

IMPUNITY IN SOUTH ASIA

The State of Impunity in Afghanistan

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ACRONYMS

AIHRC	Afghanistan Independent Human Rights Commission
ANSF	Afghan National Security Forces
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CSOs	Civil Society Organizations
HRDs	Human Rights Defenders
ICC	International Criminal Court
IDPs	Internally Displaced Persons
ISIS	Islamic State of Iraq and Syria
SIGAR	Special Inspector General for Afghanistan Reconstruction
UNAMA	United Nations Assistance Mission Afghanistan

ABSTRACT

Since 2001, Afghanistan has witnessed considerable achievements in the area of human rights, such as: the Constitution of 2004; the law on Elimination of Discrimination against Women in 2009; and the establishment of the Afghanistan Independent and Human Rights Commission. The creation of a legal system and several civil society organizations are also notable achievements.

In addition to this, the country has ratified two core international human rights treaties; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). However, with the ongoing armed conflict, these hard-won gains are more fragile than ever. If these achievements are not supported and consolidated, there is fear that they may be reversed, as the overall human rights situation appears to be deteriorating.

As it stands, there remains clear indications of declining respect for human rights; in particular, the surge in civilian casualties; an alarming level of women rights violations; deteriorating security; the recurring impunity of abusers; growing corruption; and the weak rule of law and accountability, combined with a lack of political will indicate that there is waning determination on the Afghan Government's part to respect, protect and defend human rights. Finally, despite incidents of war crimes and crimes against humanity that took place during the political expediency of the last four decades, there remains no prospects for remedial action for victims, and no accountability measures to bring perpetrators to justice.

chapter one

INTRODUCTION



In the most common use of the term, *impunity* means the absence of the rule of law, the protection of the perpetrators under certain laws, or the flagging of law enforcement bodies. According to Louis Joinet, the former UN Special Rapporteur on the Impunity of Perpetrators of Violations of Human Rights, impunity is defined as the ‘impossibility, *de jure or de facto*, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative, or disciplinary proceedings – since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted.’ Impunity feeds an environment where violations and abuses of any kind turn into normalcy, resulting in the perpetrators going unpunished.¹

Given such an environment, the culture of impunity in Afghanistan has prevailed for several decades. A broken legal system; weak rule of law alongside a lack of political will; and a large group of powerbrokers amidst the country’s chaos exacerbated citizens’ access to justice and basic human rights. During the years of the Soviet-Mujahedeen, confrontation between Mujahedeen of different factions (i.e. between factions of the 1980s and those of the 1990s); as well as human rights abuses; mass killings, and extrajudicial behaviours took precedence over the rule of law.

In a succession of wars between the Mujahedeen and the Communists, ‘more than 1.2 million Afghans are estimated to have lost their lives’, whereas hundreds of thousands were forced to seek refuge in neighbouring countries such as Iran and Pakistan, and beyond.² In the course of these brutal wars, all the country’s infrastructures were decimated. When the Taliban regime took power in Kabul in 1996, the regime carried out a carnage that left thousands of people dead. According to a report by the Human Rights Watch, the Taliban killed around 2,000 Hazaras in just three days in Mazar-e-Sharif in 1998.³ As the country’s third largest population, the Hazaras have historically suffered from oppression, torture and discrimination on the basis of their ethnicity and religious beliefs.

After the fall of the Taliban, the new Constitution (approved in 2004), and other legislations were seen as critical components to rebuilding a post-conflict society in the new political establishment. The Constitution ensures certain civil and political rights for the Afghan citizens; however, with highly concentrated power in the hands of the president, these rights are now at risk of abuse.

1 Jorge Viñuales, “Impunity: Elements for an empirical concept.” *Journal of Theory and Practice*, 25 (1), (2007) 115-145, <https://bit.ly/2VWkQ78>.

2 John Braithwaite, J. and Ali Wardak, “Crime and war in Afghanistan: Part 1: The Hobbesian solution.” *The British Journal of Criminology*, 53 (2)(2012) 179-196, <https://bit.ly/2PWlj60>.

3 Human Rights Watch, “The massacre in Mazar-e-Sharif.” Accessed May 15, 2021. <https://bit.ly/2AVk-beY>.

With support from the International community, the Afghan National Police was established to maintain order; and a legal system (albeit deficient) was established to follow judicial cases and ensure justice for all. In addition, the country ratified several international treaties on human rights; some of which were signed during the Communist regimes and post-2001. These treaties include: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture; the Convention on the Rights of the Child; the Convention on the Elimination of all Forms of Discrimination against Women; and the Convention on the Rights of Persons with Disabilities. Additionally, in 2003, the country became a state member of the International Criminal Court. As a result of signing these documents, the Afghan government has certain human rights obligations to fulfil.⁴ However, due to protracted conflict, a long-rooted culture of impunity; and political disinterest; the government has failed to fulfil its national and international human rights commitments.

In 2007, the government of Afghanistan approved a bill which resulted in all the warlords, and war criminals accused of committing war atrocities over the past three decade being acquitted and granted general amnesty with legal protection from prosecution.⁵ Subsequently, in 2010, the Government started to announce the peace process with its non-state actors, including the Taliban and the Hezb-e-Islami of Afghanistan (led by Gulbuddin Hekmatyar), with a view to bringing an end to the long-blood-soaked years of conflict in the country. As a result, the government and the Hezb-e-Islami signed a peace agreement with hopes of creating a potential blueprint for future peace talks with the Taliban in 2016. Gulbuddin Hekmatyar, who is accused of gross human rights violations and organizing dozens of terrorist attacks in Kabul and beyond, came home as a result of political expediency without being held accountable. This has raised growing concerns from human rights groups and war victims in the country about the expansion and institutionalization of an existing culture of impunity.

Although Afghanistan's Constitution and its penal code are clear in this area, political expediency and extrajudicial actions have always taken precedence over social justice and the rule of law in the country. Many human rights organizations fear that the ongoing peace process with the Taliban may also take place without the group being held accountable for its inhumane actions.

4 International Criminal Court, "Investigation: Situation in the Islamic Republic of Afghanistan." Accessed 15 May 2021, <https://bit.ly/31zicWX>.

5 Mohammad Azem Besharat, "The Story of the Looted Victims' Advocacy -Dastan-e-dad khahi taraj shuda-e-qurbaniyan (Dari)." Afghanistan Independent Human Rights Commission, <https://bit.ly/3gPPkzU>.

1.1 Changed Country Context

The political situation in Afghanistan has undergone a complete overhaul since the takeover of Kabul by the Taliban on 15 August 2021. On 7 September 2021, the Taliban announced an interim caretaker government under the leadership of Mullah Mohammad Hassan Akhund cementing the revival of the Islamic Emirate of Afghanistan. The all-male caretaker government comprises Taliban hardliners belying their earlier proclamations to form an inclusive government with representation from women and religious and ethnic minorities.

The events leading up to 15 August 2021 were marked with increased violence, credible reports of targeted attacks against women, members from the Hazara community, journalists, human rights defenders, government and security officials, and a widespread panic amongst civilians, especially women and girls as a result of the Taliban's rapid offensive across the country. The takeover of Afghanistan heightened the legitimate concerns of reprisals against the Afghani people as well as foreigners, especially women and girls and those who worked with foreign governments and institutions. The haunting images of hundreds of thousands of Afghans lined up outside the airport wishing to leave the country or people scrambling to get on any plane that would take them and losing their lives in the process are clear manifestations of a complete lack of trust in the Taliban.

The precarity of the hard-won fundamental freedoms enjoyed by the Afghani people under a Taliban regime have propelled them to converge into peaceful protests. On 7 and 8 September, protestors, mostly women gathered in large numbers demanding voice and representation in their country's governance. The Taliban wielded gunfire, intimidation, and a violent force to disperse protestors. Journalists were prevented from filming at the rally, and Tolo News cameraperson was reportedly arrested and detained for almost three hours. Following these protests, the caretaker government issued a decree requiring protestors to secure prior permission for protests or face severe legal consequences. In a clear pattern to curtail fundamental freedoms, especially of women and girls, the Taliban have instituted a ban on women, including the national women cricket team, to play sports. These policies blatantly contradict the facade of a moderate and inclusive Taliban. The caretaker government's apathy to human rights and fundamental freedoms and the evident quest to impose harsh religious authoritarianism in the country will worsen the state of deeply-entrenched impunity in the country.

On this backdrop, this study intends to examine the state of impunity in Afghanistan with a focus on the country's enacted General Amnesty and National Reconciliation Law of 2007. The study will also shed light on the Afghan peace process with its non-state actors, making reference to the issue of their legal accountability.

chapter two

METHODOLOGY



The study primarily uses a qualitative method. It starts with content analysis and desk review of the primary literature, prior to exploring and examining the national laws with reference to international human rights documents. Additionally, secondary literature, including: reports; research outcomes; policies; and other texts were reviewed. The hope is that the research will generate more expertise-based insights and a rich understanding of the forms, causes, and consequences of impunity in Afghanistan, especially after 2001.

chapter three

OVERVIEW OF THE HUMAN RIGHTS SITUATION



Afghanistan is considered one of the most dangerous hotspots for human rights. The situation is exponentially deteriorating for civilians. As a result of the ongoing armed conflict, a flawed law enforcement body; corrupt judicial system; and pervasive impunity, human rights violations are rampant in the country. The most pressing human rights challenges in Afghanistan are: civilian casualties; violence against women; torture and arbitrary detention; abusive security forces; freedom of expression and press; and discrimination. Additionally, human rights defenders who question the Government and raise sensitive topics face constant attack, threats, intimidation and killings by state and non-state actors.

3.1. Civilian Casualties

Since 2001, thousands of civilians have been killed and wounded. Systematic documentation by the United Nations gives a demonstration of 100,000 civilian casualties by different state and non-state actors, which mainly include the Taliban and other terrorist networks from 2009 onwards.⁶ Afghan men, women, and children have been the main victims of the protracted war in Afghanistan. The subsequent graph illustrates the number of civilian casualties from 2009-2019.

Figure 1: Civilian Casualties

TOTAL CIVILIAN CASUALTIES 2009-2019 IN AFGHANISTAN



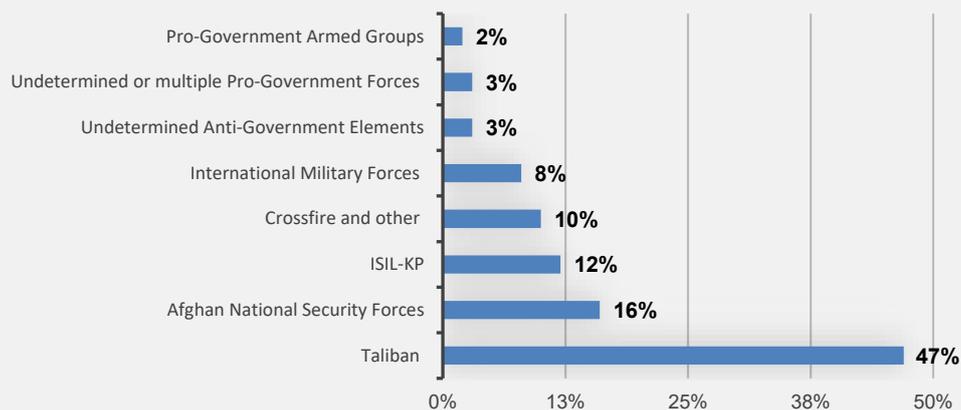
Source: UNAMA "Reports on the Protection of Civilians in Armed Conflict." Accessed 15 May 2021 <https://bit.ly/33tONja>

All parties to the conflict are responsible for civilian casualties. However, the Taliban together with other non-state actors have been in charge of the majority of these casualties, with data revealing that they have been responsible for 62 percent of human miseries and losses as shown in Figure 2.

⁶ UNAMA, Afghanistan: Human Rights and Protection of Civilians in Armed Conflict a Special Report on Kunduz Province. 2015, Accessed 15 May 2021, <https://bit.ly/31VM2W4>.

Figure 2: Civilian Casualties Distribution by Parties

Civilian Casualties by Parties to the Conflict in 2019



Source: UNAMA: <https://bit.ly/33tONja>

Following the international military drawdown in 2014, there was an exponential surge in the security situation which resulted in catastrophic human casualties and civilian displacement. In 2015, the Taliban militants raided the northern Kunduz province.⁷ The incident occurred when hundreds of Taliban fighters carried out an offensive attack from three different directions on the northern city of Kunduz. As a result of this, many civilians ‘were subjected to arbitrary killings, assaults’, and ‘other forms of violence, including gender-based violence, threats, and widespread criminality.’⁸ According to a preliminary report that was released during this time, more than 848 people were killed and injured.⁹ In addition to this, on 23 July, 2016, around 85 civilian protesters were killed and 413 others were wounded in the western part of Kabul as a result of an explosion activated by two suicide bombers. Almost all of these civilian casualties were Hazara people. Shortly after the attack, ISIS, also known as Daesh, took the responsibility for the attack.¹⁰ These remain amongst the major cases of civilian casualties and human rights violations in Afghanistan in recent years.

It is worth noting that in chaotic human circumstances, the situation proves to be far more precarious for the marginalized and unprivileged segments, including religious minorities; women; and children, since they are prone to more discrimination and violence.

7 “Taliban Fighters Raid Kunduz in Afghanistan.” Aljazeera, 28 September 2015, <https://bit.ly/3reXkAK>.

8 UNAMA. Afghanistan: Human Rights and Protection of Civilians in Armed Conflict a Special Report on Kunduz Province. Accessed 15 May 2021, <https://bit.ly/31VM2W4>

9 Ibid.

10 UNAMA. Afghanistan: Human Rights and Protection of Civilians in Armed Conflict Special Report Attack on a Peaceful Demonstration in Kabul, 23 July 2016. 2016. Accessed 15 May 2021 <https://bit.ly/3ksvb80>.

On 25 March, 2020, as a result of a similar attack carried out by the ISIS affiliates on the Afghan Hindu-Sikhs' religious ceremony in Kabul, 25 members of the Hindu-Sikhs community were killed and many others wounded. The incident was followed by a horrible explosion during a funeral ceremony near a crematorium in Kabul which left several people dead and wounded.¹¹ Moreover, on 12 May, 2020, a group of gunmen disguised in Afghan police uniform stormed out in a maternity ward located in the west of Kabul, near a Hazara Shia religious minority residential area, and claimed the lives of 24 people including nurses; mothers; and their newly-born swaddled babies.¹² According to reports, the ISIS terrorist network was behind the attack.¹³

3.2. Returning Refugees and Internal Displacement

Afghanistan faces one of the world's most acute internal displacement crises as the country is gripped with: protracted conflict; ongoing insecurity; and natural hazards such as droughts; floods; storms; and earthquakes.¹⁴

According to a survey by GIZ, between 2004 and 2017, more than 1.8 million Afghans were internally displaced as a result of natural disasters and armed conflict between state and non-state actors across the country.¹⁵ It is important to note that following the drawdown of foreign troops in 2014, the security deterioration surged dramatically. The armed conflicts between the government and armed groups, mainly in the countryside forced hundreds of civilians to leave their residential areas. The Internally Displaced Persons (IDPs) are now facing pressing challenges, including: a lack of education; weak health; and insufficient food, drinking water, shelter; and other facilities. Every winter, the children of many returning refugees die due to illnesses caused by cold weather.

The problems faced by IDPs have been exacerbated by the returnees and migrants from Iran and Pakistan, whose population, according to estimates, rested at around 610,000 in 2017.¹⁶ Following the outbreak of Covid-19 the number of returnees from Iran and Pakistan further precipitated in early 2020. In fact, As of 1 January 2020, 'the total number of undocumented returnees' was '300,512 individuals, including 298,679 from Iran and 1,833 from Pakistan.'¹⁷ Their settlement on the outskirts of the larger cities inflicts further pressure on the country's already

11 Fabrizio Foschini, "Blood in the Abode of Peace: The Attack on Kabul's Sikhs." Afghanistan Analysts Network, 1 April 2020, <https://bit.ly/3ey4NpH>.

12 "Conflict: US and Taliban sign deal to end the 18-year war." BBC. 29 February 2020, <https://bbc.in/3fSxaYF>.

13 Kathy Gannon and Tameem Akhgar, "Us Blames Deadly Afghan Maternity Hospital Attack on ISIS-K." Military Times, 15 May 2020, <https://bit.ly/3iqQl3D>.

14 Internal Displacement Monitoring Center, "Afghanistan: Overview." <https://www.internal-displacement.org/countries/Afghanistan>.

15 GIZ, "Internally Displaced Persons (IDPs) in Afghanistan." Accessed 15 May 2021, <https://bit.ly/3zqR3VN>.

16 Ministry of Returnees and Repatriation, "Return and Reintegration Response Plan." Accessed 15 May 2021, <https://bit.ly/3j1M5q6>.

17 UNHCR, "Afghanistan: Border Monitoring Update – Covid-19 Response." Accessed 15 May 15, 2021, <https://bit.ly/2QcJkGb>.

struggling job market, which is likely to trigger a subsequent chain of problems.

3.3. Violence against Women

In 2003, Afghanistan ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (UN-CEDAW). Subsequently, in 2009, the Government approved the Law on Elimination of Violence against Women. The law was approved pursuant to the UN-CEDAW and the country's 2004 Constitution, which is a promising step forward. Under this law, the Government is required to eradicate all forms of violence, aggression, and abuse against women.

However, despite this progress, efforts to implement the law have fallen short. By all accounts, the implementation of the law has remained insufficient. According to a report released by UNAMA, despite the Government's obligation, 'Afghan women's access to justice remains severely inadequate.'¹⁸ The findings in the report reveal that a majority of the cases of violence against women are dealt with through traditional dispute resolution mechanisms.¹⁹ One way of traditional resolution mechanism is mediation, which according to the report has deprived women of access to justice and has further normalized violence and impunity against them. In mediation, the victim is forced to withdraw her official complaints and succumb to informal justice systems, such as shura, religious leaders, and Jirga. In Afghanistan, Jirga and shura function as local, traditional mechanisms for dispute resolution at the countryside where formal judiciary structures are weak or do not exist.

3.4. Torture and Arbitrary Detention

There are widespread allegations of torture and inhuman treatment of detainees by the Afghan National Security Forces (ANSF). According to a UNAMA report released in February 2015, there is sufficiently reliable and credible information on instances of torture in ANSF detention facilities.

Of the 790 pre-trial detainees and convicted prisoners that UNAMA interviewed between February 2013 and December 2014, around 278 had experienced torture or ill-treatment upon arrest in certain ANSF detention facilities.²⁰ Further, of the 105 interviewed child detainees under the age of 18, 44 reported exposures to torture or ill-treatment.²¹ The finding shows a 14 percent decrease in the number of detainees that were tortured and ill-treated as compared to the previous reporting; however, the humane situation in terms of forced confession and torture within the Afghan detention facilities is still a matter of concern.

18 UNAMA, "Access to Justice for Afghan Women Victims of Violence Severely Inadequate". Accessed 15 May 2021, <https://bit.ly/3xOPmki>.

19 Ibid,

20 UNAMA, Afghanistan: Human Rights and Protection of Civilians in Armed Conflict a Special Report on Kunduz Province. Accessed 15 May 2021, <https://bit.ly/31VM2W4>

21 Ibid.

3.5. Freedom of Expression and Press

Under the current Afghan Media law, media workers and journalists in Afghanistan enjoy some freedom in broadcasting updates. However, many journalists avoid writing about sensitive topics, including: corruption; land grabbing; organized crimes; illicit drugs; and other crimes committed by influential people and those connected to Government officials, and strong powerbrokers. Evidentially, self-censorship has become a matter of survival for many journalists and civil society activists. Despite the Government's promise to protect media workers and journalists, this subset has constantly been subjected to violence, threats, and intimidation. Working as a journalist in a menacing situation like Afghanistan is a challenge where sharing updates and information is concerned. According to a report by the Journalist Safety Committee, Afghanistan witnessed 120 cases of violence against journalists in 2018, and has been ranked as the most dangerous country for journalists for two consecutive years.²²

3.6. Freedom of Assembly

On 2 June 2017, five people were killed after police opened fire to disperse protesters who were seeking to march to the Presidential Palace.²³ The protesters were calling for better security measures and the Government's resignation in the wake of a massive suicide truck bombing in Kabul. On 20 June, 2017, another protester was killed by police when police attempted to remove the tent erected to protest insecurity in Kabul.

On 23 July, of the previous year, a suicide bomb attack killed at least 80 people and wounded more than 230 others during a peaceful protest rally in Kabul.²⁴ ISIS claimed responsibility for the attack, however, the leaders of the protest accused the Government of engineering it.

On 9 May 2020, the police opened fire on a group of protesters in central Ghor province and killed four civilians and injured 14 others.²⁵ The incident happened after dozens of people gathered outside the Governor's office to protest the lack of official assistance for their poverty-stricken families in the province, especially during the Covid-19 crisis. However, as it stands, the central or local Government has not conducted an investigation into the matter.

22 Haseeba Atakpal, "Afghanistan Worst Country for Journalists in 2018: Monitor." TOLO News, 10 January 2019, <https://bit.ly/3gk3kkN>.

23 Bethan McKernan, "Kabul Attack: Police Shoot Hundreds of Protesters Calling for Better Security in Afghanistan." The Independent, 2 June 2017, <https://bit.ly/2Yq4hlp>.

24 "Kabul Explosion: IS Claimed Attack on Hazara Protest." BBC, 23 July 2016, <https://bbc.in/2CPx5MF>.

25 Ayaz Gul, "Afghan Protesters Killed in Clashes with Police." VOA, 9 May 2020, <https://bit.ly/3iwwqUE>.



chapter four

IMPUNITY



Impunity has long existed in Afghanistan which has allowed for a conducive environment for : corruption; human rights abuses; torture; and land grabbing. As some observers stated, the situation manifests as ‘an organizing principle of the post-Taliban order and a driver of persistent conflict.’²⁶ The fall of the Taliban (2001) and the United States-led international intervention did not only fail to end the country’s pervasive human rights abuses, but also set the stage for further institutionalization of the culture of impunity.

Unlike the demands from the Afghan communities, the situation made it impossible to prosecute the perpetrators of past human rights violations and ongoing human rights abuses. During the Karzai’s Administrations that lasted from 2001 to 2014, many of those previously accused of human rights violations continued to hold power at different levels of the state apparatus, including: central; provincial; and district levels.²⁷ They formed a network of impunity which further undermined access to justice and the rule of law. Additionally, human rights defenders, civil society activists, and journalists were subjected to threats; intimidation; and detention.²⁸

Impunity persisted in Afghanistan in different forms of de facto and de jure. Government officials; strong tribal leaders; Members of the Afghan parliament; ministers, and powerbrokers are not accountable before the law. At the same time, they all have common interests; whereas building the rule of law into a strong law enforcement body, with well-trained judges involves ‘challenging vested interests at the highest levels of the Afghan Government.’²⁹ According to Nick Grono, from the International Crisis Group:

‘Many Afghan power holders – from President Karzai downwards – benefit from a patronage-based system. It enables them to buy and maintain loyalty. Corruption is an integral part of such a system. So, implementing proper rule of law reforms, including the establishment of an effective justice sector, is an existential threat to these interests.’³⁰

During this time, many formerly disempowered warlords, local commanders, and other powerbrokers were empowered. From the rule of law perspective, today’s Afghanistan is not much different from 30 years ago, which is to say that it is still about ‘powerful men with guns.’³¹ Both President Karzai and President Ghani have consistently opted for expediency over principles when it comes to accountability. Many of the law-brokers are connected to the authorities in one way or another;

26 Rangelov Lavor and Marika Theros, “Political Functions of Impunity in the War on Terror: Evidence from Afghanistan.” The London School of Economics and Political Science, 18, no. 4 (2019): 407, <https://bit.ly/3kZFTBg>.

27 SIGAR, “Corruption in Conflict: Lessons from the U.S. Experience in Afghanistan.” September 2016, <https://bit.ly/3BkqQtG>.

28 Amnesty International, “Afghanistan 2019.” Accessed 15 May 2021, <https://bit.ly/39VXQet>.

29 Nick Grono, “Rule of Law and the Justice System in Afghanistan.” Accessed 15 May 2021, <https://bit.ly/3kxfyMA>.

30 Ibid.

31 Ibid.

therefore, in a climate of impunity, the law cannot reasonably bring these politically connected officials to justice.

In Afghanistan, a majority of: organized crimes; human rights abuses; gender-based violence; cases of corruption; land grabbing, and other malfeasance are mostly carried out by those who have a strong network with Government officials, mafia groups, and local power-holders. In other words, they are all linked to the highest echelons of power that stymie any quest for accountability processes and the rule of law.

In such an environment, the law enforcement bodies will be either incapable of enforcing the law or will be unwilling to do so. According to findings by SIGAR, when the Afghan law enforcement bodies with support from the international community 'try to investigate and arrests high-level perpetrators, they are often intimidated, blocked, dismissed, or even arrested.'³² Meaning that the Afghan power-holders, including some Government officials, members of parliament, together with local and traditional leaders have formed a joint kleptocratic Government whereby cases of the aforementioned crimes go un-investigated and unpunished. In 2005, the Afghanistan Independent Human Rights Commission (AIHRC) in consultation with more than 6,000 Afghan citizens proposed a national strategy for addressing the abuses of past human rights violations that took place in Afghanistan in a report titled 'A Call for Justice.' As a result, the Karzai Government together with AIHRC and the United Nations Assistance Mission in Afghanistan (UNAMA) considered the findings and recommendations in the report and developed the Transitional Justice Action Plan.³³

The main purpose of the Action Plan was to: restore and promote national co-existence and cooperation; cure the pains and wounds of victims; and reintegrate all citizens into a peaceful life. In addition, the foundation of the Action plan entails promoting a culture of forgiveness; and affection; as well as a sense of brotherhood; all while strengthening national solidarity.³⁴ The Action Plan also provides guidance on the issues of war crimes; crimes against humanity; and violations of human rights whereby perpetrators are not excused.³⁵ Under this Action Plan, the Afghan Government of the time was required to take necessary steps towards establishing accountability institutions in accordance with national and international norms, and other measures in order to apply the Action Plan.³⁶ However, the Government did not implement its obligations accordingly, and the concepts discussed in the Action Plan remained theoretical. It is worth noting that the Action Plan was supposed to be implemented over three years.

32 Rangelov Lavor and Marika Theros, "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan." *Journal of Human Rights* 18(4) (2019) Pg 408.

33 Afghanistan Independent Human Rights Commission, "Peace, Reconstruction, and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan." Accessed May 5, 2021, <https://bit.ly/2BZJ7m6>.

34 Ibid.

35 Ibid.

36 Ibid.

Nevertheless, in 2007, the Afghan Government led by Hamid Karzai drafted the General Amnesty and National Reconciliation Law, which was later approved by the Afghan parliament.³⁷ Under this bill, all those were engaged in human rights abuses and violations of the laws of war, including: genocide; widespread enforced disappearances; sexual assault and rape; torture; public executions; and other forms of misconduct would be exempted from legal prosecution if they supported the political system in Afghanistan. Article 3 of the bill states that:

‘All political factions and rival parties involved in one way or another in hostilities before the establishment of the Interim Administration shall be included in the reconciliation and general amnesty program for harmony among different segments of society, strengthening stability and starting a new life in the political history of Afghanistan. They should enjoy all their legal rights and shall not be prosecuted.’³⁸

‘Those individuals and groups, who are still in opposition to the Islamic Republic of Afghanistan, but cease enmity after the enforcement of this law and join the process of national reconciliation, demonstrating respect for the Constitution and other laws, shall enjoy the benefits of this [law]. The provisions set forth in clauses (1) and (2) of this Article shall not affect the claims of individuals against individuals based on Haqullbad (rights of people) and criminal offenses in respect of individual crimes.’³⁹

The enforcement of this law stirred up serious criticism from national and international human rights groups. Many believe that this law would virtually legalize ill-treatment, and further institutionalize impunity by providing legal cover for perpetrators of human rights abuses of the past and present. According to Amnesty International, the legislation exempts all perpetrators of war crimes and crimes against humanity, including the Taliban which has a record of terrible human rights abuses during its reign for actions such as such as stoning to death; extrajudicial trial; and direct shooting.⁴⁰

37 Sarwar Danesh, “National Reconciliation General Amnesty and Stability Bill.” Pazhwok Afghan News, 25 May 2015, <https://bit.ly/39UoBQs>.

38 Ibid.

39 Ibid.

40 Amnesty International, “Afghanistan: No impunity for war criminals.” Accessed 15 May 2021, <https://bit.ly/33tFaBq>.



CAUSES OF IMPUNITY

chapter five

5.1. Political Economy

In the post-Taliban Islamic Emirate, the continuation of armed conflict in Afghanistan gained new dynamics. Besides the pro-government coalition, several other non-state actors entered into the war. The Taliban along with the Haqqani Network and the Hezbe Islami of Gulbuddin Hekmatyar gained new momentum and became well-organized; additionally, the ISIS group, a composition of both Afghan and foreign fighters, restored and mobilized their destructive campaign, trying to gain more territories within the country.

As a result, the battleground became highly complicated and multifaceted. The proliferation of insurgency over time has amplified the international community's dependency on local partners, mainly the Afghan tribesmen, and local commanders, especially in the southern and eastern provinces; this in turn, has led to a new generation of strongmen and militias exempted from accountability for abuses.⁴¹ The aforementioned has made it hard for the Afghan Government to contain the ongoing conflict and change the balance of power. In such an environment, the police establishment is trained to fight insurgency, instead of conducting its traditional role of law enforcement.⁴² This decreases the possibility of holding the perpetrators to account.

In addition, there are economic motives behind the continued conflict in Afghanistan. Certain actors with a predatory character have entered the current conflict with the aim of exploiting the political situation in order to profit from the black-market economy. These networks of public and private actors in charge of some of the most terrible human rights violations are also the ones that 'benefit the most from the political economy of counterterrorism and state-building.'⁴³ These networks include: some of the Afghan civil and military officials; members of parliament; local strongmen and militias; different terrorist organizations such as the Taliban; ISIS; and foreign fighters operating in Afghanistan. These networks have formed a political standpoint that justifies the ongoing conflict, by allowing a propitious condition to facilitate the processes of co-option and subversion of governance and state-building, under the pretext of the war on terror.⁴⁴

Afghanistan is rich in underground resources. However, millions of dollars' worth of natural resources is being extracted annually by the aforementioned networks, 'unaccompanied by payment of applicable royalties and taxes to the state.'⁴⁵ Findings by USIP reveal that the current political and security circumstances

41 Rangelov Lavor and Marika Theros, "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan." *Journal of Human Rights* 18(4) (2019) Pg 207.

42 Abdul Rahman Yasa, "From Security Sector Reform to Endemic Corruption: The Case of Afghanistan." *Journal of Strategic Security*, 13 (3) (2020): 2, <https://bit.ly/36NbKi4>.

43 Ibid. 208.

44 Rangelov Lavor and Marika Theros, "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan." *Journal of Human Rights* 18(4) (2019).pages 403-418.

45 William Byrd and Javed Noorani, "Industrial-Scale Looting of Afghanistan's Mineral Resources." United States Institute of Peace, Accessed 15 May 2021, <https://bit.ly/3ivyY1Y>.

further pave the ground for increased looting of underground minerals by corrupt officials; warlords; local mafias; as well as the Taliban and ISIS, who are the main beneficiaries.⁴⁶ Moreover, an investigation by the Global Witness reveals that the Afghan mineral resources, specifically the lapis lazuli mines, have turned into one of the main drivers of corruption, conflict, and extremism in the country.⁴⁷

The research has also found that the Taliban and other active armed groups in the region receive more than USD 20 million per year from lapis lazuli mines, which is far beyond the total income that the Afghan Government receives for its natural resources.⁴⁸ The lapis lazuli mines are based in Badakhshan, in the country's north-eastern region, which was considered the most stable areas in Afghanistan, even at the height of Taliban power. However, severe competition between Afghan military officials; local MPs; local strongmen; the Taliban, and ISIS groups over control for this lucrative business has destabilized the province and continues to fuel the local conflict and further insurgency.⁴⁹

Nevertheless, the Afghan Government's inability, or unwillingness to prioritize security; the rule of law and accountability, has produced the 'friend-enemy antithesis' which provides substantiated narratives to justify the war on terror, at least, for an unforeseeable future.⁵⁰ This is more so the case where actors that benefit from the economy of counterterrorism have vested interests that may be impeded by any genuine measures. In the meantime, most of the powerbrokers that have held high-level positions in the Government have enjoyed the American support in pursuing its counterinsurgency operations in Afghanistan. Soon after gaining power and establishing their militias, they expanded their influence over to the provincial structures, including: the police; the courts; and economic institutions. As a result, this has created an opportunity for impunity and has further undermined law enforcement and local governance.

5.2. Legal

The approval of the General Amnesty and National Reconciliation Law, as previously mentioned, directly provides amnesty to all alleged perpetrators of war crimes and crimes against humanity both in the preceding decades, as well as in the present and future. According to this law, different factions of belligerent groups who are engaged in large-scale violations of human rights and atrocities gain legal accountability.⁵¹ If the current Afghan peace talks with the Taliban result in a political agreement, the group will also come to Kabul without any legal accountability just as Gulbuddin Hekmatyar did. So far, around one thousand

46 Ibid.

47 Global Witness, "Afghanistan's Famous Lapis Mines Funding the Taliban and Armed Groups, New Investigation Shows." Accessed 15 May, 2021, <https://bit.ly/3a9EpPf>.

48 Ibid.

49 Ibid.

50 Rangelov Labor and Marika Theros, "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan." *Journal of Human Rights* 18(4) (2019) pages 403-418.

51 Human Rights Watch, "Afghanistan: Repeal amnesty law." Accessed 15 May 2021 <https://bit.ly/3B9m-wxn>.

Taliban prisoners (of whom 400 are prisoners serving time for serious crimes hard-core inmates) have been released from the Afghan detention facilities without any legal accountability. The approval of this law has turned impunity from a mere culture to a legal foundation for war criminals.

Besides this, over the last decades, there have been numerous reports on the Afghan military forces and its international allies who have been involved in human rights violations during their counterinsurgency campaign. In particular, the international forces that have enjoyed long years of impunity in Afghanistan, have allegedly been involved in war crimes and crimes against humanity.⁵² On 5 March, 2020, the International Criminal Court (ICC) decided to authorize an investigation into possible war crimes in Afghanistan, including those allegedly committed by U.S. forces and the CIA.⁵³ However, The decision was retaliated by the then U.S. President Donald Trump by enacting sanctions and banning American visas against the Prosecutor and other personnel involved in this decision. The incumbent U.S. President Joseph Biden has reversed the sanctions. Regardless, the investigations have not commenced because of the U.S.'s strong stance against ICC as well as internal political turmoil.⁵⁴

5.3. Corruption

Corruption is pervasively and systematically entrenched in all of Afghanistan's administrative institutions. This phenomenon has become a daily occurrence, especially in the country's legal organs and security sector, which are the main law enforcement bodies. According to Transparency International's annual perception index, Afghanistan was ranked as the 4th most corrupt country in the world in 2018.⁵⁵ Most of the Afghan public has little to no access to formal judicial institutions across the country while many legal cases are dealt with informally through traditional processes such as local Jirga (s). The people, consequently, have lost trust in the formal legal systems amid a climate of impunity which has added fodder to the Taliban propaganda machine.⁵⁶

Despite some improvement in the judicial sector since 2001, many cases of human rights abuses are still left unresolved. This has been one main reason behind the (re)emergence of informal structures. According to research by Deutsche Welle, as much as 80 percent of disputes of all kinds in the South Asian countries, including Afghanistan are resolved outside the formal justice systems, usually by shuras, jirgas, mullahs and other community-based mechanisms. Due to the lack of rule

52 Elian Peltier and Fatima Faizi, "ICC Allows Afghanistan War Crimes Inquiry to Proceed." The New York Times, 5 March 2020, <https://nyti.ms/3gCFkKy>.

53 International Criminal Court, "Afghanistan: Situation in the Islamic Republic of Afghanistan." Accessed 15 May 2021, <https://bit.ly/3ftKrMH>.

54 Elian Peltier and Fatima Faizi, "ICC allows Afghanistan War Crimes Inquiry to Proceed." The New York Times, 5 March 2020, <https://nyti.ms/3gCFkKy>.

55 "Afghanistan Ranked 4th Most Corrupt Country for This Year." TOLO News, 22 February 2018, <https://bit.ly/3fHAzy7>.

56 Abdul Rahman Yasa, "From Security Sector Reform to Endemic Corruption: The Case of Afghanistan." Journal of Strategic Security 13(3) (2020). Pg1.

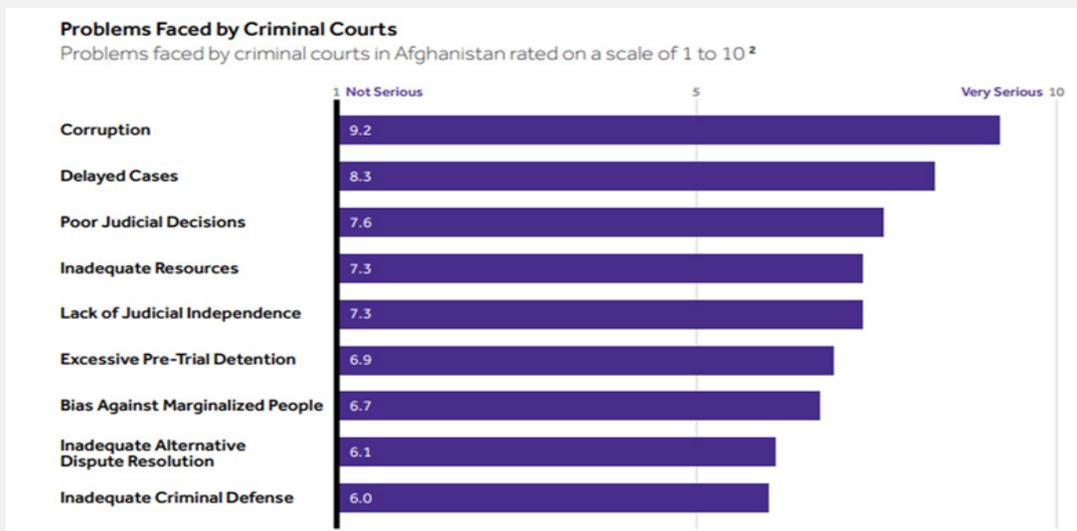
of law and accountability, the customary or informal legal systems are often as corrupt as the formal justice system.⁵⁷ In the traditional justice system, no written legislation is followed and legal decisions are made based on a few procedures.

Corruption and the weary bureaucratic judicial process in Afghanistan are key reasons that lead people to refer their legal cases to the informal legal structure. In 2014, at the outset of his appointment, President Ghani pledged to ensure transparency and reliability, especially in the country’s judiciary organs. However, the public still suffers from a lack of transparency and accountability in the legislative and law enforcement bodies. In an interview with the VOA, one respondent described his story as such:

*‘A bike had been stolen from my village, and when people went to file a complaint with the local officials, they demanded a bribe. We had to bribe our way out, and by the time we got hold of the bike, we had already paid double the amount the bike was worth’.*⁵⁸

Likewise, according to research in 2016, ‘more than half of Afghans (58 percent) have paid a bribe to process a government permit.’⁵⁹ The research finding highlights corruption as the first most pressing concern in criminal justice in Afghanistan. Figure 3 explains different variables affecting the court perceptions.

Figure 3: Afghan Survey Perception of the Courts



Source: World Justice Project

57 Gabriel Dominguez, “Why Many Afghans Distrust Their Judicial System.” Deutsche Welle, 2 May 2015, <https://bit.ly/2Tk15IG>.

58 Hasib Danish Alikozai, “Corruption Encourages Parallel Judiciary in Afghanistan.” VOA, 12 January 2016, <https://bit.ly/36YQrdw>.

59 World Justice Project, The Rule of Law in Afghanistan. 2016 <https://bit.ly/30GIDfq>.

Besides the judiciary organs, the Afghan legislative or parliament has also been known for widespread cases of corruption. The alleged cases of corruption in the Afghan parliament range from: receiving bribes in return for votes of confidence; arranging lucrative contracts; undue interference in Government recruitment; and illegal mining.⁶⁰ The former Speaker of the Lower House of the Afghan Parliament, Abdul Rauf Ibrahimi, misused around 50 million AFN (i.e., approximately USD 725,000) between 2011 and 2019. Although Ibrahimi was eventually ordered to repay the amount, he has yet to resettle the amount due to systematic corruption and his political network.⁶¹ The United Nations Assistance Mission in Afghanistan (UNAMA) once stated that 'Afghanistan's legislature (National Assembly) is part of the corruption problems and has for the most part avoided trying to be part of the solutions.'⁶²

With this in mind, corruption has been looming over all of Afghanistan's public institutions, especially the judicial organs and law enforcement bodies. Consequently, under a widespread climate of corruption and impunity 'perpetrators are rarely held to account and the victims are rarely able to gain legal redress.'⁶³

60 Jelena Bjelica and Rohullah Soroush, "Lost in Procedure: How a Corruption Case in the Afghan Parliament Was not Dealt with." Afghanistan Analysts Network. Accessed 15 May 2021, <https://bit.ly/3eposst>.

61 Massoud Ansar, "MPs Accuse the Speaker of House of Misusing Authority." TOLO News, 20 December 2017, <https://bit.ly/33MFmMi>.

62 Ziaul Islam, Shirani, "The Afghan Parliament and The Corruption Issues in Afghanistan." Center for Strategic and Regional Studies., Accessed 15 May 2021, <https://bit.ly/2PRAHkh>.

63 Human Rights Watch, "Today We Shall All Die: Afghanistan's Strongmen and The Legacy of Impunity." Accessed 15 May 2021 <https://bit.ly/3BfDols>.



chapter six

EFFECTS OF IMPUNITY

The climate of impunity in Afghanistan has inflicted dire consequences on the rule of law and further crippled the law enforcement bodies. The promotion of impunity for: warlords; high Government officials; and other strongmen who are accused of war crimes, continues to impede the advancement of the rule of law and human rights, and challenge reforms in this area.⁶⁴ The rule of law and human rights are the two sides of the same principle, and impunity in a democratic society undermines those values wherewith citizens can live in dignity.

Impunity has affected different segments of the Afghan community from: journalists, and human rights defenders; to civil society activists; and minorities, including and women and girls. In 2018, for instance, 94 journalists and media workers died in targeted killings, conflict, and bomb attacks.⁶⁵ The situation is much more hazardous for women human rights defenders and activists; according to the United Nations, 'the majority [of women killed] is linked to domestic violence,' ... and a 'culture of impunity, [but] women activists have been deliberately targeted.'⁶⁶ Therefore, women human rights defenders are targeted not only because of their activities in promoting and protecting women's human rights, but also because of their gender. This further puts them at risk of sexual violations and other forms of gender-based abuse.

As mentioned earlier, amidst the culture of impunity, the continued armed conflict has inflicted serious physical; psychological; social; and economic damage. As per 2018, around 10,000 civilians were killed by both state and non-state actors whereby insurgent groups were responsible for the majority of these casualties.⁶⁷ However, neither the Afghan Government nor the international community has conducted a thorough investigation into the matter to uncover possible war crimes and crimes against humanity. On top of this, the perpetrators for these casualties have not been brought to justice.

The Afghan Hindu-Sikh minority has borne the brunt of the instability that they had no role in creating as a result of the ongoing conflict; weak state structures, particularly within the judiciary; law enforcement; and security agencies.

The aforementioned Afghan Hindu-Sikh population figures were in the hundreds of thousands; however, due to the country's protracted conflict and lack of accountability for perpetrators of human rights abuses, the population has dwindled to a few hundred in Afghanistan.⁶⁸ Fate turned against the Afghan Hindu-Sikh community once the Mujahideen took over and the Taliban amassed power in the 1990s.

64 Per, Sevastik, "Rule of Law, Human Rights, and Impunity: The Case of Afghanistan." Hague Journal on Rule of Law, 12, (2020), Pg. 93-145, <https://bit.ly/310dGBP>.

65 "Journalists Group Says 94 Working in Media Killed in 2018, Topped by Afghanistan." Radio Free Europe, December 31, 2018, <https://bit.ly/2Wbk89d>.

66 UNAMA, OHCHR, Injustice and Impunity: Mediation of Criminal Offenses of Violence Against Women. 2018, <https://bit.ly/3xOFIDF>.

67 Human Rights Watch, "Afghanistan Events of 2018." 2018, Accessed 2019, <https://bit.ly/3z8sH2N>.

68 "Nearly 99% of Hindu, Sikhs left Afghanistan in the last three decades." TOLO News. 21 June 2016, <https://bit.ly/30a8oDr>.

Under Mujahideen, there was widespread ‘kidnappings; extortion; property expropriation; and religious prosecution, targeting Sikhs and Hindus, which became the trigger point for the exodus. After the Taliban took over Afghanistan, those who remained continued to face persecution.’⁶⁹ After the fall of the Taliban regime, in 2001, their hope for a better life held out. However, as a result of several coordinated attacks, a large portion of their already shrinking population was killed.⁷⁰ According to reports, 99 percent of the community has left Afghanistan for foreign countries, with India acting as a top destination.⁷¹ As it stands, the Government has consistently failed to protect their rights and bring the criminals to justice.

These are just some of the instances of human rights violations resulting from the weak rule of law and the Government’s unwillingness and inability to act. With support from the international community, civil society organizations, media workers, and the AIHRC have made efforts in the last two decades to advocate on the behalf of civilians and to promote their human rights values. However, due to a lack of support from the Government and security deterioration, the level of civilians’ casualties has been on the rise.⁷²

The Three Emblematic Cases of Impunity in Afghanistan

In 2007, in an unprecedented move, the Afghan Government drafted a bill known as the General Amnesty and National Reconciliation Law. Subsequently, in 2008, the amnesty law was published in the official gazette.⁷³ Over the past several decades, there has been a gross violation of human rights; war crimes; and crimes against humanity; including sexual violence as a war tool; extrajudicial executions; and ethnic cleansing.⁷⁴ And yet, the main purpose of the amnesty law was to provide the individuals who engaged in these crimes with legal impunity and to exempt prosecution and evade accountability. Under the pretext of strengthening national stability, Articles 1 and 2 of the amnesty law reiterate that the belligerent parties will be granted impunity with full enjoyment of their rights provided that they adhere to the Constitution and other enacted laws of the country.⁷⁵ The Afghan government and parliament, at the time, consisted of a bunch of warlords and their supporters who rubber-stamped the bill and protected these political leaders from all the atrocities they committed in preceding decades.

69 Divya Goyal, “Sikhs and Hindus of Afghanistan: How Many Remain, Why They Want to Leave.” The Indian Express, 28 July 2020, <https://bit.ly/30KBXfc>.

70 Fabrizio Foschini, “Blood in the Abode of Peace: The Attack on Kabul’s Sikhs.” Afghanistan Analysts Network. Accessed 15 May 2021, <https://bit.ly/3hZ6TB3>.

71 “Taliban Kill 10 Passengers, Abduct 185 others.” TOLO News. May 31, 2016, <https://bit.ly/2E1W31R>.

72 European Union, Country Report for Engagement with Civil Society in Afghanistan 2018-2020. Accessed May 15, 2021, <https://bit.ly/3kzg7mB>.

73 Human Rights Watch, “Afghanistan: Repeal amnesty law.” Accessed 15 May 2021 <https://www.hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law>

74 Ibid.

75 Sarwar Danish, “National Reconciliation General Amnesty and Stability Bill.” Pazhwok Afghan News, 18 May 2015, <https://bit.ly/3iDx5jz>.

Moreover, the bill keeps the impunity gate open to all other armed groups who wish to join the Government after the law is passed. Clause 2 of Article 3 ingeminates as such: ‘those individuals and groups, who are still in opposition to the Islamic Republic of Afghanistan, but cease enmity after the enforcement of this law and join the process of national reconciliation, respect the Constitution and other laws, shall enjoy the benefits of this [law].’⁷⁶

In 2010, the Afghan Government adopted the Afghanistan Peace and Reintegration Policy (APRP). The program aimed at initiating an Afghan-led and Afghan-owned peace talk with the armed groups such as the Hizb-e-Islami of Gulbuddin Hekmatyar and the Taliban.⁷⁷ Under the APRP, President Karzai, at the time, had established the Afghan High Peace Council to negotiate with insurgent groups, namely the Taliban and Gulbuddin Hekmatyar, for a political settlement of the current crisis. In 2014, a contested political transition resulted in the formation of the National Unity Government under the leadership of President Ghani and the Chief Executive Abdullah. The new Government decided to push forward its peace program with more momentum to a high level of negotiation and reconciliation, with a vision to attain a durable and sustainable peace to end the conflict.

Following the efforts to end the country’s long blood-soaked years of armed conflict and political frictions among elites, the Afghan Government signed a peace agreement with the country’s veteran warlord Gulbuddin Hekmatyar, the leader of Hezb-e-Islami in September 2016.

As a result of this, after almost 20 years since his banishment from Kabul by the Taliban in 1996, Mr. Hekmatyar and his militias entered Kabul with impunity amid tight security measures.⁷⁸ The vast majority of Afghan Mujahideen, who were initially fighting against the Soviet Union in the 1980s wound up fighting a bloody war against each other in the 1990s, and ultimately joined the new political establishment as a result of the Bonn Conference in 2001.⁷⁹

However, Gulbuddin Hekmatyar remained opposed to the Government due to his ousting from Kabul. During this time, he engaged in various terrorist attacks against Afghan civilians and security forces. For instance, on 10 February, 2014, Gulbuddin Hekmatyar’s Hezb-e-Islami took responsibility for a car-bomb suicide attack, which hit the capital Kabul, and left several civilians killed and wounded.⁸⁰ The year before, on May 16, an explosive-filled vehicle hit the south-eastern part of

76 Sarwar Danish, “National Reconciliation General Amnesty and Stability Bill.” Pajhwok Afghan News. Accessed 15 May 2021 <https://peace.pajhwok.com/en/laws-and-decrees/national-reconciliation-general-amnesty-and-stability-bill>

77 United Nations Development Program, “Afghanistan Peace and Reintegration Policy.” Accessed 15 May 2021 <https://bit.ly/3iEGNCq>.

78 “Former Afghan Warlord Heymatyar Enters Presidential Race.” Reuters, January 19, 2019, <https://reut.rs/3x4Mq1H>.

79 William, Byrd, “The Bonn legacy”. Foreign Policy, 2013. Accessed 15 May 2021, <https://bit.ly/3kFBO-RU>.

80 Nathan Hodge, N. and Habib Totakhil, “Kabul Car Bombing Claimed by Hezb-e Islami Group.” The Wall Street Journal, 10 February 2014, <https://on.wsj.com/3iBL1t0>.

Kabul and claimed the lives of 15 people and wounded 25 others, including women and children. The Hezb-e-Islami group told the BBC that it was responsible for the attack.⁸¹ These are two of several terrorist attacks that have been facilitated by the Hezb-e-Islami since 2001.

As an Islamist warlord, Hekmatyar has been accused of numerous atrocities during the civil war of the 1990s. He is responsible for much of the ‘terrible death and destruction’ of that period.⁸² In literature, he is known as the ‘Butcher of Kabul’ and was nicknamed ‘Rocketyar,’ in reference to the countless rockets he rained down over Kabul city during the civil war.⁸³ Gulbuddin Hekmatyar is labelled ‘one of Afghanistan’s most notorious war crimes suspects.’⁸⁴ And yet, his arrival in the city (Kabul) which he had once ruined further compounds the existing culture of impunity. Prior to the peace agreement, the Hezb-e-Islami had been under international sanctions due to ties to al-Qaeda and the Taliban.⁸⁵ However, under the peace agreement, the sanctions were lifted. Here, a large number of Hekmatyar’s armed men that had been arrested by the Afghan security forces were freed from the Afghan detention facilities with no accountability.

At the time of writing, the Afghan Government is now engaged in the peace process with the Taliban, seeking to kick off the intra-Afghan peace negotiation whereby all parties involved will work together to reach a political settlement that will end the current crises. The opportunity has arisen due to the US-Taliban agreement in Qatar early in 2020⁸⁶, which left both sides, i.e. the United States and the Taliban, with terms of conditions to meet. Subsequently, the aforementioned agreement set the stage for the United States’ military withdrawal from Afghanistan and the Taliban’s start to negotiations for a political settlement with the Afghan government. As a result of shuttling diplomacy, the Afghan government and the Taliban agreed to take preliminary steps towards face-to-face peace talks. Both sides concluded to negotiate the release of the prisoners they have in their custody. Under the U.S.-Taliban peace agreement, the Afghan Government and the Taliban are required to take the following measures:

81 “Kabul blast: Suicide Bomber Targets Foreign Convoy.” BBC , 29 February 2013, <https://bbc.in/2E1VnD7>.

82 “Afghan Warlord Hekmatyar Returns to Kabul After Peace deal.” BBC , 4 May 2017, <https://bbc.in/3kplO81>.

83 “Afghan warlord Hekmatyar Returns to Kabul after Peace Deal.” BBC , 4 May 2017, <https://bbc.in/3kplO81>.

84 Gossman, P, “Afghanistan War Crimes Suspect Comes Home.” Human Rights Watch. Accessed 15 May 2021 , <https://bit.ly/3iorBce>.

85 “Afghanistan: Hezb-e-Islami Armed Group Signs Peace Deal.” Aljazeera. 22 September 2016, <https://bit.ly/31PO611>.

86 “Conflict: US and Taliban Sign Deal to End the 18-year War.” BBC , 29 February 2020, <https://bbc.in/3fSxaYF>.

*'To expeditiously release combat and political prisoners as a confidence-building measure with the coordination and approval of all relevant sides. Up to five thousand (5,000) prisoners of the Islamic Emirate of Afghanistan, which is not recognized by the United States as a state and is known as the Taliban, and up to one thousand (1,000) prisoners of the other side will be released by March 10, 2020.'*⁸⁷

From 1996 to 2001, the Taliban ruled over Afghanistan. The group imposed a strict and harsh brand of justice as it consolidated its power in Kabul and beyond. The Taliban jurisprudence was drawn from the 'Pashtuns' pre-Islamic tribal code (Pashtunwali) and interpretations of sharia (law) colored by the austere Wahhabi doctrines of the madrassas' Saudi benefactors.⁸⁸ The regime carried out carnage throughout the country, mainly on Afghan minority groups. It also destroyed a large number of Afghanistan's historical heritage, including the bombing of the two giant Buddha statues based in Bamyán province.⁸⁹ The group is now under investigation in the International Criminal Court for alleged war crimes and crimes against humanity.

In late 2001, a US-led military intervention toppled the regime from power for its refuge of the mastermind of 9/11, Osama bin Laden. Shortly after relative security, the Taliban resumed their activities, engaging in a large-scale guerrilla war against the Afghan security forces and its international allies. However, during this time, Afghan civilians have become the main victims of the guerrilla war inflicted by the Taliban; as it stands, passengers; Government civil servants; minorities; civil society activists; women; and girls have lost their lives as a result of brutal attacks by the Taliban.

Recently, as a result of the peace process, a large number of the Taliban prisoners who had been captured from the battleground have been released from the Afghan detention facilities. As previously mentioned, the Afghan Government accelerated the planned release of 5,000 Taliban prisoners as a 'goodwill gesture' to scale up efforts for peace negotiation following the U.S.-Taliban peace agreement. Furthermore, as already noted, some of the most dangerous criminals have been engaged in major attacks against civilians and foreign nationals, including a 2017 truck bombing near the German embassy in Kabul that claimed more than 150 people (one of the deadliest attacks in nearly two decades in Afghanistan).⁹⁰

87 "U.S.-Taliban Peace Deal." The Washington Post, 14 March 2021, <https://wapo.st/3hWqVvY>.

88 Maizland, L. and Laub, Z, "The Taliban in Afghanistan." Council on Foreign Relations. Accessed 15 May 2021, <https://on.cfr.org/3gXbRuX>.

89 Ibid.

90 Hamid Shalizi, Hameed Farzad and Abdul Qadir Sediqi, "Afghanistan to Release 400 Hard-core Taliban Prisoners in Bid for Peace." Reuters. 9 August 2020, <https://reut.rs/3wY2mCT>.

On 7 August, 2020, the Afghan Government convened a three-day consultative *Loy Jerga* – grand assembly- of 3,200 members to advise the Government on whether the remaining 400 ‘hardcore’ inmates should be freed from the country’s detention centers.⁹¹ Consequently, the *Loy Jerga* voted for the release of those 400 Taliban prisoners.

There are now mounting concerns that many newly liberated terrorist prisoners will return to the battlefield again and resume: killing civilians; destroying infrastructures; setting fire to schools; and stoning women. According to a Taliban commander in Pakistan, ‘there should be no ambiguity that the released men will eventually be deployed to Afghanistan’s front lines.’⁹²

The release of 5,000 prisoners of the Taliban has triggered outrage among Afghan civilians, as well as national and international human rights groups. It has also exposed fundamental problems to the Afghan justice system that may amplify fears that the peace process will not terminate longstanding impunity for perpetrators of war crimes and crimes against humanity.⁹³

Since 2001, successive Governments in Afghanistan have officially ignored accountability for war crimes and human rights abuses at least three times. The approval of the country’s Amnesty Law of 2007 paved the way for legal impunity. The country’s Penal Code of 2007 incorporated war crimes and crimes against humanity; however, as it stands, its implementation and investigations have focused only on attacks linked to Islamic State (ISIS). The alleged crimes by perpetrators from the Mujahideen, the Hezb-e-Islami of Gulbuddin Hekmatyar, and the Taliban have and continue to be legally exempted from prosecution and accountability.

91 Ibid.

92 “Freed Taliban Prisoners Eye Return to Battlefield.” The Defense Post, 11 June 2020, <https://bit.ly/2Q5F23>

93 Patricia Gossman, “Afghanistan’s prisoner dilemma.” Human Rights Watch. Accessed 15 May 2021. <https://bit.ly/317sRcJ>



chapter seven

***DISCUSSION ON
FINDINGS AND CONCLUSION***

To conclude, there is no prospect of bringing the perpetrators to justice. Despite calls from AIHRC; civil society activists; human rights defenders; and international organizations, including the International Criminal Court, the Afghan Government has not yet initiated moves to build a strong rule of law to end impunity. The country's justice sector is gripped with corruption and is highly influenced by the president and other strongmen who have clung to power. With the presented data in mind, the key findings of the report are as follows:

- The approval of the Amnesty Law of 2007 further strengthened the existing culture of impunity and legalized the phenomenon in Afghanistan.
- There is little political will in the Afghan Government to bring legal reforms and provide justice, as most of the corrupt power holders and local officials in power have common interests in the illicit economy of counterinsurgency. Therefore, building a strong rule of law will pose an existential threat to them.
- The Afghan public has lost confidence in the country's legal system and instead refers to informal court structures such as Jirga, mullah, and shura. This is due to widespread corruptions, bureaucracy and a lack of access to the formal justice system, especially in the countryside and the areas beyond the Government's control.
- Despite the availability of financial; technical; and human resources, establishing a strong rule of law and effective law enforcement bodies has not been a priority for successive governments in Afghanistan for the last two decades. This is partly because of the security deterioration in different parts of the country, as much of the efforts were focused on counterterrorism.
- Entrenched and systematic corruption in Afghanistan's administrative systems, mainly in the legal system has been one key issue on the way to rule of law; therefore, many legal cases were left unresolved and perpetrators went unpunished.
- Increased armed conflict and insecurity, especially in the provincial districts, has led to severe civilian casualties and human rights violations. This paved the way for the emergence of illegal armed groups involved in human rights abuses. As a result, the Afghan Government could not bring them to justice.

chapter eight

RECOMMENDATIONS

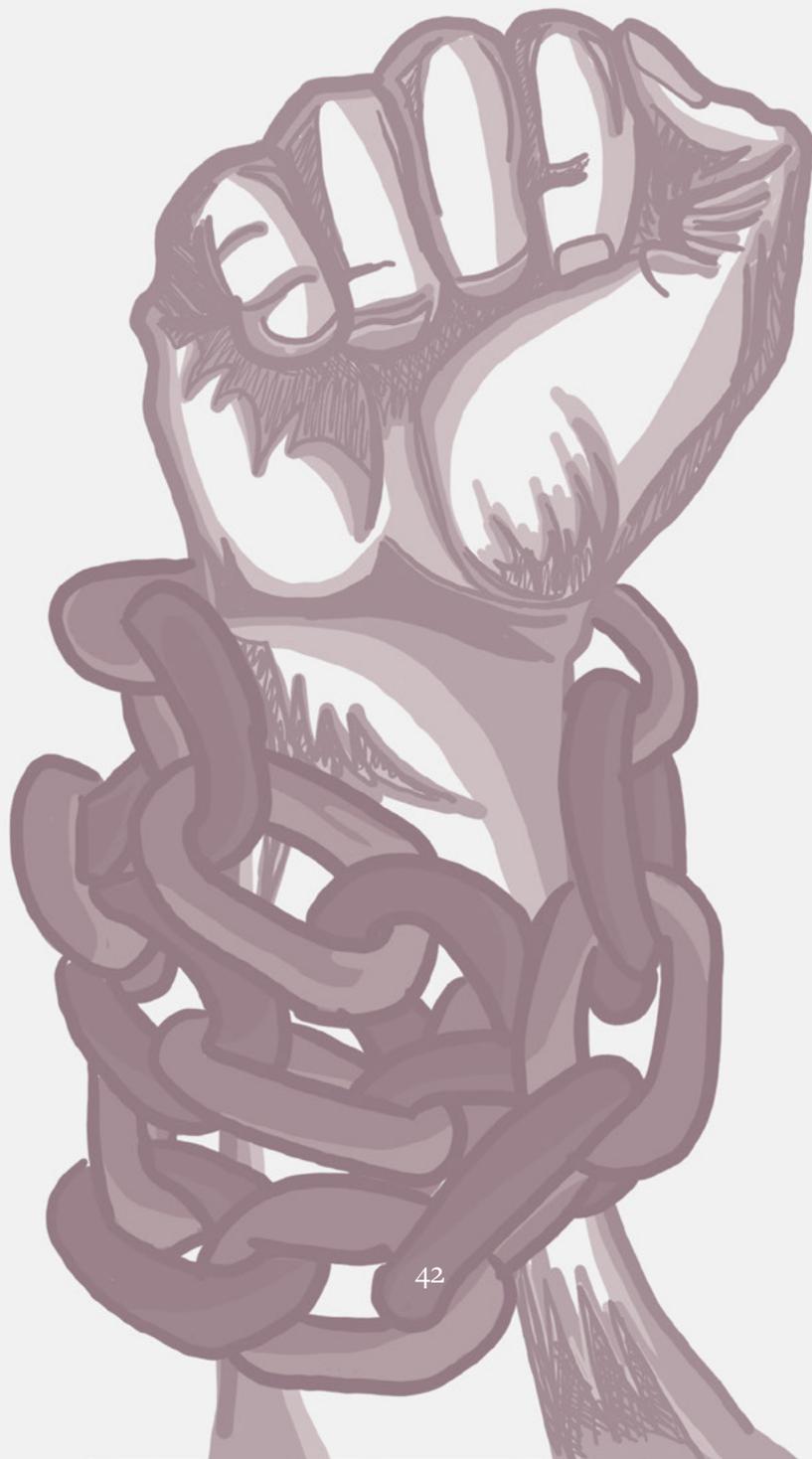


To the Government of Afghanistan

- I. Practical steps are suggested towards ending impunity in Afghanistan such as by strengthening the rule of law and implementing the AIHRC's Action Plan of 2005.
- II. A thorough investigation is to be done in a joint effort with the International Criminal Court, particularly into the cases of severe human rights violations, war crimes and crimes against humanity during the two recent decades.
- III. Political settlement is highly important in ending conflict in Afghanistan; however, the democratic achievement, mainly in the area of human rights, should not be compromised during the current peace negotiations with the Taliban.
- IV. Inclusivity of the current peace process by engaging Afghan women; victims of war; and minority groups is to be ensured.
- V. The troops withdrawal by US and NATO allies will unleash multitude of political, social, and legal challenges, with disproportionate impact on women, girls, and minorities. All parties to the conflict, including the US and NATO, must guarantee the fundamental freedoms of women, girls, ethnic and religious minorities will not regress. Similarly, journalists, human rights defenders, peacebuilders and rights activists must be protected from reprisals.

To the international community

- I. Pressure on the Afghan Government to meet its international human rights obligations and strengthen the rule of law to end impunity.
- II. Urge the Afghan Government to fulfil its anti-corruption pledges under the UN anti-corruption conventions.
- III. Ask all the warring parties, both state and non-state actors, to stop attacking civilians, especially women and girls, and civilian objects.
- IV. Support the ongoing intra-Afghan peace process to ensure that the achievements of two recent decades, mainly in the area of human rights are strongly preserved.



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