potential for successful prosecutions.<sup>146</sup>
- *Legal and Procedural Hurdles*: The legal systems in countries applying universal jurisdiction may face procedural challenges, such as a requirement for exhaustive evidence and proof of a direct link between the accused, the conflict at the time, and the alleged crimes, as seen in cases like the 2024 acquittal of an Afghan-Dutch citizen.
- *Historical and Political Context*: Afghanistan's history of shifting alliances and roles, where perpetrators sometimes become victims and vice versa, complicates judicial proceedings, especially because they take place far from the scene, years later, and are conducted by those who do not know the context.

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<sup>143</sup> Clark, Kate. (2013). Death List Published: Families of disappeared end a 30 year wait for news. Afghanistan Analysts Network. <https://www.afghanistan-analysts.org/en/reports/rights-freedom/death-list-published-families-of-disappeared-end-a-30-year-wait-for-news/>

<sup>144</sup> Universal Jurisdiction Annual Review. (2020). Trial International. <https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously/>

<sup>145</sup> Colangelo, Anthony J. (2013). The Legal Limits of Universal Jurisdiction. Routledge. <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315254135-9/legal-limits-universal-jurisdiction-anthony-colangelo>

<sup>146</sup> Qaane, Ehsan. (2024). The International Criminal Court's Afghanistan Investigation: challenges and Constraints Assessment. Raoul Wallenberg Institute of Human Rights and Humanitarian Law. Executive Order 13928 of June 11, 2020. (2020). White House. <https://www.govinfo.gov/content/pkg/FR-2020-06-15/pdf/2020-12953.pdf>

- *Political Barriers and Cooperation:* Political considerations can hinder the prosecution of international crimes. States may be reluctant to pursue cases that could strain diplomatic relations or hurt geopolitical alliances. Because building strong cases benefits from requires travel to the crime scene and access to official records, the non-recognition of the Taliban complicates efforts to hold some actors accountable.
- *Resource Constraints:* Prosecuting international crimes requires significant resources, including financial support, legal expertise, and logistical capacity. Resource constraints could be one reason for the low prosecution rates.<sup>147</sup>

## Potential Impact

Universal jurisdiction can address a broader range of international crimes not currently prioritised by the ICC or that occurred before May 2003, and thus fall outside its jurisdiction. It can thus complement the ICC's efforts and broaden the prospect for achieving justice for victims of Afghanistan's conflicts.

## Domestic Inquiries and Investigations

### Overview of Domestic Investigations

Domestic investigations can also document human rights violations and, in some cases, hold perpetrators accountable within a country's legal framework or through the publication of reports. National judicial systems, independent commissions, or other authorised bodies can conduct these investigations.

### Potential Implications for Afghanistan

Between 2001 and 2021, over 30 countries had a military presence in Afghanistan, exercising effective military control in various regions. To protect their military and civilian personnel, they signed Bilateral Immunity Agreements (BIAs) with the Afghanistan Islamic Republic that

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<sup>147</sup> Between 2014 and 2019, the German Federal Police Office (BKA) investigated 129 cases out of 7,000 referred to by the German Federal Office for Migration and Refugees (BAMF). Germany 'ignored evidence of war criminals entering'. (2019). Deutsche Welle. <https://www.dw.com/en/did-germany-ignore-thousands-of-leads-on-possible-war-crimes/a-47803729>



stipulated that Afghanistan would not exercise judicial jurisdiction over the nationals of those countries.<sup>148</sup> The countries in turn agreed to ensure accountability for acts committed by their nationals in Afghanistan.<sup>149</sup> Despite these agreements, few countries have conducted investigations into alleged abuses. Countries such as the US, New Zealand, Australia, and the UK initiated inquiries based on their domestic laws and regulations. Some have included alleged human rights violations by their forces in lessons-learned assessments of their military intervention in Afghanistan.

### Cases and Precedents

- *The Torture Report (US)*: The US Senate Select Committee on Intelligence’s investigation into the CIA’s detention and interrogation programme revealed severe human rights violations and a lack of accountability. However the 6,700 page report remains classified (only a 525-page summary was made public in December 2014). These findings were cited in the ICC Office of the Prosecutor’s request to open an investigation in Afghanistan.<sup>150</sup> However, the report has not led to prosecutions or other forms of redress.<sup>151</sup>
- *Operation Burnham Inquiry (New Zealand)*: The Burnham Inquiry investigated allegations against New Zealand Defence Force (NZDF) personnel for actions in Afghanistan in 2010. It concluded that NZDF personnel had complied with the applicable rules of engagement and international humanitarian law. Human rights groups and journalists expressed concern that the inquiry was too limited in scope and did not sufficiently consider all available evidence or testimonies from Afghan witnesses and

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<sup>148</sup> Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan. (2014). US State Department. <https://2009-2017.state.gov/documents/organization/244487.pdf>

<sup>149</sup> Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan. (2014). North Atlantic Treaty Organization. [https://www.nato.int/cps/en/natohq/official\\_texts\\_116072.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/official_texts_116072.htm?selectedLocale=en)

<sup>150</sup> Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp. (2017). The International Criminal Court. <https://www.icc-cpi.int/court-record/icc-02/17-7-red>

<sup>151</sup> Report of the Senate Select Committee on Intelligence, Study of the Central Intelligence Agency’s Detention and Interrogation Program. (2014). <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>

victims.<sup>152</sup> Critics also noted that the inquiry was conducted with a high level of secrecy, which limited public access to information.<sup>153</sup>

- *The Brereton Report (Australia)*: The release of Brereton Report,<sup>154</sup> in 2020 marked a significant milestone in efforts to hold military personnel accountable. The report uncovered evidence linking members of the Australian Special Forces to war crimes in Afghanistan between 2005 and 2016, specifically that 25 current or former soldiers were involved in the murders of 39 people and the cruel treatment of two others. In response, the Australian government established the Office of the Special Investigator (OSI) in 2021 as an independent agency to undertake investigations. These have so far resulted in charges against one former soldier.<sup>155</sup> Human rights groups have highlighted the difficulties Afghan victims and witnesses have had in engaging with the OSI's processes because of geographical distances and security concerns and because the OSI cannot access evidence or conduct investigations in Afghanistan.<sup>156</sup>
- *Afghanistan Inquiry (UK)*: In December 2022, the United Kingdom's Ministry of Defence (MOD) launched an inquiry into allegations of abuse by the British Armed Forces during detention operations in Afghanistan from 2010 to 2013. As of mid-2024 the inquiry was in its evidence-gathering phase, reviewing documents, testimony, and military records related to the operations in question.<sup>157</sup> The inquiry, which has the power to compel witness testimony and access official documents, has invited submissions from former service personnel, families of victims, and human rights organisations.<sup>158</sup>

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<sup>152</sup> Inquiry into Operation Burnham. (n.d.). Inquiry into Operation Burnham. <https://operationburnham.inquiry.govt.nz/>

<sup>153</sup> Lloyd, M., Cormier, M., Fowler, A. et al. (2023). Comparing Australia's Brereton Inquiry and New Zealand's Burnham Inquiry: A Discussion. *New Zealand Journal of Public and International Law*.

<sup>154</sup> Officially the Inspector-General of the Australian Defence Force Afghanistan Inquiry Report.

<sup>155</sup> The Inspector-General of the Australian Defence Force Afghanistan Inquiry. (n.d.) The Australian Defence Force. <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry>

<sup>156</sup> The narrow scope of and secrecy in proceedings were also challenged. *Afghanistan Inquiry: Assessing the Australian Government's Response*. (2022). Australian Centre for International Justice. [https://acij.org.au/wp-content/uploads/2022/11/ACIJ-Afghanistan-Inquiry\\_Assessing-the-Australian-Governments-Response-29-November-2022.pdf](https://acij.org.au/wp-content/uploads/2022/11/ACIJ-Afghanistan-Inquiry_Assessing-the-Australian-Governments-Response-29-November-2022.pdf)

<sup>157</sup> Revised Terms of Reference for Independent Inquiry relating to Afghanistan. (n.d.). Independent Inquiry Related to Afghanistan. [https://iiaweb-prod.s3.eu-west-2.amazonaws.com/2023090\\_Terms\\_of\\_Reference\\_IIA.pdf](https://iiaweb-prod.s3.eu-west-2.amazonaws.com/2023090_Terms_of_Reference_IIA.pdf)

<sup>158</sup> Providing information to the Inquiry. (n.d.). Independent Inquiry Related to Afghanistan. <https://www.iiaindependent-inquiry.uk/providing-information-to-the-inquiry/>

## Impact

Domestic investigations and commissions of inquiry can have several critical outcomes:

- *Legal Accountability*: They provide a mechanism for prosecuting individuals responsible for human rights violations in Afghanistan within national legal systems.
- *Victim Recognition and Acknowledgement*: They offer a formal acknowledgement of the suffering endured by the Afghan victims.

However these investigations frequently suffer from a lack of transparency and outreach, operate at a far remove from victims, focus on a limited number of crimes, and often cannot conduct on-ground investigations, thus limiting their ability to gather sufficient evidence.

## VII. ADDITIONAL AVENUES FOR JUSTICE

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*I think we have been conditioned to think of only one group (or groups) as the enemy and only one group (or groups) as victims. I think we have to get over this mentality and acknowledge that almost no one was safe from suffering and abuse since the late 1970s in Afghanistan.*

--Participant

While prosecutions may be fundamental to retributive justice, their effectiveness is constrained by several factors. International criminal trials, such as those conducted by the ICC and countries with UJ capacity, are often geographically remote, making them physically inaccessible to many victims, hindering their full participation and engagement. The complex legal language and procedures can be difficult for victims to comprehend, especially those with limited exposure to legal systems and the language of rights.

Many Afghan victims lack adequate understanding of ICC investigation on Afghanistan. In 2018, the ICC Registry noted “low levels of victim representations” at the Court “in comparison to the vast number of victims in the country.”<sup>159</sup> This was attributed to the ICC’s lack of field presence and outreach, inadequate media coverage of the Court’s proceedings, lack of education and awareness about international justice processes, and infrastructural challenges such as access to the internet particularly in rural Afghanistan.<sup>160</sup>

International prosecutions are inherently limited in their ability to comprehensively address the full scope of criminality. Decades of conflict in Afghanistan have created a massive victim population whose experiences of harm span generations. Due to temporal and subject matter jurisdictional limitations and resource constraints, international trials cannot account for the entirety of it. For instance, the ICC’s jurisdiction is restricted to crimes committed after 1 May 2003, and its focus on Taliban and ISKP crimes excludes victims of crimes committed by state forces.

In Afghanistan, a narrow interpretation of justice as retributive, combined with the involvement of human rights offenders in power-sharing deals marginalized broader accountability.<sup>161</sup> Afghanistan’s history has shown that sacrificing justice for short-term political deals can inadvertently perpetuate cycles of violence and hinder long-term stability. Therefore, transitional justice must be an integral component of any sustainable peace process.

Moreover, ongoing advocacy efforts for accountability should adopt a holistic understanding of justice, incorporating retributive, restorative, top-down, and bottom-up mechanisms. Afghan victims have repeatedly called for not only criminal prosecutions but also measures such as acknowledgment, apology, truth-telling, reparations, and guarantees of non-repetition.<sup>162</sup>

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<sup>159</sup> Public Redacted Annex I to the Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order, ICC-02/17-6 of 9 November 2017, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-29-AnxI-Red), Registrar, 20 February 2018, para.13 (‘Registry Report on Victims’).

<sup>160</sup> Ibid, paras. 12-14, 46(a).

<sup>161</sup> Since, the Bonn process included warlords “with blood-stained hands,” and justice sidelined to achieve a political deal, accountability has often been narrowly interpreted as retributive involving the punishment of wartime offenders. HRW, ‘Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity’, 2005, p.3.

<sup>162</sup> AIHRC, ‘A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan’ (2005), <<https://www.refworld.org/pdfid/47fdfad50.pdf>> (‘Call for Justice’); ICC, ‘Registry Report on Victims’, para.39; ICC, ‘Situation

Some measures are discussed below.

## Reparations

States have an obligation to provide reparations to victims; this arises as a consequence of breaching a primary obligation that caused injury.<sup>163</sup> Reparations aim to address damages suffered by victims including physical or mental injury, emotional suffering, property damage, and loss of profits.<sup>164</sup> Reparations can be individual and collective,<sup>165</sup> encompassing a wide range of responses including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>166</sup>

The purpose of reparation is “to acknowledge and dignify victims as bearers of human rights” and provide material and symbolic gestures that may help repair the harm and alleviate the pain they have suffered.<sup>167</sup> While no amount of material award can erase the loss and trauma suffered

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in the Islamic Republic of Afghanistan, Corrigendum of Updated Victims’ Appeal Brief’, Appeals Chamber. ICC-02/17 OA OA2 OA3 OA4 (2 October 2019), paras. 58, 65, 74, 95, 128 (‘Victims’ Appeal Brief’).

<sup>163</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 8; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 14(1) (‘*Convention against Torture*’); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147 (16 December 2005), Principle 11 (*Basic Principles on Reparations*); *Chorzów Factory (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, para. 29; *Responsibility of States for Internationally Wrongful Acts*, GTA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) art 31; *Basic Principles on Reparations*, Principles 13-14, 16, 17.

<sup>164</sup> United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims* (NY, 1999) 44; *Internationally Wrongful Acts* art 36(2).

<sup>165</sup> *Basic Principles on Reparations*, Principle 8 recognises that harm can be suffered individually or collectively; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle principle 32 notes that reparation may be provided “through programme [...] addressed to individuals and to communities” (emphasis added); *Prosecutor v Lubanga (Decision Establishing the Principles and Procedures to be applied to Reparations)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04/01/06, 7 August 2012) (‘*Lubanga Reparations Decision*’) [281]-[288]: The Trial Chamber recognized the possibility of awarding both individual and collective reparations and it awarded collective reparations.

<sup>166</sup> Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21 (26 May 2004), 6 [16]; *Basic Principles on Remedy*, Part IX.

<sup>167</sup> International Centre for Transitional Justice, *The Rabat Report: The Concept and Challenges of Collective Reparations* (Report, 12 - 14 February 2009), p.9.

by victims and their families,<sup>168</sup> If done properly, reparations can contribute to their healing and recovery process.<sup>169</sup>

At the moment, available avenues for pursuing reparations for Afghan victims include (i) ICC and (ii) domestic compensation programs by ISAF member states.

### International Criminal Court and Reparations

As outlined above, the ICC represents a critical avenue for justice for Afghan victims, including their pursuit of reparations. The Registry's 2018 report underscores overwhelming support among Afghan victims for an ICC investigation in order to prevent future atrocities, establish the truth about enforced disappearances, and ensure their voices are heard.<sup>170</sup> Victims have also called for reparations,<sup>171</sup> including compensation. In a submission to the ICC, one victim stated, "We lost everything we had, we want compensation. And the psychological effects on us should also be taken into consideration and should be compensated."<sup>172</sup>

The ICC can provide court-based reparation orders, on an individual or collective basis, or both, following a conviction.<sup>173</sup> The Court can issue reparation orders against a convicted person, specifying appropriate reparation including restitution, compensation and rehabilitation.<sup>174</sup> Moreover, the Court can also order that the reparations be awarded through the Trust Fund for Victims (TFV) in accordance with article 79 of the *Rome Statute*.

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<sup>168</sup> *Factory at Chorzow case (Germany v Poland) (Merits)*, [1928] PCIJ Reports (Series A) No.17, 29, 47-48.

<sup>169</sup> United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims* (NY, 1999) para.45.

<sup>170</sup> ICC, 'Registry Report on Victims', para.47. para.39. The AIHRC's 2005 consultations revealed that eighty-eight percent of respondents believed that reparations should be provided to victims of past crimes. AIHRC, 'Call for Justice', p. 33.

<sup>171</sup> *Ibid*, para.46(e); Victims' Appeal Brief, paras. 17, 58, 74.

<sup>172</sup> *Ibid*, para.46(e)

<sup>173</sup> When determining reparations, the Court must take representations made by or on behalf of victims into account. It can also appoint experts to assess the scope of damage inflicted on victims and identify appropriate reparation measures. *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002), Rules 97(1), 98(3)-(4) ('*Rules of Procedure and Evidence*'); *Prosecutor v Lubanga (Decision Establishing the Principles and Procedures to be applied to Reparations)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04/01/06, 7 August 2012) ('*Lubanga Reparations Decision*') paras. 281-288. *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*') art 75(3). *Rules of Procedure and Evidence*, Rules 97(1) and 97(2); *Rome Statute*, Art 75(1).

<sup>174</sup> *Rome Statute*, art 75.

However, court-based reparations for Afghan victims remain a distant prospect. The ICC investigation, initiated in 2020 and resumed in 2022, is still ongoing. Given the Court's lengthy processes, which can span decades, and the urgent humanitarian crisis in Afghanistan, many victims may not live to see reparations.<sup>175</sup> Given this, the TFV's assistance mandate offers a potential alternative. The TFV can utilize "other resources"—such as voluntary donations—to provide physical, psychological, and material support to victims.<sup>176</sup> This approach offers greater flexibility and timeliness in assisting a range of victims, as assistance does not rely on court convictions and is not limited to victims of crimes committed by a convicted defendant.<sup>177</sup>

However, the TFV has yet to provide any assistance to Afghan victims. A thorough analysis is needed to determine the eligibility of the Afghanistan situation for TFV support and any potential challenges, including operational, security, and resource constraints. CSOs and others interested in accountability for Afghanistan should explore this second option, starting with a thorough assessment of how the Afghanistan situation meets TFV's assistance mandate and develop arguments on why it should be prioritized.

## National Compensation Programs

Monetary compensation—the payment of a sum to the victim or their families for economically accessible damage—<sup>178</sup> is one of the most common forms of reparations for international crimes.

Australia has established a compensation scheme, effective from 19 July 2024.<sup>179</sup> This follows the damning findings of the Brereton report, which found credible evidence of war crimes by Australian forces in Afghanistan.<sup>180</sup> One of the report's key recommendations was for Australia to promptly compensate victims and the families of Afghan nationals unlawfully killed, without

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<sup>175</sup> The Pre-Trial Chamber I noted that delays in investigations could undermine timely access to reparations: “The process of reparations is intrinsically linked to criminal proceedings [...] and any delay in the start of the investigation is a delay for the victims to be in a position to claim reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court. Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3) -01/18-37, para.88.

<sup>176</sup> *Rules of Procedure and Evidence*, Rule 98 (2) and (5); ICC, *Regulations of the Trust Fund for Victims*, Doc ICC-ASP/4/Res.3 (adopted 3 December 2005), Regulations 47-48 (*‘Regulations of TFV’*).

<sup>177</sup> *Rome Statute*, art 79, *Rules of Procedure and Evidence*, Rule 98(5); *Regulations of TFV*, Regulation 48.

<sup>178</sup> *Basic Principles on Reparations*, Principle 20.

<sup>179</sup> *Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024* (*‘Australia’s Afghanistan Compensation Scheme’*).

<sup>180</sup> Inspector-General of the Australia Defence Force Afghanistan Inquiry Report (November 2020) (*‘Brereton Report’*).

waiting for the establishment of criminal liability.<sup>181</sup> Under this scheme, the Chief of the Defence Force (CDF) can provide monetary and other compensation, as well as a letter of apology, to eligible recipients following recommendations from the Afghanistan Inquiry Compensation Advocate.<sup>182</sup> Eligible recipients include those the CDF deems “reasonably likely to be the victim of an assault or property damage or a family member of a victim of unlawful killing.”<sup>183</sup>

While the scheme is a positive step, its scope is unduly restricted. Compensation is limited to incidents detailed in the Brereton report,<sup>184</sup> which made 15 recommendations on compensation. However, under international law, Australia is obliged to provide reparations for all wrongful acts committed by the Australian Defence Force or attributable to the Commonwealth. Therefore, the compensation scheme should be expanded to include credible allegations beyond those specifically mentioned in the Brereton report. Moreover, the compensation scheme appears more as a discretionary military initiative than a legally enforceable right. The lack of an independent, formal legal process to determine and implement compensation, essential due process safeguards, and judicial oversight undermine the scheme's credibility as a genuine reparation mechanism. Without clear legal criteria for eligibility and compensation amounts, the scheme risks arbitrary decisions by the CDF and fails to provide victims with the necessary legal protections.<sup>185</sup>

The scheme does not provide for mandatory consultation or direct engagement with Afghan victims who may lack awareness of the scheme. There is uncertainty about how the CDF will collect necessary information from recipients to make informed decisions, and no clear process for individuals eligible for compensation to provide or obtain information. Beyond providing general information about the compensation scheme on its website in English,<sup>186</sup> there is no information available in Dari and Pashto, the primary languages spoken in Afghanistan. Additionally, while the scheme mandates informing recipients of claim decisions, the CDF has

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<sup>181</sup> *Brereton Report*, paras. 76.

<sup>182</sup> *Ibid.*, art 7(2).

<sup>183</sup> *Ibid.*, art 5(1)(a).

<sup>184</sup> *Ibid.*, art 5(2).

<sup>185</sup> United Nations Office of the High Commissioner for Human Rights, “Experts urge Australia to pay compensation owed to victims of war crimes in Afghanistan,” August 7, 2024, <https://www.ohchr.org/en/press-releases/2024/08/experts-urge-australia-pay-compensation-owed-victims-war-crimes-afghanistan>.

<sup>186</sup> Australian Defence, ‘Findings and Recommendations FAQ’, <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/findings-and-recommendations-faq>.



broad discretion to withhold this information if it is not “appropriate, necessary, or practicable.”<sup>187</sup> These shortcomings contravene international standards that require states to inform victims about reparation processes and their rights.<sup>188</sup>

Notwithstanding its shortcomings, if properly implemented, Australia’s compensation scheme is a crucial step in (partially) addressing some of the harm inflicted by Australian forces in Afghanistan. This initiative sets an important precedent for other ISAF member states to follow to comply with their international legal obligations and deliver remedy for harm inflicted on Afghans by their forces.

### Civil Litigation

Civil litigation offers an additional pathway for accountability and justice for victims and their families. A notable example is the civil lawsuit Afghan victims brought against the Netherlands concerning a 2007 incident in which Dutch forces bombed a residential compound, causing 18 civilian deaths. On November 23, 2022, the District Court of The Hague ruled that the Dutch state breached the principle of distinction under international humanitarian law and ordered compensation for the plaintiffs.<sup>189</sup> In the case of *Hanan v Germany* (discussed above), although the German Federal Court of Justice dismissed the plaintiffs' case, the German government voluntarily compensated each victim’s family \$5,000, reflecting a measure of acknowledgement.<sup>190</sup>

## B. Documentation, Memorialization, Oral History, Archiving, and Truth-Telling Initiatives

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<sup>187</sup> *Australia’s Afghanistan Compensation Scheme*, art 8(5).

<sup>188</sup> *Basic Principles on Reparations*, Principles 11(c), 24.

<sup>189</sup> Marieke de Hoon. (2023). Dutch Court, Applying IHL, Delivers Civil Judgment for Victims of 2007 Afghanistan Attack. Just Security. <https://www.justsecurity.org/85223/dutch-court-applying-ihl-delivers-civil-judgment-for-victims-of-2007-afghanistan-attack/>; “Response to judge's ruling in the Chora case,” [https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2023Z01831&did=2023D04237](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2023Z01831&did=2023D04237)

<sup>190</sup> *Ibid.*

*Transitional justice actors inside and outside Afghanistan must also prioritise focusing on over 40 years of armed conflict in Afghanistan, work towards documenting and gathering existing evidence which might already be at risk of erosion, and ensure any effort toward accountability, transitional justice, redress, and dealing with the past addresses these and provides responses to the victims and their families. Afghanistan needs to work towards establishing national level truth and reconciliation commissions/ people/ mass groups to work towards justice and accountability with a bottom to top approach using people power, evidence and stories to make it part of the history but also ensure that justice and accountability are finally addressed in a meaningful manner in Afghanistan. – Participant*

Truth-seeking, documentation, oral history, archiving, and memorialization play a crucial role in understanding the past, countering misinformation, preserving historical memory, and combating forgetting or denial.<sup>191</sup> Moreover, they support accountability efforts in the long-term, by serving as a source of evidence for truth commissions, trials, reparation claims, and vetting processes. They also serve as satisfaction measures,<sup>192</sup> contributing to reparations for victims.

In relation to Afghanistan, there are a few existing measures that should be supported and/or improved.

## Documentation

Documentation efforts by the UNSR, UNAMA, and CSOs are essential for monitoring and documenting human rights abuses in Afghanistan and preserving a record of these. UNAMA's on-the-ground presence enables the collection of firsthand information. To ensure ongoing oversight and documentation, member states should support extending both the UNSR and UNAMA's mandates and provide necessary resources to strengthen their capacity.

Furthermore, CSOs and others advocating for accountability in Afghanistan should explore the possibility of publishing two critical documentation reports. An OHCHR report completed in 2004, mapping pre-2001 human rights abuses, and a subsequent AIHRC conflict mapping report documenting crimes between 1977 and 2001, have not been released due to political opposition. Although both only go as far as 2001, they include information about the perpetrators, the

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<sup>191</sup> Satisfaction, which is a form of reparations, and is broadly defined can capture these mechanisms: see principle 22: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

<sup>192</sup> For definition of satisfaction see, *Basic Principles on Reparations*, Principle 22.

conditions and causes of violation, and their impact on affected populations and could promote transparency and recognition of victims' experiences.<sup>193</sup>

## National Inquiries and Memorials

*The most important thing would be spaces for engagement and dialogue at these different levels where people can express themselves, talk about their experiences, and share their visions and imaginations for a future. What was done by the Afghanistan Human Rights and Democracy Organisation in Kabul was a wonderful example. It was called the Afghanistan centre for memory and dialogue. –*

Participant

National inquiries by states involved militarily in Afghanistan, such as Australia's Brereton Inquiry and the UK's independent statutory inquiry,<sup>194</sup> are essential for uncovering the truth and acknowledging the harm inflicted by international forces. The ongoing investigations, compensation efforts, and reform of the Australian Defence Force,<sup>195</sup> spurred by the findings and recommendations of the Brereton report, highlight the power of such inquiries to counter denial and pave the way for potential accountability and justice for victims. (Several national inquiries are discussed in section VI above).

Until 2023, the Australian War Memorial (AWM)'s exhibition on Australian forces in Afghanistan previously made no mention of the alleged war crimes,<sup>196</sup> raising questions about the memorial's function as a truth-telling institution. In September 2023 the AWM installed a plaque noting the involvement of one decorated soldier in apparent war crimes.<sup>197</sup> While this step

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<sup>193</sup> Although not officially published the UN Mapping Report appeared briefly on the OHCHR website and has since then been preserved on other websites, including Ahmed Rashid, "The Cloak of Silence: Afghanistan's Human Rights Mappings," Afghanistan Analyst Network, July 27, 2012, <https://www.afghanistan-analysts.org/en/reports/rights-freedom/the-cloak-of-silence-afghanistans-human-rights-mappings/>.

<sup>194</sup> *Brereton Report*; Independent Inquiry Relating to Afghanistan, 'Home', <https://www.ija.independent-inquiry.uk/>.

<sup>195</sup> Australian Defence, 'Defence Response', <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response#:~:text=The%20Afghanistan%20Inquiry%20report%20made%2015%20recommendations%20to%20consider%20compensation,the%20establishment%20of%20criminal%20liability.>

<sup>196</sup> Kelly Burke, "'We're all Responsible for Afghanistan': Confronting Exhibition Spotlights Australia's 20-Year War", *The Guardian*, 4 August 2022, <https://www.theguardian.com/culture/2022/aug/04/were-all-responsible-for-afghanistan-confronting-exhibition-spotlights-australias-20-year-war>.

<sup>197</sup> In September 2023 the memorial installed a plaque next to a display about the SAS corporal Ben Roberts-Smith, acknowledging his involvement in "unlawful killings in Afghanistan," with the caveat that he "has not been charged" and is appealing. This update followed a court judgment in the Roberts-Smith defamation case and subsequent public pressure to revise

marks a partial departure from the uncritical portrayal of the role of Australian forces in Afghanistan, it falls short of providing a comprehensive and accurate historical record about Australia's military engagement. The AWM should go further to provide detailed information about the experiences of Afghan victims.

The AWM's shortcomings also highlight the need for all ISAF member states to provide a thorough accounting of human rights violations by their forces and their impact on Afghan communities in any official exhibitions, representations, assessments, and reports on the legacy of their military engagement in Afghanistan.

### CSO-Led Action

Afghan CSOs play an important role in implementing victim-centric approaches to dealing with past and ongoing human rights violations. Initiatives like the Afghanistan Memory Home,<sup>198</sup> a digital archive created by the Afghanistan Human Rights and Democracy Organization (AHRDO), empower survivors by giving them a platform to share their experiences and expectations, and contribute to a victim-centric historical record. Arts and cultural-based programs serve as a powerful tool for memorializing and promoting remembrance.<sup>199</sup>

Oral history, which involves the collection and preservation of firsthand accounts, individual narratives, cultural memory, and community advocacy,<sup>200</sup> is another tool that has not been actively utilized and requires more attention from Afghan and international CSOs working on

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or remove exhibits honoring him. Christopher Knaus, 'Australian War Memorial Installs New Plaque Acknowledging Ben Roberts-Smith "Complicit in Unlawful Killings"', *The Guardian*, 8 September 2023, <https://www.theguardian.com/australia-news/2023/sep/07/australian-war-memorial-installs-new-plaque-acknowledging-ben-roberts-smith-complicit-in-unlawful-killings>.

<sup>198</sup> Afghanistan Memory Home, 'Home', <https://afghanistanmemoryhome.org/en/page/cuh5bcdp15u/home>.

<sup>199</sup> For example, the Twenty Years exhibition and symposium in Australia critically reflects on Australia's 20-year war in Afghanistan, highlighting in particular information about war crimes by Australian forces. Burke, *We're all Responsible for Afghanistan*. Before the Taliban takeover, AHRDO engaged in several arts-based programs in Afghanistan, including theatre and poetry. Hjalmar Jorge Joffree-Eichhorn, 'On Arts-Activism in Afghanistan', *The Festival Academy*, <https://www.thefestivalacademy.eu/en/news/250-on-arts-activism-in-afghanistan-by-hjalmar-jorge-joffree-eichhorn-mentor-atelier-gothenburg/>. These programs depicted scenes of violations, the aftermath of destruction, and the raw reactions of numbness, stillness, silence, and chaos. They aimed to portray the "kind of crude madness" and uncertainty that Afghans have endured.

<sup>200</sup> Anna Bryson, 'Victims, Violence, and Voice: Transitional Justice, Oral History, and Dealing with Past', *Hastings International and Comparative Law Review*, vol. 39, no. 2, (2016) pp. 299-354, p.306.

Afghanistan.<sup>201</sup> Many Afghans, lacking access to formal proceedings or education, may struggle to express themselves, making oral history a crucial means of amplifying their voices and preserving their memories.

The mechanisms identified above, both individually and collectively, can capture segments of the history of human rights violations in Afghanistan and their impact on affected communities. While each initiative reveals certain truths and provides some answers, they have often operated in isolation, resulting in fragmented and incomplete narratives. Discarded, fragmented, and limited to specific angles of the broader picture, these efforts do not convey the "whole story". In the future, if Afghanistan undergoes a process of transitional justice, a truth commission might provide a fuller picture and perhaps a cohesive narrative.

### C. Peoples' Tribunals

Peoples' Tribunals (PT) are independent initiatives by civil society to address impunity for past or ongoing human rights violations.<sup>202</sup> PTs investigate, conduct informal trials, and issue recommendations in response to human rights violations.<sup>203</sup> They can provide victims an avenue to justice in situations where it is otherwise inaccessible due to the deficiencies of national and international mechanisms. Judgements by such tribunals can help survivor communities raise awareness and push for action.

For Afghanistan, there are two possibilities.

First, CSOs or individuals can lodge a request with the Permanent People's Tribunal (PTT). Founded in 1979, PTT is an institution dealing with "state crimes, crimes against peace and humanity, crimes of genocide, and gross and systematic violations of the rights and freedoms of individuals, peoples, and minorities."<sup>204</sup> However, it acts only "in the absence of an international

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<sup>201</sup> In 2019, two Afghan journalists traveled across ten provinces in Afghanistan, collecting oral histories from Afghans. This provided participants an opportunity to share their stories and experiences of loss, hope, and reflections on the country's future. Fahim Abed and Fatima Faizi, "We are Inside the Fire": An Oral History of the War in Afghanistan', *New York Times*, 9 October 2019, <https://www.nytimes.com/interactive/2019/10/06/magazine/afghanistan-war-oral-history.html>.

<sup>202</sup> For discussion, see Christine M. Chinkin, 'People's Tribunals: Legitimate or Rough Justice', *Windsor Yearbook of Access to Justice* 24, no. 2 (2006).

<sup>203</sup> *Ibid*, p.211.

<sup>204</sup> Permanent People's Tribunal, 'Mandate and Functions', <https://permanentpeopletribunal.org/mandate-and-functions/?lang=en>.

jurisdiction to adjudicate on people’s justice cases”.<sup>205</sup> Given the ongoing ICC investigations for Afghanistan, the PTT could prioritise situations that lack other avenues for accountability. Nevertheless, CSOs or individuals can still make a request and let the PTT make its own determination on whether to initiate an investigation on Afghanistan.

Second, Afghan and international CSOs could seek to establish a PT specifically for the situation in Afghanistan. Since the 1960s, PTs have addressed various kinds of situations, including the crime of aggression,<sup>206</sup> war crimes,<sup>207</sup> crimes against humanity,<sup>208</sup> genocide,<sup>209</sup> and violations of women’s rights.<sup>210</sup> Pursuing this option would require a comprehensive assessment of costs, human resource requirements, and timeframes, and should carefully examine other PTs to identify the most suitable approach for the Afghanistan context.

PTs, however, lack formal legal authority and cannot enforce judgments, impose sentences, or order reparations.<sup>211</sup> Nonetheless, PTs can amplify the voices of victims often silenced by traditional judicial systems, granting them a unique moral legitimacy. Moreover, they are not bound by traditional court rules,<sup>212</sup> allowing them to be flexible and provide timely judgements.

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<sup>205</sup> Ibid.

<sup>206</sup> See e.g., Russell Tribunal on Vietnam (1966-1967) in relation to the US role in aiding South Vietnam’s war against North Vietnam during the Vietnam War (1954-75).

<sup>207</sup> Ibid.

<sup>208</sup> Iran People’s Tribunal (2010-2013) aimed to highlight executions and forced disappearances in the 1980s in Iran; Uyghur Tribunal, (2020-2021).

<sup>209</sup> Uyghur Tribunal (2020-2021).

<sup>210</sup> See e.g., Global Tribunal on Women’s Human Rights (1993); Women’s International Tribunal on Japan’s Military Sexual Slavery (2000).

<sup>211</sup> Chinkin, *‘People’s Tribunals’*, p.217.

<sup>212</sup> Ibid