

HANDBOOK ON UNIVERSAL JURISDICTION

HOLDING THE TALIBAN ACCOUNTABLE
FOR INTERNATIONAL CRIMES



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With support from:



The Simon-Skjoldt Center for the
Prevention of Genocide at the United
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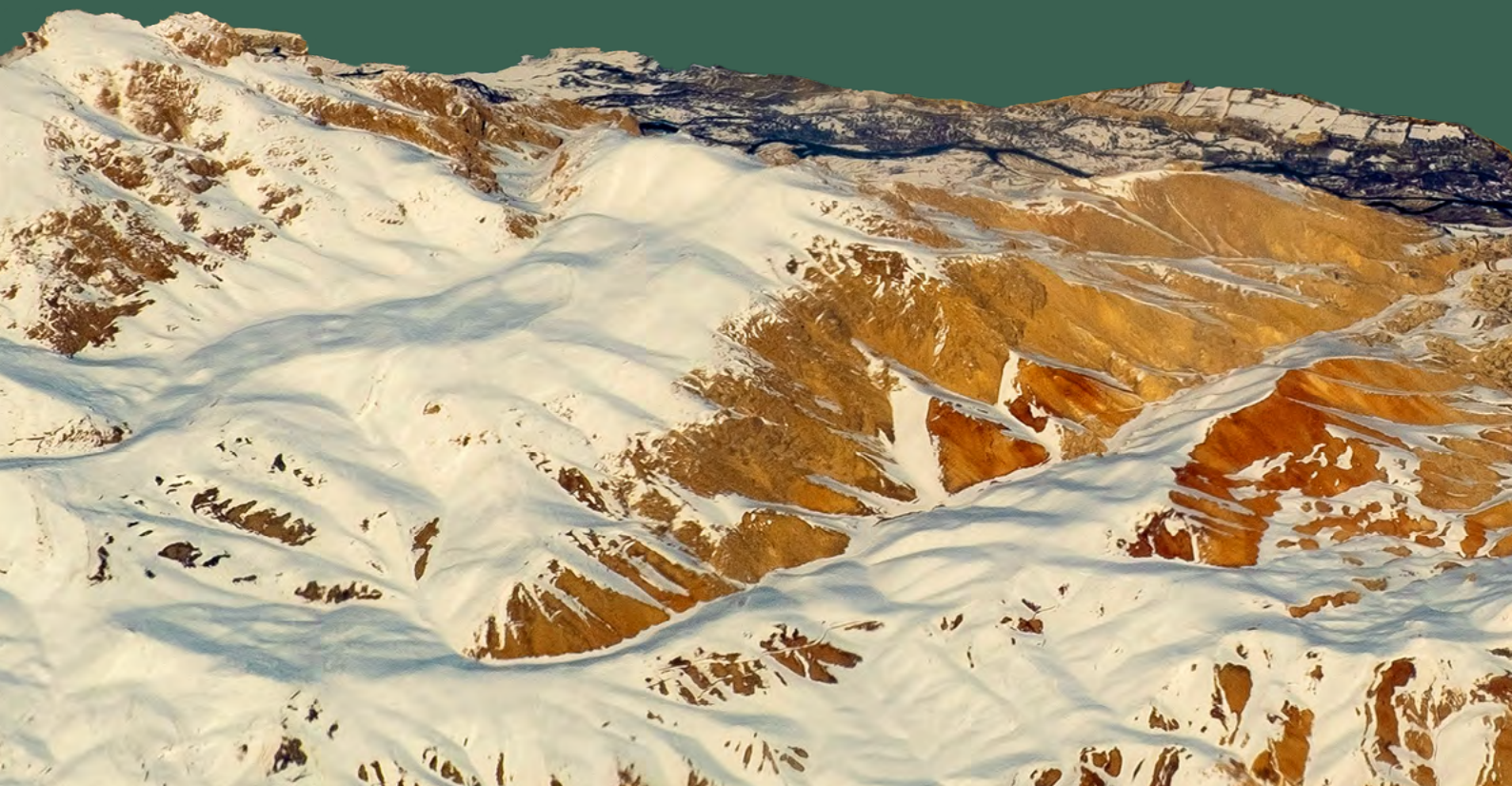
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**For the
next**
GENERATION
OF
HOPE



In memory and honour of Ustad Bayani and Ustad Noori who were killed by the Taliban on the Kandahar-Ghazni highway in 1997, and, in memory of all the innocent civilians who were killed by the Taliban since the mid-90s. And, in hope for the safe return of Zarif whose car was attacked by the Taliban in 2012 and whom we have never heard from again.



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ABOUT THE HAM DILEY CAMPAIGN

**Human beings are members of a whole,
in creation of one essence and soul.
If one member is afflicted with pain,
other members uneasy will remain.
If you have no sympathy for human pain,
the name of human you cannot retain.¹**

¹ Sa'adi Shirazi, 'Bani Adam' (human being). The poem features, amongst other places in the halls of the United Nations ('UN') in New York; 'United Nations Gifts', UN (Web Page) <www.un.org/ungifts/persian-carpet>.

The above quote by Persian poet Sa'adi Shirazi has been a guiding principle of the Ham Diley Campaign. 'Ham diley' means empathy or solidarity in Persian. The Campaign started as a volunteer-initiative by two human rights lawyers and PhD students, Azadah Raz Mohammad (University of Melbourne) and Karin Maria Frodé (Monash University), together with Simone Abel, then President of the non-profit organisation Capital Punishment Justice Project ('CPJP') (formerly Reprieve Australia). It is a response of solidarity and empathy with the people of Afghanistan following the Taliban's violent return to power on 15 August 2021. As illustrated by the many persons and entities listed in the 'Acknowledgements' section of this Handbook, the Campaign has grown from a small initiative to a global network, which we hope will continue to expand to amplify the voices calling for accountability and justice in Afghanistan.

Initially focused on emergency response, the Ham Diley Campaign facilitated safe evacuation and resettlement of more than 90 at-risk individuals from Afghanistan. The Campaign also assisted many more individuals through work such as the production of risk profile statements, applications for financial assistance grants and referrals to relevant services, such as immigration lawyers. In September 2021, two of the Co-Founders, Azadah and Karin, with support from Monash Law Clinics Melbourne established the Monash Afghanistan Support Clinic where law students in the latter stages of their degrees assist the Campaign with tasks including research and drafting.

As a result of the increasing difficulty of evacuations, coupled with the international community's waning attention on Afghanistan, the Campaign shifted focus from emergency response to primarily concentrate on research and policy work. This has involved various submissions to parliamentary inquiries in Australia and the UK, including presentation of testimony before an Australian parliamentary committee regarding the impact of the removal of allied forces from Afghanistan upon the situation of women and girls. Azadah and Karin have also presented the work of the Ham Diley Campaign at different fora in Australia and overseas to raise awareness of the importance of maintaining and strengthening solidarity efforts.

The completion of the present Handbook has been the key focus of the Campaign since the start of 2022. It was commissioned by diaspora groups across the world calling for a resource on the potential

benefits and challenges of seeking to hold members of the Taliban accountable for international crimes (including genocide, crimes against humanity and war crimes) in courts outside Afghanistan. Most members of the diaspora communities with whom the Ham Diley Campaign are in contact are themselves victim-survivors of the international crimes covered in the Handbook. While their own relatives live in fear for their lives inside Afghanistan, they witness Taliban members freely travel to other countries, sometimes upon the invitation of a government.²

As this Handbook will underline, the international community has moral and legal obligations to take all necessary steps to hold alleged perpetrators to account for international crimes committed in Afghanistan. As long as the Taliban remains in power, there is no hope for accountability inside Afghanistan. Returning again to the words of the poet Sa'adi Shirazi, we all owe a responsibility to each other as 'members of a whole' to explore other ways to seek justice for victim-survivors of international crimes.

Investigations and prosecutions conducted in courts outside Afghanistan through the principle of universal jurisdiction ('UJ') is one avenue to consider. It is not perfect for reasons which the Handbook will discuss. Even a case that results in a conviction will be far from a comprehensive remedy for victim-survivors. Nonetheless, seeking accountability through UJ (alongside other judicial and non-judicial mechanisms) is a start.

It will take time, but we place our trust in the next generation of hope.

The Ham Diley Campaign



**Azadah Mariam
Raz Mohammad**
Co-Founder



Karin M Frodé
Co-Founder

² 'Talks on Afghanistan in Oslo', *Government.no* (Web Page, 21 January 2022) <[ABOUT THE HAM DILEY CAMPAIGN | 13](http://www.regjeringen.no/en/aktuelt/talks_oslo/id2897938/#:~:text=Norway%20has%20invited%20representatives%20of,%20fields%20within%20civil%20society.>>.</p></div><div data-bbox=)

ABBREVIATIONS

AG	Attorney-General
AIHRC	Afghanistan Independent Human Rights Commission
ANDSF	Afghan National Defence and Security Forces
BSA	Bilateral Security Agreement
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIL	Customary international law
COI	Commission of inquiry
COI OPT	Commission of Inquiry on the Occupied Palestinian Territory
CPJP	Capital Punishment Justice Project
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
FFM	Fact-finding mission
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	Improvised explosive device
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IM	Investigative Mechanism
IIMM	Independent Investigative Mechanism for Myanmar
ILC	International Law Commission
ILO	International Labour Organization
IMT	International Military Tribunals
ISA	Islamic State of Afghanistan
ISAF	International Security Assistance Force
ISI	Inter-Services Intelligence
ISIL	Islamic State of Iraq and the Levant

ISIS	Islamic State in Iraq and Syria
ISKP	Islamic State Khorasan Province
KHAD	Khadamat-e Aetla'at-e Dawlati
LGBTIQA+	Lesbian, gay, bisexual, transgender, intersex, queer, questioning, asexual, non-binary, and more
MLAT	Mutual Legal Assistance Treaty
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NIAC	Non-international armed conflict
NRF	National Resistance Front of Afghanistan
OHCHR	Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
PDPA	People's Democratic Party of Afghanistan
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RSM	Resolute Support Mission
SCSL	Special Court of Sierra Leone
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
UDHR	Universal Declaration of Human Rights
UJ	Universal jurisdiction
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNITAD	United Nations Investigative Team for the promotion of Accountability for crimes committed by Daesh/ISIL
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
US	United States
VAI	Victim Advocates International
VPRS	Victims Participation and Reparations Section
VWS	Victims and Witnesses Section

HANDBOOK INTRODUCTION

Background

This Handbook is driven by the efforts of advocates inside and outside of Afghanistan to find ways in which members of the Taliban and other affiliated terrorist networks, notably the Haqqani Network and the Islamic State Khorasan Province ('ISKP'), can be held accountable for both alleged and proven crimes.¹

The 15 August 2021 has become known as the 'Fall of Afghanistan' in response to the Taliban's violent return to power. After this date, everything changed, including the prospects of accountability.

THE TALIBAN'S REIGNS OF TERROR

The Taliban violently took control of Afghanistan on 15 August 2021. This happened during ongoing peace talks between the Taliban and the Government of Afghanistan led by Ashraf Ghani. The peace talks had been widely criticised by many actors, including human rights advocates, due to the lack of participation of women.² Further, many people on the ground never believed that the Taliban would maintain promises of upholding human rights as their very ideology is openly hostile towards women and many minority groups, including religious minorities and members of the LGBTIQ+ community.³

The Taliban's first reign of terror which took place in the 1990s resulted in widespread human rights violations and oppression against those who did not adhere to the group's extremist beliefs.⁴ This included, for example, public executions by stoning.⁵ Most crimes committed by the Taliban during its first reign of terror have not been investigated and their return to power in 2021 is unlikely to see any form of accountability for past or ongoing international crimes.

Accountability requires actors to be held responsible for their actions (and sometimes failures to act). How this is achieved may vary across societies and contexts. The Ham Diley Campaign defines accountability as holding perpetrator(s) to account for crime(s) committed, following a process that upholds the rule of law and rights of the accused, as well as that of witnesses and victim-survivors. As has been well-

1 While many crimes committed in Afghanistan have gone without investigations in domestic courts, a number of senior members of the Taliban and affiliated terrorist networks were put on trial and convicted of various crimes in Afghanistan's courts over the years. However, as a result of so-called 'prisoner swaps', many convicted Taliban members have been released; see, eg, 'US and Australian Hostages Freed in Taliban Prisoner Swap', *BBC News* (online, 19 November 2019) <www.bbc.com/news/world-asia-50471186>; 'Afghan President Ghani: Freeing Prisoners Can Speed Peace Talks', *United States Institute of Peace* (online, 11 June 2020) <www.usip.org/publications/2020/06/afghan-president-ghani-freeing-prisoners-can-speed-peace-talks>.

2 'Afghanistan: Women's Full Participation Needed in Talks', *Human Rights Watch* (Web Page, 11 March 2021) <www.hrw.org/news/2021/03/22/afghanistan-womens-full-participation-needed-talks>.

3 Homa Hoodfar and Mona Tajali, 'Taliban 'Has Not Changed,' Say Women Facing Subjugation in Areas of Afghanistan under its Extremist Rule', *The Conversation* (Blog Post, 27 July 2021) <<https://theconversation.com/taliban-has-not-changed-say-women-facing-subjugation-in-areas-of-afghanistan-under-its-extremist-rule-164760>>.

4 See, eg, Human Rights Watch, *Afghanistan: The Massacre in Mazar-I Sharif* (Report, November 1998) <www.hrw.org/legacy/reports98/afghan/Afrepor0.htm>.

5 Sanjeev Miglani, 'Taliban Executions Still Haunt Afghan Soccer Field', *Reuters* (online, 13 September 2008) <<https://www.reuters.com/article/us-afghan-stadium-idUSSP12564220080913>>.

recognised, it is not limited to judicial accountability or to any particular level of society (local, national, regional or international).⁶

Justice, on the other hand, is much broader and often subjective. Holding perpetrator(s) to account does not mean that a person, or indeed a community, obtains justice. Yet, what is clear is that without accountability, there can be no justice.

Another important term for the purposes of this Handbook is **peace**. Afghanistan has been the site of one of the most complex and long-running conflicts in the world. The lack of peace, despite multiple efforts and processes over the decades, is closely related to both the lack of justice and the lack of accountability. It is well-established that peace is not simply the absence of hostilities.⁷ Sustainable peace requires an environment in which human rights and fundamental freedoms are respected, protected and fulfilled and where positive judicial and non-judicial steps are taken to ensure the maintenance of such an environment.⁸ Importantly, international human rights law ('IHRL') requires effective investigations into past violations and atrocities and access for victim-survivors and their families to effective, meaningful and timely remedies and reparations.⁹ This in turn necessitates a functioning rule of law and administrative institutions that people in the society can trust.

TRANSITIONAL JUSTICE

Mechanisms to build and maintain a peaceful environment that uphold human rights and seek accountability following large-scale atrocities are often referred to as transitional justice.¹⁰ It is not limited to judicial measures but may include non-judicial processes, such as truth-seeking and reconciliation alongside, or instead of, prosecutions of individuals and other measures.¹¹

But what about places like Afghanistan where accountability, peace and justice have been absent for decades and where the current reality perpetuates impunity, hostility and injustice on an everyday basis? It would be naive to expect anything close to a transitional justice process in Afghanistan so long as the Taliban remains in power. Such processes require respect for the rule of law and the upholding of human rights. On the contrary, the rule of law in Afghanistan has been dismantled by the Taliban. There have been many reports of extrajudicial killings and enforced disappearances which have not been investigated.¹² The list of human rights violations under their rule is long, including the ban on women and girls from attending school and university.¹³

⁶ Universal Rights Group Geneva, 'Towards a New Accountability? The Role of UN-mandated Investigative Mechanisms in Securing Accountability for Human Rights Violations at National, Regional and International Levels' (Concept Note, 1 September 2021) 1.

⁷ See, eg, *Declaration on the Right to Peace*, GA Res 71/189, UN GAOR, 71st sess, UN Doc A/RES/71/189 (19 December 2016, adopted 2 February 2017) 3.

⁸ Ibid.

⁹ *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, Agenda Item 71(a) UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) Principle III ('Van Boven/Bassiouni Principles').

¹⁰ United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (Report, 23 August 2004) 4 [8].

¹¹ Ibid.

¹² See, eg, Richard Bennett, *Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan*, UN Doc A/HRC/51/6 (Report, 9 September 2022).

¹³ Ibid 3–4, [26]–[30].



DID YOU KNOW?

Afghanistan under the Taliban is the only place in the world where women and girls are formally prohibited from attending school.¹⁴ Secondary school education and above is expressly prohibited for women and girls, which is a serious and systematic violation of the right to education and openly discriminatory on the basis of gender.¹⁵ This behaviour violates the core of IHRL which guarantees human rights to all human beings without distinction, including the right to education.¹⁶

Further, the lack of education has flow-on effects for the enjoyment of other human rights, such as the right to work, and will exclude women from participation in many areas of life. Women's freedom of movement, as well as their participation in public life through work and the enjoyment of public spaces, such as parks, are already expressly denied.¹⁷

Blatant human rights violations prevent any hope of accountability inside the country. Further, the Taliban actively dismantled institutions mandated to promote human rights, including Afghanistan's National Human Rights Institution ('NHRI'), the Afghanistan Independent Human Rights Commission ('AIHRC').¹⁸

WHAT IS A NATIONAL HUMAN RIGHTS INSTITUTION?

A NHRI is a national institution tasked with monitoring and protecting human rights in a country. NHRIs are graded against criteria known as the 'Paris Principles'.¹⁹ Important values that may result in a NHRI being deemed to be 'A-rated', the highest classification, include independence (from the government), transparency and adequate resourcing.²⁰

Afghanistan's NHRI, the AIHRC, was established after the ousting of the first Taliban regime in 2001. After the Taliban's return to power, the AIHRC (which had achieved an A-rating under the Paris Principles) was unable to operate inside the country, and in May 2022, the Taliban dissolved the institution completely.²¹ This decision has been widely criticised, including by the then UN High Commissioner for Human Rights, Ms Michelle Bachelet.²²

¹⁴ 'Fighting the Taliban's Ban on Girls' Education', *Human Rights Watch* (Web Page, 13 July 2022) <www.hrw.org/video-photos/interactive/2022/07/13/fighting-talibans-ban-girls-education>.

¹⁵ See, eg, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 10 ('CEDAW'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13 ('ICESCR').

¹⁶ Ibid.

¹⁷ See, eg, 'Taliban Ban Women from Parks and Fairs in Afghan Capital', *The Guardian* (online, 10 November 2022) <<https://www.theguardian.com/world/2022/nov/10/taliban-ban-women-from-parks-and-fairs-in-afghanistan-capital>>.

¹⁸ United Nations Office of the High Commissioner for Human Rights ('OHCHR'), 'Comment by Michelle Bachelet, UN High Commissioner for Human Rights, on the Dissolution of Afghanistan's Independent Human Rights Commission' (Press Release, 19 May 2022) <<https://www.ohchr.org/en/press-releases/2022/05/comment-michelle-bachelet-un-high-commissioner-human-rights-dissolution>>.

¹⁹ 'Principles relating to the Status of National Institutions (The Paris Principles)', GA Res 48/134, UN GAOR, 48th sess, UN Doc A/RES/48/134 (20 December 1993).

²⁰ Ibid.

²¹ OHCHR (n 18).

²² Ibid.

The dismantling of the AIHRC is one of countless examples of the Taliban's lack of adherence to human rights and fundamental freedoms and why pathways for justice must be considered outside the country.

Universal Jurisdiction and Afghanistan

As the Handbook will explain in detail, universal jurisdiction ('UJ') is the principle that enables states to investigate and prosecute persons believed to have committed certain international crimes. The crimes of focus in this Handbook include 'genocide', 'crimes against humanity' and 'war crimes'. Under what we might call 'pure' UJ, national courts can investigate and prosecute persons alleged to have committed acts that may amount to such crimes regardless of where the alleged crime was committed, the nationality of the suspect or the nationality of the victim-survivor(s).

At the time of writing, there have not been any convictions of members of the Taliban through the principle of UJ. However, in recent years, there have been several UJ prosecutions in other contexts, resulting in several high-profile convictions. For example, in 2022, the Koblenz Higher Regional Court in Germany convicted a former Syrian intelligence official of crimes against humanity, including but not limited to torture, murder and sexual violence, and sentenced the defendant to life imprisonment.²³

There are various reasons why the Ham Diley Campaign strongly believes in the importance and need to seek accountability through the principle of UJ with respect to international crimes allegedly committed by members of the Taliban in Afghanistan.

As noted above, there is no hope for accountability inside the country so long as the Taliban remains in power. Further, the long history of impunity inside the country makes accountability, both before and after the Taliban, a complex process. A conflict mapping report by the AIHRC, highlighting the suffering of the people of Afghanistan, was continuously silenced by subsequent government administrations.²⁴ Presidents Karzai and Ghani also pardoned and released high-profile Taliban prisoners, which was a major step backward for the rule of law.²⁵ There was no accountability mechanism for past war crimes or human rights abuses, and it was not uncommon for perpetrators to later be promoted to positions of leadership.²⁶

²³ See, eg, 'Germany: Conviction for State Torture in Syria', *Human Rights Watch* (Web Page, 13 January 2022) <<https://www.hrw.org/news/2022/01/13/germany-conviction-state-torture-syria>>.

²⁴ Patricia A Gossman, 'Documentation and Transitional Justice in Afghanistan', *United States Institute for Peace* (Special Report 337, 2013) <www.usip.org/sites/default/files/SR337.pdf> 7.

²⁵ Mehdi J Hakimi, 'The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan' (2022) 60(2) *Columbia Journal of Transitional Law* 315, 353.

²⁶ See for example Abdul Ghani Baradar who was released as part of peace talks in 2019 and communicated directly with the Trump Administration in negotiating the Doha Agreement as a senior member of the Taliban regime: Julian Borger, 'Taliban's Abdul Ghani Baradar is Undisputed Victor of a 20-year War', *The Guardian* (online, 16 August 2021) <<https://www.theguardian.com/world/2021/aug/15/talibans-abdul-ghani-baradar-is-undisputed-victor-of-a-20-year-war>>.

At the international level, as the Handbook will consider in more detail, there are various barriers to the investigation by the International Criminal Court ('ICC'). It has been a slow process. Even if it eventually results in proceedings against one or more Taliban members, the investigation is limited to allegations of crimes against humanity and war crimes which took place 1 May 2003 onwards.²⁷

The challenges to accountability both inside Afghanistan and at the ICC indicate the need to consider other avenues. The potentials and challenges of seeking accountability in national courts outside Afghanistan by relying on the principle of UJ is what this Handbook seeks to explore.



TO SUMMARISE

UJ is a principle through which national courts may investigate and prosecute an alleged perpetrator of certain international crimes regardless of the nationality of the alleged perpetrator or the victim-survivor(s), or where the crime took place.

It is particularly important to consider UJ with respect to crimes committed by the Taliban in Afghanistan as there is little hope for accountability inside Afghanistan and the process before the ICC is slow and for various reasons limited in scope.

Methodology

The Handbook is a report which involves desk-based research of open-source material. As mentioned, its production was commissioned by diaspora groups from Afghanistan based in various parts of the world. It has been important for the Ham Diley Campaign that the ownership remains with the diaspora groups. This involved Co-Founders speaking with a diverse group of experts early on to obtain their support for the project (see below).

Before commencing initial drafts in early 2022, the Ham Diley Campaign consulted with a number of experts as to an initial table of contents to have a sense of the type of information that would be useful to readers of the Handbook. Once input had been received, the Campaign continued by working with law students at the Monash Afghanistan Support Clinic over an extended period of time to obtain research and memoranda on various issues covered. The Campaign Co-Founders supervised the students and worked together to prepare initial content of the planned chapters for expert input. This also required a significant amount of restructure and editing to ensure that the team had sufficient material available for discussion.

²⁷ 'Afghanistan', ICC (Web Page) <<https://www.icc-cpi.int/afghanistan>>

The next phase in the process was the detailed comments of the Internal Expert Review Panel, as well as initial thoughts from a few other experts. Alongside this process, the Campaign commenced engagement with external experts to obtain their views as to the initial direction of the Handbook, as well as input on particular issues and aspects of the Handbook. Input was collected and, together with the detailed comments by the Internal Expert Review Panel, incorporated into an updated draft. The revised draft continued to be subject to review and design by experts until the latter half of 2023.

Testimony of victim-survivors who remain anonymous was also incorporated in certain sections of Part 2 of the Handbook which contains information on alleged crimes in Afghanistan and provides an overview of the history of the conflict. It was important for the Campaign that voices of those who have been directly affected were featured in the Handbook to the extent that they could remain anonymous for security reasons. Testimony was collected in Persian from sources well-known and trusted by the Campaign who voluntarily opted to share information.

The final step in the process was a detailed review by the External Reviewer. Once those comments had been incorporated, the Handbook was sent for translation into Persian and Pashto. As the translation stage is crucial to ensure that the meaning retains its significance, this process was given ample time and involved input from experts with diverse backgrounds both in law and other disciplines.

Scope

The Handbook focuses upon explaining the principle of UJ in general for the purpose of examining its potential in holding members of the Taliban and other affiliated terrorist networks, notably the Haqqani Network and ISKP, accountable for international crimes. In doing so, it does not diminish or reject the involvement of other actors in the conflict in Afghanistan. This includes allegations of international crimes by members of allied forces who were present in Afghanistan for two decades. Such alleged perpetrators may well face justice in jurisdictions where they are nationals, or face extradition to their national jurisdictions. If so, the principle of UJ would not need to be relied upon as there is a connection between the nationality of the alleged perpetrator and the jurisdiction in which they may be held accountable. Further, even if there is no such connection in a particular case, it is unlikely that allied forces would be extradited or prosecuted in other states through the principle of UJ, given the realities of international politics.

Many allegations of international crimes have also been reported against members of the various administrations of the Government of Afghanistan. Similarly, there have been reports of human rights violations by different administrations.²⁸ The content of the present Handbook will be relevant also with respect to such alleged perpetrators. The choice was made to focus on the Taliban and related terrorist networks given their current position of power in Afghanistan, as well as the many number of past reports of atrocities on the part of the Taliban in the 1990s that have gone without investigation.²⁹

²⁸ See, eg, OHCHR, 'Human Rights Council Discusses Situation of Human Rights in Afghanistan, with a Focus on the Situation of Women and Girls' (Press Release, 12 September 2022) <<https://www.ohchr.org/en/press-releases/2022/09/human-rights-council-discusses-situation-human-rights-afghanistan-focus>>.

²⁹ See, eg, Rod Nordland, 'Top Afghans Tied to '90s Carnage, Researchers Say', *The New York Times* (online, 22 July 2012) <<https://www.nytimes.com/2012/07/23/world/asia/key-afghans-tied-to-mass-killings-in-90s-civil-war.html>>.

Further, due to the length and complexity of the conflict in Afghanistan, it was not possible to consider in detail alleged crimes of all actors across the entire duration of the conflict. One section of the Handbook focuses specifically on alleged crimes of the Taliban between 1994 and 2023, referring also to atrocities claimed by the Haqqani Network and ISKP. This illustrates the type of international crimes which have been reported as having been committed by the Taliban and related terrorist networks, rather than provides a comprehensive conflict mapping. We acknowledge and deplore earlier attacks and incidents, for example, the civil wars of the early 1990s, killing 50,000 people and displacing millions.³⁰ This includes the Afshar massacre which resulted in the killing of approximately 1,000 civilians and dispossession of property.³¹

The annexes of the Handbook discuss UJ in selected jurisdictions. These jurisdictions were selected based on a number of factors, including any high-profile recent cases indicating a willingness on the part of a state to exercise UJ (although it is noted that this is often a context-specific and political decision). Australia was included as the Ham Diley Campaign started in Melbourne and has a large diaspora community.

Clarification of Terminology

Rather than including a glossary at the start, the Handbook will define relevant terms as they are mentioned throughout the Handbook. However, there are a few terms which need preliminary clarification:

- **Victim-survivors:** The Handbook uses the term ‘victim-survivors’ rather than ‘victims’. This is to recognise the autonomy of persons who have been exposed to crimes and to acknowledge that they are not passive agents requiring protection, but rather individuals empowered to seek justice and accountability. Victim-survivors are not limited to those exposed to crimes directly but also extend to their family members.
- **People of Afghanistan:** The Handbook opposes any historic and contemporary non-inclusive uses of the term ‘Afghan’. The people of Afghanistan are made up of various ethnic groups as confirmed in the 2004 Constitution.³²
- **The Taliban:** The Handbook will refer in various ways to the Taliban and its ‘regime’ and ‘officials’. These references do not in any way recognise the Taliban as the legitimate power of Afghanistan and the Ham Diley Campaign strongly advocates against such recognition. Nonetheless, while not a recognised Government, the Taliban must, if purporting to exercise state functions, respect, protect and fulfil Afghanistan’s international human rights obligations, as well as uphold the rules of international humanitarian law (‘IHL’) as a non-state actor to a non-international armed conflict (‘NIAC’).

³⁰ One of the Afghan civil wars took place between 1989 and 1992. During this time, an attack on the capital by the Hezb-e-Islami army of mujahideen leader Gulbuddin Hekmatyar resulted in the killing of 50,000 people; see, eg, Hannah Bloch, ‘A Look At Afghanistan’s 40 Years Of Crisis — From The Soviet War To Taliban Recapture’, *NPR* (online, 31 August 2021) <<https://www.npr.org/2021/08/19/1028472005/afghanistan-conflict-timeline>>.

³¹ See, eg, ‘Afshar Massacre 1993’, *Hazara International* (Web Page, 9 February 2011) <www.hazarainternational.com/2011/02/09/afshar-massacre-1993/>.

³² *Constitution of Afghanistan* [Afghanistan], 3 January 2004, art 4.



How to Navigate this Handbook

The Handbook is divided into three parts. Depending on each reader's background and experience, and what they hope to learn from the Handbook, some parts will be more relevant than others.



Part 1 provides a detailed overview and analysis of the concept of UJ. It will be relevant for readers without or with little knowledge of what UJ is and how it operates in general terms. It would also be a useful reminder for readers with some knowledge of UJ. Chapters cover topics such as the meaning and practice of UJ, as well as the human rights obligations on the part of states where UJ cases are brought towards victim-survivors of certain international crimes. It also discusses the importance and meaning of evidence and the impact of digital technology.

Part 2 provides a specific overview of the situation of Afghanistan, including its history and alleged international crimes on the part of Taliban since their emergence until 2023. In doing so, it also refers to atrocities committed by affiliate groups, notably the Haqqani Network and ISKP. This Part is particularly important for readers with little knowledge of the context of Afghanistan, but who wish to know the extent of international crimes and why UJ is such an important consideration with respect to Afghanistan, including for future case-building or advocacy efforts.



Part 3 contains jurisdiction-specific annexes that briefly review the UJ framework in the select jurisdictions (up-to-date as at the time of publication of this Handbook). Each annex includes references to jurisdiction-specific legislation and some unique challenges and potentials in particular jurisdictions, referring where relevant to any past UJ cases. Readers may be interested in one or more of these annexes depending on, for example, the reader's location and interests.



Part 1

OVERVIEW OF UNIVERSAL JURISDICTION

PART 1

AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER



THE MEANING AND PRACTICE OF UNIVERSAL JURISDICTION

Universal jurisdiction ('UJ') is a principle which enables states to pursue accountability for certain international crimes no matter where they took place, the nationality of the alleged perpetrator or that of the victim-survivor(s).

States and their senior leaders have the resources to cause unthinkable harm to their people. The position of power which they occupy also means that they may be able to avoid punishment for such suffering, resulting in what is known as 'impunity'. Like so many before them, the Taliban has used its position of military power in Afghanistan to cause terrible suffering. With evidence that those currently in control of Afghanistan are committing international crimes, the principle of UJ may present one avenue for victim-survivors and stakeholders supporting them to seek accountability for atrocities in Afghanistan.

Chapter 1 of this first Part of the Handbook is divided into two main sections. Section 1.1 introduces the concept of UJ. It considers the meaning of this principle and gives an example of typical stages involved in a proceeding. It also provides context to this principle by considering how it initially emerged to deal with crimes such as piracy. It then turns to contemporary applications of UJ with respect to international crimes. Section 1.2 considers why UJ is particularly important in the context of atrocities in Afghanistan.

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1.1 INTRODUCTORY EXPLANATION

1.1.1 What is Universal Jurisdiction?

States can criminalise acts that occur within their own borders. They can also criminalise acts of their nationals whether or not they occur within their borders. The first basis for jurisdiction is called 'territoriality', while the second is known as 'active personality'. States sometimes also take action in cases when their own nationals are the victim-survivors of certain international crime(s) overseas. This basis for action is called 'passive personality'.

'Universality' or UJ is another basis of jurisdiction. UJ is a broader tool that allows states to prosecute certain international crimes no matter where they took place, the nationality of the alleged perpetrator or that of the victim-survivor(s).¹ This means that any state can hold persons accused of such crimes accountable even if the governments where the accused are nationals or residents cannot or will not do so.

The most serious international crimes of genocide, crimes against humanity and war crimes require a state to take action. Unfortunately, a government that has directed or assisted in such crimes will often refuse to commence a criminal case against the alleged perpetrator(s) or to send ('extradite') them to a state that wants to do so.²

Leaders in societies of conflict may additionally (or alternatively) be unable to commence criminal cases because their justice system may have collapsed.³ This means that perpetrators often go free.⁴ The principle of UJ has developed because it is recognised that certain crimes offend all of humanity, not just

individual victim-survivors.⁵ For this reason, UJ is usually confined to instances of the most serious international crimes, like the ones covered in this Handbook.⁶

A full discussion of the legal bases of UJ and the potential crimes is provided in the next chapter of the Handbook. However, in terms of international crimes, this Handbook focuses primarily on three international crimes: genocide, crimes against humanity and war crimes.⁷ This is because UJ is more commonly used for these serious international crimes, and because they are relevant to the situation in Afghanistan.

Genocide involves certain acts against members of a targeted group (including but not limited to killing, causing serious mental or bodily harm, forcibly transferring children) when committed with an intent to destroy, in whole or in part, a particular national, ethnical, racial or religious group 'as such'.⁸

Crimes Against Humanity involve a range of crimes 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.⁹ The particular crimes include, for example, murder, enslavement, torture, sexual crimes and 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.¹⁰

War Crimes involve serious violations of international humanitarian law ('IHL'). The particular violations include, for example, wilful killing, torture, sexual crimes, and the taking of hostages.¹¹

1 Codified in *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 49; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 129; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 146.

2 Madeline Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks' [2001] 35 *New England Law Review* 337, 337.

3 Ibid 337–8.

4 Kenneth Roth, 'The Case for Universal Jurisdiction' (2001) 80(5) *Council on Foreign Relations* 150, 150.

5 Michael Scharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53(2) *Harvard International Law Journal* 358.

6 See, eg, *Law 26200* (Argentina) 13 December 2006 taking effect from 5 January 2007; *Criminal Code Act 1995* (Cth) div 268; *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24; *Judicial Power Organization Act* (Spain) enacted 1 July 1985, art 23.4.

7 United Nations ('UN'), *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (Report, 2014) <<https://www.globalr2p.org/wp-content/uploads/2019/09/2014-Framework-of-Analysis.pdf>> 1.

8 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art II ('Genocide Convention').

9 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7 ('Rome Statute').

10 Ibid.

11 Ibid art 8.

UJ allows states across the world to intervene when there is evidence demonstrating that innocent people have been subjected to atrocities.¹² However, there are various obstacles to UJ discussed in more detail in Part 1 Chapter 3 of this Handbook. For example, states may be hesitant to use UJ because it may impact international relations. There can also be barriers to evidence-collection for both the prosecution and the defence which can impede fair trial processes.

The International Criminal Court ('ICC') also has the ability to prosecute certain serious crimes.¹³ It functions under the principle of complementarity - which means it can only prosecute when a state is unwilling or unable to prosecute itself. This may be useful in Afghanistan, but the investigations and trials can be lengthy and difficult. The ICC has jurisdiction to investigate and prosecute when the crimes are related to its member states,¹⁴ or in certain other limited circumstances. Such other circumstances include a referral of the situation by the United Nations Security Council ('UNSC').¹⁵

The ICC's Afghanistan investigation, including barriers to its effectiveness, are discussed in Part 1 Chapter 7 of this Handbook. UJ may be a useful and more cost-effective avenue for accountability where an alleged perpetrator is discovered in, or is travelling to, a state which allows for UJ.

1.1.2 The Various Events and Stages of a Universal Jurisdiction Case

When discussing UJ, there are various events and stages that precede a potential judicial proceeding. The table to the right outlines some of the typical events and stages drawn from a recent case against a Syrian official who was tried and convicted in Germany for atrocities committed in Syria.

ATROCITIES TAKING PLACE

Anwar Raslan was a Syrian colonel under President Assad, who headed the investigation unit of one of Syria's main intelligence agencies.¹⁶ Mr Raslan was alleged to have overseen the torture of detainees between 2011 and 2012.¹⁷

ACCUSED ENTERS A STATE WITH UJ OVER ALLEGED INTERNATIONAL CRIMES

Mr Raslan entered Germany and was granted asylum in 2014.¹⁸

INVESTIGATION

The German Federal Public Prosecutor had been gathering information about serious crimes committed by the Syrian government since 2011.¹⁹ In February 2019, German authorities arrested Mr Raslan following an investigation.²⁰

COURT PROCESSES

In October 2019, Mr Raslan was brought before a German State Court. The trial commenced in April 2021. He was afforded a defence and was tried according to German law and procedure, which includes recognition of fair trial rights.

In January 2022, he was convicted and sentenced to life imprisonment for crimes against humanity, including 25 instances of causing dangerous bodily harm; two cases of rape and sexual coercion; another two for sexual abuse, as well as 14 instances of deprivation of liberty for more than one week, as well as two cases of kidnapping. In addition, he was found to have overseen the murder of 27 prisoners and the torture of thousands.²¹

OUTCOME

This was the first case where a senior official in President Assad's regime was found guilty of crimes against humanity.²² The trial was said to give 'a voice to those whom the Assad regime tried to silence'.²³ A total of 50 victim-survivors gave evidence during the case with 24 of them being named as co-plaintiffs.²⁴

¹² Morris (n 2) 338.

¹³ Rome Statute (n 9) art 5.

¹⁴ While 123 states have ratified the Rome Statute (as of December 2023), 31 have not ratified it including Russia, USA and Israel, and a further 41 have not signed it including China, Syria and Myanmar.

¹⁵ Rome Statute (n 9) art 13(b).

¹⁶ Jenny Hill, 'German Court Finds Syrian Colonel Guilty of Crimes Against Humanity', *BBC News* (online, 13 January 2022) <<https://www.bbc.com/news/world-europe-59949924>>.

¹⁷ Ibid.

¹⁸ Jonas von Schreijäg et al, *Das Erste* (online, 24 September 2020) <<https://daserste.ndr.de/panorama/archiv/2020/Asyl-fuer-syrischen-Folterchef,folter114.html>>.

¹⁹ TRIAL International, 'Anwar Raslan' (online) <<https://ujim.trialinternational.org/latest-post/anwar-raslan-and-eyad-al-gharib/>>.

²⁰ Ibid.

²¹ Philip Oltermann, 'German Court Jails Former Syrian Intelligence Officer For Life', *The Guardian* (online, 13 January 2022) <<https://www.theguardian.com/world/2022/jan/13/german-court-jails-former-syrian-intelligence-officer-anwar-raslan-for-life>>.

²² Ibid.

²³ Hill (n 16).

²⁴ Ibid.

The above is just one example of the events and stages that may be involved when pursuing alleged perpetrators through UJ. Each situation is different; where and how a person enters another state; and whether there is an investigation that leads to a trial varies from case to case.

While the case against Anwar Raslan is an example of a case resulting in conviction, there are many obstacles along the way. Many attempts at exercising UJ will not result in conviction or even reach the stage of a trial. Additionally, as noted in the Handbook Introduction, accountability does not equal justice and a conviction is only one piece of the puzzle for victim-survivors seeking justice and reparation for what happened to them, their loved ones and their community more broadly.

1.1.3 History of Universal Jurisdiction

UJ has evolved and developed over a long period of time. Understanding its history is useful for understanding how it has come to be used today.

- **To uphold an empire:** UJ was used at least as early as the Holy Roman Empire.²⁵ There, emperors and the Pope claimed that they had natural power to decide on law across the world.²⁶ They exercised UJ for themselves and their empire, rather than for a broader concept of humanity or international good.
- **To fight piracy:** From the 17th century, UJ was used to combat piracy as pirates were considered ‘enemies of humankind’.²⁷ However, the reason was not to protect the conscience of humanity as modern UJ is expressed. It was used out of necessity because pirates threatened international trade (a state interest).²⁸
- **To fight the slave trade at sea:** In the 19th century after slavery had been abolished, UJ was used by

the United Kingdom (‘UK’) to hold slave traders at sea accountable.²⁹ Unlike piracy, the slave trade did not directly impact state interests. Instead, the practice was considered ‘irreconcilable with the principles of humanity and justice’.³⁰

- **To respond to the horrors of war:** There were various responses to the heinous acts committed during the Second World War which developed the meaning and practice of UJ away from early justifications involving state interests towards the need to protect humanity from certain international crimes (most of which had been committed during the Second World War).³¹

(a) The Nuremberg Trials: Twenty-four Nazi officials were prosecuted between 1945 and 1946 in the Nuremberg Trials. These trials have had a major influence on modern UJ. During the trials, prosecutors from the US and the UK drew an analogy between the right to prosecute pirates under UJ and the legitimacy of the Nuremberg Tribunal’s extension of UJ.

(b) The Adolf Eichmann Trial: Adolf Eichmann (who played a key role in the Holocaust) was tried in 1961 in Israel for various crimes, including crimes against humanity. The Supreme Court of Israel held that ‘the substantive basis underlying the exercise of universal jurisdiction in respect of the crime of piracy’ justified its use with respect to the crimes in the Eichmann trial.³²

(c) The United Nations: The Second World War also motivated the creation of the United Nations (‘UN’). The UN as an inter-governmental organisation has facilitated the negotiation and ratification by its member states of legally binding instruments (treaties) that define international crimes. The UN itself has also created non-binding instruments that define international crimes. The UN and its legal instruments are discussed further in Part 1 Chapter 2 of this Handbook.

²⁵ Anne Orford, ‘Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect’ (2009) 30(3) *Michigan Journal of International Law* 981, 981.

²⁶ *Ibid* 988.

²⁷ Amina Adanan, ‘United Kingdom Policy Towards Universal Jurisdiction Since the Post-War Period’ (2021) 21(6) *International Criminal Law Review* 1025, 1027 citing *King v Marsh* (1615) 3 Bulstr 27; 81 ER 23. See also *United States v Smith*, 18 US (5 Wheat) 153, 161 (1820); Kenneth Randall, ‘Universal Jurisdiction under International Law’ (1988) 66(4) *Texas Law Review* 785, 788.

²⁸ Devika Hovell, ‘The Authority of Universal Jurisdiction’ (2018) 29(2) *The European Journal of International Law* 427, 442–3.

²⁹ Adanan (n 27) 1025.

³⁰ *Treaty of Peace and Amity Between his Britannic Majesty and the United States of America*, United States–Great Britain, signed December 24 1814 (entry into force 17 February 1815) art 10.

³¹ Some argue that the Second World War trials outlined below are not examples of UJ, but instead based on consent of the defeated state (here, Germany and Japan): Scharf (n 5) 378.

³² *A-G (Israel) v Adolf Eichmann (Trial)* (1962) 36 ILR 18 (District Court of Jerusalem) [12].

(d) The Tokyo Trials: The Tokyo Trials were conducted between 1946 and 1948 in response to atrocities committed by the Japanese from 1928, before the invasion of Manchuria, through to the end of the Second World War in 1945. In response to arguments from the defence that the Tribunal lacked jurisdiction, the Tribunal adopted the reasoning of the Nuremberg Trials in finding its jurisdiction to try the 27 defendants.

1.1.4 Universal Jurisdiction in Recent Years

Since the Second World War, UJ has extended to a wide range of offences that threaten humanity as a whole. While the specific crimes covered by UJ differ from one state to another depending on their national legislation, there are many which are common to all of them, notably the international crimes focused on in this Handbook.

AN EARLY LANDMARK CASE

In 1998, Augusto Pinochet was arrested in London for his role in the killings carried out while he was Chile's Head of Military Government.³³ The arrest was justified on the basis of the principle of UJ. Notably, the motion for Pinochet's arrest warrant was filed by victim-survivors of Pinochet's dictatorship,³⁴ demonstrating the ability for UJ to be used by victim-survivors.

The importance of a victim-survivor focused approach to criminal justice, including in UJ proceedings, is discussed in Part 1 Chapter 4 of this Handbook. There, we return to the *Pinochet* case in the context of victim-survivor mobilisation. We also consider the judges discussion of so-called 'immunities' – one of the barriers to UJ – in Part 1 Chapter 3 of the Handbook.

Just as new crimes have been added to the scope of UJ over time, the prevalence of UJ has also increased in recent years. In 2012, Amnesty International concluded that 76% of states (147 out of 193) allowed for UJ over genocide, crimes against humanity, war crimes or torture.³⁵ The number of UJ cases has also increased in recent years.³⁶

Germany is one of these many jurisdictions that embrace UJ. The relevant legislation allows prosecutors to exercise UJ when initiating investigations and prosecutions for genocide, crimes against humanity and war crimes.³⁷ Importantly, Germany has invested heavily in its war crimes investigations units which proactively find and investigate people in Germany who may be prosecuted using UJ.³⁸ However, German prosecutions have generally focussed on lower level offenders, with prosecutors apparently hesitant to open cases against high-ranking officials.³⁹ A review of the UJ framework in Germany and other selected jurisdictions is included in the Part 3 Annexes of this Handbook.

1.2 UNIVERSAL JURISDICTION AND INTERNATIONAL CRIMES IN AFGHANISTAN

While the discussion of UJ in this Handbook will be applicable to prosecuting atrocities around the world, the key function for this Handbook is to explore UJ in the context of international crimes committed in Afghanistan over many decades and continuing on a daily basis under the Taliban's second reign of terror.

There are various reasons why UJ is relevant in the context of Afghanistan.

³³ *R v Bartle and the Commissioner of Police for the Metropolis and other Ex Parte Pinochet* (1999) 38 ILM 581.

³⁴ 'How General Pinochet's Detention Changed the Meaning of Justice', *Amnesty International* (Web Page, 16 October 2013) <<https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice/>>.

³⁵ Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World: 2012 Update* (Report, 2012) <<https://www.amnesty.org/en/documents/IOR53/019/2012/en/>>.

³⁶ Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) *European Journal of International Law* 779, 781.

³⁷ *Völkerstrafgesetzbuch* [Code of Crimes against International Law] (Germany) ('VStGB') §§ 6, 7, 8-12.

³⁸ Loveday Morris, 'Why Germany is Becoming a go-to Destination for Trials on the World's Crimes', *Washington Post* (online, 6 March 2021) <https://www.washingtonpost.com/world/europe/germany-war-crimes-justice/2021/03/05/b45372f4-7b78-11eb-8c5e-32e47b42b51b_story.html>.

³⁹ *Ibid.*

1.2.1 The Prevalence of International Crimes over Time

First, many atrocities committed in Afghanistan raise concerns from the perspective of the international crimes subject to UJ. These are outlined in more detail in Part 2 of the Handbook.

For the past 43 years, Afghanistan has been the battlefield of proxy wars between major world and regional powers. Civil unrest began after King Nader Shah was assassinated in the 1970s.⁴⁰ In 1979, the Soviet Union invaded Afghanistan after the rise of national communist parties, and withdrew ten years later.⁴¹ In this time, an estimated 870,000 Afghans were killed and three million maimed or wounded.⁴² Bombings by the Soviet Union were indiscriminate; in one day it was reported that 1,000 civilians were killed in the Faryab province.⁴³

The Taliban ruled Kabul from 1996 to 2001 and were by 1997 in control of 90% of Afghanistan.⁴⁴ The Taliban attempted to erase women from civic life: girls were barred from education and women could neither work nor leave the house without a male relative.⁴⁵ Those who the Taliban perceived as criminals were executed in stadiums and civilians were forced to watch.⁴⁶ Many ethnic groups were persecuted, and the Hazaras were subject to ethnic cleansing.⁴⁷ In 1998, it was reported that the Taliban killed thousands of Hazara civilians in Mazar-i-Sharif, and there is evidence indicating that even children were summarily executed in the streets.⁴⁸

After the attacks of 9/11 (2001), the US invaded Afghanistan. By 2009, it was estimated by the UN

Assistance Mission to Afghanistan ('UNAMA') that more than 100,000 people in Afghanistan had been killed or wounded by this conflict.⁴⁹

After the withdrawal of US armed forces in August 2021, the Taliban immediately retook control of Kabul, and shortly after the rest of Afghanistan. As of June 2023, UNAMA reported that more than 1,000 civilians have been killed by improvised explosive devices ('IEDs') alone since the 2021 takeover, in addition to thousands more injured in such attacks.⁵⁰

The Taliban are targeting women and girls, minorities, and human rights defenders on a systematic basis.⁵¹ UNAMA states the Taliban continues to perpetrate violence despite promises of amnesty, including 160 extrajudicial killings, 56 incidents of torture, and 178 arbitrary arrests and detentions.⁵² The risk of more international crimes continues.

1.2.2 The Lack of Accountability inside Afghanistan

Second, the international crimes in Afghanistan have gone with little to no accountability and there is no hope of any change to this trend inside Afghanistan as long as the Taliban remains in power.

Landmark attempts at peace following periods of conflict consistently failed to bring transitional justice (discussed in more detail in Part 2 Chapter 2 of the Handbook).⁵³

■ **The Geneva Accords** were agreements signed on 14 April 1988 between Afghanistan, Pakistan, the US and the Soviet Union outlining (among other things) a timetable of the withdrawal of

40 Human Rights Watch, 'Backgrounder on Afghanistan: History of the War' (Web Page) <<https://www.hrw.org/legacy/backgrounder/asia/afghan-bck1023.pdf>>.

41 Ashley Jackson, *The Cost of War: Afghan Experiences of Conflict, 1978-2009* (Report, 1 November 2009) <https://www-cdn.oxfam.org/s3fs-public/file_attachments/afghanistan-the-cost-of-war_14.pdf>8.

42 Ibid.

43 Ibid.

44 Nasreen Ghufuran, 'The Taliban and the Civil War Entanglement in Afghanistan' (2001) 41(3) *Asian Survey* 462, 463. The historical context of Afghanistan which gave rise to the Taliban and the current situation is discussed at length in Part 2 of this Handbook.

45 Jackson (n 41) 11.

46 Ibid.

47 Ibid.

48 Meg Cramer, 'Mass Murder in Afghanistan: 40 Years of Conflict', *The Institute of World Politics* (Article, 18 December 2020) <<https://www.iwp.edu/articles/2020/12/18/mass-murder-in-afghanistan-40-years-of-conflict/>>.

49 Ibid.

50 UNAMA, 'UNAMA Reports Records Heavy Toll on Afghan Civilians by IED Attacks' (Press Release, 27 June 2023) <https://unama.unmissions.org/sites/default/files/27_june_2023_-_unama_report_records_heavy_toll_on_afghan_civilians_by_ied_attacks_english.pdf>.

51 'Populations At Risk: Afghanistan', *Global Centre for the Responsibility to Protect* (Web Page, 1 September 2022) <<https://www.globalr2p.org/countries/afghanistan/>>.

52 'UN Releases Report on Human Rights in Afghanistan since the Taliban Takeover', UNAMA (Web Page, 20 July 2022) <<https://unama.unmissions.org/un-releases-report-human-rights-afghanistan-taliban-takeover>>.

53 Ehsan Qaane, 'Peace in The Air, But Where Is Justice? Efforts to Get Transitional Justice on the Table' *Afghanistan Analysts Network* (Research Paper, 28 February 2019) <<https://www.afghanistan-analysts.org/en/reports/rights-freedom/peace-in-the-air-but-where-is-justice-efforts-to-get-transitional-justice-on-the-table/>>.

Soviet Troops from Afghanistan.⁵⁴ However, the Mujahideen (the group which later formed the Taliban) were not a party to the Accords and, while they stopped receiving aid, they continued fighting.⁵⁵ The Accords also only provided 'diplomatic cover' for the Soviet withdrawal rather than achieving meaningful transitional justice.⁵⁶

- **The Bonn process** was convened by the UN in 2001, and intended to be an 'Afghan-led' process to plan the future leadership of Afghanistan after the US military operations which followed 9/11.⁵⁷ However, short-term stability was prioritised over long term transitional justice,⁵⁸ with the transitional government not wanting to 'rock the boat'.⁵⁹
- **The Doha Agreement** was a peace agreement signed on 29 February 2020 between the US and the Taliban for the complete withdrawal of US troops from Afghanistan in 2021.⁶⁰ However, the Government of Afghanistan was excluded from talks leading up to the Agreement,⁶¹ and the US failed to negotiate significant concessions in exchange for withdrawal.⁶² Once the agreement was signed, there was no leverage for any form of transitional justice, and the Taliban took control of Afghanistan immediately after the withdrawal.

Inside Afghanistan, the lack of accountability can be observed through the failure on the part of subsequent government administrations to take meaningful or practical steps to investigate and prosecute the crimes committed by the Taliban or

other actors since the Taliban's resurgence in 2004. Any attempts at accountability faced backlash. For example, the Government continuously prevented the publication of a conflict-mapping report that highlighted the suffering of the people of Afghanistan to be used, amongst other things, to commemorate victim-survivors.⁶³ Indeed, presidents of Afghanistan pardoned and released many high-profile Taliban prisoners who were convicted of killing civilians.⁶⁴ There was no accountability mechanism for past war crimes or human rights abuses.⁶⁵ Instead, a bill was passed in 2007 providing total amnesty for crimes committed prior to 2001.⁶⁶

1.2.3 The Slow Progress at the International Level

Third, the process for accountability at the international level has been slow and is filled with various roadblocks.

In particular, the ICC has not been effective in providing accountability. The ICC was created to prosecute genocide, crimes against humanity, war crimes, and more recently the crime of aggression.⁶⁷ At the time of writing, 123 states are currently parties to the *Rome Statute of the International Criminal Court* ('Rome Statute') (the document underpinning the ICC) and have therefore accepted the ICC's jurisdiction over these significant crimes.⁶⁸ Details of the ICC are discussed more in Chapter 2 of this Part of the Handbook.

⁵⁴ Matthew Fielden and Jonathan Goodhand, 'Beyond the Taliban? The Afghan Conflict and United Nations Peacemaking' (2001) 1(3) *Conflict, Security and Development* 5, 8.

⁵⁵ Fatima Ayub and Sari Kouvo, 'Righting the Course? Humanitarian Intervention, the War on Terror and the Future of Afghanistan' (2008) 84(8) *International Affairs* 641, 643.

⁵⁶ Fielden and Goodhand (n 54) 17 quoting Rubin R Barnett, 'Afghanistan: Persistent Crisis Challenges the UN System', Writenet Country Papers, August 1998.

⁵⁷ Ayub and Kouvo (n 55) 649.

⁵⁸ Ibid 650.

⁵⁹ Qaane (n 53) 4.

⁶⁰ Sarah Dadouch et al, 'U.S. Signs Peace Deal with Taliban Agreeing to Full Withdrawal of American Troops from Afghanistan', *The Washington Post* (online, 29 February 2020) <https://www.washingtonpost.com/world/asia_pacific/afghanistan-us-taliban-peace-deal-signing/2020/02/29/b952fb04-5a67-11ea-8efd-0f904bdd8057_story.html>.

⁶¹ Lisa Curtis, 'How the Doha Agreement Guaranteed US Failure in Afghanistan', *Hoover Institution, Stanford University* (Essay, 2 November 2021) 3 <<https://www.hoover.org/research/how-doha-agreement-guaranteed-us-failure-afghanistan>>.

⁶² Ibid 2–5.

⁶³ Patricia A Gossman, *Documentation And Transitional Justice In Afghanistan* (Special Report, 1 September 2013) <<https://www.usip.org/sites/default/files/SR337.pdf>>. The Commissioner overseeing the report (an outspoken critic of the President of Afghanistan) did not have his term renewed half a year out from report completion, and the report was never finished.

⁶⁴ Mehdi J Hakimi, 'The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan' (2022) 60(2) *Columbia Journal of Transitional Law* 315, 353.

⁶⁵ Ahmad Nader Nadery, 'Peace or Justice? Transitional Justice in Afghanistan' (2007) 1(1) *The International Journal of Transitional Justice* 173, 173; Parwez Besmel, 'The Pathway to Transitional Justice in Afghanistan' (2020) 37(2) *University Press of Florida* 240, 250–1.

⁶⁶ Parwez Besmel, 'The Pathway to Transitional Justice in Afghanistan' (2020) 37(2) *University Press of Florida* 240, 250 citing 'Afghanistan: Repeal Amnesty Law', *Human Rights Watch* (online, 10 March 2010) <<https://hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law>>.

⁶⁷ Rome Statute (n 9) art 5.

⁶⁸ 'The States Parties to the Rome Statute', *International Criminal Court* (Web Page, accessed 15 May 2023) <asp.icc-cpi.int/states-parties>.

The ICC has long been criticised as slow-moving with lengthy investigations.⁶⁹ The ICC does not have the resources to force defendants to attend the court, with no police force of its own, and no means to oblige states to cooperate and extradite a wanted individual.⁷⁰ For example, in 2009 the ICC Office of the Prosecutor ('OTP') first issued an arrest warrant for Sudan's President Omar Al-Bashir. This warrant was ignored by 19 states, nine of whom are signatories to the Rome Statute.⁷¹

In March 2020, after a request made in 2017, the ICC Prosecutor decided to commence an investigation into alleged war crimes and crimes against humanity committed in Afghanistan since 2003, almost 20 years ago.⁷² However, the investigation is still ongoing because of numerous significant delays. For example, on 26 March 2020, the Government of Afghanistan made a successful request to defer the investigation stating that investigations were already underway domestically. However, these investigations ceased when the Taliban overthrew the Government in August 2021. With the Taliban refusing to investigate, on 31 October 2022, the ICC authorised the Prosecution to resume its investigation.⁷³ The various aspects and challenges of the investigation are discussed in detail in Part 1 Chapter 7 of this Handbook. Nevertheless, even the brief outline above underlines the importance of considering additional avenues, such as UJ, to complement the ongoing efforts at the international level.

⁶⁹ Elizabeth Wilmshurst, 'Strengthen the International Criminal Court', *Chatham House* (Commentary, 12 June 2019) <<https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court>>.

⁷⁰ Frankie Wong, 'Criticisms and Shortcomings of the ICC', *Access Accountability* (Web Page, 26 September 2019) <<https://accessaccountability.org/index.php/2019/09/26/criticisms-and-shortcomings-of-the-icc/>>.

⁷¹ Ibid.

⁷² 'Afghanistan', *International Criminal Court* (Web Page, 5 March 2020) <<https://www.icc-cpi.int/afghanistan>>.

⁷³ 'ICC Judges Authorise Prosecution to Resume Investigation in Afghanistan', *International Criminal Court* (Press Release, 31 October 2022) <<https://www.icc-cpi.int/news/icc-judges-authorise-prosecution-resume-investigation-afghanistan>>.



IN SUMMARY:

- UJ is a principle that allows states across the world to pursue accountability for certain international crimes no matter where they took place, the nationality of the alleged perpetrator or that of the victim-survivor(s).
- The Handbook focuses primarily on the crimes of genocide, crimes against humanity and war crimes as UJ is commonly recognised for these crimes and they are crimes frequently reported on in the context of Afghanistan.
- UJ emerged a long time ago and has been used in a range of different contexts, ranging from the need to stem piracy to respond to the horrors of the Second World War.
- The prevalence of UJ has increased significantly in recent years, both in terms of the number of states with UJ frameworks to enable UJ cases to be brought, as well as the actual practice of cases that rely upon the UJ principle.
- Nevertheless, there has been a shortage of UJ cases concerning atrocities in Afghanistan, and no cases targeting members of the Taliban.
- Afghanistan in particular would benefit from UJ as one avenue for accountability, for example, due to the lack of prospects for accountability inside of Afghanistan as long as the Taliban remains in power, as well as the slow progress of the investigation before the ICC.

PART 1

AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER



THE LEGAL BASES OF UNIVERSAL JURISDICTION

Having introduced UJ and its relevance in the context of Afghanistan, the Handbook turns to consider the legal bases that underpin the use of UJ to prosecute certain international crimes which took place beyond borders, and which did not (necessarily) have any victim-survivor or perpetrator link to the state applying the UJ principle. What are the justifications that states raise when they apply this principle to seek to hold another state's national(s) to account? Why is it that this principle has come to develop? These and various other questions will be considered in this chapter.

Chapter 2 begins by setting out the underlying framework of jurisdiction in international law. It then goes on to explain the broad legal concepts, justifications and categories of UJ. Next, Chapter 2 outlines the crimes UJ can be used to prosecute by considering international documents and practices. It ends by explaining the principle of *jus cogens*, which means that certain international crimes are breaches of the highest standards of behaviour in the international system.

As this chapter concerns the law around UJ, the content necessarily includes some legal terminology which readers may find difficult. As far as possible, the Handbook seeks to explain complex principles and concepts to ensure that content is useful for all readers.

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2.1 LEGAL FRAMEWORK

2.1.1 Overview of Jurisdiction in International Criminal Law

Jurisdiction refers to a state's authority to control behaviour (e.g., whether they can make and apply their laws).¹ *Where* a state has jurisdiction is a difficult question in international law — for example, can Brunei make laws about stealing in Belgium? If they were to, could they arrest somebody who stole in Belgium, bring them back to their courts, and try them?

There are three main aspects of jurisdiction:

- **Prescriptive jurisdiction** refers to a state's authority to make laws.²
- **Enforcement jurisdiction** refers to a state's authority to enforce compliance with those laws, for example by using its police to arrest somebody.³
- **Adjudicative jurisdiction** refers to a state's authority to decide legal proceedings.⁴

2.1.2 Accepted Bases of Prescriptive Criminal Jurisdiction

A state can only make laws governing particular places and people if they have prescriptive jurisdiction over those places and people. There are several bases allowing states to do so:

- **Territoriality:** A state has prescriptive jurisdiction over all acts committed in its territory.⁵ This is the most fundamental basis of jurisdiction.⁶
- **Nationality:** A state has prescriptive jurisdiction over its own nationals. This is uncontroversial and extends to all acts.⁷

- **Passive Personality:** Some states argue they have prescriptive jurisdiction over crimes where the victim-survivor is one of its nationals. This basis is controversial, but reflected in the laws of various countries.⁸
- **Protective:** A state has prescriptive jurisdiction over acts threatening its fundamental national interests, for example national security.⁹
- **Universality:** UJ is a form of prescriptive jurisdiction. A state has prescriptive jurisdiction over certain severe crimes where no other bases apply (over crimes committed by non-nationals over non-nationals in foreign territory).

UJ is therefore a basis of prescriptive jurisdiction, allowing states to make laws to prohibit particular crimes overseas. Importantly, this allows states to make laws but *not* to enforce or adjudicate them. Still, if a person commits an international crime overseas and then travels to a state with UJ laws, they can be prosecuted. This is because, when they travel into the territory of another state, that state will have enforcement and adjudicative jurisdiction.

2.2 JUSTIFICATIONS, SOURCES AND SCOPE

2.2.1 How do States Justify Universal Jurisdiction?

UJ is generally understood to allow any state to prosecute certain crimes even when the state has no connection to the crime, the alleged offender, or the victim-survivor.¹⁰ Despite the existence of many books and publications to explain UJ,¹¹ it remains a complex and contentious concept.¹² There is no single agreed upon justification for the legal authority of UJ.¹³

1 Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 645.

2 Roger O'Keefe, *International Criminal Law* (Oxford University Press, 1st ed, 2015) 4. Note, this is sometimes also called 'legislative' jurisdiction.

3 Ibid 4–5. Note, this is sometimes also called 'executive' jurisdiction.

4 Ibid 4. Note, this is sometimes also called 'judicial' or 'curial' jurisdiction.

5 Ibid 9–10. This extends to a state's internal waters, territorial sea, and airspace. Acts committed on planes or ships may fall under the *sui generis* principle: at 14–15.

6 Ibid 9.

7 Ibid 11. Note, this is sometimes also called the 'active personality' principle. It may also be able to apply to habitual residents of the state: at 16–17. A state also has jurisdiction over non-nationals serving in their armed forces through the *sui generis* principle, even when serving in foreign territory: at 15.

8 *Arrest Warrant of 11 April 2000 (Congo v Belgium) (Judgment)* [2002] ICJ Rep 2001 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 76–7, [47].

9 O'Keefe (n 2) 12. This principle may be extended for terrorist offences which threaten the security of other states.

10 Kenneth C Randall, 'Universal Jurisdiction under International Law' [1988] 66 *Texas Law Review* 785, 785. However, no single accepted definition of UJ exists: Matthew Garrod, 'Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and Universal Jurisdiction in the Light of the *Habre Casé*' (2018) 59(1) *Harvard International Law Journal* 125, 131.

11 Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press, 2020) 161.

12 Anthony Colangelo, 'The Legal Limits of Universal Jurisdiction' (2005) 47(1) *Virginia Journal of International Law* 149, 149.

13 See, eg, Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427.

UJ may be *authorised* through laws or treaties (see subsection 2.2.2 below), but there must be some broader *justification* for allowing it.¹⁴ Two important ways to justify UJ are proposed below.¹⁵

POTENTIAL JUSTIFICATIONS FOR UNIVERSAL JURISDICTION

Humanity: For crimes which threaten humanity itself, UJ is often said to protect the international community.¹⁶ In the *Adolf Eichmann Trial*, the Supreme Court of Israel famously allowed UJ because the crimes ‘struck at the whole of mankind and shocked the conscience of nations’.¹⁷ Many recent UJ trials have been based on this justification.¹⁸

Victim-survivors: UJ may be justified because it brings justice to victim-survivors of terrible events.¹⁹ Most UJ trials happen after pressure from victim-survivor groups,²⁰ and accountability for perpetrators is a crucial step in transitional justice.²¹ One report which listed factors in favour of using UJ pointed to the vulnerability of the victim-survivor and the danger that action would not be taken without UJ.²² Unfortunately, existing legal structures appear to undervalue the interests of victim-survivors when determining if UJ should be used.²³

2.2.2 Legal Sources of Universal Jurisdiction

Legal sources allowing for UJ range from:

- Customary international law (‘CIL’);
- Treaties; and
- Delegation by other states.²⁴

A. CUSTOMARY INTERNATIONAL LAW

CIL is international law derived from the general practices or customs of states together with ‘*opinio juris*’, which is to say, their subjective belief that they are legally bound to follow these practices or customs.²⁵ A number of severe acts (including genocide, crimes against humanity, and war crimes) are considered crimes under CIL.²⁶ Any of those acts will be a crime under CIL ‘regardless of where, by whom, and against whom’.²⁷

Some argue that UJ applies to *all* international crimes under CIL.²⁸ However, there is insufficient state practice and *opinio juris* to extend UJ to politically sensitive crimes like aggression.²⁹ The more accepted view is that the use of UJ over only certain serious international crimes has become part of CIL.³⁰

UJ has been largely accepted to exist over some international crimes under CIL.³¹ These include:

- Genocide;
- Crimes against humanity;
- War crimes;
- Piracy; and
- Slavery.³²

¹⁴ Ibid 436–7.

¹⁵ The authors of this Handbook believe the most logical justifications today are ‘humanity’ and ‘victim-survivors’ which are explained in-text. Two other justifications include domestic sovereignty and inter-state community: *ibid* 438–43.

¹⁶ Ibid 443–9; Cormier (n 11) 185.

¹⁷ *Attorney-General of the Government of Israel v Adolf Eichmann* (1962) 36 ILR 5, 26.

¹⁸ Hovell (n 13) 448.

¹⁹ Ibid 449–55.

²⁰ Ibid 450.

²¹ Yasmin Sooka, ‘Dealing with the Past and Transitional Justice: Building Peace through Accountability’ (2006) 88(862) *International Review of the Red Cross* 311, 325.

²² Hovell (n 13) 455.

²³ Ibid 450 citing *Nait-Liman v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 51357/07, 21 June 2016).

²⁴ Cormier (n 11) 162–6.

²⁵ *Statute of the International Court of Justice* art 38(1)(b) (‘ICJ Statute’); Martin Dixon, *Textbook on International Law* (Oxford University Press, 7th ed, 2013) 54.

²⁶ O’Keefe (n 2) 24–5.

²⁷ Ibid 25.

²⁸ Ibid.

²⁹ James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 468–9. Aggression is the ‘use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations’: *Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, Agenda Item 86, Supp No 31, UN Doc A/RES/3314 (14 December 1974) annex, art 1. The *crime* of aggression is defined as ‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8 *bis* (‘Rome Statute’).

³⁰ Hovell (n 13) 433.

³¹ Crawford (n 29) 468.

³² Bartram Brown, ‘The Evolving Concept of Universal Jurisdiction’ (2001) 35(2) *New England Law Review* 383, 384; Rudolf Bernhardt et al, *Restatement of the Law Third: The Foreign Relations Law of the United States* (American Law Institute Publishers, 1987).

When it is justified in this way, unlike UJ in treaty law, it can be exercised truly universally. However, the confusion surrounding its justification (and the imprecise criteria for establishing an international custom) means it is difficult to precisely define the specific criminal acts to which customary UJ can extend.

B. TREATIES

Another legal source for UJ may be treaties which are international agreements that allow states to prosecute crimes outside their borders. This is called ‘treaty-based’ or ‘conventional’ UJ.³³

A number of international treaties prohibit serious crimes and allow (or oblige) states parties to those agreements to either extradite or prosecute the alleged perpetrator for breaches of the treaty, even where they occur in other states.³⁴ However, while these treaties allow states to prosecute outside their borders, jurisdiction is still generally limited. For example, treaties generally only apply to crimes which are connected to at least one of the contracting states.³⁵ Therefore, there is some debate as to whether treaty-based UJ is ‘real’ UJ.³⁶ However, whether it is classified as UJ or not, jurisdiction from international treaties is still relevant to this Handbook as it may help bring justice to victim-survivors in the same way as customary UJ.

A BRIEF OVERVIEW OF TREATIES

A treaty (sometimes called international covenant or convention)³⁷ is an international agreement between two or more states. The states will agree in the treaty to act in a certain way. The treaties this Handbook discusses generally require states to acknowledge certain behaviour as criminal and to take action against that behaviour.

States can consent to be bound by a treaty by signing it which obligates the state in question not to undermine the object and purpose of the treaty.³⁸

States which ratify or accede to a treaty are bound by treaty as a whole (subject to any reservations if permitted) and are obligated to incorporate it into their national laws and procedures.³⁹ Once a state becomes a party to a treaty, the principle of *pacta sunt servanda* requires that it performs the treaty in good faith.⁴⁰

A treaty is different to a declaration which is not legally binding (unless they enshrine CIL) in which case their principle(s) are legally binding under CIL). Yet declarations and other so-called ‘soft law’ may still be influential. For example, the *Universal Declaration of Human Rights* is commonly referenced as an authority for universally recognised human rights principles and many of its provisions have since come to be recognised as CIL and/or been incorporated into human rights treaties.⁴¹

33 Anthony Colangelo, ‘The Legal Limits of Universal Jurisdiction’ (2005) 47(1) *Virginia Journal of International Law* 149, 163.

34 Ibid 167. Over 60 treaties oblige extradition or prosecution in this way: Garrod (n 10) 128–9.

35 One explanation for UJ based on treaty law is that, in making and agreeing to the treaty, the participating states have consented to each other using their jurisdiction to address crimes under the treaty: Hovell (n 13) 432. However, there are instances where treaty-based UJ was used even against a state who was not party to the treaty: see, eg, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 20 July 2012, ICJ Reports (2012) 422, [102]; Máximo Langer and Mackenzie Eason, ‘The Quiet Expansion of Universal Jurisdiction’ (2019) 30(3) *European Journal of International Law* 779, 790 citing Sala Nacional, *Sala en lo Penal, Sección Tercera*, Sentencia no. 16/2005; Tribunal Supremo, *Sala de lo Penal, Sentencia no. 798/2007*.

36 If treaty-based UJ is explained by treaty parties delegating their jurisdiction to each other by consent, then it may be a modern form of delegated jurisdiction discussed above: Claus Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit international’ (2006) 4 *Journal of International Criminal Justice* 561, 568. See also, Garrod (n 10) 132.

37 ICJ Statute (n 25) art 38(1)(a).

38 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 12, 18 (‘VCLT’).

39 Ibid arts 14–15.

40 Ibid art 26; Anthony Aust, ‘Pacta Sunt Servanda’ (last updated February 2007) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press).

41 *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948) (‘UDHR’).

C. DELEGATION BY OTHER STATES

States can cooperate to bring criminals to justice. If a criminal commits a crime in state A and flees to state B, state B may begin a trial with the consent of state A if it is not possible to extradite the criminal.⁴² However, even though state B may have no connection to the crime or criminal, this mere delegation of jurisdiction is typically not considered UJ.⁴³

To extradite a criminal means to make them travel to a different state, usually to be prosecuted. For example, if a criminal committed a crime in state A and then fled to state B, they might be extradited back to state A to be prosecuted.

2.2.3 Scope of Universal Jurisdiction

Without a proper basis in international law, states will not be able to use UJ.⁴⁴ However, even if international law allows the use of UJ (for example for the prosecution of genocide), individual states must have incorporated the crime into their domestic law to then prosecute an individual for that crime. This is automatic in monist systems but many states are so-called dualist in which case they need to take steps, for example, enacting domestic law to incorporate the international law in question into the domestic legal framework.

In other words, to be able to use UJ to prosecute X crime, you need both:

- international law which allows UJ for X crime (for example through treaty or CIL); **and**
- domestic law which allows for UJ for X crime.

This Chapter discusses the instances where (a) will be met (where international law allows UJ). Whether or not (b) is met depends on the specific domestic jurisdiction in question. If there is a domestic law which explicitly allows UJ over a particular crime (b) will be met. For example, Germany has a law explicitly allowing the use of UJ for genocide.⁴⁵ Examples of domestic laws and practices required by (b) are discussed in Part 3 of the Handbook which includes information specific to selected domestic jurisdictions.

However, it is worth noting that sometimes domestic laws do not explicitly allow or disallow UJ. State A might make genocide a crime, but not explicitly say that it covered instances of genocide occurring overseas. In that case, it will be up to state A's judges to interpret whether they can use UJ. There have been instances where civil law judges have done so, but common law judges have generally been unwilling to do so, often for political reasons.⁴⁶ If an alleged perpetrator is known to be travelling through a civil law state (even one without specific UJ laws), it may be possible to get courts to prosecute them.

2.3 UNIVERSAL JURISDICTION AND JUS COGENS

Certain prohibitions of international crimes are referred to as 'jus cogens' or 'peremptory norms of general international law'. These are considered the highest rules of behaviour under international law from which no deviation is ever permitted. This classification is also important in terms of the obligations that they generate as all states have an obligation to prosecute violations of jus cogens norms, even if the alleged perpetrator has no connection to the prosecuting state. There is therefore an argument that states have an obligation to use UJ to prosecute crimes, the prohibition of which is considered to be jus cogens. Jus cogens is a complex legal term which will be explained in the two subsections below.

2.3.1 The Meaning of Jus Cogens

Jus Cogens is a Latin phrase meaning 'compelling law'.⁴⁷ Jus cogens norms (or peremptory norms of international law) refer to certain standards in international law from which it is never permissible to depart from.⁴⁸ Jus cogens norms create so-called 'erga omnes' obligations to prosecute breaches. Obligations which are 'erga omnes' are obligations owed by all states to each other. This means that all states are prohibited from violating jus cogens norms, and there will be international legal consequences for any violations of jus cogens norms (discussed below).

⁴² Cormier (n 11) 162.

⁴³ Ibid.

⁴⁴ Hovell (n 13) 431.

⁴⁵ *Völkerstrafgesetzbuch* [Code of Crimes against International Law] (Germany) ('VStGB') § 6.

⁴⁶ Michael Kirby, 'Universal Jurisdiction and Judicial Reluctance: A New "14 Points"' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2006) 240–9.

⁴⁷ 'Jus Cogens', *Oxford Bibliographies* (Web Page, 29 May 2015) <<https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0124.xml>>.

⁴⁸ VCLT (n 38) art 53.

A 'norm' must be accepted as such by the vast majority of states in the international community to gain status as an accepted peremptory legal norm.⁴⁹ However, it is not required for all states to accept the norm for it to become recognised as a jus cogens norm.

There are no set criteria for identifying a jus cogens norm. One scholar provides the following examples of characteristics that may help identify such norms:

their fundamental character; the importance of the values that they represent; the interest or interests that they satisfy, or the entity or group of entities in which those interests are vested; the legal relationship or relationships that they establish; their origin or the source of law from which they derive; their deontic character; or the legal consequences ensuing from their classification as *jus cogens*.⁵⁰

The International Law Commission ('ILC') has provided a list of some jus cogens norms, including:

- The prohibition of genocide;
- The prohibition of crimes against humanity;
- The basic rules of international humanitarian law;
- The prohibition of racial discrimination and apartheid;
- The prohibition of slavery;
- The prohibition of torture;
- The right of self-determination; and
- The prohibition of aggression.⁵¹

While the above is not a complete list of all accepted jus cogens norms, it highlights that many accepted jus cogens norms are prohibitions of serious international crimes.

2.3.2 Legal Sources and Consequences of Jus Cogens

Jus cogens norms are mainly derived from CIL and treaty law.⁵² Deviating from these norms result in a number of legal consequences that demonstrate the importance of the values and principles protected by these norms:

- New treaties are void (have no legal effect) if it contravenes an accepted jus cogens norm;⁵³
- It does not matter if a treaty or CIL rule existed before a norm is accepted as having jus cogens status; if a new jus cogens norm emerges, any existing treaty which conflicts with that norm becomes void and terminates;⁵⁴ and
- Further, accepted jus cogens norms can only be modified by a new jus cogens norm (and no international laws of lesser hierarchical status).

In this way, jus cogens norms 'trump' any treaty-based sources of law. These norms also rank higher than local, special, and general customary rules. As such, jus cogens norms are seen to sit at the top of the international legal hierarchy.⁵⁵

⁵² Ibid 143 (Conclusion 5).

⁵³ VCLT (n 38) art 53.

⁵⁴ Ibid art 64.

⁵⁵ ILC (n 51) 154 [9] quoting *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Judicial Reports 1998, 569 [153].

⁴⁹ Ibid art 53.

⁵⁰ See Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar Publishing, 2020) 11.

⁵¹ ILC, 'Peremptory Norms of General International Law', GA Res 74/10, UN GAOR, 74th sess, UN Doc A/74/10, 147.



IN SUMMARY:

- There are three main aspects of jurisdiction: prescriptive; adjudicative; and enforcement jurisdictions. UJ allows states to prescribe laws over certain international crimes committed by non-nationals against other non-nationals outside its own territory.
- When the alleged perpetrator travels to the state with such UJ framework, the state in question may *enforce* such laws by, for example, arresting the person, and *adjudicate* the law by putting the alleged perpetrator before its courts.
- Broader justifications for the use of UJ is today often that it is in the service of all of humanity due to the heinous nature of the crime in question.
- In terms of legal sources, UJ can be authorised by treaties, CIL or delegation by other states. This is coupled with, in dualist systems, the existence of domestic law implementing such international legal sources into the domestic legal framework.
- Many prohibitions of international crimes are considered to be so-called 'jus cogens norms' which means that no deviation from these prohibitions are ever permitted. Further, it also results in obligations 'erga omnes', meaning that the norm's violation is a matter of concern to all states who can take steps to ensure its compliance.
- This special character of many prohibitions of international crimes is important as it adds an obligation on states to take steps, for example through UJ, to end the violation in question, particularly if the state where the atrocities took place is unwilling or unable to pursue accountability.

PART 1
AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER



CHALLENGES FOR UNIVERSAL JURISDICTION



While this Handbook shows how UJ may be used to achieve justice and accountability for serious international crimes, UJ has its limitations. Chapter 3 outlines some of these and provides possible reasons why such limitations would not apply to the situation in Afghanistan, or ways in which they may be avoided. Still, pursuing accountability through UJ can be a difficult and emotional process for victim-survivors. It is important to recognise that these pursuits may not always result in convictions, or otherwise have the outcome that a participating victim-survivor is hoping for.

Specifically, this Chapter highlights several key obstacles to UJ, including immunities which prevents prosecution of certain government figures for crimes committed during their time in power; an unwillingness to implement laws allowing UJ or to initiate prosecutions to avoid the risk of political backlash; risks of undermining the legal system of alleged offenders' states; and politically motivated prosecutions. The final part of the Chapter discusses how these obstacles have led to a less ambitious 'no safe haven' model of UJ (compared to the earlier 'global enforcer' model).

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3.1 MANAGING EXPECTATIONS

UJ has its limitations. While the authors of this Handbook believe that UJ is a promising tool which can help victim-survivors pursue accountability, UJ may not always lead to convictions and it is not the *only* tool (additional avenues and their respective limitations are discussed in Part 1 Chapter 7 of this Handbook).¹ Victim-survivors may find the process emotionally difficult,² as a prosecution that does not result in a conviction may be particularly difficult to withstand. Therefore, it is important that all people involved with UJ cases have realistic expectations about the likelihood of UJ bringing victim-survivors the outcomes that they are hoping for.

A primary barrier to the use of UJ is politics. It has been criticised for disrupting international relations between states and interfering with political solutions to mass atrocity crimes.³ This means that some states may be unwilling to use UJ at all. Even where states have laws allowing UJ, prosecutors may not be willing to take on cases against high-profile individuals. Furthermore, many of these individuals may have immunities under international law. This Chapter argues that these obstacles may not apply to the situation in Afghanistan and provides exceptions to them where relevant. Still, it must be acknowledged that *any* UJ case may ultimately be unsuccessful.

3.2 OBSTACLES AND LIMITATIONS

3.2.1 Immunities

Political figures can be immune from prosecution by other states under international law. There are two types of immunity: personal immunity (immunity *ratione personae*) and functional immunity (immunity *ratione materiae*).

¹ See, eg, Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105(1) *American Journal of International Law* 1, 42–4.

² Ingrid Massagé, Mandira Sharma, 'Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case' (2018) 10(2) *Journal of Human Rights Practice* 327, 336. Specifically, Massagé and Sharma explain how in jurisdictions with adversarial criminal justice systems, the court has a passive role while defence lawyers are incentivised to attack the credibility and character of the accused: at 335. They observed that many victim-survivor witnesses felt 'as if they were being accused' and found the process 'disturbing': at 335. Experiences may vary depending on the state where the UJ case is pursued. Still, these difficulties are on top of the pain and suffering all victim-survivors necessarily have and continue to endure.

³ See generally Langer (n 1).

A. PERSONAL IMMUNITY

Personal immunity gives certain high-level state officials immunity from prosecution by other states while they are in power. This immunity extends to heads of state, heads of government and foreign ministers, and includes immunity for private acts, serious international crimes, and acts committed prior to holding office.⁴ However, after an official's time in power ends, the immunity stops and the official may be prosecuted for certain acts that were previously covered by the immunity.

B. FUNCTIONAL IMMUNITY

Functional immunity gives State officials protection when committing 'official acts' as part of their duties to the State.⁵ This immunity only applies to those 'official acts' and no other private acts and may extend to lower level state officials, as well as more high ranking officials.

There is no precise definition of 'official acts'. It includes acts performed by a person in an official capacity to fulfil a state function rather than for their own benefit. This type of immunity does not apply, for example, to crimes committed for personal enrichment, corruption and drug trafficking.⁶ There is a strong argument to be made that acts that amount to international crimes can never be considered 'official' state acts (regardless of the fact that many international crimes are committed with state resources, pursuant to state policy). In other words, functional immunity arguably does not apply to international crimes. However, this point is highly contested in international law as will be discussed further in subsection 3.2.3 below.⁷

It is also unclear *who* functional immunity extends to. The traditional view is that it protects *all* state officials performing official acts,⁸ while some argue that the immunity only extends to a 'restricted core' of foreign officials whose duties relate specifically to international relations.⁹

⁴ Rebecca Hamilton, 'Ukraine's Push to Prosecute Aggression' (2023) 55(1) *Case Western Reserve Journal of International Law* 5; Pavel Šturma, 'How to Limit Immunity of State Officials in relation to Grave Violations of Human Rights? Between the Definition of Official Acts and Exceptions' (Conference Paper, European Society of International Law 2016 Annual Conference, 31 January 2017) 12.

⁵ Riccardo Mazzeschi, 'The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories' in Pia Acconci et al (eds) *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (Brill Nijhoff, 2016) 509.

⁶ Šturma (n 4) 13.

⁷ Ibid 13–14.

⁸ Mazzeschi (n 5) 511.

⁹ Ibid 514.

Finally, and importantly, functional immunity does not expire. While personal immunity ends once an official is no longer in power, functional immunity continues to provide officials protection for ‘official acts’.¹⁰

C. APPLICATION TO AFGHANISTAN

At the time of writing the Handbook, the Taliban is not formally recognised by the international community as the legitimate Government of Afghanistan.¹¹ While immunities apply to officials of governments who have effective (*de facto*) control over a country, other states’ non-recognition may impact upon the extent to which such officials may in fact be afforded immunity by non-recognising states.¹²

The Taliban has been generally acknowledged as having effective control of Afghanistan.¹³ However, it is important to note that armed uprising against the Taliban is being attempted in certain parts of the state (discussed in Part 2 Chapter 7 of the Handbook), which may come to challenge this situation in future. Further, even with effective control and the immunities that come with it, as mentioned above, non-recognising states may nonetheless make a political decision not to uphold immunities for

members of the Taliban. Further, Taliban members will not be entitled to functional immunities for actions taken before the Taliban gained effective control of Afghanistan as they would then not have been the government for the purposes of immunity.

D. EXCEPTIONS TO IMMUNITIES

Immunities are also subject to several potential exceptions. Most relevantly, it is likely that functional immunity does not apply to at least some serious crimes under international law.

The International Military Tribunal (‘IMT’) at Nuremberg famously found that immunities would not protect individuals from crimes under international law, arguing that the Nazi officers on trial ‘[could not] shelter themselves behind their official position in order to be freed from punishment’.¹⁴ Other international criminal tribunals have since included similar rules.¹⁵ However, the exception is not as clear for individual states using UJ.

ANOTHER LOOK AT THE PINOCHET CASE

In the *Pinochet* case (introduced in Part 1 Chapter 1 of this Handbook), the majority of the UK House of Lords found that functional immunity did not apply to acts of torture.¹⁶

However, only one judge of the seven, Lord Hutton, argued that crimes contrary to international law that have acquired the status of *jus cogens* would never be protected by functional immunity in national courts.¹⁷

Lord Hope and Lord Philips relied on the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’) (which allows the use of UJ for torture) to avoid the application of functional immunity.¹⁸

Ultimately, Pinochet’s immunity was removed, but the judgment addressed only acts of torture and the opinions of each judge differed.

¹⁰ Hamilton (n 4) 5.

¹¹ See, eg, Muhammad Faheem and Minhas Khan, ‘Recognition of the Taliban Government in Afghanistan and International Community’ (2022) 42(1) *Strategic Studies*; Betül Yuruk, ‘UN Tells Taliban: No Recognition Without Respect for Human Rights’, *Anadolu Agency* (online, 10 November 2022) <<https://www.aa.com.tr/en/world/un-tells-taliban-no-recognition-without-respect-for-human-rights/2734963>>.

¹² Ben Saul, ‘“Recognition” and the Taliban’s International Legal Status’, *International Centre for Counter-Terrorism* (Web Page, 15 December 2021) <<https://icct.nl/publication/recognition-talibans-international-legal-status/>>; Margaret McGuinness, ‘Non-Recognition and State Immunities: Toward a Functional Theory’ in Władysław Czapliński and Agata Kleczkowska (eds), *Unrecognised Subjects in International Law* (Scholar Publishing, Warsaw 2018) 283–320. See also Julius Hines, ‘Why do Unrecognized Governments Enjoy Sovereign Immunity? A Reassessment of the Wulfsohn Case’ (1991) 31(4) *Virginia Journal of International Law* 717. Nevertheless, the authors of this Handbook are of the view that the international community should not recognise or establish formal diplomatic relations with the Taliban. There is some academic support for the idea that ‘governments lacking democratic legitimacy should not be awarded recognition’: Anne Schuit, ‘Recognition of Governments in International Law and the Recent Conflict in Libya’ (2012) 14 *International Community Law Review* 381, 388 citing Brad Roth, *Government Illegitimacy in International Law* (Oxford University Press, 2000) 146. Not only does the Taliban’s constitution not allow for public input into decision-making, but the Taliban have repeatedly committed human rights abuses against the people of Afghanistan: Ikramuddin Kamil, ‘What the Taliban’s Constitution Means for Afghanistan’, *Fair Observer* (online, 26 January 2022) <https://www.fairobserver.com/region/central_south_asia/ikramuddin-kamil-afghanistan-constitution-taliban-news-afghan-world-news-43794/>.

¹³ Saul (n 12).

¹⁴ *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL 172, 221.

¹⁵ Šturma (n 4) 3.

¹⁶ *R v Bow Street Metropolitan Stipendiary Magistrate and others*, ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147.

¹⁷ Ibid 261–2.

¹⁸ *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 5 (‘CAT’).

There are serious allegations that the Taliban has repeatedly committed serious international crimes and evidence pointing to this is set out in Part 2 of this Handbook. Even if functional immunity protects individuals who have committed these crimes, many have since *Pinochet* argued that functional immunity does not cover (some) crimes under international law. For example, the Institute of International Law stated in a resolution that functional immunities will not protect state officials from serious crimes under international law (genocide, crimes against humanity, torture, and war crimes).¹⁹ Many scholars have argued the same, but with different legal theories.²⁰

One argument is that a violation of *jus cogens* norms (discussed in Part 1 Chapter 1 of the Handbook) prevails over functional immunity.²¹ This argument has previously been rejected by the International Court of Justice ('ICJ') in the *Arrest Warrant* case and the *Jurisdictional Immunities of the State* case.²²

In 2017, the International Law Commission ('ILC') adopted a draft article which stated that functional immunity did not apply to certain crimes under international law (including genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances).²³ This draft article was controversial (only being adopted after a rare recorded vote), but was ultimately justified by the

jus cogens argument.²⁴ While ILC Draft Articles are not binding,²⁵ national courts appear to increasingly ignore functional immunity for serious international crimes.²⁶ In preparing the report, Australia, Spain, the UK and Ireland made comments that their laws precluded immunity for *jus cogens* breaches.²⁷ In January 2022, a court in Germany convicted a former Syrian Colonel (a state official generally entitled to functional immunity) for torture as a crime against humanity.²⁸

Even if there are no other exceptions to an immunity, the International Criminal Court ('ICC') and some international tribunals may be able to prosecute the relevant individual.²⁹ More details on the potentials and limitations of other platforms for accountability are discussed in Part 1 Chapter 7.

¹⁹ Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes* (Naples Session, 2009) <https://www.idi-il.org/app/uploads/2017/06/2009_naples_01_en.pdf>.

²⁰ Šturma (n 4) 14. See also Dapo Akande and Sangeeta Shas, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21(4) *The European Journal of International Law* 815.

²¹ See, eg, Selman Özdan, *The Human Rights Challenge to Immunity in International Law* (Springer Nature Switzerland, 2022) 199.

²² *Arrest Warrant of 11 April 2000 (Congo v Belgium)* (Judgment) [2002] ICJ Rep 2001; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Judgment) (2012) ICJ Rep 99. However, the ICJ has previously overruled its past judgments in other areas of law to better protect and uphold human rights: Gleider Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of International Community' (2013) 83(1) *The British Yearbook of International Law* 13, 31.

²³ ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction*, UN GAOR, 69th Sess, UN Doc A/CN.4/L.893 (10 July 2017) draft art 7.

²⁴ Ibid; Sunand Subramaniam, 'ILC Draft Article 7 on Immunity of State Officials from Foreign Criminal Jurisdiction' (2016) *Völkerrechtsblog* <<https://voelkerrechtsblog.org/ilc-draft-article-7-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction/>>; Atul Alexander, 'Jus Cogens and Immunity: Revisiting ILC Draft Article 7 on Immunity of State Officials from Foreign Criminal Jurisdiction', *Opinio Juris* (Blog Post, 19 July 2022) <<http://opiniojuris.org/2022/07/19/jus-cogens-and-immunity-revisiting-ilc-draft-article-7-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction/>>.

²⁵ Sotirios-Ioannis Lekkas, 'The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?' (2022) 69 *Netherlands International Law Review* 327, 328.

²⁶ See, eg, Aziz Epik, 'No Functional Immunity for Crimes under International Law before Foreign domestic Courts: An Unequivocal Message from the German Federal Court of Justice' (2021) 19(5) *Journal of International Criminal Justice* 1263 citing Bundesgerichtshof [German Federal Court of Justice], 3 StR 564/19, 28 January 2021. But see Cour de cassation [French Court of Cassation], 20-80511, 13 January 2021, [25].

²⁷ Alexander (n 24).

²⁸ Subramaniam (n 24). Another trial where immunity was nullified occurred in 2021 involving an Afghan soldier for war crimes against captured Taliban fighters: Robert Kaufman, 'Germany Top Court Rules Foreign Soldiers Not Immune from War Crimes Charges', *Jurist* (online, 29 January 2021) <<https://www.jurist.org/news/2021/01/germany-top-court-rules-foreign-soldiers-not-immune-from-war-crimes-charges/>>.

²⁹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 27 ('Rome Statute'). See also Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *The American Journal of International Law* 407.

3.2.2 Conflicts of Interest

A. POLITICAL HESITATIONS

Difficulties with UJ arise when the accused is a prominent political figure. In addition to questions of immunities, the prosecuting state must consider how pursuing a political figure of another state may threaten or damage diplomatic relationships between states and their respective allies. It could lead to political unrest and further conflict, civil war or result in an unstable state. This could threaten the security of surrounding states.

This illustrates the evolving difficulties and differences between the original basis for UJ and its application today. Historically, there was no difficulty in getting states to cooperate under UJ for acts of piracy because pirates did not operate or answer to any state, therefore their prosecution could only bring a net positive benefit to all state interests such as protecting international trade.³⁰

In contrast, crimes committed by political figures will necessarily cause opposing political interests to arise due to their impact on international relations. This may explain the reluctant approach that Australia took when dealing with Mahinda Rajapaksa and how other states such as The Netherlands, Norway and Sweden all have legislation granting wide discretion to invoke UJ. As mentioned, individual state practices are set out in the annexes of Part 3 of this Handbook.³¹ States favour UJ laws which have wide discretion to enable officials to manoeuvre international relations carefully. It is here that we see the political barrier and difficulty in applying the UJ principle.

B. DIRECTLY CONFLICTING INTERESTS

The other difficulty in applying UJ is that it requires two entities with opposing political interests to cooperate, that is the state exercising UJ and the state of the accused.

For instance, 'it is unlikely that a government that is responsible for [gross crimes] would be efficacious in their prosecution'.³² The problem remains that UJ often requires cooperation with the state of the alleged perpetrator, and if that state is declining to prosecute the accused for crimes that attract UJ, it is highly unlikely they would be of assistance in extraditing the accused to a foreign state to be prosecuted for a crime they sanctioned.

CASE EXAMPLE ON THE DIFFICULTY OF STATE COOPERATION

The case of Antonio González Pacheco illustrates this issue of cooperation when applying UJ on the international stage. González Pacheco was a Spanish Police Officer accused of torturing victims in 1970. Spanish authorities refused to prosecute him. In 2013, Argentinian Justice Maria Servini issued a summons against González Pacheco under the principle of UJ.³³

However, this prosecution was ultimately unsuccessful as Spain refused to cooperate with Argentina, arguing that time had run out to prosecute the accused.³⁴ This represents the difficulty in getting an accused's home state to cooperate and allow another state to exercise jurisdiction over their citizens.

3.2.3 Other Concerns over Universal Jurisdiction

A. UNDERMINING LEGAL SYSTEMS

A major criticism of UJ is that it may undermine the legal systems of states where the accused is from. Henry Kissinger (former US Secretary of State) was an outspoken critic of UJ. He was particularly critical of the withdrawal of immunity in the case of Pinochet and the consequent prosecution in UK courts. He noted that the judgment of serious crimes by external states under UJ 'would subject the accused to the criminal procedures of the magistrate's state, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distance'.³⁵

³⁰ Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29(2) *The European Journal of International Law* 428, 443

³¹ Open Society Justice Society Initiative and TRIAL International, *Universal Jurisdiction Law and Practice in the Netherlands* (Briefing Paper, April 2019) <<https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-the-netherlands>>¹²; Open Society Justice Initiative and TRIAL International, *Universal Jurisdiction Law and Practice in Norway* (Briefing Paper, January 2019) <<https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-norway>>²³; Open Society Justice Initiative and TRIAL International, *Universal Jurisdiction Law and Practice in Sweden*, (Briefing Paper January 2019) <<https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-sweden>>¹⁴.

³² Madeline Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks' (2001) 35(2) *New England Law Review* 337, 337.

³³ María Manuela Márquez Velásquez, 'The Argentinian Exercise of Universal Jurisdiction 12 Years After its Opening', *Opinio Juris* (Blog Post, 4 February 2022) <<https://opiniojuris.org/2022/02/04/the-argentinian-exercise-of-universal-jurisdiction-12-years-after-its-opening/>>.

³⁴ 'Argentina Asks Spain to Arrest 20 Franco-era Officials', *BBC News* (online, 1 November 2014) <<https://www.bbc.com/news/world-latin-america-29868270>>.

³⁵ Henry Kissinger, 'Pitfalls of Universal Jurisdiction' (2001) 80(4) *Foreign Affairs* 86, 90.

George Fletcher has built on this criticism by noting that in several constitutional democracies, 'basic constitutional guarantees of a fair trial apply to everyone; every person accused of crime, no matter how serious the crime, no matter how much evidence of guilt the prosecution commands.'³⁶ These procedural guarantees, according to Fletcher, include a higher standard of double jeopardy than many European courts, the presumption of innocence, and the privilege against self-incrimination.³⁷ He argues that in international criminal law, this focus on the rights of the accused is replaced by a focus on the interests of victim-survivors,³⁸ and that the focus is therefore on achieving retribution rather than a fair trial.³⁹

On the contrary, the growing number of UJ cases have generally shown that UJ trials have been conducted fairly.⁴⁰

B. POLITICALLY MOTIVATED PROSECUTIONS

Another risk of UJ is that it may be abused by states for political reasons. UJ can be used to gain an advantage over opponents in interstate conflicts by 'prosecuting nationals of those opponent states'.⁴¹ Again, UJ trials have generally been found to have been conducted fairly.⁴² Still, the misuse of UJ remains a future risk. A state may ensure fair trials, but also only choose to use UJ against political 'opponents' (but not use UJ against nationals from states who they have good relations with).

³⁶ George Fletcher, 'Against Universal Jurisdiction' (2003) 1(3) *Journal of International Criminal Justice* 580, 580.

³⁷ Ibid 581.

³⁸ Ibid.

³⁹ Ibid 580.

⁴⁰ See generally Langer (n 1).

⁴¹ Morris (n 32) 356.

⁴² See generally Langer (n 1).

3.3 HOW LIMITATIONS AFFECT UNIVERSAL JURISDICTION

This Chapter has identified how UJ *could* be misused. Even if these risks are unwarranted,⁴³ they have contributed to political hesitations regarding the use of UJ. Sometime after the landmark use of UJ in the *Pinochet* case, Belgium and Spain weakened their UJ laws, after previously having led the way.⁴⁴ Belgium did so after immense pressure exerted on them by the US.⁴⁵ Many saw this as the 'fall' or 'death' of UJ.⁴⁶

However, the number of cases of UJ has continued to rise in recent years.⁴⁷ The value of UJ as a tool to proactively enforce accountability and remove impunity is discussed at length throughout this Handbook. The authors of the Handbook believe that UJ can, and should, be used in this way. However, because of the political limitations discussed in this chapter, the international community is currently hesitant to do so. Therefore, it is important to manage expectations regarding the current political climate. While further developments in UJ may be advocated, in its current state the prosecution of lower-level officials is more likely.

⁴³ See generally *ibid*.

⁴⁴ Sienho Yee, 'Universal Jurisdiction: Concept, Logic and Reality' (2011) 10(3) *Chinese Journal of International Law* 503, 511. Specifically, Belgium and Spain removed 'pure' UJ laws which allowed the use of UJ *in absentia* (without the actual presence of the accused in Belgium or Spain).

⁴⁵ 'Belgium: Universal Jurisdiction Law Repealed', *Human Rights Watch* (Web Page, 22 January 2003) <<https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed>>.

⁴⁶ See, eg, Ignacio del Moral, 'The Swan Song of Universal Jurisdiction in Spain' (2009) 9(5) *International Criminal Law Review* 777.

⁴⁷ See, eg, Máximo Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction' (2015) 13(2) *Journal of International Criminal Justice* 245; Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) *European Journal of International Law* 779.

**IN SUMMARY:**

- There are no guarantees that efforts to hold alleged perpetrators to account through UJ will result in a case before the courts, let alone a conviction.
- A number of challenges exist for the effective application of UJ which must always be kept in mind. This includes the role of politics which may determine whether or not a state is willing to support a UJ case brought to its attention.
- Another challenge is the issue of immunities. Incumbent political figures, often high-level officials enjoy certain immunities from prosecution under international law which has sometimes prevented UJ cases from proceeding.
- Further, UJ is sometimes argued to be a risk for politically-motivated prosecutions or ones where the fair trial rights of the accused are not guaranteed.
- While all the challenges discussed in the Chapter should be seriously considered and kept in mind, UJ cases against members of the Taliban may be less concerning for the prosecuting states politically than pursuit of political figures in recognised governments. Additionally, the issue of immunities is less likely to pose a problem in the context of the Taliban for the reasons discussed.

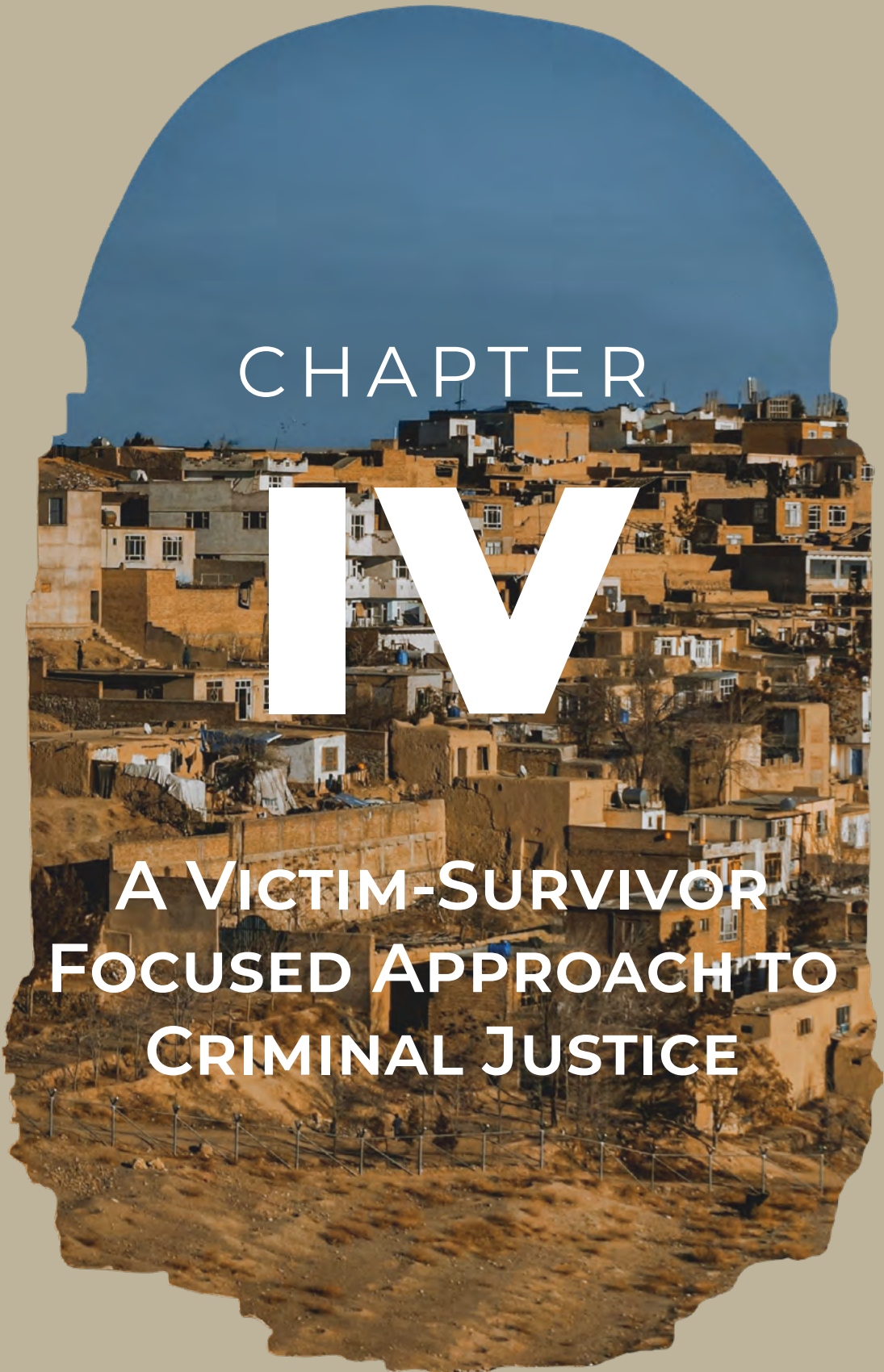
PART 1

AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER

IV

**A VICTIM-SURVIVOR
FOCUSED APPROACH TO
CRIMINAL JUSTICE**



Chapter 4 discusses the important and evolving role of victim-survivors in proceedings concerning accountability for the international crimes covered in this Handbook, including in domestic courts through the principle of UJ.

By ‘a victim-survivor focused approach to criminal justice’ the Handbook refers to criminal justice processes and platforms which recognise and accommodate the role of victim-survivors as active agents who pursue accountability and justice, rather than as passive objects that await accountability and remedies to be handed to them ‘from above’. Victim-survivor focused approaches can contribute to the long-term sustainability of justice and peace in a fragile context, like Afghanistan. Meaningful participation of victim-survivors and the affected communities in legal proceedings, including UJ, can ensure that their voices are heard and their loss is acknowledged.

The Chapter begins by exploring how the perception of victim-survivors in criminal justice has changed with time to recognise the need for a victim-survivor focused approach at both the international and domestic levels. This change emerged through the efforts of victim-survivors themselves and is an important evolution in international criminal justice, which initially recognised only a very limited role for victim-survivors. To illustrate this, the Chapter considers the little attention afforded to victim-survivors in some of the early prosecutions for atrocity crimes. Chapter 4 then turns to consider the International Criminal Court (‘ICC’) framework which, while leaving scope for improvement, illustrates an expanding role for victim-survivors. The Chapter concludes by considering the importance of victim-survivor mobilisation and some of the key barriers that prevent effective mobilisation.

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4.1 THE CHANGING ROLE OF VICTIM-SURVIVORS

Traditionally, there has been a tendency to think of persons subjected to crime as passive objects that need to be saved. As noted in the Handbook Introduction, the change in terminology from *victims* to *victim-survivors* reflects the changing perception of their role in holding perpetrators to account for alleged atrocity crimes. Persons subjected to atrocities are ‘survivors of crime who never asked to be brought into the system but were dragged into it by the criminals and are now stepping forward to make sure justice is done’.¹ Victim-survivors are active agents with capacity to play a crucial role in attempts to hold perpetrators accountable. This is also demonstrated through this Handbook which is driven by the wishes and ideas of victim-survivors themselves who endeavour to hold members of the Taliban and affiliated groups to account.

In the context of international criminal justice, the change in perception of victim-survivors is a slow and continuous process, as subsection 4.2 below will illustrate with reference to how international courts and tribunals have accommodated victim-survivors.²

4.1.1 Early Calls for Focus on Victim-Survivors

Early calls encouraging a shift towards victim-survivor empowerment in criminal justice processes came from both academia and victim-survivor movements:

- **Academia:** In academia, a discipline known as ‘victimology’ emerged around the mid-20th century.³ At this time, ideas about the need to provide financial assistance to victim-survivors

and the creation of compensation schemes emerged as part of reforms of criminal justice systems around the world.⁴

- **Social movements:** In the 1970s, social movements around the world emerged in support of efforts to reform criminal justice processes in support of victim-survivors. This included feminist movements which sought to shift the focus to the lack of power of women in sexual assault and domestic violence cases.⁵

Over time, calls for reform, particularly on the part of victim-survivors, have been motivated by a number of factors.⁶

A. ‘SECONDARY VICTIMISATION’

Victim-survivors may experience what is often referred to as ‘secondary victimisation’ when they are required to engage with criminal justice processes.⁷ This term has been created to signal that harm may be experienced by a victim-survivor not only as a result of the initial criminal act, such as one of the international crimes mentioned in this Handbook, but additionally as a result of their treatment by institutions or individuals in the criminal justice system.

SECONDARY VICTIMISATION

The UN has defined this term as ‘victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim.’⁸

This may include not being given the opportunity to be heard or make decisions about how the criminal case proceeds, or being placed in a position that puts the victim-survivor’s life in danger (e.g. from the alleged perpetrator on trial).

¹ Joanna Tucker Davis, ‘The Grassroots Beginnings of the Victims’ Rights Movement’ (Newsletter, National Crime Victim Law Institute, 2005) <<https://law.lclark.edu/live/files/6453-the-grassroots-beginnings-of-the-victims-rights>> 1.

² Sam Garkawe, ‘Victims and the International Criminal Court: Three Major Issues’ [2003] 3(4) *International Criminal Law Review* 345, 346. While the focus in this Chapter is on the role of victim-survivors in court-based proceedings, this does not detract from the importance of other approaches, such as truth and reconciliation mechanisms in the context of transitional justice. While a detailed exploration of such other processes go beyond the scope of this Handbook, these ought to be pursued alongside criminal justice proceedings.

³ Mina Rauschenbach and Damien Scalia, ‘Victims and International Criminal Justice: A Vexed Question?’ (2008) 90(870) *International Review of the Red Cross* 441, 442.

⁴ Marlene Young and John Stein, ‘The History of the Crime Victims’ Movement in the United States - a Component of the Office for Victims of Crime Oral History Project’, *OVC Archive* (Web Page) <https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pg4c.html>; Paul Rock, ‘Governments, Victims, and Policies in Two Countries’ (1988) 28 (1) *The British Journal of Criminology* 44, 56; Rauschenbach and Scalia (n 3) 443.

⁵ Rauschenbach and Scalia (n 3).

⁶ Garkawe (n 2) 348.

⁷ Ibid.

⁸ United Nations Office on Drugs and Crime (‘UNODC’) Centre for International Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (Report, 1999) 9.

B. FEELINGS OF INJUSTICE

Another aspect that has led to calls for a shift in focus towards victim-survivors is the feelings of injustice that persons most affected by the criminal act in question – in the context of this Handbook, the most serious types of crimes – are given the least power in criminal processes.⁹

This criticism was made with reference to the adversarial system of common law jurisdictions where the focus is upon the parties before the court and the evidence they put forward, as opposed to a more inquisitorial system that may involve fact-finding and investigation by the court in addition to the statements and evidence produced by the parties.¹⁰

C. DISPROPORTIONATE IMPACTS

There is a need to also pay particular attention to groups of victim-survivors at risk of experiencing disproportionate impacts in the criminal justice system.

For example, feminist scholars and advocates have underlined the disproportionate adverse effects and trauma many women and children who are victim-survivors experience during the course of a criminal proceeding.¹¹ In times of conflict, women and children are primarily and disproportionately the targets of sexual violence including rape, enforced sterilisation, enforced prostitution, trafficking and forced pregnancy.¹² These crimes have not only physical but also psychological, economic and social consequences for the victim-survivor that need to be considered during the trial process. As such, there is a need to account for the particular experiences of certain groups of victim-survivors to avoid indirectly causing secondary victimisation noted above.

4.1.2 International Crimes and the Importance of Victim-Survivors

There are various reasons why victim-survivors are of particular importance in cases that involve the international crimes considered in this Handbook. Such crimes are very likely to involve not just any particular individual but thousands of members of a community, or of an ethnic, religious or national group.¹³

Victim-survivors in this situation must not only overcome their personal suffering, but also take part in a process of social healing with their community or group as a whole.¹⁴ This unique aspect of international crimes increases the risk of psychological trauma and post-traumatic stress reactions that may be suffered by these victim-survivors.¹⁵ Moreover, as victim-survivors are often involved in conflicts where their entire community is targeted, they are often forced to flee their homes.¹⁶ Afghanistan is a key example; mental, emotional and financial harms flow from the international crimes considered in this Handbook, in addition to the physical harm that many people have also experienced.¹⁷

The complexities and gravity of the harm suffered by victim-survivors of these crimes demonstrate the importance of recognising and taking seriously their experiences and needs. Involving victim-survivors in criminal proceedings that seek to hold their perpetrators to account is important not only from the prosecutorial perspective of proving liability, but also from the defence perspective of ensuring that the alleged perpetrator is given the opportunity to reply. Finally, it is crucial from the perspective of victim-survivors themselves as a way for their voices and experiences to be heard.

4.2 A (SLOW) TURN TO VICTIM-SURVIVORS IN INTERNATIONAL CRIMINAL JUSTICE

4.2.1 Limited Role of Victim-Survivors Prior to the Rome Statute

Despite the importance of victim-survivor focused approaches in international criminal justice and early calls for victim-survivor focus in domestic criminal justice, international recognition of victim-survivors as active agents has been limited, particularly if we look at the international criminal proceedings before the establishment of the ICC.

⁹ Garkawe (n 2) 347–8.

¹⁰ Ibid 348.

¹¹ Ibid.

¹² Anne-Marie De Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families' [2007] 20 *Leiden Journal of International Law* 208.

¹³ Rauschenbach and Scalia (n 3) 450.

¹⁴ Ibid.

¹⁵ Basia Spalek, *Crime Victims: Theory, Policy and Practice* (Palgrave MacMillan, 2006).

¹⁶ European Center for Constitutional and Human Rights, International Federation for Human Rights and REDRESS, 'Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes' (Report, September 2020) <https://www.ecchr.eu/fileadmin/Publikationen/Breaking_Down_Barriers_EN_web_FINAL_2020-11-08.pdf> 12.

¹⁷ 'Victim Assistance and Witness Protection', UNODC (Web Page) <<https://www.unodc.org/unodc/en/organized-crime/witness-protection.html>>.

A. INTERNATIONAL MILITARY TRIBUNALS

The two international military tribunals ('IMTs') prosecuting international crimes following the Second World War did not have much focus on victim-survivors.¹⁸ A number of shortcomings of these tribunals can be made from the perspective of victim-survivors.

First, victim-survivor participation in the IMTs was limited to providing evidence as witnesses in the trials. These trials have also been criticised for the limited number of victim-survivors who were in fact called to give evidence. This also meant there was no variety in the victim-survivors to constitute an adequate representation of the vast number of victim-survivor groups targeted by the Axis powers.¹⁹

VICTIM-SURVIVORS LIMITED TO WITNESSES

Early international criminal proceedings limited victim-survivor participation to the role of a witness. This is problematic as it does not accurately represent the experience of victim-survivors. Victims-survivors are more than mere observers of the criminal act, they are subject to it. This in turn risks undermining the voice of the victim-survivor. Occasionally at the IMTs, victim-survivors' sharing of their experiences were disregarded on the basis that such testimony was not relevant to prove guilt.²⁰

Second, victim-survivors who did testify at Nuremberg did not tend to receive protection against insensitive questioning by defence lawyers.²¹ Before the Tokyo IMT, protection for victim-survivors was at the discretion of the presiding judge and was not explicitly provided for in the Charter.²²

Third, while participating witnesses at Nuremberg were kept in a safe house guarded by the US army, it was not guaranteed that they would not come into contact with the accused outside the trial which could generate further trauma for victim-survivors.²³

Finally, while the Charter of the Nuremberg Tribunal allowed for restitution of stolen property, no such orders were issued and reparations for victim-survivors of the atrocity crimes were not addressed.²⁴ Similarly, reparations were not ordered during the Tokyo IMT and victim-survivors of sexual slavery by Japanese military officials are still pursuing actions to obtain reparations.²⁵

B. AD HOC INTERNATIONAL CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RWANDA

Victim-survivors also played a limited role in the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). Like in the IMTs, victim-survivor participation was restricted to witnesses giving evidence. Participation in this way depended upon the victim-survivor being called by one of the parties or the presiding judge.²⁶

However, unlike the IMTs, the ICTY and the ICTR did include some protections for victim-survivors when giving evidence to prevent victimisation. To support and protect all witnesses, including victim-survivor witnesses, the ICTY established a special unit known as the Victims and Witnesses Section ('VWS').²⁷ The VWS provided logistical support for witnesses, as well as psychosocial support services. It also ensured that ICTY witness details were kept secure.

In terms of protecting witnesses giving evidence, the ICTY allowed special arrangements to ensure the safety of the witness. Such safety measures included:

1. Removing names and any other information that might identify the witness from the ICTY's public records;²⁸
2. Modifying witnesses' appearance or voice to avoid recognition;²⁹

18 Kinga Tibori-Szabo and Megan Hirst (eds), *Victim Participation in International Criminal Justice Practitioners' Guide* (TMC Asser Press, 2017) [1.1].

19 Luke Moffett, 'The Role of Victims in the International Criminal Tribunals of the Second World War' [2012] (12) *International Criminal Law Review* 245, 254.

20 Ibid 255–6.

21 Sam Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal' in Herbert R Reginbogin and Christoph Safferling, *The Nuremberg Trials: International Criminal Law Since 1945* (De Gruyter Saur 2006) 86, 90–1.

22 Moffett (n 19) 267.

23 Ibid 256.

24 Ibid.

25 'South Korea: Lawsuits Against Japanese Government Last Chance for Justice for 'Comfort Women'', *Amnesty International* (Web Page, 12 August 2020) <<https://www.amnesty.org/en/latest/news/2020/08/south-korea-lawsuits-against-the-japanese-government-last-chance-for-justice-for-comfort-women/>>.

26 'Witnesses - FAQs', ICTY (Web Page) <<https://www.icty.org/en/about/registry/witnesses/faq>>.

27 Ibid.

28 International Tribunal for the Former Yugoslavia, *Rules and Procedures of Evidence*, Doc No IT/32/Rev.50 (adopted 8 July 2015) r 75(B)(i)(a) ('ICTY RPE').

29 Ibid r 75(B)(i)(c).

3. Allowing witnesses to give evidence remotely 'through video recording in a separate room, away from the accused; and'³⁰
4. Allowing the witnesses to testify in closed court (which means only the lawyers and judges will hear the evidence, the evidence will not be made publicly available).³¹

Compensation for victim-survivors of atrocities in Rwanda and the former Yugoslavia was largely left to the national courts. The main reason for this was that the ICTY and ICTR were concerned that the incorporation of compensation would delay proceedings at the two tribunals.³² The large number of victim-survivors meant that the tribunals needed to carefully balance adequate representation of victim-survivors and the need for an expedient and fair trial of the accused.

4.2.2 UN Basic Principles of Justice for Victims of Crime and Abuse of Power

The 1985 UN *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* is one of the earliest statements at the international level that illustrates the gradual shift in perception of the role of victim-survivors in criminal justice.³³

According to the Declaration, victim-survivors should be provided access to justice, including remedies and reparations (discussed further in Part I Chapter 5 of this Handbook). Importantly, it also envisages an expanded role for victim-survivors in criminal justice. In particular, victim-survivors should be:

- Informed as to their role and scope in a proceeding;
- Allowed to express concerns and views where appropriate during the proceeding if their 'personal interest' are affected and provided the rights of the accused are not prejudiced;
- Given adequate 'proper assistance' during legal processes; and
- Guaranteed safety and privacy during the process to prevent further victimisation.³⁴

³⁰ Ibid r 75(B)(ii).

³¹ Ibid rr 75(B)(ii), 79(A)(ii).

³² Juan Carlos S Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Martinus Nijhoff, 2013) 207.

³³ UN *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/RES/40/34 (29 November 1985).

³⁴ Ibid para 6.

As noted in subsection 4.2.1 above, the early ad hoc tribunals on the former Yugoslavia and Rwanda did not fully embrace the expanded role of victim-survivors as envisaged in this early Declaration. This has since changed both with respect to the ICC and other subsequent ad hoc tribunals.

4.2.3 Expanded Role of Victim-Survivors at the ICC

This subsection considers the expanded role of victim-survivors before the ICC, particularly when it comes to victim-survivor participation. While the focus is on the ICC, courts and tribunals which followed the ICC have also implemented a victim-survivor approach, enabling their independent participation in criminal proceedings and processes for reparations.³⁵ This includes the Extraordinary Chambers in the Courts of Cambodia ('ECCC'); the Special Tribunal for Lebanon ('STL'); the Kosovo Specialist Chambers; the African Union-sponsored Chambres Africaines Éxtraordinaires; and the Cour Pénale Spéciale Centrafricaine.

A. BRIEF OVERVIEW OF ICC VICTIM-SURVIVOR PARTICIPATION

In 1998, the *Rome Statute of the International Criminal Court* ('Rome Statute') and the accompanying *Rules of Procedure and Evidence* ('RPE') provided the legal framework for victim-survivor participation in court proceedings.³⁶ Under this framework, the role envisaged for victim-survivors is more expansive than earlier examples, allowing participation of victim-survivors not solely as witnesses but also in the less common form of direct involvement in the criminal trial proceedings. Victim-survivors are offered 'the right to participate in proceedings by expressing views and concerns through their legal representatives'.³⁷

³⁵ Kinga Tibori-Szabó and Megan Hirst, 'Introduction: Victim Participation in International Criminal Justice' in Tibori-Szabó and Hirst (n 18) 1.1.

³⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute'); International Criminal Court, Rules of Evidence and Procedure, Doc No ICC-ASP/1/3 (adopted 9 September 2002) ('ICC RPE').

³⁷ Christine Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6(3) *Northwestern Journal of International Human Rights* 459, 460.

PROCESS FOR VICTIM-SURVIVOR PARTICIPATION AT THE ICC

1. Meaning of 'victim'

A 'victim' is defined by the ICC rules as a 'natural person who ha[s] suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.³⁸

In *The Prosecutor v Thomas Lubanga Dyilo*, a case regarding the situation in the Democratic Republic of the Congo, the judges authorised 146 persons to participate in the case.³⁹ It was held by the Pre-Trial Chamber ('PTC') that victim-survivor participation is to be given a broad approach, granting a right to 'express their views and concerns through statements, examination of witnesses or by filing written submissions'.⁴⁰

2. Sufficient 'personal interest'

If a person is deemed to be a 'victim', the Court must decide whether or not the person has sufficient 'personal interest' to participate.⁴¹

In *Prosecutor v Bahr Idriss Abu Garda*, the PTC held that personal interest of victim-survivors comes from:

- 'the desire to have a declaration of truth by a competent body (right to truth);
- their wish to have those who victimised them identified and prosecuted (right to justice); and
- the right to reparation'.⁴²

3. Stage of proceeding where participation is appropriate

Even if the above is met, the ICC considers which state of the legal proceeding participation by victim-survivors is appropriate. This decision is at the discretion of the Chamber in charge who will also assess the manner in which victim-survivors can participate.⁴³

4. Participation and the rights of the accused

Participation, even if it meets the various thresholds and considerations above, must be determined by the Court not to be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.⁴⁴

Provided it is not, judges may make modifications to accommodate the participation of the victim-survivor.

³⁸ International Criminal Court, Rules of Evidence and Procedure, Doc No ICC-ASP/1/3 (adopted 9 September 2002) ('ICC RPE') r 85.

³⁹ *Prosecutor v Thomas Lubanga Dyilo* (Decision on Victims' Participation, Trial Chamber I, Doc No ICC-01/04-01/06).

⁴⁰ Ibid [98].

⁴¹ *Rome Statute* (n 36) art 68(3).

⁴² *Prosecutor v Bahr Idriss Abu Garda* (Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, Doc No ICC-02/05-02/09) [3].

⁴³ *Rome Statute* (n 36) art 68(3) ('Rome Statute').

⁴⁴ Ibid.

Anyone who wishes to participate in an ICC proceeding must lodge a written application to the Registrar, who will file the application with the judges.⁴⁵ The application by a person or group must meet the above criteria. If not, the Chamber will reject the application.⁴⁶

A victim-survivor does not need legal representation to participate in the ICC proceedings, but it is highly encouraged. They are entitled to be assisted by a legal representative who must be a person with over 10 years of experience as a criminal lawyer, judge or prosecutor. If victim-survivors seek to participate in the proceedings as a group, they may have a 'common legal representative'.⁴⁷

The Victims Participation and Reparations Section ('VPRS') of the ICC Registry can inform victim-survivors of their rights and assist them with applications for participation and with finding and funding a legal representative.⁴⁸

B. THE PRACTICAL REALITY OF PARTICIPATION

While victim-survivors can participate, what degree of influence do they actually have in the legal proceeding? The need to balance their rights with the rights of the accused has raised practical concerns regarding delays and long proceedings which have hindered the accused's right to an expeditious trial.⁴⁹ As there are no established guidelines for this balancing exercise, it is difficult to see how each victim-survivor will be involved before the ICC.⁵⁰

An added complication is that, when it comes to international crimes, there are 'economies of scale in representing' victim-survivors of atrocities.⁵¹ This leads to the Court grouping victim-survivors based on their common interests and geographical location.⁵²

If participation is limited to collective representation and assisting the Court in gathering evidence, the extent to which it is effective and meaningful for the victim-survivor is questionable. On the other hand, such collective representation may limit delays to allow for more swiftly processes and may also demonstrate grievances on a community-level.

Nonetheless, the ICC framework does demonstrate that international criminal justice has progressed, albeit slowly, since the early days of the IMTs. While the particular extent of victim-survivors' role in international criminal justice will depend on the jurisdiction in which the case is pursued, the experience before the ICC is an example of a general trend which extends to cases concerning atrocity crimes towards victim-survivor focused approaches.

4.3 VICTIM-SURVIVOR MOBILISATION

As this Chapter has highlighted, victim-survivors can play an active role in pursuing accountability and justice for themselves and the broader community. For this reason, their ability to mobilise and form victim-survivor groups that can be ready to take action should opportunities arise (such as an alleged perpetrator travelling to their jurisdiction or if there are cases arising at the ICC) is crucial.

This subsection will consider a number of aspects that may affect the extent to which victim-survivors mobilise.

4.3.1 The Importance of Knowledge

If victim-survivors are unaware the actions that have caused their suffering can amount to crimes under international criminal law, they may not be aware of potential avenues to seek accountability and justice.

Raising awareness of the meaning of international crimes and possible avenues for redress under the current international criminal justice system is important in seeking to combat knowledge gaps. Examples of how victim-survivor groups from other countries have fought to attain justice can help spread understanding about how to seek redress and reparations. This has been evidenced by the work of Victim Advocates International ('VAI'), a humanitarian organisation aimed at assisting victim-survivors of international crimes. In 2020, VAI produced short videos featuring Rohingya Muslims

⁴⁵ ICC RPE (n 38) r 89(1).

⁴⁶ Ibid r 89(2).

⁴⁷ Ibid r 90(2).

⁴⁸ Ibid r 90(3)–(5).

⁴⁹ Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8(1) *Journal of International Criminal Justice* 137, 145.

⁵⁰ Jo-Anne Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate' (2010) 23(3) *Leiden Journal of International Law* 629, 631.

⁵¹ Christine Schwöbel-Patel, 'The 'ideal' victim of international criminal law' (2018) 29(3) *European Journal of International Law* 703, 719.

⁵² Ibid.

sharing their experiences in terms of seeking justice following the recent persecution and alleged genocide against this group in Myanmar.⁵³ These videos were shared with victim-survivor groups from South Sudan in light of the ongoing violence due to the civil war.⁵⁴ VAI found that producing these videos not only helped bridge the knowledge gaps of South Sudanese victim-survivors, but was also a useful experience for the Rohingya groups, allowing them to build confidence and 'fe[el] a sense of pride in being asked to talk about their experiences.'⁵⁵ Overall, the more that victim-survivor groups are able to share their experiences with each other and the international community at large, the less alone they will feel in their journeys in seeking justice.

A key mission of this Handbook is precisely to bridge the knowledge gaps discussed above by raising awareness of legal principles relating to the international crimes unfolding in Afghanistan, as well as the potential challenges of seeking to hold the Taliban to account through the principle of UJ.

4.3.2 Ensuring Safety

Of crucial importance in victim-survivor mobilisation efforts is ensuring the safety of everyone involved in the process.

For victim-survivors from Afghanistan, speaking out against the Taliban and rallying international support goes hand-in-hand with threats to personal safety, and also to the safety of their family. The Taliban continues to both threaten and act on such threats of violence, which contributes to the cycle of hopelessness victim-survivors face.

A criminal justice system, whether at the domestic or international levels, which does not provide sufficient and adequate safeguards to protect victim-survivors who decide to participate in legal proceedings can act as a deterrent for future victim-survivors to step forward. As this Chapter has demonstrated, while

there is still scope for improvement, a changing perception as to the role of victim-survivors in criminal justice means that there are now generally more safeguards in place.

4.3.3 The Need for Trust

Related to both the importance of knowledge and safety is the need for victim-survivors to trust the system which they use to seek accountability and justice. Yet, a lack of knowledge of the workings of such systems combined with safety concerns with respect to their operation may result in mistrust.

With respect to Afghanistan, the issue of lack of trust is particularly pressing. The many decades long conflict has seen little progress in terms of accountability and justice and victim-survivors have not mobilised to any greater extent during this time. Concerns over the justice of the system itself is exacerbated by the way in which the international community has itself been involved in alleged atrocities in Afghanistan and by the way in which states may remain unwilling to take action against the Taliban for political reasons (one of the key barriers to UJ proceedings discussed in Part I Chapter 3 of this Handbook).

Victim-survivors may also have concerns over the extent to which the ICC may be considered an effective pathway. A persistent criticism of the ICC is that its processes are very slow, and it may take years for meaningful results to be achieved (discussed further in Part 1 Chapter 7 of the Handbook). Further, ICC procedures can be fairly rigid; in the context of Afghanistan, an initial prosecutorial request into investigating the situation in Afghanistan was rejected by the Court.⁵⁶

⁵⁶ 'ICC Judges Reject Opening of an Investigation regarding Afghanistan Situation', ICC (Press Release, 12 April 2019) <<https://www.icc-cpi.int/news/icc-judges-reject-opening-investigation-regarding-afghanistan-situation>>.

⁵³ 'Connecting Victim Groups Across the World to Form a Movement', VAI (online, 12 March 2021) <<https://www.victimadvocatesinternational.org/connecting-victim-groups-across-the-world-to-form-a-movement/>>.

⁵⁴ See, eg, 'South Sudan: Survivors Describe Killings, Mass Displacement and Terror Amid Fighting in Western Equatoria', Amnesty International (online, 9 December 2021) <<https://www.amnesty.org/en/latest/news/2021/12/south-sudan-survivors-describe-killings-mass-displacement-and-terror-amid-fighting-in-western-equatoria/>>

⁵⁵ VAI (n 53).

CASE STUDY: MOBILISATION OF PINOCHET VICTIM-SURVIVORS

The *Pinochet* case (as previously discussed in Part I Chapter 3 of this Handbook) is not only an important case study on the implementation of UJ despite the political barriers which pose significant hurdles for victim-survivors seeking to hold perpetrators to account through domestic proceedings. It also demonstrates the importance of victim-survivor mobilisation and their active role in driving the UJ process in this case.

Pinochet was a Chilean dictator whose regime was notorious for the use of torture, forced disappearances and murder of political dissidents. Even after Pinochet stepped down from political power, he appeared immune from prosecution of these alleged crimes given his position as a former Head of State. When UK courts found that they were entitled to extradite Pinochet to Spain to be tried under the principle of UJ,⁵⁷ victim-survivors across the world began to mobilise to bring actions for atrocity crimes.

Some examples include:

- Chilean migrants in Sweden sought to have Pinochet charged with murder and kidnapping in Spain (25 October 1998);⁵⁸
- British-based Chilean exiles' called for Pinochet to be tried in the UK on torture charges (27 October 1998);⁵⁹ and
- A victim-survivor of torture brought a case at the Inter-American Court of Human Rights ('IACtHR') which resulted in a landmark decision awarding the claimant moral compensation against the Chilean Government for the atrocities he suffered under the Pinochet administration (2013).⁶⁰

Prosecutions, investigations, or even attempted prosecutions and investigations into alleged perpetrators demonstrate that there are an array of avenues available for victim-survivors to consider for accountability and redress.

The Pinochet example demonstrates that victim-survivors themselves, with the knowledge, sufficient safeguards and access to the various mechanisms can push accountability efforts forward.



IN SUMMARY:

- Victim-survivors are active agents that play or ought to play a crucial role in efforts to hold perpetrators of international crimes to account.
- Their role in international criminal justice matters has gradually become more recognised through the adoption of what this Chapter has referred to as 'victim-survivor focused approaches'. Such approaches ensure that victim-survivors' experiences are taken seriously and accommodated in criminal justice proceedings in ways which ensure the safety of victim-survivors.
- Given the importance and increasing recognition of the need to focus on victim-survivors, victim-survivor mobilisation and preparation for potential possibilities to pursue accountability is crucial.
- Barriers to victim-survivor mobilisation include a lack of knowledge of relevant legal proceedings, safety concerns and a lack of trust and access to available mechanisms.
- Despite the many challenges for victim-survivors in the criminal justice system, national and international, they have always been and continue to be the driving force for accountability.

⁵⁷ See *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147.

⁵⁸ 'Pinochet on Trial: Timeline', *Transnational Institute* (Web Page, 17 November 2002) <<https://www.tni.org/en/article/pinochet-on-trial-timeline>>.

⁵⁹ Ibid.

⁶⁰ 'Chilean Exile Wins Compensation over Pinochet-Era Torture', *BBC* (online, 2 November 2013) <<https://www.bbc.com/news/world-latin-america-24785827>>.

PART 1

AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER



VICTIM-SURVIVORS, REMEDIES AND REPARATIONS



International obligations require states to uphold the rights of victim-survivors, regardless of the fact that the crimes committed against them occurred in a different jurisdiction. For many victim-survivors, the reality is that it is unlikely that remedies can be obtained in the state where the atrocities took place, as the alleged perpetrators of the atrocities are still in power and many victim-survivors find themselves in other jurisdictions as a result of a need to flee situations of conflict and persecution.

This Chapter will consider what obligations countries in which victim-survivors find themselves have towards victim-survivors in their pursuit of justice with respect to international crimes that took place elsewhere. In doing so, the Handbook takes as its starting point every victim-survivor's right under international law to an effective remedy.

Chapter 5 begins by explaining what this right means and the sources of the right. It then turns to consider what obligations the states have to all persons in their jurisdiction in this context. The Chapter next considers different types of remedies and reparations and considers the extent to which UJ cases contribute towards victim-survivors' right to an effective remedy.

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5.1 THE RIGHT TO AN EFFECTIVE REMEDY

All human beings are entitled to enjoy the basic rights and freedoms set out in international human rights law ('IHRL') instruments.¹ The international crimes of concern in this Handbook amount to gross violations of human rights and serious violations of international humanitarian law ('IHL') in conflict situations.²

5.1.1 Origins of the Right to an Effective Remedy

Many international agreements recognise a specific right to an effective remedy which seeks to address the violations of IHRL and IHL by providing victim-survivors with a range of different types of remedies and reparations, including material and symbolic settlements, as well as guarantees of non-repetition of the commission of atrocities through, for example, effective investigation and prosecution of alleged perpetrators.³

WHAT ARE REPARATIONS AND REMEDIES?

- **Reparations:** Reparations are the acts and processes to make amends for wrongs. These transcend a single person and look to compensate groups of people and their descendants for violations of their human rights. Reparations aim to promote justice by redressing gross violations of IHRL or serious violations of IHL.⁴

- **Remedies:** Remedies consist of both procedural and substantive remedies.

- a. **Procedural remedies include the right to prove one's right before an independent and impartial body and have their violation of human rights ceased, and the fact of its occurrence recognised.⁵**
- b. **Substantive remedies are evidenced by the doctrine of state responsibility which obliges a state to cease, assure of non-repetition, and also make full reparation for the internationally wrongful act for which it is responsible.⁶**

A. INTERNATIONAL HUMAN RIGHTS LAW

IHRL protects the right to an effective remedy in various instruments. For example:

- Article 2(3) of the *International Covenant on Civil and Political Rights* ('ICCPR') requires that victim-survivors whose rights and freedoms have been violated be given an effective remedy.⁷
- Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') requires states parties to enforce in their legal systems that victim-survivors of torture have an accessible right to compensation, including full rehabilitation.⁸

The details of the right to an effective remedy are also elaborated on in the *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* (often referred to as the 'Van Boven/Bassiouni Principles' after their authors).⁹ While these principles are not legally binding, they clarify important aspects of the right to an effective remedy as confirmed in IHRL and IHL.

1 Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR'); Theo Van Boven, 'Victim's Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Leiden: Brill, 2nd rev ed, 2009) 20.

2 *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 3rd Comm, 60th sess, Agenda item 71(a) UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) Principle III ('Van Boven/Bassiouni Principles').

3 See, eg, UDHR (n 1) art 8; *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) ('ICCPR'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 6 ('ICERD'); *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 ('CAT').

4 Cordula Droege, 'The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide', *International Commission of Jurists* (Report, 2006) <<https://icj2.wpunepowered.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf>> 5.

5 Livio Zilli, 'The Right to a Remedy and Reparation for Gross Human Rights Violations', *International Commission of Jurists* (Report, 2018) <<https://icj2.wpunepowered.com/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>> 52.

6 *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 6th Comm, 56th sess, Agenda item 162 UN Doc A/RES/56/83 (28 January 2002) arts 30–1.

7 ICCPR (n 3).

8 CAT (n 3).

9 Van Boven/Bassiouni Principles (n 2).

B. INTERNATIONAL HUMANITARIAN LAW

IHL protects the right to repair in response to the harm occurring to victim-survivors in times of armed conflict. Relevant provisions include, for example:

- Article 3 of the *Fourth Hague Convention respecting the Laws and Customs of War on Land* states that a belligerent party violating regulations is liable to pay compensation and is liable for the acts committed by people forming part of their armed forces.¹⁰
- Article 91 of the *Additional Protocols to the Geneva Conventions* also requires compensation to be paid for violations of the *Geneva Conventions*.¹¹
- The four *Geneva Conventions* require in Articles 49,¹² 50,¹³ 129,¹⁴ and 146,¹⁵ respectively, that states seek out perpetrators no matter their nationality and either prosecute them in their own courts or deliver them for trial by another State.¹⁶ This will provide a gateway in victim-survivors accessing remedies.

As noted above, the Van Boven/Bassiouni principles elaborates upon the meaning and scope of the right to an effective remedy in response to both violations of IHRL and IHL.

C. INTERNATIONAL CRIMINAL LAW

Holding perpetrators to account under international criminal law ('ICL') can form part of the process of obtaining remedies and reparations (even though this area of law has only seen a 'slow turn' to victim-survivors as discussed in the previous Chapter of the Handbook). As will be explained further below, ensuring that perpetrators are held to account may

prevent repetition of crimes by the same perpetrator but also by others, as it may have a deterrent effect.

Further, there are also ways in which victim-survivors may obtain compensation, for example through the Victim Trust Fund of the International Criminal Court ('ICC') (discussed further below).

- Article 75 of the *Rome Statute of the International Criminal Court* ('Rome Statute') gives victim-survivors a right to reparations, and this right will be discussed further later in this Chapter.¹⁷

5.1.2 Victim-Survivors Outside their Country of Origin

As a result of war and civil unrest, many victim-survivors of atrocities flee to safe countries to survive. The case of Afghanistan is an illustrative example. Victim-survivors of international crimes still have rights in the jurisdictions they find themselves, including the right to an effective remedy.

In ratifying human rights treaties, states are obligated to incorporate them into their domestic legal system.¹⁸ In monist legal systems, international and domestic law form a single universal legal system.¹⁹ In dualist legal systems, however, international and domestic law are separate, and international law treaties and principles must be incorporated into the state's domestic law.²⁰

This obligation also extends to states having to provide for appropriate and effective legislative and administrative procedures. As discussed in Part 1 Chapter 2 of this Handbook, there are various treaties which permit or obligate countries to take steps to address international crimes. For example, the *Geneva Conventions* require state parties to search and prosecute alleged perpetrators before their own courts.²¹ Further, according to IHRL, states must ensure that appropriate remedies and reparations are adequate, effective, prompt, and appropriate.²²

¹⁰ *The Hague Convention (IV) respecting the Laws and Customs of War on Land*, Second International Peace Conference (entered into force 18 October 1907).

¹¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, of 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 92.

¹² *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 (entered into force 12 August 1949).

¹³ *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 (entered into force 12 August 1949).

¹⁴ *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135 (entered into force 12 August 1949).

¹⁵ *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 75 UNTS 287 (entered into force 12 August 1949).

¹⁶ International Committee of the Red Cross, 'Universal Jurisdiction over War Crimes – Factsheet' (online, 21 May 2021) <https://www.icrc.org/en/download/file/167011/dp_consult_38_universal_jurisdiction.pdf>.

¹⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 75 ('Rome Statute').

¹⁸ Van Boven/Bassiouni Principles (n 2).

¹⁹ Madelaine Chiam, 'Monism and Dualism in International Law' *Oxford Bibliographies* (Encyclopaedia, 27 June 2018) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml#>>.

²⁰ Ibid.

²¹ Droege (n 4) 1, 237.

²² Ibid.

With respect to the serious violations of IHRL, countries have a duty to investigate and prosecute, as well as assist and cooperate with other bodies in the investigation and prosecution of these violations.²³ Such measures may involve legal proceedings under the principle of UJ.

Moreover, countries should facilitate extradition, and provide judicial assistance and cooperation to other states or international judicial bodies where it is provided for in an applicable instrument. This includes assistance to and protection of victims and witnesses.²⁴

Finally, for victim-survivors who decide to engage in UJ proceedings in the exercising state, or in other efforts to hold alleged perpetrators to account, the state in question must ensure that victim-survivors are not victimised by facing threats to themselves or their family members during such proceedings. This may include various efforts to ensure that the proceedings are victim-survivor focused as discussed in Part 1 Chapter 4 of this Handbook. Exercising states have obligations to protect the human rights and fundamental freedoms of all persons within their jurisdiction, including victim-survivors who have fled atrocities. Such rights include the right to life which includes protecting against harm by third parties.

5.2 REMEDIES AND REPARATIONS

5.2.1 Overview

All persons harmed by a violation of human rights are entitled to remedy. This includes victim-survivors. The ICC grants victims of international crimes the right to participate in the trial and have their concerns heard on the matter. As noted above, various international instruments guarantee all persons a right to an effective remedy when their human rights have been violated. This includes violations taking place as a result of international crimes, known as serious violations of human rights.

5.2.2 Types of Reparations

There are five types of reparations in the realm of public international law that may be available to victim-survivors but which have a more limited scope under UJ.

A. RESTITUTION

Restitution is grounded in the idea of returning victim-survivors to the position they would have been in, had the violation not occurred.²⁵ There are different types of restitution: restoration of legal rights, restoration of liberty, restoration of citizenship, return to one's place of residence, restoration of employment, and return of property.²⁶ For many victim-survivors in the context of UJ, returning to their place of residence may not be possible, but restitution in part in terms of restoration of their legal rights can be.

B. COMPENSATION

Compensation entails the provision of monetary awards for certain losses caused by gross violations of human rights, to financially aid victim-survivors.²⁷ Economic compensation must be provided by the alleged perpetrators.²⁸

According to the Van Boven/Bassiouni principles, compensation may address the following:

- a. Physical or mental harm;
- b. Lost opportunities, including employment, education, and social benefits;
- c. Material damage and loss of earnings, including loss of earning potential);
- d. Moral damage; and
- e. Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.²⁹

The recognition of UJ over civil proceedings is contentious and not well-recognised in international law and a discussion of such a principle is not covered in this Handbook.

However, recovery of assets and eventual pay-out to victim-survivors may hold some prospects in terms of materialising compensation and/or restitution. A recent example includes a case in France where the uncle of Syrian President Bashar al-Assad was sentenced to imprisonment for, amongst other

²³ Ibid 5.

²⁴ Ibid.

²⁵ Van Boven/Bassiouni Principles (n 2) Principle 19.

²⁶ Zilli (n 5) 159–72.

²⁷ Van Boven/Bassiouni Principles (n 2).

²⁸ Nora Sveaass, 'Gross Human Rights Violations and Reparation under International Law: Approaching Rehabilitation as a Form of Reparation' (2013) 4 *European Journal of Psychotraumatology* 1, 8.

²⁹ Van Boven/Bassiouni Principles (n 2) Principle 20.

finance related charges, conspiracy to launder public funds in Syria.³⁰ The case follows another one in France concerning the son of the President of Equatorial Guinea which resulted in a suspended prison sentence and a fine of 30 million euros.³¹

Separate from any compensation that may be obtained through domestic court proceedings, the ICC Trust Fund for Victims ('TFV') is a process that victim-survivors in cases before the ICC could pursue for economic relief.³² The goal of the Fund is to assist victim-survivors and address the harm caused by international crimes. When people are designated as 'victims', it is still necessary to prove a connection between the suffering they endured and the offender's crime.³³ To access the reparations mandate, an ICC conviction is also required.

However, investigations and convictions at the ICC are slow-moving and can take decades, as is the case with Afghanistan (for details on the ICC investigation, see Part 1 Chapter 7 of this Handbook).

C. REHABILITATION

Rehabilitation covers a wide range of services and support for victim-survivors. This includes medical, psychological, legal, and social support services to assist the victim-survivors.³⁴ Rehabilitation can be provided by the exercising state through health and social services, or as part of a scheme to redress serious crimes committed overseas.³⁵

Separate to any rehabilitation obtained by the victim-survivor in the exercising state, cases before the ICC might also provide victim-survivors with rehabilitative measures. Unlike any financial compensation before the ICC, no conviction is required for victim-survivors in ICC proceedings to access the assistance programs.³⁶ The program aims to provide rehabilitative support to victims, including the following:

- Physical rehabilitation in providing support mechanisms for victim-survivors with physical injuries to the point they can fulfil their roles as productive and contributing members of the society they belong to.
- Psychological rehabilitation in providing accessible psychological, social, and other health support to support the recovery of victim-survivors and educate the local community about their needs.
- Material support to better the economic status of victim-survivors to aid their recovery and integrate them back into society.³⁷

D. SATISFACTION

Satisfaction is a symbolic, non-financial reparation that aims to restore the dignity and reputation of a victim-survivor. Satisfaction is a broad principle that can include the following:

- Verifying the facts and fully disclosing the truth to the public as an acknowledgement of the event in a way that does not affect the safety and interests of victim-survivors and their relatives.
- Searching for disappeared persons, children abducted, the bodies of those killed, and assisting in the recovery, identification, and burial of their bodies following the wishes of the victims or cultural practices.
- A public apology and acceptance of responsibility, commemorations, and tributes for victim-survivors.
- Judicial sanctions against those liable for the violations.³⁸

To some extent, the symbolic measure of satisfaction may be addressed through UJ proceedings. The exercising state is capable of enforcing judicial sanctions against those liable, and recognising the event and other atrocities occurring in the state where the crimes were committed.

E. GUARANTEE OF NON-REPETITION

Guarantee of non-repetition aims to systematically alter society in a structural manner so that the violations in question cannot occur again.³⁹ This includes, for example, the changing of public

30 'French Court Upholds Assad Uncle's Conviction over Ill-Gotten Assets', *France 24* (online, 7 September 2022) <<https://www.france24.com/en/live-news/20220907-french-court-upholds-assad-uncle-s-conviction-over-ill-gotten-assets>>.

31 Ibid.

32 Rome Statute (n 17) art 79(1).

33 Eva Dwertmann, *The Reparation of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff, 2010) 285.

34 Van Boven/Bassiouni Principles (n 2) Principle 21.

35 Sveaass (n 28).

36 'Assistance Programmes', *Trust Fund for Victims* (Web Page) <<https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>>.

37 Ibid.

38 Van Boven/Bassiouni Principles (n 2) Principle 22.

39 Zilli (n 5) 152.

policy.⁴⁰ Guarantees of non-repetition, are unlikely to be available under UJ. This is because the state of the alleged perpetrator may not recognise, or even support, the actions of the perpetrator.

For the past 40 years, victim-survivors have been neglected in peace negotiations in Afghanistan; resulting in a continuing cycle of violence with little accountability. Indeed, the warlords of the 80s and 90s reappeared as government officials and in positions of power (discussed further in Part 2 Chapter 1 of the Handbook). Guarantees of non-repetition were not implemented, failing to prevent these crimes from occurring again and again.

With respect to non-repetition and UJ, at least to some extent, the prosecution of alleged perpetrators of atrocities may have the effect of deterring at least some future atrocities if there are risks that the perpetrators could face prosecution if they travel or reside elsewhere. Yet, this type of reparation appears to be more targeted toward the systematic and structural changes within the society where atrocities happen.

5.2.3 Gender-Sensitive Reparations

In addition to the different types of reparations, the fundamental right to an effective remedy also recognises the importance of reparations being adapted to the victim-survivor or group's particular circumstances. This includes the need to ensure that reparations are gender-sensitive, recognising the disproportionate impact which atrocities have on women and girls as underlined in the previous Chapter of the Handbook (and discussed further in the context of Afghanistan in Part 2 Chapter 6).

The Committee overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') has elaborated upon the importance of gender-sensitive reparations. In particular, the Committee has underlined that '[a]n assessment of the gender dimension of the harm suffered is essential to ensure that women are provided with adequate, effective and prompt reparations'.⁴¹ Further, 'reparation measures should seek to transform the structural inequalities which led to the violations of

women's rights, respond to women's specific needs and prevent their reoccurrence'.⁴²

In other words, for victim-survivors who already experience deep structural marginalisation and exclusion, reparations may assist in addressing such inequalities provided that they take a sensitive approach which is conscious of how existing marginalisation enhances suffering.⁴³



IN SUMMARY:

- **Many treaties recognise a right to an effective remedy which seeks to address violations of IHRL and IHL by providing victim-survivors with a range of different types of remedies and reparations.**
- **There are five common types of reparations in international law: (i) Restitution; (ii) compensation; (iii) rehabilitation; (iv) satisfaction; and (v) guarantee of non-repetition.**
- **Not all types of reparations are attainable in UJ proceedings; however, the pursuit of accountability by holding an alleged perpetrator to account forms one part of the right to an effective remedy.**
- **Civil claims relying upon the principle of UJ have been made but the idea of UJ in such contexts is not well-recognised and falls outside the scope of this Handbook.**
- **For reparations to be effective, they must take account of the specific circumstance of the victim-survivors. This includes the disproportionate impact which suffering from atrocities have on women and girls, necessitating reparations to be gender-sensitive.**

⁴⁰ Van Boven/Bassiouni Principles (n 2) Principle 23.

⁴¹ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations' (1 November 2013), UN Doc CEDAW/C/GC/30 22 [79].

⁴² Ibid.

⁴³ Sareta Ashraph, 'Transitional Justice – Without the Transition? Considering a Path to Reparations for the Syrian People' in Ferstman and Goetz (eds) (n 1) 762.

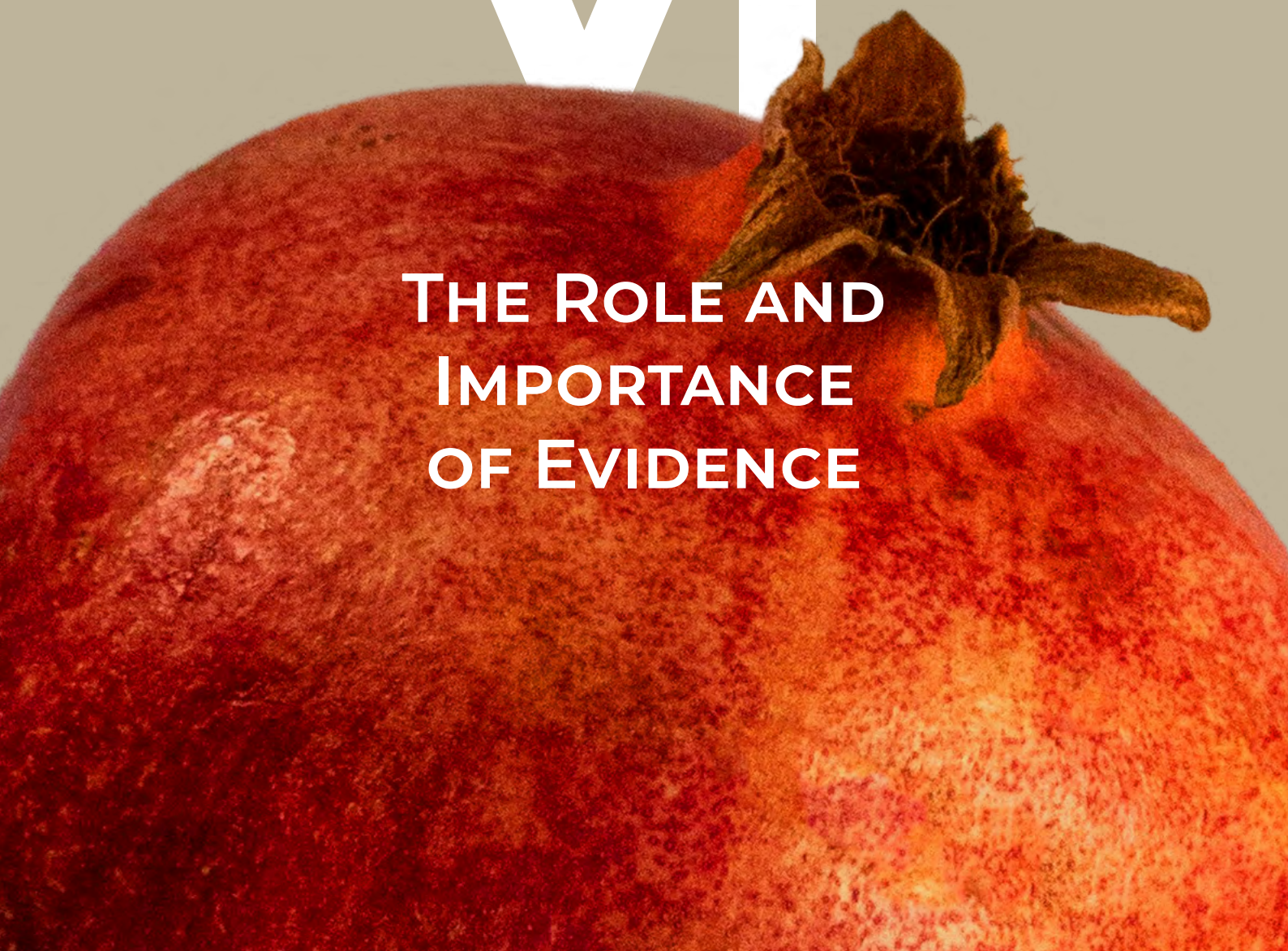
PART 1

AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER

VI

THE ROLE AND IMPORTANCE OF EVIDENCE



The process of collecting and preserving evidence of international crimes committed in Afghanistan has always been a challenge. There are currently no mechanisms or institutions in place to actively document evidence of mass atrocities committed in Afghanistan. This complicates case-building efforts outside of Afghanistan and once again underlines the crucial role of meaningful participation and engagement with victim-survivors and other members of diaspora communities in UJ efforts.

While rules and procedures of evidence differ among states, this Chapter provides a general introduction to the topic of evidence. In particular, it explains what evidence is and gives some examples of different types of evidence. It also considers how evidence is sometimes collected in cases concerning international criminal justice and the challenges that accompany evidence.

Finally, the Chapter reviews the potential benefits and challenges of the digital sphere in the context of evidence. Digital tools and platforms emerge at a rapid pace and are increasingly playing a role in court proceedings around the world.

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6.1. MEANING AND ADMISSIBILITY

6.1.1 What is Evidence?

Evidence represents the relationship between two facts: the fact in issue, which is what the prosecution must establish for the case to succeed, and the evidentiary fact, the supporting material.¹ Evidence, therefore, is any fact or information that has the quality of proving or disproving a fact in issue.²

Many things may constitute evidence, including documents, witness statements, and physical evidence, such as a gun used in a crime.³ Generally, a witness can only give evidence of a fact that is in issue and is relevant to the case, of which they have personal knowledge (something they saw or perceived themselves), and not their opinion.⁴

There are a number of fundamental principles and concepts that are relevant to evidence in any kind of case, including those based upon the principle of UJ. What will become clear is that evidence is often more difficult to gather in cases involving allegations of international crimes. There are a number of reasons for this. For example, the alleged crime took place far away where it may be difficult to obtain evidence; or the alleged crime may have taken place a long time ago. Despite the seriousness of the alleged crime, the basic fundamentals of evidence still apply, albeit with jurisdiction-specific rules and procedures. This is important to ensure the integrity and fairness of the proceedings, including the rights of all parties involved.

A. DIRECT AND INDIRECT

Evidence can be direct or indirect:

- **Direct** evidence is based on a witness's personal knowledge of a fact in issue, such as a witness account of a crime.⁵
- **Indirect** evidence (sometimes referred to as circumstantial evidence) is inferred from a material fact and describes the circumstances

surrounding an event.⁶ For example, a witness may not have seen the defendant commit murder but saw them enter a room with a person who was then found dead in that room.⁷

B. BURDEN AND STANDARD OF PROOF

Proof refers to establishing facts or statements as being true, and this is done through the use of evidence.⁸ A distinction is made between the standard and the burden of proof:

- **Standard** of proof is the level that the fact must be proven to.⁹
- **Burden** of proof explains who bears the burden of proving the existence of a fact.¹⁰

The standard of proof in criminal proceedings is high.¹¹ It requires proof of guilt 'beyond reasonable doubt'.¹² It is a balancing act between protecting the community from crime and harm, and preventing wrongful convictions from happening.¹³ It is not sufficient that there is a high probability that the accused should be convicted, the evidence must be of the threshold to remove any reasonable doubt.¹⁴ Every rational explanation conveying the innocence of the accused must be dismissed, meaning the standard of proof is intertwined with the evaluation of evidence.¹⁵

The burden of proof is on the prosecutor to rebut the so-called presumption of innocence.¹⁶

C. THE PRESUMPTION OF INNOCENCE

The presumption of innocence means that a person, no matter how heinous the crime that they are accused of having committed, is presumed to be innocent unless and until they are proven guilty.¹⁷

¹ Mark Klamberg, *Evidence in International Criminal Trials* (Leiden, The Netherlands: Brill 2013) 117.

² Gideon Boas, Geoffrey Bellew, and John Arthur, *Australian Uniform Evidence: Principles and Context* (LexisNexis Butterworths, 2019) 305 [11.1].

³ *Australian Law Dictionary* (3rd ed, 2018) 'evidence' (def 1).

⁴ Boas, Bellew and Arthur (n 2) 306 [11.3].

⁵ Klamberg (n 1) 116.

⁶ Ibid 409.

⁷ Boas, Bellew and Arthur (n 2) 214 [8.4].

⁸ Ibid 159 [6.2].

⁹ Ibid.

¹⁰ Ibid.

¹¹ Klamberg (n 1) 116.

¹² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 66(1) ('Rome Statute').

¹³ Klamberg (n 1) 128.

¹⁴ Boas, Bellew and Arthur (n 2) 160 [6.5].

¹⁵ Ibid 160 [6.6].

¹⁶ Rome Statute (n 12).

¹⁷ Klamberg (n 1) 118, 120.

The reason for this principle is to eliminate any preconceived idea that the accused has committed the offence.¹⁸

It is a central and well-established principle in both criminal law and human rights law. For example, article 11(1) of the *Universal Declaration of Human Rights* ('UDHR') states that those charged with an offence have the right to be presumed innocent until proven guilty.¹⁹ In international criminal law ('ICL'), the presumption of innocence is enshrined in article 66(1) of the *Rome Statute of the International Criminal Court* ('Rome Statute').²⁰

6.1.2 Admissibility of Evidence

Whether or not a particular piece or category of evidence is allowed in a legal proceeding depends on whether it is deemed to be 'admissible'. Rules on admissibility are different between jurisdictions. In broad terms, a key difference in approach can be seen between common law and civil law jurisdictions.

- In **common law jurisdictions**, admissibility centres on issues of relevance and probative value.²¹ Probative value concerns whether the evidence is useful in affecting the outcome of a trial. However, it must outweigh the prejudicial effect it has on the accused, meaning that it must not too strongly bias the court against the accused.²² It is up to the court to determine this. The probative value of the evidence is weighed against the prejudice it could have on the fairness of the trial.²³
- In **civil law jurisdictions**, admissibility tends to focus on whether or not evidence was improperly or illegally obtained, and therefore would not be admissible.²⁴ An example of illegally obtained evidence is that which was obtained through torture.²⁵

6.2 EVIDENCE IN ADVERSARIAL AND INQUISITORIAL LEGAL SYSTEMS

In determining UJ cases, it is important to consider the type of legal system used by each country and the differences in procedure and rules between them. Admissibility of evidence varies depending on whether countries use an adversarial or inquisitorial legal system. This section considers the differences between the two systems and how those differences affect the use of evidence depending on jurisdiction and how UJ cases are started and determined.

- **Adversarial System:** This is the system of conducting trials used in common law countries. It is also known as the accusatorial system. In this system, it is up to the prosecution and the defence (the parties) to provide evidence to the courts.²⁶
- **Inquisitorial System:** This is the system of conducting trials used in civil law countries. In this system, the courts and judges investigate to find evidence. The prosecution and defence do not provide evidence to the courts.

²⁶ 'Adversarial Versus Inquisitorial Legal Systems', *United Nations Office on Drugs and Crime* ('UNODC') (Web Page) <<https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html>>.

¹⁸ Ibid 119.

¹⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 11(1) ('UDHR').

²⁰ Rome Statute (n 12).

²¹ Bartłomiej Krzan, 'Admissibility of Evidence and International Criminal Justice' (2021) 7(1) *Brazilian Journal of Criminal Procedure* 161, 161.

²² 'Probative Value', *Legal Information Institute* (Web Page, May 2022) <https://www.law.cornell.edu/wex/probative_value>.

²³ Ibid.

²⁴ Krzan (n 21) 162.

²⁵ Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals' (2020) *The Law & Practice of International Courts and Tribunals* [2.1].

OUTLINED BELOW ARE SOME OF THE MAIN DIFFERENCES BETWEEN THE TWO SYSTEMS

	ADVERSARIAL	INQUISITORIAL
ROLE OF THE PARTIES	To gather evidence and provide legal arguments to the court during trial	To present evidence and legal arguments given by the courts
ROLE OF THE JUDGE AND COURTS	To monitor rules of the trial and ensure fairness	To investigate and gather evidence and question parties at trial
WHO CONDUCTS THE TRIAL?	Prosecution and defence	The judge and courts
WHO GATHERS EVIDENCE?	Prosecution and defence	The judge and courts ²⁷
HOW ARE WITNESSES USED?	Often called by the parties to provide evidence during the trial	Rarely called, but are examined by the courts if they are
WHAT EVIDENCE IS ALLOWED?	Rules of evidence apply to limit what types of evidence are admissible	Uses 'free proof', with evidence being widely admitted if relevant and having probative value ²⁸

²⁷ Peter Murphy and Lina Baddour, 'International Criminal Law and Common Law Rules of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010) 97–8.

²⁸ Ibid 98.

6.2.1 Differences in Evidence between Adversarial and Inquisitorial Systems

States that use adversarial systems will have different ways of interpreting UJ cases compared to states with inquisitorial systems. There may be different ways of gathering evidence and the types of evidence allowed may be restricted. This section considers how the differences between adversarial and inquisitorial systems affect the application of UJ and the admission and use of evidence in such cases.

THE INQUISITORIAL SYSTEM IN FRANCE

France is a civil law country and thus uses the inquisitorial system. The French Code of Criminal Procedure governs the rules of evidence in its domestic courts.²⁹ The French legal system has investigating judges who oversee investigations into criminal offences and determine whether a case should proceed to trial.³⁰ Under article 81 of the French *Code of Criminal Procedure*, the investigating judge can take any investigative steps they deem useful for the discovery of the truth.³¹ Investigating judges have wide powers to gather evidence with the assistance of the police, including ordering telephone tapping and compelling witness interviews. During trial, a separate judge from that of the investigative judge monitors the trial. They have broad discretion to determine what weight to assign evidence, rather than in adversarial systems where evidence is given weight or excluded according to set rules.³² Where in adversarial systems the parties are important in presenting legal arguments and evidence to affect the outcome of the case, the inquisitorial system has the evidence and outcome decided mainly by the courts and judge.

²⁹ *Code de Procédure Pénale* [Code of Criminal Procedure] (France).

³⁰ 'Judicial Inquiry', *Service-Public.fr* (Web Page) <<https://www.service-public.fr/particuliers/vosdroits/F1456?lang=en>>.

³¹ *Code of Criminal Procedure* (France) (n 29) art 81.

³² *Ibid* art 428.

THE ADVERSARIAL SYSTEM IN THE UNITED STATES

The United States ('US') is a common law country which uses the adversarial system. The *Federal Rules of Evidence* govern the rules of evidence nationally.³³ As an adversarial system, the US has the judge take an impartial role in overseeing trials, while the parties have the duty of collecting evidence and making legal arguments before and during the trial.³⁴

The prosecution, as one of the parties to the case, chooses what evidence to present, including witnesses and documents. The defence also has a larger role in the adversarial system, actively defending the accused and providing their own evidence and arguments to establish their side of the trial. In contrast, the role of the defence in the inquisitorial system is limited to the evidence gathered by the courts.

Adversarial systems are also subject to strict rules of evidence. For example, the US *Federal Rules of Evidence* limit the types of evidence which are admissible, including character evidence³⁵ and hearsay evidence.³⁶ Comparatively, the inquisitorial system allows a broader range of evidence at the discretion of their judges and courts.

The initial indictment in UJ cases has a broader scope of evidence than in regular US criminal trials, where the regular rules of evidence do not apply, similar to that of an inquisitorial system for evidence.³⁷ The actual trial follows the adversarial system of standard US federal law, where evidence is restricted by rules and is decided by the parties. If heard in the US, UJ cases would therefore be limited in what evidence would be allowed, though the initial indictment can be made out on a wider range of evidence.

³³ *Federal Rules of Evidence*, 28 USC (1975 & Supp 2018) (United States).

³⁴ Rodger Benefiel, 'Adversarial System of Justice', *Oxford Bibliographies* (Web Page, 26 May 2022) <<https://www.oxfordbibliographies.com/display/document/obo-9780195396607/obo-9780195396607-0320.xml>>.

³⁵ *Federal Rules of Evidence* (United States) (n 33) §404.

³⁶ *Ibid* §802.

³⁷ Open Society Justice Initiative, TRIAL International, Center for Justice and Accountability, Civitas Maxima, 'Universal Jurisdiction Law and Practice in the United States of America' (Briefing Paper, May 2022) <<https://trialinternational.org/wp-content/uploads/2022/05/UJ-USA-1.pdf>> 38.

The differences between the US and French legal systems demonstrate how evidence is collected and admitted in various jurisdictions. While the inquisitorial system provides a wider range of evidence at the discretion of the courts, the adversarial system limits potentially unnecessary evidence and the length and costs of the trial as a result. This is relevant to Afghanistan, where the difficulty in obtaining reliable evidence may be further restricted by rules of evidence and procedure in adversarial legal systems. An inquisitorial system may be helpful in allowing as much evidence as possible to be gathered from stakeholders. However, there remain concerns that too much unnecessary evidence is admitted. It is important to balance between the difficulty of gathering evidence in Afghanistan with the need for timely and efficient resolution for victim-survivors of such crimes.

6.3 RULES OF EVIDENCE AND OPEN-SOURCE EVIDENCE

In the digital age, courts often have to deal with evidence which is digitally sourced or otherwise has connection to the digital sphere, resulting in the need to consider the admissibility of digital evidence.³⁸ Oftentimes, such digital evidence is open-source, meaning that it is freely available and publicly accessible. Although the presence of technology and transformation of evidence in our contemporary society has changed the legal rules in a way that allows for more prosecutions, there are also some disadvantages of open-source information that may impact the integrity of investigations.³⁹

6.3.1 What is Open-Source Evidence?

Digital open-source evidence is freely available information that can be publicly accessed through internet platforms.⁴⁰ Open-source information can be observed through images, videos and audio recordings on websites or social media pages such as

Facebook and Youtube.⁴¹ This type of digital evidence is readily available to the public, and individuals do not need to engage in illegal hacking or have special authority to access open-source material.

Open-source digital tools, information and data analytics have become integral to criminal investigations.⁴² This is particularly so where evidence cannot be obtained in high conflict zones due to security or diplomatic reasons, open-source data allows investigators to access such information remotely and safely. The power of footage can spread awareness and bring global attention to human rights violations and war crimes, and further accountability in legal processes.⁴³

Further, digital tools and information help aggregate and map individuals implicated in international crimes, supporting the identification of both incidents and perpetrators. One example is the mobile camera app called 'eyeWitness to Atrocities' which allows people to document photos or videos of human rights atrocities in a secure manner.⁴⁴ The footage is securely encrypted, timestamped, geo-located and sent to protected servers in order to keep the content authentic and verifiable.⁴⁵ The information gathered on the app is reviewed by lawyers who process the visual evidence and present them to investigators. Video footage captured on the app has successfully been used as evidence to convict perpetrators for crimes against humanity.⁴⁶

Digital tools and platforms in this way give ordinary people an opportunity to share their stories and help fact-finding processes gain traction. Digital open-source information has also been proven to

³⁸ Ate Kloosterman et al, 'The Interface between Forensic Science and Technology: How Technology could cause a Paradigm Shift in the Role of Forensic Institutes in the Criminal Justice System' (Opinion Piece, 16 March 2015) <<https://royalsocietypublishing.org/doi/10.1098/rstb.2014.0264>>.

³⁹ Mark Reith, Clint Carr and Gregg Gunsch, 'An Examination of Digital Forensic Models' (2022) 1(3) *International Journal of Digital Evidence* 9.

⁴⁰ Graeme Edwards, *Cybercrime Investigator's Handbook* (John Wiley & Sons, 2020) 7.

⁴¹ Konstantina Stavrou, 'Open-Source Digital Evidence in International Criminal Cases: A Way Forward in Ensuring Accountability for Core Crimes?', *Opinio Juris* (Blog Post, 26 January 2021) [2] <<http://opiniojuris.org/2021/01/26/open-source-digital-evidence-in-international-criminal-cases-a-way-forward-in-ensuring-accountability-for-core-crimes/>>.

⁴² Daniel Trottier, 'Open Source Intelligence, Social Media and Law Enforcement: Visions, Constraints and Critiques' (2015) 18(4-5) *European Journal of Cultural Studies* 530.

⁴³ Nikita Mehandru and Alexa Koenig, 'Open Source Evidence and the International Criminal Court' (2022) 35 *Harvard Human Rights Journal* 1.

⁴⁴ 'eyeWitness to Atrocities', *LexisNexis: Rule of Law Foundation* (Web Page) <<https://www.lexisnexisrolfoundation.org/projects/eyewitness.aspx?p=projects>>.

⁴⁵ Dylan Carter, 'Mobile App Helps Lawyers Prosecute War Crimes' *The Brussels Times* (online, 20 March 2023) <<https://www.brusselstimes.com/413308/mobile-app-helps-lawyers-prosecute-war-crimes>>.

⁴⁶ Ibid.

help minimise the risk for witnesses.⁴⁷ Witnesses are protected as verifiable public information can be used without asking for an individual to testify against a perpetrator, where the act of testifying against certain offenders may put them at risk of harm.

The Taliban maintains an oppressive handle on the access to information for the general public, free media and journalists, which makes it difficult for people to collect evidence for criminal proceedings.⁴⁸ However, despite the risk and threats targeting people of Afghanistan, many individuals continue to document and report the ongoing human rights abuses committed by the Taliban. This evidence is often shared on social media by victim-survivors and bystanders, and as a result, there is a large number of pictures and videos available as open-source information.⁴⁹

6.3.2 Using Digital Open-Source Information

With an increased interest in using digital open-source information for investigating war crimes, the University of California Berkeley Human Rights Centre and the Office of the UN High Commissioner for Human Rights ('OHCHR') developed the *Berkeley Protocol on Digital Open Source Investigations*.⁵⁰ The Protocol provides a guide on how to effectively use digital open-source information in investigating violations of international criminal human rights. Its aim is to suggest uniform methods for stakeholders to improve the use of digital open-source information to promote justice and accountability. Stakeholders include individuals, researchers, legal actors, international organisations, non-governmental organisations, tribunals, as well as web-based service providers such as social media platforms.⁵¹

⁴⁷ Yvonne McDermott, Alexa Koenig and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations' (2021) 19(1) *Journal of International Criminal Justice* 87.

⁴⁸ Muzhgan Samarqandi, 'Afghanistan, the Taliban and the Liberation Narrative' (2022) 28(2) *Pacific Journalism Review* 162.

⁴⁹ Cathryn Boyes, 'Afghan Women Send Message to Taliban with Social Media Campaign' *The News Daily* (Online, 14 September 2021) <<https://thenewdaily.com.au/news/world/2021/09/14/afghan-women-social-media/>>.

⁵⁰ OHCHR and University of California Berkeley Human Rights Centre, *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law* <<https://humanrights.berkeley.edu/berkeley-protocol-digital-open-source-investigations>> ('Berkeley Protocol').

⁵¹ Ibid.

The need for uniform approaches to maximise effectiveness of the use of digital open-source information is demonstrated by the growing number of initiatives which have started to use such content to document human rights violations, as well as pursue accountability efforts. For example, the University of California Berkeley and the Syrian Archive used open-source information to document chemical weapon strikes on Al-Lataminah in Syria in March of 2017.⁵² The investigation used videos of the chemical attack to prove Syria's violation of international law.⁵³

Courts have similarly engaged with digital open-source information. This includes the International Criminal Court ('ICC') which for the first time in 2017 used open-source information in the form of a video posted on social media showing the execution by a Libyan National Army commander of 33 people which resulted in the ICC issuing an arrest warrant.⁵⁴ Open-source content is useful for the ICC and also for domestic courts, regional human rights courts and international tribunals to gather evidence of human rights abuses.

These are just a few examples showing open-source investigations being used to prosecute offenders of international crimes. Many other investigations have been conducted in countries such as Yemen, Myanmar, Cameroon, Democratic Republic of Congo and Nigeria.⁵⁵

6.3.3 Challenges for Digital Open-Source Information

Although the Berkeley Protocol provides a comprehensive guide for human rights investigators and criminal courts, and attempts to increase the authenticity and verification of evidence, there are still various challenges with the use of digital open-source information.

⁵² Anna Banchik et al, 'Chemical Strikes on Al-Lataminah: A Student Led Open Source Investigation' (Final Report, December 2017) <https://www.law.berkeley.edu/wp-content/uploads/2019/01/Hama-Report-Final_190111.pdf> 9.

⁵³ Ibid.

⁵⁴ Alexa Koenig, 'Open Source Evidence and Human Rights Cases: A Modern Social History' in Sam Dubberley, Alexa Koenig and Daragh Murray, *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation and Accountability* (Cambridge University Press, 2019) 41.

⁵⁵ Vaishnavi Chaudhry, 'The Berkeley Protocol: A Potential Game Changer for Open-Source Investigations?' (2021) *Centre for Research in International Law* [5]; Christoph Koettl, Daragh Murray and Sam Dubberley, 'Open Source Investigation for Human Rights Reporting: A Brief History' in Dubberley, Koenig and Murray (n 54) 23.

LACK OF RESOURCES

While the rapid improvement of technology is beneficial for criminal prevention and accountability, it can also be problematic. The advancement of mobile phones has dramatically increased the volume of information being generated of crime scenes and perpetrators, which is both useful and difficult for locating evidence as it can be time and resource consuming to analyse so much data.⁵⁶ The process of perpetrator mapping is very resource intensive and these projects demand a level of staff adequacy and security. The amount of information can overwhelm investigative parties and the nature of this type of information collection must be acknowledged.⁵⁷

MISINFORMATION

Misinformation threatens to hinder the efforts of international organisations and individuals seeking to rely upon digital open-source information to pursue accountability. Artificial intelligence raises the potential of ‘deepfakes’ which are fictional images or videos which can sometimes appear very realistic.⁵⁸

Offenders could, for example, use artificial intelligence to create material which counteract some of the allegations made against them. Similarly, materials could be created of persons engaging in prohibited acts when in fact the persons in the images or videos are not real. The potential for deepfakes also raises the risk of real footage being dismissed as fake.⁵⁹

BIAS

Other risks of using digital open-source information as evidence include the influence of bias during the investigation and prosecution of international crimes. Bias is defined as a ‘process at any stage of inference which tends to produce results or conclusions that differ systematically from the truth’.⁶⁰

Bias may be cognitive or technical.⁶¹ Cognitive bias refers to any distorted evaluation of information by humans.⁶² The idea of cognitive bias changes one’s perception of reality based on their preconceived impressions.⁶³ Selection bias is a type of cognitive bias where population groups are either under-represented or over-represented in a study.⁶⁴ For example, evidence of gender-based impacts of atrocities may be overlooked in evidence collection processes. Technical bias, on the other hand, is linked to the decisions constructed by computer systems. It may include issues such as uneven algorithms that distribute information inconsistently or the lack of information provided within uploads, particularly on social media posts.⁶⁵

Despite the risks noted above, digital open-source information can be used to support case-building efforts by organisations, individuals and the legal community seeking to hold alleged perpetrators to account through UJ. However, for such materials to be admissible as evidence, it is important that the collection of information is fair, accurate, and credible.⁶⁶ Further, it is important that legal actors, such as judges, are trained on digital open-source information as evidence.

⁵⁶ McDermott, Koenig and Murray (n 47); Kloosterman (n 38) 2 [3].

⁵⁷ Sarah Zarmsky and Judy Mionski, ‘Symposium on Fairness, Equality, and Diversity in Open Source Investigations: Out in the Open: Fair Trial Rights and Open Source Evidence at the ICC’, *Opinio Juris* (Blog Post, 10 February 2023) <<http://opiniojuris.org/2023/02/10/symposium-on-fairness-equality-and-diversity-in-open-source-investigations-out-in-the-open-fair-trial-rights-and-open-source-evidence-at-the-icc/>>.

⁵⁸ Ian Sample, ‘What are Deepfakes - and How Can You Spot Them?’ *The Guardian* (online, 13 January 2020) <<https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them>>.

⁵⁹ Brit McCandless Farmer, ‘The Impact of Deepfakes: How Do You Know When a Video is Real?’ *CBS News* (online, 31 July 2022) <<https://www.cbsnews.com/news/deepfakes-real-fake-videos-60-minutes-2022-07-31/>>.

⁶⁰ David L Sackett, ‘Bias in Analytic Research’ (1979) 32 *Journal of Chronic Diseases* 51.

⁶¹ McDermott, Koenig and Murray (n 47) 88.

⁶² Dan Simon, ‘In Doubt: The Psychology of the Criminal Justice Process’, (2012) *Harvard University Press* 38.

⁶³ Sara Mosqueda, ‘How to Deal with Bias in Investigations’, *ASIS International* (Web Page, 3 March 2023) <<https://www.asisonline.org/security-management-magazine/articles/2023/03/investigations/investigation-bias/>>.

⁶⁴ McDermott, Koenig and Murray (n 47) 94.

⁶⁵ Brooke Erin Duffy and Colten Meisner, ‘Platform Governance at the Margins: Social Media Creators’ Experiences with Algorithmic (In)visibility’ (2023) 45(2) *Media, Culture and Society* 285.

⁶⁶ Kellie Riordan, ‘Accuracy, Independence and Impartiality: How Legacy Media and Digital Natives Approach Standards in the Digital Age’ (2014) *Reuters Institute for the Study of Journalism* 8 [1.2].

In terms of the information collection itself, one of the advantages is that it invites the participation of a range of actors, including victim-survivors.⁶⁷ Tools such as camera-enabled smartphones and network connectivity allow for the capabilities of open-source data to expand to engage many individuals.⁶⁸ Footage and videos of the destruction of hospitals and schools are examples of materials which can corroborate more traditional evidence, such as witness testimony.

⁶⁷ Chelsea Quilling, 'The Future of Digital Evidence Authentication at the International Criminal Court' (2022) *Journal of Public and International Affairs* 7.

⁶⁸ Benjamin Duerr, 'Can Smartphones help ICC Investigators?', *Justice Hub* (online, 15 September 2015) <<https://justicehub.org/article/can-smartphones-help-icc-investigators/>>.



IN SUMMARY:

- The rules and procedures of evidence vary between different states. Whether or not a state has an adversarial or inquisitorial system impacts upon the way in which evidence comes before the court.
- Regardless of the gravity of the alleged crimes or amount of evidence held against an offender, UJ cases are still subject to fundamental principles of criminal law and human rights law.
- The growth of digital open-source information may help alleviate the evidentiary issues associated with UJ cases. While highly useful in allowing individuals to provide images and videos of alleged offences, such information is still subject to various challenges, such as lack of resources, misinformation and bias.
- In Afghanistan, there are certain challenges that make collecting evidence difficult such as lack of accessibility to the country, serious threats of violence and lack of independent media. Over the past 40 years, there has been no formal investigation to collect evidence or prosecute offenders in Afghanistan.⁶⁹ The fall of Afghanistan's government has made it even more difficult to gather evidence.
- Despite these challenges, digital open-source information and the platforms and tools which enable its creation have the advantage of involving a range of actors in case-building efforts, including victim-survivors. This is crucial in the context of Afghanistan where formal investigations struggle to gain access with the Taliban in power.

⁶⁹ Nema Milaninia, 'Evidence Destruction and the Crisis in Afghanistan', *Just Security* (Blog Post, 20 August 2021), <<https://www.justsecurity.org/77831/evidence-destruction-and-the-crisis-in-afghanistan/>>.

PART 1
AN OVERVIEW OF UNIVERSAL JURISDICTION

CHAPTER

VII

ADDITIONAL
PATHS TOWARD
ACCOUNTABILITY?



Part 1 of the Handbook concludes by considering additional paths toward accountability for international crimes alongside UJ. As was underlined at the start of the Handbook, there is no one method that will necessarily be successful in holding the Taliban and affiliated terrorist networks accountable for international crimes.

This Chapter focuses on avenues at the international level. For reasons which are discussed in Part 2 of the Handbook, the Taliban's dismantling of domestic rule of law coupled with a long-standing history of impunity means that accountability through Afghanistan's own institutions will not be possible in the near future.

The Chapter begins by outlining what ad hoc international criminal tribunals achieved in the context of the Former Yugoslavia and Rwanda and notes some lessons from these tribunals with respect to atrocities in Afghanistan. The Chapter then looks at the ongoing investigation before the International Criminal Court ('ICC') into the situation in Afghanistan and the many challenges it faces. The Chapter concludes by considering what the authors of the Handbook strongly believe is a necessary development at the international level, namely a UN-mandated independent investigative mechanism. This has been created with respect to many other conflicts but not yet for Afghanistan.

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7.1 AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

7.1.1 What are Ad Hoc International Criminal Tribunals?

Ad hoc international criminal tribunals are tribunals with the power to prosecute suspects of certain international crimes. These tribunals are different from domestic courts acting under the principle of UJ as these tribunals are created in response to a particular conflict or situation. Another difference is that the tribunals are set up to prosecute high-level individuals. The prosecution of low-level offenders is either left to national courts set up after the conflict (like in Bosnia and Herzegovina) or not prosecuted (as in the case of Cambodia) in order to focus on reconciliation.

While the nature of these tribunals differs, they have usually been created when states have joined together to agree on the terms and conditions of their operation (often referred to as the tribunal's 'statute'). 'Ad hoc' means that the tribunals are not permanent.

Early ad hoc international criminal tribunals (which also inspired the understanding and development of UJ) include the International Military Tribunals ('IMTs') of Nuremberg and Tokyo at the end of the Second World War. The victorious states decided on the operation and reach of these tribunals which resulted in many convictions of Nazi and Japanese officials for war crimes and crimes against humanity.

The next and arguably most impactful development occurred in the 1990s in response to two specific conflicts:

- **Former Yugoslavia:** The atrocities committed in the former Yugoslavia triggered the UN Security Council ('UNSC') to establish the International Criminal Tribunal on former Yugoslavia ('ICTY') in 1993.¹
- **Rwanda:** A little over a year later, atrocities in Rwanda led to the establishment also through a UNSC resolution of the International Criminal Tribunal for Rwanda ('ICTR').²

1 SC Res 827, UN GAOR UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN GAOR, UN Doc S/RES/1877 (7 July 2009).

2 SC Res 955, UN GAOR, UN Doc S/RES/955 (8 November 1994).

WHAT HAPPENED IN FORMER YUGOSLAVIA AND RWANDA?

Large-scale atrocities in former Yugoslavia and in Rwanda in the 1990s resulted in grave losses of human life and destruction of property and generated the creation of two ad hoc international criminal tribunals.

Former Yugoslavia: The dissolution of the Soviet Union at the start of the 1990s and a rise of nationalism in the former socialist republics led to widespread tension across Eastern Europe.³ The tension resulted in hostilities and mass atrocities in the so-called Socialist Federal Republic of Yugoslavia which led to its disintegration in 1992.⁴ In response to this, the UNSC created the ICTY.⁵ The ICTY was created to prevent the violence and restore, maintain, and safeguard international peace and security.⁶

Rwanda: Following the killing of the country's President, a member of the Hutu ethnic majority, a campaign was launched to exterminate the Tutsi ethnic minority.⁷ This led the country into civil war and genocide which ended with over 800,000 citizens killed.⁸ The international community has been heavily criticised for their failure to prevent mass atrocities, including genocide, and delay in action.⁹ One action that was taken towards the end of the atrocities was the establishment of the ad hoc International Criminal Tribunal ICTR, also by a UNSC resolution.

The ICTY and the ICTR both played a critical role in prosecuting many high-level officials alleged to be involved in atrocities.¹⁰

3 'The Tribunal – Establishment', ICTY (Web Page) <<https://www.icty.org/en/about/tribunal/establishment>>.

4 Ibid.

5 Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford University Press, 2004) 3.

6 'The Tribunal – Establishment' (n 3).

7 Michael P Scharf, *Statute of the International Criminal Tribunal for Rwanda* (Introductory Note, United Nations Audiovisual Library of International Law).

8 Ibid.

9 Lindsey Hilsum, 'Rwanda's Genocide Could Have Been Prevented. The UN Let People Die and Now It Watches as the Survivors Die', *The Guardian* (online, 29 March 2004) <<https://www.theguardian.com/world/2004/mar/28/westafrika.rwanda>>.

10 'Achievements', ICTY (Web Page) <<https://www.icty.org/en/about/tribunal/achievements>>; 'The ICTR in Brief', *United Nations International Criminal Tribunal for Rwanda* (Web Page) <<https://unictr.irmct.org/en/tribunal>>.

7.1.2 Challenges for Ad Hoc International Criminal Tribunals

A. POLITICISATION

The process by which ad hoc international criminal tribunals are created is subject to the will of states in a forum such as the UNSC. Further, most actions on the part of the UNSC are subject to a veto power on the part of the so-called ‘Permanent Five’ (the United States (‘US’), China, Russia, France; and the United Kingdom (‘UK’)).¹¹

If created, the effectiveness of the tribunals further depends on the extent to which states cooperate in bringing alleged perpetrators before the tribunal. This includes acts such as the sharing of information and resources. The dependence on cooperation has led to various inefficiencies on the part of the ad hoc tribunals. For example, the ICTY struggled to bring alleged offenders before the tribunal as it needed cooperation from the state in which the atrocities took place, the state that currently had custody of the person in question, as well as the evidence.¹² However, the struggle to obtain custody over alleged perpetrators did improve over time with 94% of accused being in the tribunal’s custody by 2006.¹³

B. RIGHTS OF VICTIM-SURVIVORS

The statutes of the ICTY and ICTR did not create any rights on the part of victim-survivors. Article 20 of the ICTY *Statute* and art 19 of the ICTR *Statute* only state that the trials must be conducted ‘with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.¹⁴ The way in which these provisions are phrased puts the focus on the rights of the accused without mentioning rights but simply ‘due regard’ for victim-survivors. As discussed in Part 1 Chapter 4 of the Handbook, international criminal law (‘ICL’) has gradually improved its attentiveness to victim-survivors, from their absence or mere ‘due regard’ to viewing them as active agents in their fight for international criminal justice.

C. COSTS

Given the nature of the crimes and the number of possible accused, a major challenge for ad hoc international criminal tribunals has been the cost involved in proceedings. The collection of evidence and preparation for trials is complex in cases concerning international crimes, resulting in lengthy cases that incur high costs. For this reason, one cost-saving measure is for these tribunals to focus only on high-ranking officials, leaving cases against those of lower ranks to domestic courts (in situations where this is possible).¹⁵

The growing size of the ICTY and ICTR was not expected. By 2004, the tribunals had almost 2,000 employees and spent more than \$250 million per year.¹⁶ This constituted approximately 15% of the UN’s General Budget.¹⁷ As a result, the UNSC arranged a ‘completion strategy’ for the ICTY and ICTR to complete their work by 2010.¹⁸ Despite the many efforts undertaken to achieve this, the ICTY continued to operate until 2017, marking 25 years after its creation while the ICTR completed its work in 2015.

D. LENGTH OF INTERNATIONAL CASES

As noted above, the complexity of cases involving international crimes, as well as the reliance upon cooperation with other states, mean that cases before ad hoc international tribunals may go on for a long time. Despite the statute of the ICTY specifying that the accused should be ‘tried without delay’, the process from arrest to appeal on average took 4.5 years. While this has natural impacts on the rights of the accused, it also delays remedies for victim-survivors seeking to hold alleged perpetrators to account.¹⁹

While UJ proceedings involve similarly complex investigations into international crimes, domestic courts are often well-resourced, and some jurisdictions have established specific units specialised in international crimes. Examples of such units can be found in some of the Part 3 annexes.

¹¹ *United Nations Charter* art 27(2).

¹² Steven D Roper and Lilian A Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Ashgate, 2006) 2–3; Theodor Meron, ‘Answering for War Crimes: Lessons from the Balkans’ (1997) 76(1) *Foreign Affairs* 2.

¹³ Roper and Barria (n 12).

¹⁴ SC Res 827 (n 1) art 20; SC Res 955 (n 2) art 19(1).

¹⁵ Lilian A Barria and Steven D Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’ (2005) 9(3) *International Journal of Human Rights* 349, 360.

¹⁶ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies - Report of the Secretary-General*, UN GAOR, UN Doc S/2004/616 (23 August 2004) [43].

¹⁷ *Ibid.*

¹⁸ SC Res 1503, UN GAOR, UN Doc S/RES/1503 (28 August 2003).

¹⁹ Barria and Roper (n 15) 362.

E. TENSIONS BETWEEN NATIONAL AND INTERNATIONAL INTERESTS

The involvement of many different stakeholders in the ICTY and the ICTR meant that these tribunals often had to strike a balance between international and national interests.²⁰ For example, during trials, there were competing tensions between promoting justice for victim-survivors and guarding against the perception of so-called ‘victor’s justice’.²¹ Similarly, the tribunal must balance between the interest of holding the alleged war criminals accountable and protecting the accused in the process.²²

7.1.3 Ad Hoc International Criminal Tribunals and Afghanistan

Could an ad hoc international criminal tribunal for Afghanistan be an additional platform to hold those responsible for atrocities to account? The various challenges discussed above mean that the creation of an ad hoc tribunal for Afghanistan is unlikely. The UNSC has been cautious regarding the creation of new tribunals despite many calls for it to do so, for example in response to the atrocities by the Khmer Rouge in Cambodia and alleged international crimes in East Timor.²³ New tribunals have tended to be created on a more stringent budget and with a plan of completion. This is reflected in the creation of the Special Court of Sierra Leone (‘SCSL’) through a bilateral treaty with a much smaller budget than the ICTY, and a duration of 4-5 years.²⁴

Further, the ongoing investigation into the situation in Afghanistan before the ICC (discussed below) also suggests that a separate judicial/quasi-judicial institution is unlikely to be created.

7.2 THE INTERNATIONAL CRIMINAL COURT

7.2.1 Overview

The ICC is an international court established to hear cases concerning allegations of certain international crimes.²⁵ These are the crimes that the *Rome Statute of the International Criminal Court* (‘Rome Statute’) calls ‘the most serious crimes of concern to the international community as a whole’:

- Genocide;
- Crimes against humanity;
- War crimes; and
- Aggression.²⁶

The ICC focuses upon individual criminal responsibility for wrongful acts. It is different from ad hoc tribunals in that it serves as a permanent platform that widens its focus on more than one specific situation or conflict.

Because the ICC is a court of last resort, it is designed to be *complementary* to national criminal jurisdictions.²⁷ Therefore, states that are party to the Rome Statute are expected to ‘implement’ it by adopting laws which comply with the overall purpose of ending impunity. While some states have only created laws which allow them to ‘minimally assist’ by helping ICC prosecutions run, others believe that complementarity (and implementation) requires them to adopt more expansive laws which allow them to independently search for impunity.²⁸

20 Stephanos Bibas and William W Burke-White, ‘International Idealism Meets Domestic-Criminal-Procedure Realism’ (2010) 59(4) *Duke Law Journal* 637.

21 Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 12.

22 Ibid.

23 *Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135*, UN Doc A/53/850 (16 March 1999) annex para 148; *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UN Doc A/54/726-S/2000/59 (31 January 2000) annex [153]. The entity which was eventually created in the case of Cambodia, the *Extraordinary Chambers in the Courts of Cambodia* (‘ECCC’) is a national court which receives funding from the UN but remains separate from the organisation: ‘About ECCC’, Extraordinary Chambers in the Courts of Cambodia (Web Page) <<https://www.eccc.gov.kh/en/about-eccc>>.

24 William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006) 5.

25 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (‘Rome Statute’).

26 Ibid arts 5-8 bis.

27 Ibid art 1.

28 See, eg, Frédéric Mégret, ‘Too Much of a Good Thing? Implementation and the Uses of Complementarity’ in Carsten Stahn and Mohamed El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011).

WHEN CAN A PERSON BE PROSECUTED AT THE ICC?

Four conditions must be met:

Jurisdiction: The ICC must be authorised by the Rome Statute to exercise jurisdiction over the suspect (who must not be under 18²⁹) and the crime (which must have been committed on the territory of a state that has accepted the ICC's jurisdiction; or the accused person must be a national of a state that has accepted the ICC's jurisdiction).³⁰ Furthermore, the alleged crime must have been committed after the ICC was officially established on 1 July 2002,³¹ and the alleged crime must be either an act of genocide, a crime against humanity, a war crime or an act of aggression.³²

Jurisdiction is 'triggered': The ICC's jurisdiction must be triggered (activated) by one of three mechanisms:

- i. The OTP can initiate an investigation which must then be authorised by one of the Court's Pre-Trial Chambers ('PTCs');
- ii. A state party to the *Rome Statute* may refer a situation to the ICC; or
- iii. The UNSC may vote unanimously to refer a situation to the ICC.³³ In cases involving a UNSC referral, there is no requirement for the alleged crimes to have been committed on either the territory of a state party or to have been committed by nationals of a state party.

Admissibility: The ICC can only proceed with cases where national courts that would otherwise have jurisdiction have shown an 'unwillingness' or 'inability' to prosecute the alleged criminal.³⁴ This may occur either where no domestic criminal investigation has commenced or where a state has commenced an investigation or criminal proceedings but has shown an 'unwillingness' or 'inability' to proceed genuinely.³⁵

Discretion: Even if the ICC has jurisdiction and the case is admissible, the Court has some discretion over whether the case *should* be started. In deciding whether to take up a case, the ICC will consider whether it would be in the 'interests of justice' to do so.³⁶

IMPORTANT FACTS – AFGHANISTAN AND THE ICC

- Afghanistan is a **state party** to the *Rome Statute* and can therefore consider investigating and prosecuting atrocities in its territory.³⁷
- Afghanistan became a state party after the *Rome Statute* had already entered into force. The ICC therefore has power with respect to crimes alleged to have been committed in Afghanistan from **1 May 2003 onwards only**.³⁸
- At the time of writing this Handbook, there is an ongoing investigation into the situation in Afghanistan from which prosecution(s) may or may not follow.
- While the efforts before the ICC do not completely lack potential for accountability with respect to atrocities committed by the Taliban and IS-K, various challenges will be considered below.

³⁷ 'Afghanistan: Situation in the Islamic Republic of Afghanistan', ICC (Web Page) <<https://www.icc-cpi.int/afghanistan>>.

³⁸ Ibid.

²⁹ Rome Statute (n 25) art 26.

³⁰ Ibid art 12.

³¹ Ibid art 11.

³² Ibid art 5.

³³ Ibid art 13.

³⁴ Ibid arts 17, 20.

³⁵ Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (The Raoul Wallenberg Institute Human Rights Library, vol 34, 2008) 26.

³⁶ Rome Statute (n 25) arts 53(1)(c), 53(2)(c). Whether taking up a case would serve the interests of justice will include many considerations including the gravity of the crime, the role of the accused in the crime, and the interests of victim-survivors.

7.2.2 A Complex and Slow Process

Seeking accountability before the ICC is not a quick and easy process. This is demonstrated clearly with respect to the situation in Afghanistan.



DID YOU KNOW?

It took 13 years from the time the Prosecution's preliminary examination of the situation in Afghanistan was made known to the public until its investigation was approved in 2020.³⁹

The Taliban's violent takeover of Afghanistan in 2021 has added further delays and complications to the investigation which was already on hold since 2020. This includes that the Taliban are unlikely to cooperate with the ICC and the difficulty in obtaining evidence from inside the country.

The timeline below demonstrates the lengthy process and various hurdles of the investigation:

- **2007:** The preliminary examination of the situation in Afghanistan was made known to the public following various communications for such investigations to the Office of the Prosecutor ('OTP').⁴⁰ The allegations included various acts constituting crimes against humanity and war crimes.
- **2016:** The OTP released a report which stated that the preliminary examination had passed the relevant assessments to proceed. This included, for example, deciding whether the potential case is being genuinely investigated and prosecuted at the national level.⁴¹ This then allows a final conclusion to be reached concerning whether the case passes the gravity test which will be discussed in more detail later.

- **2017:** The situation in Afghanistan was assigned to a PTC of the ICC to consider the OTP's request for a formal investigation into crimes under the *Rome Statute* allegedly committed in relation to the armed conflict in Afghanistan.⁴²
- **April 2019:** All the judges of Pre-Trial Chamber II rejected the OTP's request for a formal investigation, on the grounds that it would not serve 'the interests of justice'.⁴³ This rejection came after a long delay of 18 months.⁴⁴
- **November 2019:** The decision by Pre-Trial Chamber II to deny a formal investigation was appealed by the OTP with the widespread support of human rights groups.⁴⁵
- **March 2020:** All the Appeals Chamber judges approved the OTP's appeal and granted the request for a formal investigation into alleged crimes committed by the Taliban, Afghan National Security Forces, and US Military and CIA personnel.⁴⁶ This investigation covered alleged crimes committed from 1 May 2003 onwards in Afghanistan (and alleged crimes in other ICC member states since 1 July 2002 that have sufficient connection to the armed conflict in Afghanistan).⁴⁷
- **March 2020:** The Government of Afghanistan sought to delay the investigation citing its own national investigations of alleged crimes.⁴⁸
- **September 2021:** The new Prosecutor changed the direction of the investigation to exclude alleged crimes by actors other than the Taliban and ISIS-K, a decision that has been widely criticised for leaving many alleged reports of atrocities outside the scope of the investigation.⁴⁹

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Julian Elderfield, 'Uncertain Future for the ICC's Investigation into the CIA Torture Program', Just Security (Web Page, 2022) <<https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/>>.

⁴⁵ 'ICC Greenlights Afghanistan Investigation', Human Rights Watch (Web Page, 2022) <<https://www.hrw.org/news/2020/03/05/icc-greenlights-afghanistan-investigation>>.

⁴⁶ Ibid.

⁴⁷ 'Afghanistan: Situation in the Islamic Republic of Afghanistan' (n 37).

⁴⁸ OTP, 'Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's Letter Concerning Article 18(2) of the Statute', ICC-02/17 (15 April 2020).

⁴⁹ Nada Kiswanson, 'Limits To Prosecutorial Discretion: The ICC Prosecutor's Deprioritisation Decision in Afghanistan', *Opinio Juris* (Blog Post, 2021) <<http://opiniojuris.org/2021/11/26/limits-to-prosecutorial-discretion-the-icc-prosecutors-deprioritisation-decision-in-afghanistan/>>.

- **September 2021:** The Prosecutor asked the Pre-Trial Chamber for permission to continue the investigation.⁵⁰
- **November 2021:** The Pre-Trial Chamber invited victim-survivors to give their views as to the Prosecutor's request to continue the OTP's investigation.⁵¹
- **October 2022:** The investigation was authorised to continue by the Pre-Trial Chamber.⁵²
- **April 2023:** The Appeals Chamber confirmed that any narrowing of the scope of the Prosecutor's investigation by the Pre-Trial Chamber was an error of law and the investigation remains as per the expanded scope of the 2020 Appeals Chamber ruling.⁵³

It has taken more than a decade for the alleged atrocities to move from the preliminary examination to a formal investigation.⁵⁴ This alone is a cause for concern and there are no guarantees that prosecutions, let alone successful findings of guilt and conviction, will follow.

7.2.3 Other Major Challenges

In addition to the slow and complex nature of the ICC investigation, it is unlikely that cooperation with the ICC will be forthcoming.⁵⁵ There are ambiguities

regarding the legal implications of the Taliban's *de facto* status. The Prosecutor of the ICC has acknowledged that he cannot be assured of his practical ability to confer with the state authorities in question due to legal impediments in recognising the credentials of such authorities.⁵⁶ This led to a search for the 'competent authorities' in Afghanistan, causing yet another delay.⁵⁷

It is clear that the ICC has been a slow and inefficient platform to investigate atrocities in Afghanistan which continues to face a number of challenges, not the least since the Taliban's violent takeover. While the investigation may eventually lead to prosecutions, the various shortcomings of accountability through courts and tribunals at the international level underline the importance of exploring the potential for cases to be brought in courts around the world under the principle of UJ.

7.3 INDEPENDENT INVESTIGATIVE MECHANISMS

7.3.1 The Establishment of Investigative Mechanisms

As concluded from the many challenges of pursuing accountability through courts and tribunals at the international level, the focus in this Handbook on the potentials and challenges of UJ is all the more important. In addition to courts and tribunals, there are, however, other types of measures at the international level that may assist efforts at the national level under the principles of UJ, as well as the ICC investigation and any potential future prosecutions.

UN-mandated international, impartial and independent investigative mechanisms ('IMs') seek to ensure accountability for international crimes by collecting and preserving evidence of serious human rights abuses and international crimes.⁵⁸

⁵⁰ OTP, 'Request to Authorise Resumption of Investigation under Article 18(2) of the Statute', ICC-02/17 (27 September 2021).

⁵¹ PTC II, 'Decision on Submissions Received and Order to the Registry Regarding the Filing of Documents in the Proceedings Pursuant to Articles 18(2) and 68(3) of the Statute', ICC-02/17 (8 November 2021).

⁵² 'ICC Judges Authorise Prosecution to Resume Investigation in Afghanistan', ICC (Press Release, 31 October 2022) <<https://www.icc-cpi.int/news/icc-judges-authorise-prosecution-resume-investigation-afghanistan>>.

⁵³ Appeals Chamber, 'Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber II Entitled "Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation"', ICC-02/17 (4 April 2023).

⁵⁴ Ehsan Qaane, 'Delaying Justice? The ICC's War Crimes Investigation in Limbo over Who Represents Afghanistan - Afghanistan Analysts Network - English', Afghanistan Analysts Network - English (Web Page, 2022) <<https://www.afghanistan-analysts.org/en/reports/rights-freedom/delaying-justice-the-iccs-war-crimes-investigation-in-limbo-over-who-represents-afghanistan/>>.

⁵⁵ Mahir Hazim, 'An Urgent Need for Justice: Expediting the International Criminal Court's Afghanistan Investigation', *The Diplomat* (Web Page, 2022) <<https://thediplomat.com/2022/02/an-urgent-need-for-justice-expediting-the-international-criminal-courts-afghanistan-investigation/>>.

⁵⁶ Qaane (n 54).

⁵⁷ Ibid.

⁵⁸ Ferencz International Justice Initiative, *Lessons Learned from the First Generation of UN Investigative Mechanisms for Future Criminal Accountability: Considerations for CSO engagement with the United Nations Independent Investigative Mechanism for Myanmar* (Report, 13 September 2019) <https://www.ushmm.org/m/pdfs/19.09.17_Considerations_for_CSO_Engagement_with_UN_Investigative_Mechanisms.pdf> 3

IMs created to-date include, for example:

- The 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011' ('Syria IIIM'),⁵⁹
- The 'UN Investigative Team for Accountability of Daesh' ('Iraq UNITAD').⁶⁰
- The 'Independent Investigative Mechanism for Myanmar' ('Myanmar IIMM').⁶¹

The mechanisms listed above were established through resolutions adopted by the UNSC, the Human Rights Council ('UNHRC'), and the UN General Assembly ('UNGA').⁶² The Office of the United Nations High Commissioner for Human Rights ('OHCHR') provides expertise and support for these mechanisms as part of its core work, which includes guidance and advice on the investigative methods and application of relevant international law, as well as providing administrative, logistical and security support.⁶³

To ensure accountability, the investigative mechanisms must be accompanied by adequate resources and the political will to hold perpetrators accountable.⁶⁴ Both adequate resources and political will present challenges for accountability through IMs.

7.3.2 Case Studies

As noted above, IMs have been created in response to several different situations. However, at the time of writing this Handbook, not in response to the situation in Afghanistan. The two brief case studies below help explain how IMs operate and may provide important lessons for the potential future creation of an IM for Afghanistan.

A. SYRIA IIIM

Political turmoil and unrest in Syria began in March 2011, and since then over five million people have fled the country, and over six million remain as internally displaced people.⁶⁵ The UN has estimated over 400,000 people have lost their lives as a result of the civil war and armed conflict.⁶⁶ Many of those had been oppressed by non-State armed groups, such as the Islamic State of Iraq and the Levant ('ISIL'), and many others at the hands of government forces through makeshift detention centres in the country.⁶⁷

Before the establishment of the Syria IIIM, the UNHRC in 2011 created an Independent International Commission of Inquiry ('COI') on the Syrian Arab Republic.⁶⁸ The COI was mandated to:

*investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.*⁶⁹

In December 2016, UNGA created the Syria IIIM. While the IIIM draws upon the work of the COI, it is different in its mandate to prepare a case file against alleged

⁵⁹ UNGA, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN GAOR, 71st sess, Agenda Item 31, UN Doc A/RES/71/248 (11 January 2017).

⁶⁰ SC Res 2379, UN GAOR, UN Doc S/RES/2379 (21 September 2017).

⁶¹ UNHRC, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, UN GAOR, 39th Sess, Agenda Item 2, UN Doc A/RES/39/2 (28 September 2018).

⁶² UNGA, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic Since March 2011*, UN GAOR, 71st sess, Agenda Item 31, UN Doc A/RES/71/248 (11 January 2017); SC Res 2379(2017), UN GAOR, UN Doc S/RES/2379(2017) (21 September 2017); UNHRC, UN Doc A/RES/39/2 (n 61).

⁶³ OHCHR, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (United Nations New York and Geneva, 2015) 3.

⁶⁴ OHCHR, 'The Role of UN-mandated Investigative Mechanisms in Securing Accountability for Human Rights Violations at National, Regional and International Levels' (Statement, 31 August 2021) <<https://www.ohchr.org/en/statements/2021/10/role-un-mandated-investigative-mechanisms-securing-accountability-human-rights>>.

⁶⁵ UNHRC, 'Independent International Commission of Inquiry on the Syrian Arab Republic', OHCHR, (Web Page) <<https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/independent-international-commission>>.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ UNHRC, *Situation of human rights in the Syrian Arab Republic*, UN Doc S-17/1, 17th special session, 1st meeting (18 August 2011).

⁶⁹ UNHRC, 'Independent International Commission of Inquiry on the Syrian Arab Republic' (n 65); UNHRC, UN Doc S-17/1 (n 68) (emphasis added).

perpetrators of international crimes in Syria.⁷⁰ Nevertheless, the COI and IIIM mechanisms work in tandem and the COI assisted the work of the IIIM by working to provide a factually accurate record of events.⁷¹

B. MYANMAR IIIM

In 2018, UNHRC established the Myanmar IIIM, building on the political momentum established by reports of the dire human rights situation in the country by the UN Special Rapporteur for Myanmar.⁷² The mechanism followed 740,000 members of the Rohingya ethnic and religious minority who fled Myanmar due to systematic persecution and threats of genocide in 2017.⁷³

Like the Syria IIIM, the Myanmar IIIM also follows an existing investigative process, in this case by the Special Rapporteur but also an existing fact-finding mission ('FFM') into Myanmar.⁷⁴ The FFM was established in March 2017, and reported violations of international humanitarian law, including torture and ill-treatment of insurgents, as well as sexual and gender-based violence committed by the Myanmar military.⁷⁵

The Myanmar IIIM is mandated to:

*collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law (emphasis added).*⁷⁶

Like the Syria IIIM, the Myanmar IIIM is mandated to build case files aiming for future criminal proceedings. Since the release of the report and the commencement of the IIIM, The Gambia has filed a case against Myanmar at the International Court of Justice ('ICJ').⁷⁷ This shows how IMs push for action and often follow other investigative initiatives such as COIs, FFM and Special Procedure Mandates, and may also inspire or contribute towards other actions, such as litigation.

7.3.3 The Need for an IM for Afghanistan

Presently, there is no UN-mandated IM, COI or FFM for Afghanistan.⁷⁸ Since August 2021, the Taliban has targeted a wide range of civilians, including reports of killings and other crimes, including forced evictions.⁷⁹ For example, Tajiks in the Panjshir province have been subjected to attacks for their resistance against the Taliban over the past 20 years (discussed further in Part 2 Chapter 7 of this Handbook).⁸⁰

A positive development is the establishment of the UN Special Procedure Mandate on the Situation of Human Rights in Afghanistan, currently held by Mr Richard Bennett. His role is to investigate the state of human rights in the country, report concerns and make recommendations for improvement.⁸¹

Yet, it is worth noting that special procedure mandates are held in an independent and voluntary capacity which means that there is a need for greater resources to support the work of the mandate. The Special Rapporteur's work is crucial to help build momentum to push for a UN investigative mechanism for Afghanistan, as has occurred in the case of Myanmar. Such a mechanism could work in tandem with the Special Procedure mandate and other accountability efforts, such as UJ and organisations supporting victim-survivors.

⁷⁰ UNGA, UN Doc A/RES/71/248 (n 59).

⁷¹ 'Responding to Misconceptions Regarding the IIIM', Syria Justice and Accountability Centre (Web Page) <<https://syriaaccountability.org/responding-to-misconceptions-regarding-the-iiim>>.

⁷² UNHRC, UN Doc A/RES/39/2 (n 61).

⁷³ 'Myanmar's Rohingya Persecuted, Living under Threat of Genocide, UN Experts say', OHCHR (Web Page, 16 September 2019) <<https://www.ohchr.org/en/press-releases/2019/09/myanmars-rohingya-persecuted-living-under-threat-genocide-un-experts-say?LangID=E&NewsID=24991>>.

⁷⁴ UNHRC, *Situation of Human Rights in Myanmar*, UN GAOR, 34th sess, Agenda item 4, UN Doc A/HRC/RES/34/22 (3 April 2017).

⁷⁵ UNHRC, UN Doc A/RES/39/2 (n 61).

⁷⁶ Ibid (emphasis added).

⁷⁷ Global Centre for the Responsibility to Protect, *Human Rights Council Investigative Mechanisms and Mass Atrocity Prevention* (Background Briefing, 16 November 2019) <<https://www.globalr2p.org/wp-content/uploads/2019/11/2019-November-FFMs-Cols-and-R2P.pdf>> 4. The ICJ is the principal judicial organ of the UN: UN Charter arts 7(1), 92. It settles disputes between states in accordance with international law and gives advisory opinions on international legal issues: *Statute of the ICJ* arts 36, 65.

⁷⁸ Belquis Ahmadi, Kate Bateman and Scott Worden, 'Intolerance of Atrocity Crimes in Ukraine Should Apply to Afghanistan', *United States Institute of Peace* (Commentary, 28 April 2022) <<https://www.usip.org/publications/2022/04/intolerance-atrocity-crimes-ukraine-should-apply-afghanistan>>.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ UNGA, *Situation of Human Rights in Afghanistan*, UN GAOR, 48th sess, Agenda Item 2, A/HRC/RES/48/1 (13 October 2021).



IN SUMMARY:

- UJ is only one avenue for accountability that ought to be pursued and considered in the context of additional pathways.
- However, the importance of UJ in particular can be seen when viewed in light of the limitations of some of the pathways at the international level. For example, it is unlikely that an ad hoc international criminal tribunal would ever be created with respect to the atrocities that have taken place and continue to occur in Afghanistan.
- Further, the investigation into the situation in Afghanistan before the ICC is slow-running and complex, with no guarantees that prosecutions will follow.
- What the authors of this Handbook calls for is the establishment of an international, independent and impartial IM, similar to those created for other situations, such as Myanmar and Syria. Such mechanisms can support case-building efforts across the world, including those relying upon the principle of UJ.
- Whether or not an IM will be established depends upon political will, something which is not forthcoming at the time of writing.
- For the above reasons, UJ continues to provide an important pathway for accountability efforts in the context of Afghanistan, even though it must never be viewed as the only one.



Part 2

AFGHANISTAN AND INTERNATIONAL CRIMES



PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER

I

HISTORY OF CONFLICTS (1979 – 2023)

Part 1 of the Handbook introduced readers to the concept of UJ and its meaning in theory and practice. In doing so, it noted why in particular it is an important avenue to consider with respect to atrocities in Afghanistan, including the challenges that accompany accountability efforts at the international level.

Part 2 begins by providing an overview of the long history of conflicts in Afghanistan from 1979 to the present (2023). Afghanistan's geographic location and richness of natural resources have had a major role in determining its history both regionally and globally. This includes being subjected to proxy and civil wars fought between major world powers, regional powers and other actors and groups along ethnic, regional and geographic lines.¹

This Chapter contextualises the subsequent chapters and goes on to provide consideration of the complex nature of the conflicts and importantly, the lack of accountability and continued occurrence of atrocities to this day. Of particular concern are the current acts of the Taliban and affiliated terrorist networks at the time of writing this Handbook. However, understanding the history and complexity of the conflicts is important for anyone seeking to hold these actors accountable.

The lack of accountability for the many atrocities that have taken place since the beginning of the conflicts underline the significance and pressing need to consider the potential and challenges of UJ as one avenue to explore in efforts to seek accountability and justice.

¹ Nasreen Ghufraan, 'The Taliban and the Civil War Entanglement in Afghanistan' (2001) 41(3) *Asian Survey* 462, 463.

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1.1 THE SOVIET INVASION (1979 – 1992)

1.1.1 From a Kingdom to a Republic

Prior to the 1970s, Afghanistan was a monarchy under King Mohammad Zahir Shah, who started his reign in 1933 after the assassination of his father. King Zahir Shah was dethroned by his cousin, Daoud Khan, in a bloodless coup in 1973.² Khan declared Afghanistan a republic, and himself as the first president of the country despite the lack of democratic processes or mechanisms.³

As a result of Daoud Khan's authoritarian tendencies and shifts in global politics during the Cold War, the groups that had earlier supported Khan orchestrated a violent coup on 27 April 1978. The coup, led by the People's Democratic Party of Afghanistan ('PDPA'), assassinated Daoud Khan and replaced him with Noor Mohammad Taraki.⁴ Taraki was overthrown 18 months later by Hafizullah Amin in an internal coup on 14 September 1979. Amin's reign was short-lived as he was killed in December 1979 in another internal coup supported by the invading Red Army.⁵

1.1.2 Uprising by the Mujahideen

Instead of bringing the situation under the control of the Soviet-backed regime in Kabul, the Soviet invasion of Afghanistan provided further impetus for the religiously motivated insurgent groups known as 'Mujahideen', which translates as 'holy warriors against an infidel enemy'. Rebellion flourished and spread to all regions of the country.⁶

Approximately 100,000 Soviet forces were in control of the cities, major towns, and garrisons in Afghanistan, and the Mujahideen could freely operate and travel

around the countryside.⁷ Despite the Soviet military's efforts to put an end to the uprising using a variety of strategies, the insurgents managed to revive from attacks.

The Soviets then decided to deprive the Mujahideen of civilian support by carrying out bombings and other heavy-handed tactics.⁸ These strategies triggered a large-scale exodus of civilians from Afghanistan. By 1982, 1.5 million people had fled to Iran and another 2.8 million had sought refuge in Pakistan.⁹

1.1.3 Withdrawal of Soviet Troops

Under the auspices of the United Nations ('UN'), Pakistan and Afghanistan signed an agreement in 1988 under which the Soviet Union would withdraw its troops and Afghanistan would retreat to its non-aligned status, not siding with either of the two Cold War superpowers.¹⁰ The Soviet Union and the United States ('US') acted as guarantors for this accord (discussed further in the next Chapter of the Handbook).¹¹ However, the agreement was not implemented successfully.¹² Najibullah, the Soviet-backed President of Afghanistan, failed to reach a peaceful negotiated settlement to the conflict.¹³ Different Mujahideen groups, working in tandem with their sympathetic forces within the Government, entered Kabul and put an end to the communist regime in Afghanistan.¹⁴

² 'Backgrounder on Afghanistan: History of the War' Human Rights Watch (Web page, 23 October 2001) <www.hrw.org/legacy/backgrounder/asia/afghan-bck1023.pdf>.

³ Ibid.

⁴ Ibid.

⁵ Fred Halliday and Zahir Tanin, 'The Communist Regime in Afghanistan 1978-1992: Institutions and Conflicts' (1998) 50(8) *Europe-Asia Studies* 1357, 1373.

⁶ Antonio Giustozzi, 'The Missing Ingredient: Non-Ideological Insurgency and State Collapse in Western Afghanistan, 1979-1992' (Working Paper, February 2007) <<https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp11.2-the-missing-ingredient.pdf>> 2-3.

⁷ Alan Taylor, 'The Soviet War in Afghanistan, 1979 - 1989', *The Atlantic* (Web Page, 4 August 2014) <www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786/>.

⁸ Ibid.

⁹ 'A Historical Timeline of Afghanistan', *PBS NewsHour* (Web Page, 30 August 2021) <www.pbs.org/newshour/politics/asia-june-june11-timeline-afghanistan>.

¹⁰ Rosanne Klass, 'Afghanistan: The Accords' (1987-1988) 66 *Foreign Affairs* 922, 938, 992.

¹¹ David B Ottaway, 'Agreement on Afghanistan Signed in Geneva', *The Washington Post* (Web Page, 15 April 1988) <www.washingtonpost.com/archive/politics/1988/04/15/agreement-on-afghanistan-signed-in-geneva/c7288c64-6764-4e73-9bc5-7eeb48f7827d/>.

¹² Svetlana Savranskaya and Tom Blanton, 'The Soviet Withdrawal from Afghanistan 1989', *National Security Archive* (Web Page, 27 February 2019) <<https://nsarchive.gwu.edu/briefing-book/afghanistan-russia-programs/2019-02-27/soviet-withdrawal-afghanistan-1989>>.

¹³ Heela Najibullah, President Najibullah and the National Reconciliation Policy (Conciliation Resources Accord Issue 27, June 2018) 30.

¹⁴ Ibid 32.

This era was marked by widespread and gross human rights violations including mass arrests, severe torture,¹⁵ forced disappearances and summary executions of civilians.¹⁶

1.2 THE MUJAHIDEEN AND THE TALIBAN CIVIL WAR (1992 – 2001)

1.2.1 The Mujahideen Factions

Mujahideen factions that had previously fought against a common enemy turned against each other and Kabul soon became the main stage of the resulting hostilities.¹⁷ Each warring party was dominated by members of one of the four major ethnic groups and represented ethnic and regional demands for political inclusion and thus marked each party with their ethnic identity.¹⁸

A particularly large-scale attack that took place in the capital during this period was the massacre of Afshar in West Kabul in 1993, where indiscriminate military attacks, rape, abduction, summary executions and enforced disappearances were committed by forces affiliated to Jamiat-i Islami and another party known as the Ittihad-i Islami.¹⁹

During this time, the people of Afghanistan became wholly dependent on food supplies from international aid organisations and the UN.²⁰ Additionally, there was an absence of peace and security. Abductions, for retribution or ransom, were frequent.²¹ The Taliban attracted popular support during this time as the people of Afghanistan hoped that the group would restore law and order to the country.²²

1.2.2 The Taliban's Rise to Power in 1994

The Taliban (meaning 'students' in Pashto) first appeared in early 1994 in the southern city of Kandahar. The group's first leader, Mullah Mohammad Omar, was a former Mujahideen combatant of modest background.²³ Omar organised between 30 and 53 students to free two teenage girls who had been raped and kidnapped in a village in Kandahar.²⁴ The Taliban killed the commander holding them and released the girls. They gained support in Kandahar as they were seen to be a group who could restore law and order and protect the Islamic character of Afghanistan.²⁵

THE IDEOLOGY OF THE TALIBAN

The Taliban's immediate goals were to defeat rival military groups, enforce Islamic law and retain all areas they captured.²⁶ They were opposed to the tribal system in Afghanistan and sought to rebuild the Islamic Emirate.²⁷ After the Taliban captured Kabul, the group issued no manifesto. There was also no foreign policy, public services or economic plan.²⁸

The Taliban, Islamic State Khorasan (IS-K) and Al-Qaeda share a similar ideology. Part 2 Chapter 4 of the Handbook provides an elaboration on the shared ideologies between these terrorist groups.

The Taliban's first major operation was in October 1994 when they freed a convoy sent from Pakistan with medicine, food and other goods passing through Kandahar and Herat to Turkmenistan.²⁹ They then moved into the city of Kandahar, where they ousted all the commanders and captured their heavy weaponry, including helicopters, jets, and tanks. Within a few months, the Taliban had seized control of the southern region of the country with minimal effort and quickly grew in size.³⁰

15 'Afghanistan's Pul-e Charkhi Prison Nightmare Remembered' BBC News (Web Page, 1 October 2013) <www.bbc.com/news/world-asia-24331539>.

16 Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity, 1978-2001* (Report, July 2005) <www.opensocietyfoundations.org/publications/casting-shadows-war-crimes-and-crimes-against-humanity-1978-2001> 86.

17 Gilles Dorronsoro, 'Kabul at War (1992-1996): State, Ethnicity and Social Classes' (2007) *South Asia Multidisciplinary Academic Journal* [1].

18 'Hazaras', *Minority Rights Group International* (Web Page, December 2021) <<https://minorityrights.org/communities/hazaras/>>.

19 Afghanistan Justice Project (n 16).

20 Ibid.

21 Ibid.

22 Fayaz Hussain, 'Implications of the Enigmatic Rise of Taliban: A Historical Perspective' (2021) 6(1) *Global Regional Review* 230, 230.

23 Afghanistan Justice Project (n 16).

24 Hussain (n 22) 231.

25 Ibid.

26 Kamal Matinuddin, *The Taliban Phenomenon: Afghanistan 1994-1997* (Oxford University Press, 1999) 25-6.

27 Ibid.

28 Ralph H Magnus, 'Afghanistan in 1996: Year of the Taliban' (1997) 37(2) *Asia Survey* 111.

29 Barnett Rubin, 'The Political Economy of War and Peace in Afghanistan' (2000) 28(10) *World Development* 1789, 1794.

30 Ibid; Ghufraan (n 1) 467.

The Taliban's vague promise of bringing Islamic order was desirable to the rural population. The Mujahideen's commitment to their militant group began to falter, and armed men gradually turned on their commanders and joined the Taliban. The Taliban also profited from the substantial amount of weaponry that these former Mujahideen carried with them.³¹ The group was initially guided by the Pakistani military and eventually became an auxiliary force of Pakistan's Inter-Services Intelligence ('ISI') in Afghanistan.³²

The Taliban managed to avoid direct confrontation with other possible adversaries with some degree of success.³³ This included negotiations with local authorities through clerics and a promise of peace in exchange for their imposition of Islamic law and surrender to the Taliban.³⁴ It also included the handing over of weaponry and gradually, the Taliban achieved disarmament of many local militia groups.³⁵

However, the Taliban still faced resistance and resorted to violence. Examples of alleged international crimes committed by the Taliban during this time, as well as during their second reign of terror are provided in Chapter 3 of this Part of the Handbook. By 1997, the Taliban was in control of approximately 90% of the country.³⁶

The Taliban only obtained official recognition from Pakistan, Saudi Arabia and the United Arab Emirates during their first reign of terror. The group came under vigorous international criticism for its extreme policies, especially their profound disregard for women's rights and human rights.³⁷ The Taliban flogged and executed women in public and shut down schools for women and girls (further elaborated upon in Part 2 Chapter 6 of the Handbook).³⁸ They also destroyed the Buddha statues in Bamiyan in March 2001 (discussed in detail in Part 2 Chapter 5).

The UN called for the extradition of Osama bin Laden, a Saudi national and leader of Al-Qaeda, the Islamic extremist group condemned by the US for plotting crimes against humanity and setting up a global terrorist network. This request was refused by the Taliban and resulted in UN sanctions against the regime in November 1999 to January 2001.³⁹ In addition to Al-Qaeda, the Taliban harboured other international jihadists - many of whom had been fighting in the war against the Soviets.⁴⁰

1.3 THE US INVASION (2001) AND THE RETURN OF THE TALIBAN

1.3.1 9/11 and the Immediate Response of the US

Following 9/11, the deadliest attack in US history, the administration of then President George W Bush announced a plan to overthrow the Taliban in Afghanistan and dismantle Al-Qaeda. Bush demanded that Taliban leader Mullah Mohammed Omar 'deliver to [the] United States authorities all the leaders of Al-Qaeda who hide in your hand.'⁴¹ When the Taliban refused to cooperate, the US invaded Afghanistan.

Experts believe that the assassination of Ahmad Shah Massoud, the leader of the Taliban and Al-Qaeda resistance, two days before 11 September by Al-Qaeda operatives made certain that Osama bin Laden would be protected by the Taliban after 9/11.⁴² Massoud had tried to warn the world of a possible terrorist attack before 9/11, making him a target for Al-Qaeda.⁴³

By late October, Taliban-held towns had increasingly been taken over by allied forces who, on 13 November, marched into Kabul as the Taliban withdrew without

31 Matinuddin (n 26) 26.

32 Human Rights Watch, *Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fueling the Civil War in Afghanistan* (Report, 1 July 2001) <www.hrw.org/report/2001/07/01/crisis-impunity-role-pakistan-russia-and-iran-fueling-civil-war-afghanistan> 23.

33 Ghufuran (n 1) 468.

34 Ibid.

35 Ibid.

36 Ibid.

37 Afghanistan Justice Project (n 16) 6.

38 Physicians for Human Rights, 'The Taliban's War on Women: A Health and Human Rights Crisis in Afghanistan' (Report, 1 August 1998) <www.peacewomen.org/sites/default/files/Health_TalibanWarWomen_PHR_1998_0.pdf> 33.

39 Ibid.

40 Ibid.

41 George W Bush, 'Address to a Joint Session of Congress and the American People' (Speech, Washington, 20 September 2001) <<https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>>.

42 'The U.S. War in Afghanistan', *Council on Foreign Relations* (Web Page) <www.cfr.org/timeline/us-war-afghanistan>.

43 Amin Saikal, 'Al-Qaeda, the Taliban and the Tragedy of Afghanistan', *Australian Strategic Policy Institute* (Web Page, 9 September 2022) <www.aspi.org.au/al-qaeda-the-taliban-and-the-tragedy-of-afghanistan/#:~:text=Afghan%20commander%20Ahmad%20Shah%20Massoud,alliance%20in%20the%20following%20decade>.

resistance.⁴⁴ The Taliban's stronghold of Kandahar was surrounded by two armies: (i) one commanded by Hamid Karzai advancing from the north; and (ii) one commanded by Gul Agha Sherzai advancing from the south. Both factions received significant support from the US. Karzai was then chosen to serve as Afghanistan's temporary president.⁴⁵

During this time, Osama bin Laden managed to escape to Pakistan.⁴⁶ Mullah Omar and his senior Taliban lieutenants also escaped to Pakistan and resided in Quetta, a small city in Pakistan's Balochistan province.⁴⁷

1.3.2 The New Government of Afghanistan

A Constitution was drafted and approved by a controversial assembly of tribal elders in 2004.⁴⁸ In contrast to the long-standing traditions of the nation, the 2004 Constitution gave Afghanistan a strong central government and weaker regional and local authority.⁴⁹ This helped Karzai gradually sideline his Mujahideen challengers and establish a centralised control over the state apparatus. The first presidential election in Afghanistan following the collapse of the Taliban was held on 9 October 2004, where Karzai received a majority of votes.⁵⁰ Parliamentary elections were held a year later. Women were able to win more seats than the designated 25% for them to guarantee gender diversity.⁵¹

Meanwhile, the Taliban re-grouped in Pakistan and established its presence using new strategies. This included recruitment of new members from so-called 'madrassas', religious schools that indoctrinated

young students and the use of suicide bombers and roadside bombs.⁵² These extremist tactics steadily proliferated as the conflict intensified and increasingly targeted crowded urban centres.

Later that year, the North Atlantic Treaty Organization ('NATO') assumed control of the conflict nationwide; and US authorities predicted that their country would play a smaller role due to the conflict becoming more multinational in nature.⁵³ However, the conflict remained active.

In an August 2009 election, characterised by extensive claims of fraud, Karzai had won a fresh five-year term. Meanwhile, Karzai declared that he would make an effort to make amends with the Taliban but several efforts to engage in talks with the Taliban to find a peaceful settlement to the conflict failed.⁵⁴ On 28 March 2010, Obama made his first trip to Afghanistan as US President. He demanded that Karzai eliminate corruption in his administration.⁵⁵ In response, Karzai condemned misguided bombardments by the coalition forces and on one occasion even threatened to join the Taliban if night raids continued.⁵⁶

Having evaded arrest in the Tora Bora mountains of Afghanistan for over ten years, US forces killed Osama bin Laden on 2 May 2011.⁵⁷ On 22 June 2011, Obama declared a timeline for the withdrawal of American soldiers from Afghanistan, claiming that

⁴⁴ 'Taliban Are Back - What Next for Afghanistan?', *BBC News* (online, 20 August 2021) <www.bbc.com/news/world-asia-49192495>.

⁴⁵ Ibid.

⁴⁶ Macon Phillips, 'Osama Bin Laden Dead', *National Archives* (Web Page, 2 May 2011) <<https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>>.

⁴⁷ Frédéric Grare, *Carnegie Endowment for International Peace, Pakistan-Afghanistan Relations in the Post-9/11 Era* (Report, October 2006) <https://carnegieendowment.org/files/cp72_grare_final.pdf>5.

⁴⁸ Mohammad Jamil Hanifi, 'Editing the Past: Colonial Production of Hegemony through the "Loay Jirga" in Afghanistan' (2004) 37(2) *Iranian Studies* 295, 320.

⁴⁹ *Constitution of the Islamic Republic of Afghanistan* 2004.

⁵⁰ Adam Jay, 'Karzai Confirmed as Afghan President', *The Guardian* (online, 3 November 2004) <www.theguardian.com/world/2004/nov/03/afghanistan.afghanistantimeline>.

⁵¹ 'Proportion of Seats Held by Women in National Parliaments (%) - Afghanistan', *World Bank* (Web Page) <<https://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=AF>>.

⁵² 'The Afghan Taliban', *Stanford University Center for International Security and Cooperation* (Web Page, June 2018) <<https://cisac.fsi.stanford.edu/mappingmilitants/profiles/afghan-taliban>>.

⁵³ Sean Kay and Sahar Khan, 'NATO and Counter-Insurgency: Strategic Liability or Tactical Asset?' (2007) 28(1) *Contemporary Security Policy* 163, 171.

⁵⁴ Steve Brooking, United States Institute of Peace, *Why Was a Negotiated Peace Always Out of Reach in Afghanistan: Opportunities and Obstacles, 2001-21* (Report, 30 August 2022) <www.usip.org/publications/2022/08/why-was-negotiated-peace-always-out-reach-afghanistan> 9.

⁵⁵ Ewan MacAskill, 'Barack Obama Visits Afghanistan for a Pep Talk with Hamid Karzai', *The Guardian* (online, 29 March 2010) <www.theguardian.com/world/2010/mar/28/barack-obama-hamid-karzai-taliban>.

⁵⁶ Ray Rivera, 'Karzai Gives 'Last' Warning to NATO on Airstrikes', *New York Times* (online, 31 May 2011) < www.nytimes.com/2011/06/01/world/asia/01afghanistan.html>; 'Karzai Threatened to Join Taliban, Sources Say' *CBS News* (online, 5 April 2010) <www.cbsnews.com/news/karzai-threatened-to-join-taliban-sources-say/>.

⁵⁷ Bruce Riedel, 'Pakistan's Osama bin Laden Report: Was Pakistan Clueless or Complicit in Harboring Bin Laden?', *Brookings* (Web Page, 12 July 2013) <www.brookings.edu/articles/pakistans-osama-bin-laden-report-was-pakistan-clueless-or-complicit-in-harboring-bin-laden/>.

by disrupting Al-Qaeda's activities and eliminating many of its leaders, the US had 'made substantial progress' on its objectives in Afghanistan.⁵⁸ In preparation for a full departure of combat forces by the end of 2014, the plan aimed for a reduction of up to 30,000 American soldiers in Afghanistan within the first year.⁵⁹

A Bilateral Security Agreement ('BSA') was negotiated between the US and Afghanistan.⁶⁰ The objective was to provide a framework for economic and security cooperation between the two nations following the withdrawal of forces.⁶¹ President Karzai, at this time at the end of his presidential term, refused to sign the BSA, suggesting instead that signing should be delayed until after the April 2014 elections.⁶²

1.3.3 The End of US and NATO Combat Operations

Ashraf Ghani signed the BSA immediately after being elected to succeed Karzai as President in late September 2014.⁶³

While the military mission of the US and allied forces since 2001 (known as the International Security Assistance Force ('ISAF')) was finalised at the end of 2014, a limited number of troops were kept in Afghanistan under the NATO-led mission called the Resolute Support Mission ('RSM').⁶⁴ This was to support and train Afghanistan forces until May 2021 when the mission commenced its termination, completed in September 2021.⁶⁵ The US troops had

agreed to their withdrawal in the Doha Accord as part of peace negotiations between the US and the Taliban discussed more in the next Chapter of this Part of the Handbook.⁶⁶

The political and moral implications of the withdrawal of troops were disastrous for the government and the people of Afghanistan and delivered a surprisingly quick victory to the Taliban.⁶⁷

⁶⁶ *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America*, signed 29 February 2020 <www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

⁶⁷ Brookings, United States Institute of Peace (n 54) Summary.

⁵⁸ 'The Way Forward in Afghanistan', *The White House President Obama* (Web Page) <<https://obamawhitehouse.archives.gov/issues/defense/afghanistan>>.

⁵⁹ Ibid.

⁶⁰ *U.S.-Afghanistan Bilateral Security Agreement*, signed 30 September 2014 (entered into force 1 January 2015); John R Evans, 'Bilateral Security Agreement: A New Era of Afghan-U.S. Cooperation', *Brookings* (Web Page, 30 September 2014) <<https://www.brookings.edu/articles/bilateral-security-agreement-a-new-era-of-afghan-u-s-cooperation/>>.

⁶¹ Evans (n 60).

⁶² Emma Graham-Harrison, 'Hamid Karzai Refuses to Sign US-Afghan Security Pact', *The Guardian* (online, 24 November 2013) <www.theguardian.com/world/2013/nov/24/hamid-karzai-refuses-to-sign-us-afghan-security-deal>.

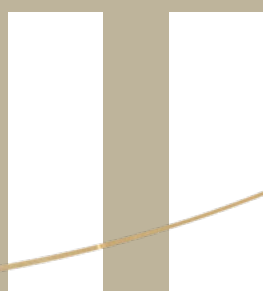
⁶³ Brookings, United States Institute of Peace (n 54) 13.

⁶⁴ 'Resolute Support Mission in Afghanistan (2015-2021)', *NATO* (Web Page) <www.nato.int/cps/en/natohq/topics_113694.htm>.

⁶⁵ Ibid.

PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER



PEACE NEGOTIATION



Part 2 of the Handbook continues by providing an overview of the various and so far unsuccessful peace negotiations undertaken in the context of the conflicts in Afghanistan, ranging from the late 1980s until the Taliban's violent return to power in 2021.

The Chapter considers why and how these processes failed. Specifically, it underlines the importance of an approach to peace that focuses on both the meaningful participation of victim-survivors in peace negotiations and reconciliation efforts, as well as on accountability for international crimes.

The purpose of the Chapter is to demonstrate the lack of effective peace and transitional justice which underpin the continued conflict and atrocities in Afghanistan, necessitating (at least in the short- to medium-term) accountability efforts outside Afghanistan. In doing so, it is recognised that, long-term, an effective and inclusive peace process is needed which centres the experiences of victim-survivors whilst also considering how to further community reconciliation.

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2.1 WHAT ARE PEACE PROCESSES?

Peace-making can be defined as the negotiations aimed at ending conflict and achieving a peaceful resolution.¹ Peace-building addresses the root causes of the conflict to sustain peace.² During peace processes, parties must examine how to best deal with the serious violations of international law committed during the conflict.³ Addressing past abuses and centring victim-survivors' perspectives and needs are paramount to ensuring accountability and the legitimacy of peace processes.⁴

Transitional justice, discussed later in this Chapter, encompasses the processes and mechanisms of a society dealing with a large-scale past conflict, and aims to ensure accountability and achieve reconciliation.⁵ It was a crucial aspect of peace processes which ended wars in countries such as Guatemala and South Africa.⁶

Afghanistan's past peace processes, as this Chapter will demonstrate, have failed largely due to the absence of transitional justice and the lack of an approach that focuses on victim-survivors (including the almost complete exclusion of women from peace processes), as well as deeply rooted impunity for serious violations of international law. If a post-conflict society does not centralise accountability and victim-survivors in its peace negotiations, wounds will remain unhealed, and it is likely that the peace processes will fail.

2.2 THE GENEVA ACCORDS 1988

2.2.1 Overview of the Accords

The Geneva Accords were reached in April 1988 after six years of heavy deliberations.⁷ The UN facilitated communication between Afghanistan and Pakistan,

the two parties to the Accord, with the Soviet Union and the United States ('US') serving as guarantors.⁸ Pakistan feared for its own national security following the invasion and presence of Soviet forces in Afghanistan, motivating their participation.⁹

The Geneva Accords contained four key documents:

1. A bilateral agreement between Afghanistan and Pakistan on non-interference and non-intervention in each other's affairs.¹⁰
2. A declaration on international guarantees, signed by the US and the Soviet Union.¹¹ The two parties were required to respect the independence, sovereignty, and territorial integrity of Afghanistan and Pakistan, and to refrain from interfering in the internal affairs of Afghanistan and Pakistan.¹²
3. An agreement on the voluntary return of refugees between Afghanistan and Pakistan was signed by both countries.¹³ This would be assisted by the UN High Commissioner for Refugees ('UNHCR').¹⁴
4. An agreement on the 'the Interrelationships for the Settlement of the Situation Relating to Afghanistan'.¹⁵ This required a commitment that the Soviet forces would withdraw from Afghanistan within nine months of the agreement.¹⁶

Despite the signing of the Accords, as well as the withdrawal of Soviet troops, Afghanistan continued to descend into violence and conflict.¹⁷

¹ César Rojas-Orozco, *International Law and Transition to Peace in Colombia* (Brill Nijhoff, 2021) 5.

² Ibid.

³ 'Peace Processes', *International Center for Transitional Justice* (Web Page) <www.ictj.org/peace-processes>.

⁴ Ibid.

⁵ 'Transitional Justice and Human Rights', *Office of the High Commissioner for Human Rights* ('OHCHR') (Web Page) <www.ohchr.org/en/transitional-justice#:~:text=Transitional%20justice%20covers%20the%20full,S%2F2%2004%2F616>.

⁶ 'Peace Processes' (n 3).

⁷ Mohammed Ehsan Zia, 'An Analysis of Peacebuilding Approaches in Afghanistan' (Dissertation, Norwegian Church Aid, August 2000).

⁸ Ibid; Farouq Azam, 'The Geneva Accords on Afghanistan' (Introduction Paper, July 1993) 1.

⁹ Geoff Berridge, *Return to the UN: UN Diplomacy in Regional Conflicts* (Palgrave Macmillan, 1991) 57.

¹⁰ *Bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in Particular on Non-Interference and Non-Intervention*, Afghanistan-Pakistan, signed 14 April 1988 (entered into force 15 May 1988); Agha Shahi, 'The Geneva Accords' (2008) 61(1/2) *Pakistan Horizon* 143, 143.

¹¹ *Declaration on International Guarantees*, USSR-US, signed 14 April 1988 (entered into force 15 May 1988).

¹² Ibid.

¹³ *Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees*, Afghanistan-Pakistan, signed 14 April 1988 (entered into force 15 May 1988).

¹⁴ Ibid.

¹⁵ *Agreement on the Inter-Relationships for the Settlement of the Situation Relating to Afghanistan*, Afghanistan-Pakistan, signed 14 April 1988 (entered into force 15 May 1988).

¹⁶ Ibid.

¹⁷ Ehsan Zia (n 7).

2.2.2 Shortcomings of the Accords

Despite being a step toward peace, the negotiations and the resulting Accords did not focus on victim-survivor participation and transitional justice.¹⁸

Further, the anti-communist resistance forces, collectively known as the Mujahideen,¹⁹ were not parties to the peace negotiations or to the Accords, despite being a main party to the conflict.²⁰ The key principle of conflict resolution is that both internal and external parties to the conflict should participate and agree on the solution.²¹ The failure to include the Mujahideen led to the continuation of their fighting and the emergence of the Taliban as detailed in the previous Chapter.

Another and related failure of the Geneva Accords was that the process did not address the power struggle between various factions of the Mujahideen. This was one of the root causes of the conflict in Afghanistan, as discussed in the previous Chapter of the Handbook.²² During 1978 and 1989, it has been estimated that at least 500,000 civilians were killed in the conflict.²³ Yet the Accords stated nothing about the future government of Afghanistan, and though the issue of transitional justice was mentioned twice during the negotiations, it was not present in the Accords.²⁴

2.3 THE BONN CONFERENCE 2001

2.3.1 Conference Overview

After the overthrow of the Taliban and the invasion of Afghanistan by US forces after 9/11, the Bonn Conference in late 2001 sought to find a post-Taliban political future for Afghanistan. It resulted in the formation of an Interim Administration led by Hamid Karzai, and ultimately the drafting of the 2004 Afghanistan Constitution.²⁵

The Bonn Agreement was supported and observed by the UN Security Council ('UNSC') and set a three-year political and administrative Roadmap for change.²⁶ However, the Roadmap in question did not include any clauses concerning accountability and the establishment of transitional justice mechanisms.

During the Conference negotiations, Pakistan had requested for the Taliban to be included in discussions of the restructuring of Afghanistan's political and constitutional climate.²⁷ However, due to the Taliban's state of collapse following their overthrow, it is highly unlikely that they would have made any meaningful commitments to a peaceful future.²⁸

2.3.2 Shortcomings of the Conference

The Bonn negotiations were held behind closed doors and outside contact was limited.²⁹ Publicity of the Conference only occurred after the final Agreement had already been signed.³⁰

The Conference was composed of four delegations representing the united front resistance to the Taliban (largely constituted of the Northern Alliance), the former King of Afghanistan based in Rome, former Mujahideen groups based in Pakistan and Cyprus, as well as delegations from the US and neighbouring countries.³¹ The Agreement attempted to lay out a liberal framework for what was to be done in the country through a 'power sharing arrangement' among the political parties and ethnic political elites.³² However, it had various shortcomings. Notably, transitional justice was once again not a central topic at the peace negotiations, apart from

18 William Maley and Ahmad Shuja Jamal, 'Diplomacy of Disaster: The Afghanistan "Peace Process" and the Taliban Occupation of Kabul' (2022) 17(1) *The Hague Journal of Diplomacy* 32, 36; Ehsan Zia (n 7).

19 Part 2 Chapter 1 of this Handbook elaborates more on the formation of Mujahideen.

20 Ehsan Zia (n 7).

21 Ibid.

22 Ibid.

23 'Afghanistan: Soviet Invasion and Civil War', *World Peace Foundation* (Web Page, 7 August 2015) <<https://sites.tufts.edu/atrocityendings/2015/08/07/afghanistan-soviet-invasion-civil-war/>>.

24 Ehsan Zia (n 7); 'Afghanistan: Soviet Invasion and Civil War' (n 23).

25 Maley and Jamal (n 18) 40.

26 *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions* ('Bonn Agreement'), UN GAOR, UN Doc S/2001/1154, 5 December 2001.

27 International Crisis Group, 'Pakistan: Shoring Up Afghanistan's Peace Process' (Briefing, 30 June 2021) <www.crisisgroup.org/asia/south-asia/pakistan/b169-pakistan-shoring-afghanistans-peace-process>.

28 Maley and Jamal (n 18) 40.

29 William Byrd, 'The Bonn Legacy', *Foreign Policy* (Blog Post, 8 July 2013) <<https://foreignpolicy.com/2013/07/08/the-bonn-legacy/>>.

30 Ibid.

31 'Bonn Receives Attendees to Conference on Afghan Governance', CNN (online, 25 November 2001) <<http://edition.cnn.com/2001/WORLD/europe/11/25/gen.bonn.afghanistan/>>.

32 Human Rights Watch, *Afghanistan's Bonn Agreement One Year Later A Catalog of Missed Opportunities* (Report, 2002) <www.hrw.org/legacy/backgrounder/asia/afghanistan/bonn1yr-bck.pdf> 1.

the establishment of the Afghanistan Independent Human Rights Commission ('AIHRC').³³

Further, there was no accountability mechanism for international crimes, as some of the alleged perpetrators now held key positions in the Government and were US allies in the fight against terrorism.

The exclusion of civil society from the peace process, in particular the representation and active participation of women and victim-survivors of war, led to a prevailing culture of impunity in the post-2001 era. There was no genuine effort to heal the wounds of several decades of conflict, which marginalised victim-survivors of war and emboldened the perpetrators. It also deprived the country of a chance to build peace at the grassroots level. Furthermore, the Taliban's exclusion from the Bonn Agreement ensured that the conflict would continue in the country.

2.4 THE DOHA AGREEMENT 2020

2.4.1 Doha Agreement Overview

In February 2020, the US and the Taliban signed what is known as the Doha Agreement in an attempt to advance peace efforts in Afghanistan.³⁴ The Agreement was preceded by the Trump Administration speaking directly with the Taliban, bypassing the Government of Afghanistan.³⁵

The Agreement concerned the withdrawal of US troops from Afghanistan and counter-terrorism obligations on the part of the Taliban.³⁶ Importantly, the US agreed to the release of 5,000 Taliban prisoners (among them Taliban commanders convicted of serious international crimes in Afghanistan courts) in exchange for 1,000 defence and security forces

held captive by the Taliban.³⁷ Under pressure from the US (the Government of Afghanistan was not a party to the negotiations), President Ashraf Ghani agreed to the release of the Taliban prisoners, resulting in the eventual release of more than 5,000 Taliban prisoners.³⁸

The Agreement between the US and the Taliban set the stage for the so-called intra-Afghan peace talks and a possible power-sharing agreement between the Taliban and the Government of Afghanistan.³⁹ These negotiations started in Doha on 12 September 2020 where the two sides planned to negotiate the Taliban's future role in governing Afghanistan and a permanent ceasefire.⁴⁰

The start of the intra-Afghan dialogue was conditioned upon, amongst other aspects, the completion of the prisoner swap noted above. President Ghani had stated that the Doha Agreement would 'go down in history as one of the worst agreements ever concluded', that the US manifested 'wishful thinking', and that he was given false assurance, such as a ceasefire.⁴¹ However, at the time, he regarded the decision to release prisoners as 'dangerous' but 'necessary'.⁴²

In fact, Presidents Karzai and Ghani had for years been releasing high-profile Taliban and other anti-government prisoners convicted of killing civilians and other crimes.⁴³ Instances of such releases took place until as recently as 2019 when President Ghani released 890 prisoners, the majority of whom were senior members of the Taliban convicted of international crimes.⁴⁴

³³ Bonn Agreement (n 26) pt C para 6.

³⁴ Mehdi J Hakimi, 'The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan' (2022) 60(2) *Columbia Journal of Transitional Law* 315, 340; *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a State and is known as the Taliban and the United States of America*, 29 February 2020 <www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

³⁵ International Crisis Group (n 27).

³⁶ Hakimi (n 34).

³⁷ 'Afghanistan Begins Release of 400 Taliban Prisoners', *Al Jazeera* (online, 14 August 2020) <www.aljazeera.com/news/2020/8/14/afghanistan-begins-release-of-400-taliban-prisoners>.

³⁸ Ibid.

³⁹ *Joint Declaration between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan*, 29 February 2020 <www.state.gov/wp-content/uploads/2020/02/02.29.20-US-Afghanistan-Joint-Declaration.pdf>.

⁴⁰ Emma Graham-Harrison, 'Afghan Peace Talks with Taliban Begin in Doha with Rocky Path Ahead', *The Guardian* (online, 12 September 2020) <www.theguardian.com/world/2020/sep/12/afghan-peace-talks-with-taliban-begin-in-doha-with-rocky-path-ahead>.

⁴¹ Nick Schiffrin and Dan Sagalyn, 'Afghanistan's Former President Ashraf Ghani on the U.S. Withdrawal and Taliban Takeover', *PBS News* (online, 25 August 2022) <www.pbs.org/newshour/show/afghanistans-former-president-ashraf-ghani-on-the-u-s-withdrawal-and-taliban-takeover>.

⁴² Hakimi (n 34) 342.

⁴³ Ibid 353.

⁴⁴ Ibid 354.

2.4.2 Shortcomings of the Doha Agreement

The Doha negotiations failed to include victim-survivor groups and a strong female representation.⁴⁵ There were only four women representatives at the negotiations (on the side of the Government of Afghanistan),⁴⁶ and a notable absence of victim-survivor groups participating in the talks.

Further, the Taliban was incentivised to participate in the talk in exchange for impunity. The released prisoners included those who had been convicted of crimes codified in the *Rome Statute of the International Criminal Court* ('Rome Statute'), such as war crimes and crimes against humanity.⁴⁷ Further, there was no guarantee in the Agreement that the released prisoners would cease fighting, and instead, 90% of the ex-prisoners were redeployed as Taliban soldiers and commanders by February 2021.⁴⁸ The release of these prisoners and the Doha Agreement led to the Taliban seizing Kabul on 15 August 2021, signifying a catastrophic failure of an Agreement which had the objective of peace.⁴⁹ The Taliban never agreed to a ceasefire during the Doha negotiations and violence against civilians continued to increase during the Intra-Afghan Peace Talks.⁵⁰

The Doha negotiations were closely watched by the UN, the EU and the US, but there was not a single call for accountability for the commission of international crimes committed by the Taliban, including the Taliban's oppression of women in the 1990s. As noted above, there were only four women included in the negotiations and no victim-survivor groups.

2.5 A PEACE PROCESS FOCUSED ON VICTIM-SURVIVORS

The victim-survivors of atrocity crimes must be at the centre of peace negotiations and should take an active part in transitional justice mechanisms.⁵¹ This means more than simply honouring victim-survivors and addressing their suffering but also requires their meaningful participation in the entire peacebuilding process.⁵²

At the Bonn Conference, 'peace over justice' was endorsed by the UN, which prevented Afghanistan from applying victim-survivor-centred transitional justice out of fear that alleged perpetrators would feel threatened and retaliate against a transitional justice process.⁵³ This endorsement set a wrongful precedent in Afghanistan of ignoring justice centred on victim-survivors.⁵⁴ For example, both Presidents Karzai and Ghani suppressed the publication of a conflict mapping report, which was prepared by the AIHRC as part of a transitional justice initiative to honour victim-survivors and acknowledge their suffering.⁵⁵

2.5.1 Case Study from Colombia

In 2016, the Colombian Government ratified a package of five peace agreements that were negotiated over four years.⁵⁶ The agreements sought to bring closure to Colombia's over the 52-year-long armed conflict with the Revolutionary Armed Forces of Colombia.⁵⁷

The peace agreements focused on victim-survivors' right to truth, justice and reparations.⁵⁸ Notably, victim-survivors of violence perpetrated by all

45 Masooma Rahmaty, 'The Exclusion of Women's Voices from Afghan Peace Talks Remains the Norm', *International Peace Institute Global Observatory* (online, 30 March 2021) <<https://theglobalobservatory.org/2021/03/exclusion-womens-voices-afghan-peace-talks-remains-norm/>>.

46 Ibid.

47 Hakimi (n 34) 342.

48 Ibid 342, 351.

49 Ibid 355.

50 'Afghanistan Violence Jumps 50 Percent Amid Peace Talks: Watchdog', *Al Jazeera* (online, 5 November 2020) <www.aljazeera.com/news/2020/11/5/afghanistan-violence-jumps-50-percent-amid-peace-talks-watchdog>.

51 Kobra Moradi, 'Setting the Right Precedent: Victim-Centred Justice in Afghanistan', *Opinio Juris* (Blog Post, 9 August 2021) <<https://opiniojuris.org/2021/08/09/setting-the-right-precedent-victim-centred-justice-in-afghanistan/>>.

52 Ibid.

53 Ibid.

54 Ibid.

55 Ibid.

56 Roddy Brett, 'Victim-Centred Peacemaking: The Colombian Experience' (2022) 16(4) *Journal of Intervention and Statebuilding* 475, 475.

57 Ibid.

58 Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice* (Report, July 2019) <www.brookings.edu/articles/peace-with-justice-the-colombian-experience-with-transitional-justice/> 2.

armed forces during the conflict were given a voice.⁵⁹ In 2014, the parties to the agreements invited five delegations, each including 12 victim-survivors, to the peace talks and allowed each victim-survivor to present their testimonies and proposals.⁶⁰ The fifth agreement in the package was dedicated to transitional justice for the country's eight million victim-survivors, which the delegations were brought in to discuss.⁶¹

A Truth Commission was established whereby testimonies from victim-survivors and perpetrators were collected across Colombia and abroad to expose the international crimes committed, including gender and sexual-based violence, extrajudicial killings and enforced disappearances.⁶² The Truth Commission had a mandate to recognise and uncover the crimes committed, to then promote coexistence and non-recurrence.⁶³

While each conflict situation is different and requires its own tailored solutions, the process in Colombia offers a useful example of a model where victim-survivors are at the centre of the peace process, unlike the past negotiations which have taken place in Afghanistan. For any future peace process in Afghanistan, placing victim-survivors at the centre is important for lasting change. However, in the short- to medium-term, accountability efforts outside Afghanistan, including UJ, is necessary given the lack of stability inside the state and the decades that have gone by without effective and inclusive attempts at healing past wounds and looking forward to the future.

⁵⁹ Roddy Brett, 'Victim-Centred Peacemaking: The Colombian Experience' (2022) 16(4) *Journal of Intervention and Statebuilding* 475, 476.

⁶⁰ Ibid 476, 482. The 60 victims were split 60% female and 40% male.

⁶¹ Ibid 476.

⁶² 'A War Victim's Search for Peace, Reconciliation in Colombia', OHCHR (Web Page, 26 July 2023) <www.ohchr.org/en/stories/2023/07/war-victims-search-peace-reconciliation-colombia>; Natalia Venegas, 'Colombian Truth Commission's Final Report', Geneva International Centre for Justice (Web Page, 20 July 2022) <www.gicj.org/positions-opinions/gicj-positions-and-opinions/2810-colombian-truth-commission-s-final-report>.

⁶³ Piccone (n 58) 20.

PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER



ALLEGED INTERNATIONAL CRIMES BY THE TALIBAN (1994 – 2023)

Part 2 continues with examples of alleged international crimes committed by the Taliban from the group's emergence in 1994 to its present-day rule. The Chapter does not seek to provide a comprehensive report of such allegations but rather aims to demonstrate a trend of systematic allegations of such crimes between 1994 and the end of 2023. The sections are divided between 1994 - 2004; 2005 - 2021; and 2021 - 2023 and contain a chronological structure which documents some of the key incidents reported.

The significant number of incidents which have gone without accountability underline the importance and relevance of UJ proceedings in the context of Afghanistan. This Chapter is particularly important for readers who may not have significant knowledge of the Afghanistan conflicts, particularly the acts of the Taliban, and wish to explore specific incidents which may form the subject of a UJ investigation and prosecution.

The subsequent chapters of Part 2 highlight specific types or themes of alleged international crimes which have been frequently reported upon.

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3.1 EXAMPLES OF ACTS REPORTED (1994 – 2004)

This section provides an overview of allegations of international crimes committed by the Taliban during its first reign of terror and in the early years of having been ousted by the US and allied forces. It is not a comprehensive account but is included to underline the systematic nature of reported incidents which raise questions of international crimes. Accountability for such acts ought to be pursued through various available avenues of which UJ holds promise for the reasons discussed throughout the Handbook.

3.1.1 Chronology

A. 1996

One of the first acts by the Taliban that came to the attention of the international community was the killing of Afghanistan's former President Najibullah in 1996. It is documented that the Taliban abducted and tortured Najibullah before dragging his corpse through the streets of Kabul.¹

After the Taliban took control of Kabul, they were reported to have detained hundreds of civilians that they perceived to be supporters or sympathisers of another former president, Burhanuddin Rabbani.²

B. 1997

A report by the United Nations ('UN') Secretary-General documented the summary execution of 53 Hazara villagers in Qezalabad in September 1997, an attack which included the burning of 20 houses.³ In the same month, the UN also reported that the Taliban summarily executed 38 elderly people in the village of Sheikhabad.⁴ Similar instances of summary executions by the Taliban were also documented by the UN to have taken place throughout 1997.⁵

1 Ralph H Magnus, 'Afghanistan in 1996: Year of the Taliban' (1997) 37(2) *Asian Survey* 111.

2 Amnesty International, *Amnesty International Report 1997 – Afghanistan* (Report, 1 January 1997) <www.refworld.org/docid/3ae6a9fd40.html>.

3 Kofi Annan, 'Situation of Human Rights in Afghanistan: Report of the Secretary-General', UN Doc E/CN.4/1998 /71 (12 March 1998) 15.

4 Ibid.

5 Ibid 4.

C. 1998

On 8 August 1998, the Taliban captured the city of Mazar-i-Sharif and started a well-documented three-day massacre, summarily executing at least 2,000 civilians according to Human Rights Watch.⁶ Many of the civilians killed were ethnic Hazaras.⁷

Mullah Manon Niazi, who was the then governor of the Taliban accused the Hazaras of murdering Taliban soldiers in 1997 and ordered them to become Sunni Muslims or risk being killed.⁸ During this period there were also reports that many Hazara women were raped and abducted by Taliban troops.⁹ The specific targeting of Hazaras is discussed in detail in the next Chapter of the Handbook.

The denial of freedom of religion and targeting of entire ethnic groups, including but not limited to the Hazaras, was enforced through the Ministry for the 'Propagation of Virtue and Prevention of Vice'.¹⁰ For example, in September 1998, the Taliban prohibited non-Muslims from building places of worship.¹¹ The Ministry is also known for having specifically targeted women through public beatings and other forms of punishment.¹² Chapter 6 of this Part of the Handbook discusses the Taliban's gender-based persecution during both its first and current reign of terror in detail.

D. 1999

Between July and December 1999, the Taliban was reported to have committed summary executions, forced labour, abduction of women, burning of homes, and destruction of other property and agriculture.¹³

6 Human Rights Watch, *Afghanistan: The Massacre in Mazar-i Sharif* (Report, 1 November 1998) <<https://www.hrw.org/legacy/reports98/afghan/Afrep00.htm>>.

7 Ibid.

8 Ibid.

9 Ibid.

10 US Department of State, 'Annual Report on International Religious Freedom for 2001 – Afghanistan' (Report, 26 October 2001) <www.refworld.org/docid/3bdbdd7e1.html>.

11 Ibid.

12 See, eg, US Department of State, '2000 Annual Report on International Religious Freedom: Afghanistan' (Report, 5 September 2000) <https://1997-2001.state.gov/global/human_rights/irf/irf_rpt/irf_afghanis.html#:~:text=2000%20Annual%20Report%20for%20International%20Religious%20Freedom%3A%20Afghanistan&text=Freedom%20of%20religion%20is%20restricted,policies%20of%20the%20warring%20factions.>>.

13 Kamal Hossain, 'Report on the Situation of Human Rights in Afghanistan', UN GAOR, UN Doc E/CN.4/2000/33 (10 January 2000) 12–13.

For example, Human Rights Watch reported that 3,000 houses in Khwajaghar were destroyed during July.¹⁴ In December 1999, the Taliban forces were reported to have killed ethnic Uzbeks in the village of Khoja Kuliob of the Aibak district in the Samangan province.¹⁵

E. 2000

In May 2000, another Human Rights Watch report found that Taliban forces summarily executed 31 civilians who had been captured in the past year near the Robatak pass, located to the northwest of Pul-i Khumri.¹⁶

According to the UN Secretary-General, between August and October 2000, the Taliban was responsible for the bombing of residential areas in Taloqan and nearby villages causing major destruction of civilian homes.¹⁷ Further, the UN Secretary-General's report also noted that after the Taliban took control of the villages in question, the forces summarily executed persons they perceived to be supporters of Ahmad Shah Massoud, the commander of the United Front resistance.¹⁸

F. 2001

Many more killings were documented throughout 2001. For example, multiple sources reported the massacre by the Taliban of more than 170 civilians, most of them Hazaras, in the Yakaolang district in January 2001.¹⁹ In the same year, Human Rights Watch also documented that the Taliban executed at least 38 ethnic Uzbeks in the Takhar province.²⁰

The allegations against the Taliban were not limited to attacks on people. In early 2001, the leader of the Taliban, Mullah Mohammad Omar, ordered the destruction of two Buddha statues carved into a cliff in Bamiyan (an incident discussed in detail in Chapter 5 of this Part of the Handbook).²¹ The Buddhas were a core part of Hazara identity, and therefore their physical destruction also destroyed an element of Hazara culture,²² adding to reports of the systematic targeting of Hazara peoples over time, including allegations of genocide (discussed in detail in the next chapter of the Handbook).

3.2 EXAMPLES OF ACTS REPORTED (2005 – 2020)

From 2005, violence increased as the Taliban established its presence using new strategies inspired by Iraqi insurgents, such as the use of suicide bombers and roadside explosives.²³

3.2.1 Chronology

A. 2005 – 2010

During the resurgence of the Taliban following their ousting by the US and allied forces, Afghanistan experienced a high frequency of suicide bombings. The use of these tactics became more and more common as the conflict intensified and increasingly targeted crowded urban centres.

On 28 September 2008, news outlets reported that Malalai Kakar – a female police officer and the then head of Kandahar's Department of Crimes Against Women – was killed by the Taliban. Prior to her killing, she received many threats in writing and over the phone to pressure her into quitting her job.²⁴

¹⁴ Human Rights Watch, *Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fueling the Civil War in Afghanistan* (Report, 1 July 2001) <www.hrw.org/report/2001/07/01/crisis-impunity-role-pakistan-russia-and-iran-fueling-civil-war-afghanistan> 20.

¹⁵ Ibid.

¹⁶ Human Rights Watch, *Massacres of Hazaras in Afghanistan* (Report, 1 February 2001) <www.hrw.org/report/1998/11/01/afghanistan-massacre-mazar-i-sharif> 8–10.

¹⁷ Kofi Annan, 'The Situation in Afghanistan and its Implications for International Peace and Security', UN GAOR, UN Doc A/54/918-S/2000/581 (16 June 2000) 9; Kofi Annan, 'The Situation in Afghanistan and its Implications for International Peace and Security', UN GAOR, UN Doc A/55/393-S/2000/875 (18 September 2000) 7; Kofi Annan, 'The Situation in Afghanistan and its Implications for International Peace and Security', UN GAOR, UN Doc A/55/633-S/2000/1106 (20 November 2000) 12–13.

¹⁸ Ibid.

¹⁹ See, eg, Human Rights Watch, *Massacres of Hazaras in Afghanistan* (n 16); Amnesty International, *Afghanistan: Massacres in Yakao-lang* (Report, March 2001) <www.amnesty.org/en/wp-content/uploads/2021/06/asa110082001en.pdf>.

²⁰ Human Rights Watch, *Crisis of Impunity* (n 14).

²¹ Pierre Centlivres, 'The Death of the Buddhas of Bamiyan', *Middle East Institute* (Web Page, 18 April 2012) <www.mei.edu/publications/death-buddhas-bamiyan>.

²² US Department of State, 'Annual Report on International Religious Freedom for 2001 – Afghanistan' (Report, 26 October 2001) <www.refworld.org/docid/3bdbdd7e1.html>.

²³ US Department of State, '2000 Annual Report on International Religious Freedom: Afghanistan' (Report, 5 September 2000) <https://1997-2001.state.gov/global/human_rights/irf/irf_rpt/irf_afghanis.html>.

²⁴ 'Taliban Kills Top Afghan Female Police Officer', *CBC News* (online, 28 September 2008) <<https://www.cbc.ca/news/world/taliban-kills-top-afghan-female-police-officer-1.763725>>.

In November 2008, another female police officer in Kandahar was reported to have been receiving death threats.²⁵ The local police were allegedly unavailable to provide her with adequate protection, and simply advised her to cease working and stay home.²⁶

B. 2011

In 2011, Human Rights Watch reported several instances of children being used as suicide bombers by the Taliban.²⁷ For example, in April a 13-year-old boy was killed when his explosive vest detonated, killing 10 people including other children.²⁸ Another boy, not yet 13, was killed when his explosive vest detonated at a market in the Barmal district of the Paktika province, resulting in the death of four people.²⁹ These are unfortunately only two of the many instances reported.

THE USE OF CHILDREN FOR SUICIDE BOMBINGS

A horrific tactic on the part of the Taliban which became more and more common as the conflict intensified was the use of children for suicide attacks by having them wear explosive vests and enter crowded areas.

The examples included in this Chapter from 2011 are sadly only a handful of such attacks that disproportionately affected children, particularly those from vulnerable backgrounds who ended up in the hands of the Taliban as a result of poor families seeking free schooling for their children.³⁰ This is because many of the children, often boys, were groomed by the Taliban to carry out these attacks during their time at religious schools known as 'madrasas'.³¹

The above illustrates the intersectional way in which the violence manifested in this context on the basis of age, gender, and class.

25 UN Assistance Mission in Afghanistan ('UNAMA'), *Annual Report on Protection of Civilians in Armed Conflict 2008* (Report, January 2009) <https://unama.unmissions.org/sites/default/files/unama_09february-annual20report_poc202008_final_11feb09.pdf> 30.

26 Ibid.

27 'Afghanistan: Taliban Should Stop Using Children as Suicide Bombers', *Human Rights Watch* (Web Page, 31 August 2011) <www.hrw.org/news/2011/08/31/afghanistan-taliban-should-stop-using-children-suicide-bombers>.

28 Ibid.

29 Ibid.

30 Dawood Azami, 'How the Taliban Groom Child Suicide Bombers', *BBC News* (15 December 2014) <www.bbc.com/news/world-asia-27250144>.

31 Ibid.

C. 2012

On 4 September 2012, the UN Assistance Mission in Afghanistan ('UNAMA') reported a suicide attack in Dur Baba district of the Nangarhar province, killing 20 civilians and injuring another 66.³²

D. 2014

A suicide attack at a local volleyball game in November 2014 killed 53 civilians and injured 85.³³ Many children were present at the event.³⁴

E. 2015

On 28 September 2015, Kunduz province was captured by the Taliban. The Afghanistan Independent Human Rights Commission ('AIHRC') reported that around 50 civilians were killed, and another 350 people injured during the armed conflict in Kunduz.³⁵ There were also reports of sexual assaults during the Kunduz conflict.³⁶

Further, reports were also made of the Taliban targeting media and journalists.³⁷ Local media and radio stations were destroyed, and the Taliban tried to locate journalists, civil society activists, and human rights defenders across the city.³⁸ In addition to attacks on civilians and journalists, the Taliban specifically identified all government employees, as well as persons working with foreign organisations as potential targets.³⁹

Though the Taliban was known to recruit child soldiers in the 1990s, Human Rights Watch reported an increase in recruitment in 2015 in connection with the Taliban's growing attacks on the Government of

32 UNAMA, *Annual Report 2012 Protection of Civilians in Armed Conflict* (Report, February 2013) <https://unama.unmissions.org/sites/default/files/2012_annual_report_eng_0.pdf> 35.

33 Sune Engel Rasmussen, 'Suicide Bomber Kills at least 50 at Volleyball Match in Afghanistan' *The Guardian* (online, 24 November 2014) <www.theguardian.com/world/2014/nov/23/suicide-bomber-kills-at-least-40-volleyball-match-afghanistan>.

34 Ibid.

35 AIHRC, *Report on the Investigation of Human Rights and Humanitarian Rights Situation in Kunduz Province Armed Conflict* (Report, 17 October 2015) <www.refworld.org/docid/5a1feb4c4.html> 10.

36 'Taliban 'Rape' Girls at Hostel After Kunduz Attack', *Tolo News* (online, 8 October 2015) <<https://tolonews.com/afghanistan/taliban-rape-girls-hostel-after-kunduz-attack>>.

37 AIHRC (n 35).

38 Ibid.

39 UNAMA, *Annual Report on Protection of Civilians in Armed Conflict 2015* (Report, February 2016) <https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf> 27.

Afghanistan.⁴⁰ In the Kunduz province, the Taliban used religious schools to provide military training to teenagers, many of whom were subsequently deployed in combat as mentioned above.

The AIHRC reports that of the 74 complex and suicide attacks that resulted in civilian casualties in 2015, the Taliban claimed responsibility for 41 of them.⁴¹

F. 2016

In January 2016, the Taliban claimed responsibility for a suicide attack on a bus which killed seven journalists.⁴² Afterwards, the Taliban issued a statement that warned the media against promoting 'foreign culture' and 'obscenity'.⁴³ During 2016, UNAMA reported numerous cases of abductions by the Taliban of religious leaders and scholars.⁴⁴ For example, a religious scholar whose sons were members of Afghanistan's National Defence and Security Forces ('ANDSF') were abducted in the Nangarhar province and released upon the payment of a ransom.⁴⁵ In Badakhshan province, the Taliban was reported to similarly have abducted a religious leader who was perceived to express anti-Taliban sentiments. He was tortured to death.⁴⁶ It should be noted that, during this time, threats to religious leaders were also reported by UNAMA as being made by pro-government forces against those perceived to support the Taliban.⁴⁷

40 'Afghanistan: Taliban Child Soldier Recruitment Surges', *Human Rights Watch* (Web Page, 17 February 2016) <

41 UNAMA, *Annual Report on Protection of Civilians in Armed Conflict 2015* (n 39) 6.

42 Hasib Danish Alikozai, 'Report: 21 Journalists Killed in Afghanistan in 2017', *VOA News* (online, 3 January 2018) <www.voanews.com/a/report-21-journalists-killed-in-afghanistan-2017/4191693.html>.

43 Ibid.

44 UNAMA, *Protection of Civilians in Armed Conflict: Attacks Against Places of Worship, Religious Leaders and Worshipers* (Report, 7 November 2017) <https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_150218.pdf>.

45 Ibid.

46 Ibid.

47 Ibid.

G. 2017

The violence on the part of anti-government forces, including the Taliban, was continuously reported by UNAMA in 2017. For example, on 3 August 2017, the Taliban and local self-proclaimed Islamic State-affiliated fighters were reported to have attacked Mirza Olang village located in the Sayyad district of the Sari Pul province.⁴⁸

H. 2018

At the start of 2018, UNAMA documented two large-scale attacks in Kabul, killing at least 125 civilians, for which the Taliban claimed responsibility.⁴⁹ The first attack took place at a hotel and the second in a crowded street home to offices of the European Union ('EU'), a hospital, and a shopping area.⁵⁰

During 2018, violence was also linked to election campaigns as documented in a special report published by UNAMA.⁵¹ UNAMA documented and verified a total of 152 instances of election-related violence which resulted in 156 deaths and 340 injuries, as well as 245 abductions (35% of which were of women and children).⁵²

A statement by the Taliban called for the targeting of those assisting in the 2018 democratic election process.⁵³

UNAMA managed to match 63 of the Taliban's claims of responsibility in election-related security incidents, of which 13 concerned those, which after preliminary findings, caused the death of five persons and injured another 118.⁵⁴ UNAMA reported that schools used as polling stations were targeted by the Taliban using explosive devices and suicide attacks resulting in schools closing in some areas.⁵⁵

48 UNAMA, *Attacks in Mirza Olang, Sari Pul Province: 3 - 5 August 2017* (Report, August 2017) 1 <<https://unama.unmissions.org/sites/default/files/english.pdf>>.

49 'Kabul Mourns 100 Dead after Ambulance Bomb', *BBC News* (online, 28 January 2018) <<https://www.bbc.com/news/world-asia-42850624>>.

50 Ibid.

51 UNAMA, *Afghanistan Protection Of Civilians In Armed Conflict: 2018 Elections Violence* (Report, November 2018) <https://unama.unmissions.org/sites/default/files/special_report_on_2018_elections_violence_november_2018.pdf> 1.

52 Ibid 3.

53 'Statement of the Islamic Emirate about the Forthcoming Bogus Elections', *Long War Journal* (Web Page, 8 October 2018) <<https://www.longwarjournal.org/wp-content/uploads/2018/10/18-10-08-Statement-of-the-Islamic-Emirate-about-the-forthcoming-bogus-elections---Islamic-Emirate-of-Afghanistan.pdf>>.

54 UNAMA, *Afghanistan Protection Of Civilians In Armed Conflict: 2018 Elections Violence* (n 51) 4.

55 Ibid 6.

I. 2020

In 2020, a shooting took place in a maternity ward in a Hazara neighbourhood of Kabul known as Dasht-e-Barchi. The well-documented incident resulted in the deaths of 24 people, including mothers, pregnant women, newborn children, and hospital staff.⁵⁶ No group claimed responsibility for the attack, which remains without accountability.

The COVID-19 pandemic added pressure on an already weak healthcare system in Afghanistan, made worse by incidents reported to have been conducted by the Taliban, such as abductions of medical staff to prevent the provision of medical treatment and deliberate attacks on medical facilities, including pharmacies and ambulances.⁵⁷ For example, at the start of 2020, UNAMA reported the abduction by the Taliban of 23 healthcare workers in separate incidents across the country.⁵⁸

In 2020, there were also reports from UNAMA of six separate instances of cruel, inhuman and degrading punishment by the Taliban in relation to what the group perceived as 'transgressions of moral or gender norms, such as extramarital relations'.⁵⁹

3.3 EXAMPLES OF ACTS REPORTED (2021 – 2023)

Since the Taliban's violent return to power in August 2021, there have been numerous allegations of the Taliban's involvement in international crimes. Due to the difficulties and dangers experienced by independent media seeking to operate in Afghanistan under the Taliban regime, the information that reaches the international community likely represents only a small proportion of a vast amount of incidents which, if verified, may constitute international crimes.

⁵⁶ 'Afghan Maternity Ward Attackers Came to Kill the Mothers', *BBC News* (online, 15 May 2020) <www.bbc.com/news/world-asia-52673563>.

⁵⁷ UNAMA, *Protection of Civilians in Armed Conflict: Attacks on Healthcare During the Covid-19 Pandemic* (Report, June 2020) <https://unama.unmissions.org/sites/default/files/unama_special_report_attacks_on_healthcare_during_the_covid-19_pandemic_20_june_2020.pdf> 10.

⁵⁸ Ibid 9.

⁵⁹ Ibid 59.

3.3.1 Chronology

A. JULY 2021

In the months before the Taliban captured Kabul, there were numerous reports of violence. For example, in July 2021, Human Rights Watch reported the abduction and execution of popular comedian Nazar Mohammad, known as Khasha Zwan.⁶⁰ The Taliban was also reported to have executed nine Hazara men in July following the capture of the Malistan district in Ghazni province.⁶¹

B. AUGUST 2021

Following the takeover in August 2021, the Taliban started searching for members of the previous Government despite promising an amnesty.⁶² The same month, the execution of two former senior police officials, Haji Mullah and Ghulam Sakhi Akbari was reported.⁶³ Multiple reports of executions continued throughout the month of August. For example, folk singer Fawad Andarabi was killed as the Taliban deems music without religious meaning 'un-Islamic'.⁶⁴ Eleven Hazaras were also reported to have been executed, nine of whom had been working with the former ANDSF.⁶⁵

C. SEPTEMBER 2021

The violence continued in September. This included the killing of a pregnant former police officer in front of her family.⁶⁶ The Taliban was accused of the execution but denied the allegations.⁶⁷ Human

⁶⁰ 'Afghanistan: Mounting Taliban Revenge Killings', *Human Rights Watch* (Web Page, 30 July 2021) <<https://www.hrw.org/news/2021/07/30/afghanistan-mounting-taliban-revenge-killings>>.

⁶¹ 'Afghanistan: Taliban Responsible for Brutal Massacre of Hazara Men – New Investigation', *Amnesty International* (online, 19 August 2021) <<https://www.amnesty.org/en/latest/news/2021/08/afghanistan-taliban-responsible-for-brutal-massacre-of-hazara-men-new-investigation/>>.

⁶² Yogita Limaye, 'Amid Violent Reprisals, Afghans Fear the Taliban's 'Amnesty' was Empty', *BBC News* (online, 31 August 2021) <www.bbc.com/news/world-asia-58395954>.

⁶³ Ibid.

⁶⁴ Hannah Ritchie, 'Afghan Folk Singer Taken from His House and Killed by the Taliban', *CNN World* (online, 31 August 2021) <<https://edition.cnn.com/2021/08/30/asia/fawad-andarabi-afghan-folk-singer-killed-intl/index.html>>.

⁶⁵ Amnesty International, *No Escape: War Crimes and Civilian Harm During the Fall of Afghanistan to the Taliban* (Report, 2021) <www.amnesty.org/en/documents/asa11/5025/2021/en/> 17.

⁶⁶ Lyse Doucet, 'Afghanistan: Taliban Accused of Killing Pregnant Police Officer', *BBC News* (online, 5 September 2021) <www.bbc.com/news/world-asia-58455826>.

⁶⁷ Ibid.

Rights Watch also reported the execution of four other police officers.⁶⁸

Amnesty International reported the killing of 20 civilians when the Taliban captured Panjshir, one of the main areas for resistance fighters and a stronghold against the Taliban (more details on the violence in Panjshir is discussed in Chapter 7 of this Part of the Handbook).⁶⁹

In addition to summary executions, other violations were also reported, such as forced displacement. For example, 4,000 Hazaras were reported to have been forced to flee their homes in Daikundi.⁷⁰ Evictions also took place in Uruzgan and Kandahar provinces.⁷¹

The evisceration of women from public life as seen in the 1990s quickly became apparent following the Taliban's return to power. This included women's employment. For example, in September, female civil servants were told to stay home and only to come to work if their work could not be covered by male workers.⁷² Similar events were also reported in September with respect to female journalists.⁷³ In response to the Taliban's takeover, women took to the streets in protest. In September, the Taliban was reported to have responded violently to the protests, beating several women participating and

firing into the crowd.⁷⁴ The Taliban also targeted Hazara journalists Taqi Daryabi and Nemat Naqdi of Etilaatroz Newspaper for reporting on the women's protests against the Taliban.⁷⁵

D. OCTOBER 2021

Alongside the many confirmed deaths since the Taliban's return to power are numerous enforced disappearances. This includes Alia Azizi, a former warden of Herat women's prison who never returned home after going to work on 2 October 2021.⁷⁶

E. NOVEMBER 2021

In November 2021, the Taliban was reported to have attacked a Hazara family at their home in Sewak Shebar village in the Daikundi province, killing eight members of a family, including women and children.⁷⁷

F. JANUARY 2022

Despite the harsh crackdown on women's basic rights and liberties, women continued to protest the Taliban in 2022. In January, a group of women marched to Kabul University and were met with violence from the Taliban, including beatings and the use of pepper spray.⁷⁸

68 Human Rights Watch, "No Forgiveness for People Like You": Executions and Enforced Disappearances under the Taliban in Afghanistan (Report, November 2021) <www.hrw.org/report/2021/11/30/no-forgiveness-people-you/executions-and-enforced-disappearances-afghanistan>7.

69 Amnesty International, *No Escape* (n 65) 18.

70 Sitarah Mohammadi and Sajjad Askary, 'Why the Hazara People Fear Genocide in Afghanistan', *Al Jazeera* (online, 27 October 2021) <<https://www.aljazeera.com/opinions/2021/10/27/why-the-hazara-people-fear-genocide-in-afghanistan>>.

71 'Afghanistan: Taliban Forcibly Evict Minority Shia Hazaras, Former Civil Servants Targets of Collective Punishment, Land-Grabbing', *Human Rights Watch* (online, 22 October 2021) <<https://www.hrw.org/news/2021/10/22/afghanistan-taliban-forcibly-evict-minority-shia>>.

72 Kabul Government's Female Workers Told to Stay at Home by Taliban', *The Guardian* (online, 19 September 2021) <www.theguardian.com/world/2021/sep/19/kabul-governments-female-workers-told-to-stay-at-home-by-taliban>.

73 Kim Willsher, 'Afghanistan: Fewer than 100 out of 700 Female Journalists Still Working', *The Guardian* (online, 1 September 2021) <www.theguardian.com/world/2021/sep/01/afghanistan-only-handful-of-female-journalists-still-working>; Jake Epstein and Madison Hall, 'A Female Afghan Reporter Says the Taliban Refused to Let Her Work', *Business Insider* (online, 19 August 2021) <www.businessinsider.com/female-afghan-reporter-says-taliban-refused-to-let-her-work-2021-8>.

74 Fereshta Abbasi, 'Afghan Women Protest Against Taliban Restrictions 'They Cannot Eliminate Us from Society'', *Human Rights Watch* (online, 7 September 2021) <www.hrw.org/news/2021/09/07/afghan-women-protest-against-taliban-restrictions>; 'Afghanistan: Taliban Abuses Cause Widespread Fear Women in City of Herat Describe Loss of Freedoms Overnight', *Human Rights Watch* (online, 23 September 2021) <<https://www.hrw.org/news/2021/09/23/afghanistan-taliban-abuses-cause-widespread-fear>>.

75 'Afghanistan: Journalists Tell of Beatings by Taliban', *BBC News* (online, 9 September 2021) <www.bbc.com/news/world-asia-58500579>.

76 'Afghanistan: Taliban Authorities Must Reveal Alia Azizi's Whereabouts' *Amnesty International* (online, 21 January 2022) <<https://www.amnesty.org/en/latest/news/2022/01/afghanistan-taliban-authorities-must-reveal-alia-azizis-whereabouts/>>.

77 Abdul Rauf Hakimi, 'Taliban Murders Entire Hazara Family in Daikundi, Afghanistan', *Genocide Watch* (Web Page, 2 December 2022) <<https://www.genocidewatch.com/single-post/taliban-murders-entire-hazara-family-in-daikundi-afghanistan>>; 'Survivors of Deadly Taliban Raid on Hazara Village in Afghanistan Demand Justice', *Radio Free Europe/Radio Liberty* (Web Page, 20 December 2022) <www.rferl.org/a/afghan-survivors-taliban-raid-hazara-village-demand-justice/32185190.html>.

78 Sahar Fetrat and Heather Barr, 'Taliban Use Harsh Tactics to Crush Afghan Women's Rights Protest Threats, Assaults, and "Less-Lethal Weapons" Against Peaceful Protesters', *Human Rights Watch* (online, 18 January 2022) <www.hrw.org/news/2022/01/18/taliban-use-harsh-tactics-crush-afghan-womens-rights-protest>; 'Afghan Woman Activist Beaten Up by Taliban during Kabul Protest: Report', *NDTV* (online, 4 September 2021) <www.ndtv.com/world-news/afghan-woman-activist-thrashed-by-taliban-during-kabul-protest-2529829>.

G. MARCH 2022

In March 2022, women faced further restrictions to basic rights and freedoms. This included being banned from boarding flights without a male guardian, as well as having to fully cover their faces in public.⁷⁹ Women remain barred from attending school past the sixth grade.⁸⁰

3.4 THE URGENT NEED FOR ACCOUNTABILITY

The example of allegations against the Taliban outlined above suggest a systematic and widespread targeting of civilians since the group's emergence in the 1990s. The gravity of the acts documented are severe and raise serious concerns from an international law perspective, particularly with respect to the international crimes of genocide, war crimes and crimes against humanity covered in the Handbook.

While the Taliban has claimed responsibility for many violent acts and many Taliban members who were released in the various prisoner swaps discussed in the previous Chapter have been convicted and sentenced by Afghanistan's courts, many reported incidents remain allegations of responsibility. The principle of innocence until proven guilty discussed in Part 1 Chapter 6 of the Handbook applies no matter how serious the alleged crime and individual criminal responsibility must be determined by an impartial and independent judicial body through a fair trial.

As underlined throughout the Handbook, most of the violent incidents during Afghanistan's conflict have been perpetrated with impunity – in other words, without any criminal investigation and trial of the alleged perpetrator(s). Due to the impossibility for accountability inside Afghanistan at least in the short- to medium-term, as well as the shortcomings of the ICC investigation (discussed in Part 1 Chapter 7), UJ holds potential despite some of its challenges. As this Chapter has demonstrated, there are ample reports of allegations that may form the subject of potential UJ cases. Victim-survivors both inside and outside of Afghanistan also have a vast amount of electronic and physical documentation that can be used to support such allegations and form a key part in case-building efforts.

⁷⁹ Emma Graham-Harrison, 'Taliban Order All Afghan Women to Cover Their Faces in Public', *The Guardian* (online, 8 May 2022) <<https://www.theguardian.com/world/2022/may/07/taliban-order-all-afghan-women-to-wear-burqa>>.

⁸⁰ Emma Graham-Harrison, 'Taliban Ban Girls from Secondary Education in Afghanistan', *The Guardian* (online, 18 September 2021) <www.theguardian.com/world/2021/sep/17/taliban-ban-girls-from-secondary-education-in-afghanistan>; David Connett, 'Protesters Call for the Taliban to Reopen Afghan Girls' Schools', *The Guardian* (online, 27 March 22) <<https://www.theguardian.com/world/2022/mar/27/protesters-call-for-the-taliban-to-reopen-afghan-girls-schools>>.

PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER

IV

TARGETING OF
THE HAZARAS



Having outlined examples suggesting a systematic trend on the part of the Taliban of targeting civilians in ways which raise concerns of international crimes in the previous Chapter, Part 2 turns to consider acts on the part of the Taliban which target specific groups or indicate the (potential) commission of identity-based crimes.

In the first of these chapters, the Handbook considers the consistent and systematic targeting of the Hazara ethnic group and religious minority. Despite constituting the third largest ethnic group in Afghanistan, the Hazaras have been subjected to numerous physical attacks, as well as attempts at evisceration of their culture.¹

The opposition to the Hazaras' way of life, including direct discrimination based on ethnicity and religion, did not start with the Taliban. It can be traced as far back as the 19th century. However, persecution continued and intensified at the hands of the Taliban during the 1990s, and again in the 21st century.² Following the trajectory of historical precedence and the unstable climate resulting from the more recent Taliban takeover in August 2021, there are strong reasons for concern for the safety of the Hazara community residing in Afghanistan.

In addition to attacks against the Hazaras linked to the Taliban, the Chapter will also consider targeted attacks connected to the Islamic State Khorasan Province ('ISKP') and their affiliates which have, like the Taliban, encouraged the marginalisation of particular groups, including in this instance the Hazaras. As the collective crimes perpetrated against the Hazaras have been alleged to constitute genocide, particularly during the 1990s and again since the Taliban's return to power, there is an urgent need to ensure the protection of the rights of the Hazara people.

1 Saleem Javed, 'A Brief History of The Plight of Hazaras in Afghanistan', *India Today* (online, 17 September 2021) <www.indiatoday.in/world/story/a-brief-history-of-the-plight-of-hazaras-in-afghanistan-1853708-2021-09-16>.

2 Leela Jacinto, 'Afghanistan's Minority Hazaras see Gains of Past Two Decades 'Falling Apart'', *France 24* (online, 23 August 2021) <www.france24.com/en/asia-pacific/20210823-afghanistan-s-minority-hazaras-see-gains-of-past-two-decades-falling-apart>.

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4.1 BACKGROUND AND HISTORY OF THE OPPRESSION

The Hazara people comprise an ethnic and religious community indigenous to Afghanistan. The majority of Hazaras are Shi'a Muslims and speak Persian, in contrast to the predominantly Sunni Muslim population in Afghanistan.³ The Hazara people are often distinguished by their Asian facial features which can make them easily identifiable targets.⁴

It is important to understand the historical background of the Hazaras to contextualise the current situation. Whilst comprising a reasonable percentage of Afghanistan's population, the Hazaras have struggled to maintain their autonomy due to marginalisation and oppression. Dating back to the late 19th century, the ruler of Afghanistan at the time (Abdur Rahman Khan) conducted raids with the intention to kill Hazaras.⁵ Under Khan's rule, it is estimated that approximately 60% of Hazaras in Afghanistan were killed.⁶ During the 19th century, the Hazara people also lost much of the most fertile parts of their lands.⁷

Mass atrocities continued throughout the next century. During the 20th century, many Hazara women were sold into slavery both inside and outside of Afghanistan.⁸

Throughout Afghanistan's protracted conflicts, Hazaras were subjected to many deliberate attacks. One of the most brutal attacks that occurred during the civil war was the February 1998 Afshar massacre.⁹ The entire neighbourhood was destroyed by heavy shelling. As documented by the Afghanistan Justice Project, war crimes, including indiscriminate attacks, rape, abduction, and summary executions, were perpetrated by two prominent Mujahideen groups, the Jamiyat-e Islami and the Itihad-e Islami groups.¹⁰

The Hazara people continued to suffer targeted attacks during the Taliban's first reign of terror, including the destruction of Hazara cultural heritage and the banning of their religious practices and ceremonies discussed in the next section of the Chapter.

In addition to the historic persecution outlined above, the Hazara community is in a deeply vulnerable position within the current political climate in Afghanistan. There is a need for the international community to protect the Hazaras and ensure that past and ongoing atrocities are investigated and prosecuted in courts across the world.

4.2 THE TALIBAN AND ATTACKS ON THE HAZARAS

As noted above, the Hazara community has long been persecuted on the grounds of both religion and ethnicity by the political group(s) in power in Afghanistan. The Taliban's violence against Hazaras, which follows from previous campaigns under various regimes, has resulted in large-scale abuses. These attacks can be categorised across three distinct periods: the civil war during the Taliban's first reign of terror (1994 - 2001); the gradual resurgence of the Taliban (2010 - 2021); and the time since the Taliban's violent return to power (August 2021 - present). The targeted attacks against the Hazara people associated with the Taliban did thus not cease with their fall in late 2001 but continue to this day.

3 'Afghanistan: ISIS Group Targets Religious Minorities', *Human Rights Watch* (Web Page, 6 September 2022) <www.hrw.org/news/2022/09/06/afghanistan-isis-group-targets-religious-minorities>.

4 Mehdi J Hakimi, 'Relentless Atrocities: the Persecution of Hazaras' (2023) 44(2) *Harvard Law School* 159, 190 citing Abdul Karim Hekmat and Ben Doherty, 'Resurgent Taliban Targets Afghan Hazara as Australia Sends Them Back', *The Guardian* (online, 16 December 2014) <www.theguardian.com/australia-news/2014/dec/17/resurgent-taliban-targets-afghan-hazara-as-australia-sends-them-back>

5 Ibid 160 citing Australian Government Department of Foreign Affairs and Trade, *Hazaras in Afghanistan* (Report, 2017) 3-4.

6 Ibid. See also, UN High Commissioner for Refugees ('UNHCR'), 'Persecution and Perseverance: Survival Stories from the Hazara Community' (online, 24 July 2020) <www.unhcr.ca/news/persecution-perseverance-survival-stories-hazara-community/>.

7 Sayed Askar Mousavi, *The Hazaras of Afghanistan: An Historical, Cultural, Economic and Political Study* (Curzon, 1998) 65.

8 See, eg, Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Afghanistan* (Report, 2008) <www.refworld.org/docid/49749d693d.html>.

9 'Afshar Massacre 1993', *Hazara International* (Web Page, 2010) <www.hazarainternational.com/2011/02/09/afshar-massacre-1993/>.

10 Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001* (Report, 2005) <<https://www.opensocietyfoundations.org/publications/casting-shadows-war-crimes-and-crimes-against-humanity-1978-2001>> 14.

Since regaining power, the Taliban has consistently discriminated against and oppressed many groups of people, often on an intersectional basis, as the targeting of the Hazaras based on ethnicity *and* religion clearly illustrates.

The examples of targeted attacks described in the remainder of this section have been recorded through various testimonies and official reports but represent only a small number of attacks and exclusion of the Hazara people, most of which have been committed with impunity.

4.2.1 Examples of Attacks between 1994 – 2001

While most of the Taliban's control remained in Pashtun areas of Afghanistan in the mid-1990s, targeted attacks and exclusion of Hazaras still took place and indeed escalated during this time. For example, on 14 September 1997, the death of 70 Hazaras at the hands of Taliban guards were reported by eyewitnesses of the attack which took place in the northern city of Qezelabad.¹¹ The Taliban denies responsibility for this specific attack.¹² A few months later, the Taliban refused to lift a food blockade they imposed in the area of Hazarajat, predominantly populated by Shi'a Muslims.¹³

A large-scale indiscriminate shooting, known as the 'Mazar-i Sharif Massacre', took place on 8 August 1998 when the Taliban captured the city from resistance forces.¹⁴ The days that followed saw the summary execution of Hazara men and boys, as well as those of other ethnicities, including Uzbeks and Tajiks.¹⁵ According to Human Rights Watch, Hazaras were particularly and disproportionately targeted in the raids which resulted in scores of deaths, possibly reaching hundreds (the exact numbers are not reported as the reporting of the incident was heavily circumscribed as media was not allowed to access the city).¹⁶

The killings have been described as 'driven by racial and religious prejudice'.¹⁷ As noted above, the targeted attacks can be described as intersectional having both ethnic and religious dimensions. As also observed above, gender also plays a role. Just as men and boys were the targets of house searches, Hazara women and girls were the specific targets of sexual violence, including rape.¹⁸

THE MASSACRE IN MAZAR-I SHARIF

Among the endless number of reports and documentation of killings and other human rights violations disproportionately affecting Hazaras, what has become known as the 'massacre in Mazar-i Sharif' is one of the most infamous examples. The mass killing took place during the course of a few days in August 1998 and resulted in the deaths of many people, disproportionately Hazara civilians.¹⁹ Other violations, including rape, specifically affected Hazara women and girls.²⁰

The killing of Hazaras continued in the early 2000s. At least 31 bodies of Hazara civilians who had been detained months earlier were found in the Robatak Pass between the two provinces of Baghlan and Samangan in May 2000.²¹ The signs of the site indicated that they had been summarily executed as their hands were tied to their backs and many of the bodies showed signs of torture.²²

Another mass killing took place in 2001 in the context of the Taliban's attempt at recapturing the city of Yakaolang.²³ The killings took place in the locality of Nayak with a majority of Hazara residents.²⁴ Witness testimonies describe how the Taliban searched houses and lined up detainees, many of whom were executed, including Hazara elders seeking to mediate with the Taliban.²⁵

11 Amnesty International, *Afghanistan: Continuing Atrocities Against Civilians* (Report, September 1997) <<https://www.refworld.org/reference/countryrep/amnesty/1997/en/58318>> 1.

12 Ibid.

13 Dexter Filkins, 'Afghans Starve in Siege from Within', *Los Angeles Times* (online, 8 May 1998) <www.latimes.com/archives/la-xpm-1998-may-08-mn-47605-story.html>.

14 See generally, Human Rights Watch, *Afghanistan: The Massacre in Mazar-i-Sharif* (Report, November 1998) <www.hrw.org/reports/pdfs/a/afghan/afrepor0.pdf>.

15 Ibid 2.

16 Ibid.

17 Kenneth Cooper, 'Taliban Massacre Based on Ethnicity', *The Washington Post* (online, 28 November 1998) <www.washingtonpost.com/archive/politics/1998/11/28/taliban-massacre-based-on-ethnicity/efe15f81-abed-4e57-96f1-046cc59d1d48/>.

18 Human Rights Watch, *Afghanistan: The Massacre in Mazar-i-Sharif* (n 14) 3.

19 See generally *ibid*.

20 Ibid 3.

21 Afghanistan Justice Project (n 10) 120.

22 Human Rights Watch, *Massacres of Hazaras in Afghanistan* (Report, February 2001) <<https://www.hrw.org/report/2001/02/01/massacres-hazaras-afghanistan>> pt V.

23 Ibid pt IV.

24 Ibid.

25 Ibid.

Attacks have also extended to the destruction of cultural property of significance to the Hazara community. Of particular note is the Taliban's destruction of the Buddhas of Bamiyan in March 2001, discussed in detail in the next Chapter of the Handbook. It is alleged that these statues were destroyed because the Taliban maintained the view that the 'statues were and are sanctuary for 'unbelievers'.²⁶ The Buddhas of Bamiyan, were a core part of Hazara identity, and therefore their physical destruction also destroyed an element of Hazara culture.

4.2.2 Examples of Attacks between 2010 – 2021

Targeted attacks and exclusion of Hazaras continued after the Taliban was ousted by the United States ('US') and allied forces following 9/11. During this time, the Taliban built up their strength and were to return with the same ideology, including hatred for groups such as the Hazaras. Below are a few examples of some of the attacks documented as associated with the Taliban in the second decade of the 21st century.

In June 2010, decapitated bodies of 11 Hazara men were found in the Khas Uruzgan district of the Uruzgan province in southern Afghanistan.²⁷ A police official told international media that the men had been executed by the Taliban as a way to punish them for their ethnicity and religion, although the Taliban did not comment on this claim.

More examples of brutal attacks, including abductions and beheadings, have been documented. In February 2015, the European Union Agency for Asylum reported the abduction of 30 Hazaras who were travelling to Kabul from Iran.²⁸ Many other abductions have been reported. For example, in April 2015, a group of Hazara farmers in the Malistan district of the Ghazni province were abducted and

four of them beheaded.²⁹ Shortly thereafter, another instance of abduction and beheading of Hazaras travelling from the Daikundi province was reported.³⁰

Other reports of the Taliban stopping vehicles and specifically targeting Hazaras include an incident in July 2015 when 14 Hazara bus passengers were singled out and killed, including a newlywed couple.³¹ A year later, the US Department of State report on the human rights situation in Afghanistan reported the abduction by the Taliban of 17 Hazara community members in the Sar-i Pul province.³²

In August 2017, the United Nations Assistance Mission in Afghanistan ('UNAMA') verified reports of at least 36 killings by the Taliban together with ISKP of persons (including civilians) in the Mirza Olang village in Sayyad district of the Sari-i Pul province predominantly populated by Hazara people.³³

Even more recently, there have been a growing number of reports, including in the months leading up to the Taliban's violent return to power. During the first six months of 2021, the United Nations ('UN') documented 20 different incidents where Hazaras were targeted, and which resulted in 143 deaths and another 357 casualties.³⁴ Around the same time, Amnesty International published findings of a targeted attack by the Taliban on Hazaras in the Malistan district of the Ghazni province, resulting in the death of nine men.³⁵

26 Pierre Centlivres, 'The Death of the Buddhas of Bamiyan', *Middle East Institute* (online, 18 April 2012) <www.mei.edu/publications/death-buddhas-bamiyan>.

27 'Police Find 11 Beheaded Bodies in Afghan South', *Reuters* (online, 26 June 2010) <www.reuters.com/article/us-afghanistan-beheading-idUSTRE6502ML20100625>.

28 European Asylum Support Office, *Country of Origin Information Report: Afghanistan Security Situation* (Report, January 2016) <https://euaa.europa.eu/sites/default/files/public/EASO-COI-Afghanistan_Security_Situation-BZ0416001ENN_FV1.pdf> 86.

29 Rod Nordland and Jawad Sukhanyar, 'Taliban are Said to Target Hazaras to Try to Match ISIS' Brutality', *The New York Times* (online, 22 April 2015) <www.nytimes.com/2015/04/23/world/asia/taliban-are-said-to-target-hazaras-to-try-to-match-isis-brutality.html>.

30 Ibid.

31 'Gunmen Killed Novaros and Damad and 12 Other People in Ghor', *BBC News* (online, 25 July 2014) <www.bbc.com/persian/afghanistan/2014/07/140725_k02-ghor-cilians-killed>.

32 US Department of State, *Afghanistan 2016 Human Rights Report* (Report, 2016) <www.state.gov/wp-content/uploads/2019/01/Afghanistan-1.pdf> 3.

33 UNAMA, *Human Rights Protection of Civilians in Armed Conflict: Attacks in Mirza Olang, Sari Pul Province – 3-5 August 2017* (Report, August 2017) <<https://unama.unmissions.org/sites/default/files/english.pdf>> 1.

34 UNAMA, *Afghanistan: Protection of Civilians in Armed Conflict – Midyear Updated 1 January to 30 June 2021* (Report, July 2021) <https://unama.unmissions.org/sites/default/files/unama_poc_midyear_report_2021_26_july.pdf> 5.

35 'Afghanistan: Taliban Responsible for Brutal Massacre of Hazara Men – New Investigation' *Amnesty International* (online, 19 August 2021) <www.amnesty.org/en/latest/news/2021/08/afghanistan-taliban-responsible-for-brutal-massacre-of-hazara-men-new-investigation/>.

4.2.3 Examples of Attacks between (August) 2021 – 2023

Since the Taliban's violent return to power in August 2021, reports of attacks upon the Hazara people have continued. In the weeks following the fall of Kabul, Amnesty International reported the killing of 11 Hazaras, nine with ties to the Afghanistan National Defence and Security Forces ('ANDSF') and two civilians which included a teenage girl.³⁶ Another example of targeted killings included reports of the murder of eight Hazara family members in the Sewak Shebar village in the Daikundi province in November 2022, including women and children.³⁷

Short of death, Hazaras were also subject to violent assaults. For example, two Hazara journalists from the newspaper Etilaatroz told media of the physical assault they suffered at the hands of the Taliban when they were covering an anti-Taliban protest by a group of women in response to their brutal crackdown on women's rights (discussed further in Chapter 6 of this Part of the Handbook).³⁸

The documentation of the specific targeting of Hazaras also extends to forceful displacement of thousands of people from their homes in the Daikundi province, leaving them without food or shelter.³⁹ Forceful displacement of Hazaras by the Taliban was also documented to have taken place in the Uruzgan and Kandahar provinces.⁴⁰ In early October 2021, similar incidents were also reported in the Helmand and Balkh provinces.⁴¹

Reports were also received of incidents targeting Hazara culture and religion. This included the closing of two religious offices in the Ghazni province which also involved reports of beating and imprisonment of the staff working there.⁴² It also included forcing Hazaras to change the way they celebrate religious holidays, including Eid. For example, in March 2023, the Taliban forced Hazaras in the city of Nili in the Daikundi province to break their fast according to the Taliban's announcement of the day of Eid.⁴³

4.3 ISKP AND ATTACKS ON HAZARAS

As noted in the Handbook introduction, ISKP is a terrorist group primarily based in Afghanistan that is affiliated with the Islamic State in Iraq and Syria ('ISIS').⁴⁴ ISKP has been reported as furthering a campaign of targeted killings since 2020 and has continued to do so after **the Taliban takeover in August 2021**.⁴⁵ The group has claimed responsibility for several terrorist attacks in Kabul and other provinces across Afghanistan, with many reports of attacks on mosques, schools and workplaces.⁴⁶

The Taliban have made minimal efforts to protect these communities from unlawful attacks or to provide necessary medical care or assistance to victim-survivors.⁴⁷ Further, no investigation by the former Government of Afghanistan has taken place.

36 Amnesty International, *No Escape: War Crimes and Civilian Harm During the Fall of Afghanistan to the Taliban* (Report, December 2021) <www.amnesty.org/en/documents/asa11/5025/2021/en/> 17.

37 Abdul Rauf Hakimi, 'Taliban Murders Entire Hazara Family in Daikundi, Afghanistan', *Genocide Watch* (online, 2 December 2022) <www.genocidewatch.com/single-post/taliban-murders-entire-hazara-family-in-daikundi-afghanistan>.

38 'Afghanistan: Journalists Tell of Beatings by Taliban', *BBC News* (online, 9 September 2021) <www.bbc.com/news/world-asia-58500579>.

39 Sitarah Mohammadi and Sajjad Askary, 'Why the Hazara People Fear Genocide in Afghanistan', *Al Jazeera* (online, 27 October 2021) <www.aljazeera.com/opinions/2021/10/27/why-the-hazara-people-fear-genocide-in-afghanistan>.

40 'Afghanistan: Taliban Forcibly Evict Minority Shia Hazaras, Former Civil Servants Targets of Collective Punishment, Land-Grabbing', *Human Rights Watch* (online, 22 October 2021) <www.hrw.org/news/2021/10/22/afghanistan-taliban-forcibly-evict-minority-shia>.

41 Ibid.

42 'Shia and Sunni Scholars: The Closure of Taqlid Offices by the Taliban in Ghazni is a Violation of Religious Freedom', *Etilaatroz* (online, 14 January 2018) <www.etilaatroz.com/144215/shiite-and-sunni-clerics-taliban-closure-of-imitation-offices-in-ghazni-violates-religious-freedom/>.

43 'Taliban in Daikundi Forces Residents to Celebrate Eid a Day Earlier', *Kabul Now* (online, 21 April 2023) <<https://kabulnow.com/2023/04/taliban-in-daikundi-forces-residents-to-celebrate-eid-a-day-earlier/>>.

44 Abdul Sayed and Tore Refslund Hamming, United States Institute of Peace, *The Growing Threat of the Islamic State in Afghanistan and South Asia* (Report, June 2023) <www.usip.org/sites/default/files/2023-06/sr-520-growing-threat-islamic-state-afghanistan-south-asia.pdf>.

45 '1.4. Islamic State Khorasan Province (ISKP)', *European Union Agency for Asylum* (Web Page, April 2022) <<https://euaa.europa.eu/country-guidance-afghanistan-2022/14-islamic-state-khorasan-province-iskp#:~:text=Table%20of%20Contents&text=The%20ISKP%20is%20a%20transnational,%20government%20elements%2C%203%5D>>.

46 European Asylum Support Office, *Afghanistan Country Focus: Country of Origin Information Report* (Report, January 2022) <<https://euaa.europa.eu/publications/coi-report-afghanistan-country-focus>>. 41.

47 Weronika Strzyzyska, 'Hundreds of Hazaras Killed by ISKP since Taliban Took Power, Say Rights Group', *The Guardian* (online, 6 September 2022) <www.theguardian.com/global-development/2022/sep/06/hundreds-of-hazaras-shia-killed-iskp-islamic-state-khorasan-province-taliban-power-human-rights-watch>.

Indeed, as discussed at the start of this Chapter, the Hazaras have faced discrimination by successive governments of Afghanistan for a long time, and there is a concerning lack of safety for these individuals who are considered by ISKP as the ‘enemies of Islam’.⁴⁸ Human Rights Watch reported that **over 700 people were killed in 13 attacks between 2021 and 2022**, with the Hazaras, who comprise 15% of Afghanistan’s population, forming the main target.⁴⁹

The ISKP has targeted Hazara communities in Afghanistan since at least 2015.⁵⁰ For example, on **23 June 2016, a bomb attack in Kabul** killed 80 civilians and injured another 250 who had gathered to protest the Government’s decision regarding an electricity line.⁵¹ Most protesters were Hazaras and the ISKP claimed responsibility for this attack.⁵² In **July 2019, a suicide attack at a wedding celebration** killed eight civilians and injured 14 in the Nangarhar province.⁵³ A well-documented terror attack includes the **12 May 2020 shooting at a maternity ward** in the Hazara neighbourhood of Dasht-e-Barchi in Kabul.⁵⁴ The attack resulted in the death of 24 people, including newborns and mothers.⁵⁵ While ISKP did not claim responsibility, many parties (including the US Government) believe that they were behind the attack.⁵⁶ Reports state that the gunmen were ‘searching out the newborns and mothers’ as they entered the medical complex, ‘ignoring units closer to the entrance’.⁵⁷

48 Ibid.

49 Human Rights Watch, ‘Afghanistan: ISIS Group Targets Religious Minorities’ (online, 6 September 2022) <<https://www.hrw.org/news/2022/09/06/afghanistan-isis-group-targets-religious-minorities>>.

50 ‘Afghanistan: Surge in Islamic State Attacks on Shia’, *Human Rights Watch* (online, 25 October 2021) <www.hrw.org/news/2021/10/25/afghanistan-surge-islamic-state-attacks-shia>.

51 US Department of State (n 32) 24.

52 Sune Engel Rasmussen, ‘Isis Claims Responsibility for Kabul Bomb Attack on Hazara Protesters’, *The Guardian* (online, 24 July 2016) <www.theguardian.com/world/2016/jul/23/hazara-minority-targeted-by-suicide-bombs-at-kabul-protest>.

53 Fahim Abed, ‘Afghan War Casualty Report: July 12-18’, *The New York Times* (online, 18 July 2019) <www.nytimes.com/2019/07/18/magazine/afghan-war-casualty-report.html#:~:text=July%2012%20Nangarhar%20Province%3A%20nine,the%20commander%20in%20Pachiragam%20District.>>.

54 ‘Afghanistan: Massacre in a Maternity Ward’, *Médecins Sans Frontières* (online, 21 August 2020) <www.doctorswithoutborders.org/latest/afghanistan-massacre-maternity-ward>.

55 Ibid.

56 Kathy Gannon and Tameem Akhgar, ‘US Blames Brutal Attacks on Afghan Maternity Hospitals on IS’, *Associated Press News* (online, 16 May 2020) <<https://apnews.com/article/europe-religion-islamic-state-group-eebcd4af6c821e5530f3795352542f9f>>.

57 Ibid.

The following year, the Sayed al-Shuhada school in the same Hazara neighbourhood was **attacked by a car bomb and two improvised explosive devices** (‘IEDs’) that killed at least 90 people and injured another 240.⁵⁸ The majority of casualties were girls between the ages of 11 and 15.⁵⁹ Many residents who resided in the western district where the massacre occurred are of Hazara ethnic minority. ISKP was reported to be responsible.⁶⁰

On **8 October 2021, dozens of people were killed in a suicide attack** during Friday prayers at a Shia Mosque in the city of Kunduz.⁶¹ Reports claim that 49 were killed and another 143 injured. The mosque is mainly used by the minority Shia (Hazara) Muslim community.⁶² ISKP claimed responsibility the following week via its telegram channels. The same month, another Shia Mosque (this time in Kandahar city) was bombed during Friday prayers, killing at least 65 people and injuring over 70.⁶³ ISKP later released a media statement claiming responsibility for the attack.

Attacks associated with ISKP aimed at predominantly Hazara neighbourhoods and facilities continued in 2022. For example, on **19 April 2022**, Abdul Rahim Shahid High School and the nearby Mumtaz Education Centre in Dasht-e-Barchi were subject to **multiple explosions**. It has been reported that at least six staff and students were killed and another 11 injured.⁶⁴ ISKP once again claimed responsibility for the attacks. **A few days later**, ISKP claimed responsibility for another attack, namely the **explosion at the largest Shia Mosque in Afghanistan located in Mazar-i Sharif**, killing 31 people and injuring another 87.⁶⁵

58 Thomas Gibbons-Neff and Najim Rahim, ‘Bombing Outside Afghan School Kills at Least 90, With Girls as Targets’, *The New York Times* (online, 8 May 2021) <www.nytimes.com/2021/05/08/world/asia/bombing-school-afghanistan.html>.

59 Ibid.

60 Ibid.

61 ‘Suicide Bomber Kills Scores in Afghan Mosque Attack’, *Reuters* (online, 9 October 2021) <www.reuters.com/world/asia-pacific/blast-hits-mosque-northeastern-afghanistan-killing-worshippers-2021-10-08/>.

62 Ibid.

63 Ehsan Popalzai and Mostafa Salem, ‘More than 30 Killed as Suicide Attack Rocks Mosque in Afghanistan’s Kandahar’ *CNN* (online, 15 October 2021) <<https://amp.cnn.com/cnn/2021/10/15/asia/mosque-blast-kandahar-intl/index.html>>.

64 ‘Afghanistan: School Bombings a ‘Reprehensible Attack’ on Religious and Ethnic Minorities’, *Amnesty International* (online, 19 April 2022) <<https://www.amnesty.org/en/latest/news/2022/04/afghanistan-school-bombings-a-reprehensible-attack-on-religious-and-ethnic-minorities/>>.

65 ‘Afghanistan: “Blood and Fear Everywhere” after Deadly IS Blast’, *BBC News* (online, 22 April 2022) <<https://www.bbc.com/news/world-asia-61174991>>.

Before the year was over, another educational institution in Dasht-e-Barchi was bombed in a suicide attack which claimed the lives of 45 female students.⁶⁶

4.4 CALLS FOR THE RECOGNITION OF HAZARA GENOCIDE

The incidents targeting Hazaras, or areas predominantly populated by Hazaras (both those associated with the Taliban and the ISKP), raise serious concerns of the international crimes covered in this Handbook. Their systematic and widespread nature, for example, could be raised in connection with crimes against humanity.⁶⁷ Alongside inflicting murder, inhumane acts and suffering, these attacks have also prevented Hazara minorities from participating in the community, practising their religion, and accessing education. Although the ISKP maintains no territorial control in Afghanistan, their campaign of targeted killing, particularly towards Shia Hazara communities, has continued since the Taliban takeover in August 2021 and remains a serious concern.

The long-running and targeted nature of the attacks against the Hazara people has resulted in calls for the recognition that what is taking place is the commission of the crime of genocide. As introduced in Part 1, genocide is one of the crimes of concern in this Handbook and involves:

1. certain acts (including killing, causing serious mental or bodily harm, forcibly transferring children);
2. when committed with an intent to destroy a particular national, ethnical, racial or religious group 'as such'.⁶⁸

Both elements must be proven for the crime of genocide to be made out. The intent requirement is difficult to prove and requires concrete evidence of

the specific intent to destroy the group 'as such' and does not extend to cultural destruction but relates to their physical and/or biological destruction.⁶⁹

Often, the violence and its impacts are intersectional, for example, taking place on a combination of grounds, such as ethnicity and religion (as in the case of the Hazara – a distinct ethnic and often also religious group as Hazaras are predominantly Shia Muslim), and often also gender with women and girls from minority groups being targeted. The gender-based violence is demonstrated, for example in the attack on the maternity ward in Kabul discussed above.

It has been alleged that genocide has been committed by members of the Taliban during their first reign of terror, as well as since their violent return to power in 2021, and by affiliated terrorist groups like the ISKP. As with any allegations of crimes, to be credible they must be backed up by detailed legal analysis and credible sources to support the claims made. Such detailed analysis falls outside the scope of this Handbook.⁷⁰ Instead, this Chapter seeks to underline that all the international crimes covered in the Handbook may be relevant in potential UJ cases that concern allegations of crimes against Hazaras.

Undoubtedly, the long-running targeted attacks on the Hazara community and their way of life have created a sense of marginalisation that is rooted in the structure and systems of Afghanistan. Forms of violence, targeting killings, forcible displacement and destruction of mosques among many other crimes, have systematically excluded the Hazaras from the social dynamics of wider Afghanistan. As with most incidents outlined in this Part of the Handbook, attacks against the Hazaras have gone without much if any accountability. Calls for the recognition of a Hazara genocide and reports of continued atrocities perpetrated specifically against this group of people must be taken seriously by the international community.

66 Yogita Limaye, 'Afghanistan: "More of Us Might Be Killed - But We Will Win"', BCC News (online, 7 October 2022) <www.bbc.com/news/63158127>.

67 'Afghanistan: Surge in Islamic State Attacks on Shia' (n 50).

68 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art II ('Genocide Convention'); Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 6 ('Rome Statute').

69 See, eg., 'Genocide', *UN Office on Genocide Prevention and the Responsibility to Protect* (Web Page) <www.un.org/en/genocideprevention/genocide.shtml#:~:text=To%20constitute%20genocide%2C%20there%20must,to%20simply%20disperse%20a%20group.>>.

70 For such a detailed legal analysis, the authors of this Handbook refer readers to Mehdi J Hakimi, 'The Genocide of Hazaras' (2023) 63 *Virginia Journal of International Law Online* 19.

PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER

V

DESTRUCTION OF CULTURAL PROPERTY



Part 2 continues by focusing on the destruction of cultural property which often takes place in the context of the international crimes considered in this Handbook.

The existence of various international agreements concerning the preservation and protection of cultural property and heritage demonstrates the seriousness with which the international community views this issue. Nevertheless, destruction of cultural property often takes place with impunity. In Afghanistan, this includes the destruction of the Buddhas of Bamiyan by the Taliban in 2001.

The Chapter looks at the destruction of the Buddhas of Bamiyan as a case study to demonstrate the severe impact that the destruction of cultural property can have on the population, often particular groups for whom the property in question had significant cultural meaning and represented an important part of their history. The destruction of the Buddhas forms part of the trend of targeting of the Hazara people discussed in the previous Chapter of the Handbook.

In doing so, the Chapter underlines the potential to investigate and consider the destruction of cultural property in UJ proceedings as part of, or as adding evidence to, international crimes.

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5.1 THE SIGNIFICANCE OF THE BUDDHAS OF BAMIIYAN

The destruction of the Buddhas of Bamiyan by the Taliban in March 2001 was a significant event that resulted in widespread global condemnation.¹ Yet, to-date, no one has been held accountable for their destruction.

Under international human rights law ('IHRL'), cultural property is recognised as being intrinsically tied to individual and community identities and the preservation of minorities.² The Buddhas were cherished by the local Hazara population,³ and were important to the global community as historical, cultural artefacts.⁴

5.1.1 The Historic Location of the Buddhas

The Bamiyan Valley forms part of the Silk Road. Historically, it operated as an important junction between Europe and Asia that facilitated trade of both commodities and ideas.⁵ Bamiyan was also a site for monasteries and an important pilgrimage destination for Buddhists.⁶

The two Buddha statues were carved out of sandstone cliffs in the fourth and fifth centuries AD when Afghanistan was a centre for Buddhism.⁷ Even from the time of construction, the statues signified the global interconnectedness of the region through the incorporation of Central Asian, Indian and Hellenistic art influences in the design.⁸ With the region undergoing significant changes over time, the statues came to function as a 'testament to a world once linked by a vast overland network of commerce and communication',⁹ and were valued across the world as important historical artefacts.¹⁰

¹ Luke Harding, 'Taliban Blow Apart 2,000 Years of Buddhist History', *The Guardian* (online, 4 March 2001) <www.theguardian.com/world/2001/mar/03/afghanistan.lukeharding>.

² Lara Pratt, 'Prosecution for the Destruction of Cultural Property – Significance of the *al Mahdi* Trial' (2018) 18(6) *International Criminal Law Review* 1048, 1050. See also *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') art 27; UN Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, UN GAOR, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) 4 [9].

³ See generally, Said Reza Hussein, 'Destruction of Bamiyan Buddhas, Taliban Iconoclasm and Hazara Response' (2012) 16(2) *Himalayan and Central Asian Studies* 15; Rashid Ahmadi, 'Bamiyan Buddhas: Views from Hazara' (2012) 16(2) *Himalayan and Central Asian Studies* 51; Sayed Askar Mousavi, *The Hazaras of Afghanistan: An Historical, Cultural, Economic and Political Study* (Routledge, 2016) 38.

⁴ Cornelius Holtorf, 'Destruction and Reconstruction of Cultural Heritage as Future-Making' in Masanori Nagaoka (ed), *The Future of the Bamiyan Buddha Statues: Heritage Reconstruction in Theory and Practice* (Springer, 2020) 157, 158.

⁵ Kanchana Wangkeo, 'Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime' (2003) 28(1) *Yale Journal of International Law* 183, 246; Hussein (n 3) 15.

⁶ Wangkeo (n 5).

⁷ Hope Ngo, 'Afghanistan: Treasure Chest of Early Asian Culture', *CNN News* (online, 2 March 2001) <<http://edition.cnn.com/2001/WORLD/asiapcf/central/03/02/afghanistan.art/index.html>>.

⁸ Wangkeo (n 5).

⁹ Helaine Silverman, 'Learning From Ground Zero: The Presence of Absence at Two Sites of Destruction' in Masanori Nagaoka (ed), *The Future of the Bamiyan Buddha Statues: Heritage Reconstruction in Theory and Practice* (Springer, 2020) 187, 188.

¹⁰ Wangkeo (n 5) 257.

Photos of the Buddhas of Bamiyan before 2001¹¹

- ¹¹ Pepe Escobar, 'When the Taliban Blew Up the Buddhas', *Asia Times* (online, 3 March 2021) <<https://asiatimes.com/2021/03/when-the-taliban-blew-up-the-buddha/>>.



The larger Western Buddha



The smaller Eastern Buddha

Photos of the Bamiyan Buddhas after their destruction

The site of the Eastern Buddha after its destruction¹²

- ¹² Tessa Solomon, 'UNESCO Resumes Preservation of Endangered Heritage Sites in Bamiyan, Afghanistan', *ART News* (online, 21 April 2023) <www.artnews.com/art-news/news/unesco-resumes-preservation-of-endangered-heritage-sites-in-bamiyan-afghanistan-1234665264/>.



The site of the Western Buddha after its destruction¹³

- ¹³ Adam Taylor, 'What Mohammad Omar Took from Afghanistan That Can Never be Returned', *The Washington Post* (online, 30 July 2015) <www.washingtonpost.com/news/worldviews/wp/2015/07/30/what-mullah-omar-took-from-afghanistan-that-can-never-be-returned/>.

5.1.2 The Buddhas' Connection with the Hazara People

As the populace of Bamiyan changed in the years following the construction of the Buddha statues, the religious significance of the statues faded.¹⁴ By the time Islam reached modern-day Afghanistan, the practice of Buddhism was largely replaced, with Muslim clerics taking the place of Buddhist monks.¹⁵ This did not, however, diminish the value of the statues for the local Hazara community.¹⁶ A deep cultural significance remained in the Buddhas, such that they even formed the subject of traditional folktales.¹⁷

The Hazaras believed that the Buddhas were carved so as to reflect Hazara facial features, with the Buddhas becoming a symbol of Hazara identity and ancestry.¹⁸ Evidence, including coins found in Bamiyan, paintings on temple walls and around the Buddha statues and paintings of kings of the era, also point towards similar facial and physical features, such that Hazara ancestry can be traced back to the inhabitants of Bamiyan at the time of constructing the Buddhas.¹⁹

5.2 THE TALIBAN'S DESTRUCTION OF THE BUDDHAS IN 2001

On 26 February 2001, Taliban leader Mullah Muhammad Omar announced the intention of the Taliban to destroy Afghanistan's 'non-Islamic statues'.²⁰ The international community, including the US, India, Russia, the European Union ('EU'), and Pakistan, denounced this order in the hopes that the Taliban might reconsider the destruction of the Buddhas.²¹

Yet, despite the widespread international condemnation, the destruction of the Buddhas commenced on 1 March 2001, with reports of Taliban soldiers using tank shells and rockets in the attacks.²² Ultimately, the destruction of the Buddhas was carried out with dynamite.²³ The destruction followed previous attacks on the statues by the Taliban, most notably targeting the Buddhas' faces removing some of their facial features.²⁴

5.2.1 The Taliban's Justification for the Destruction

The Taliban has claimed in part that the destruction of the statues was to prevent the practice of idol worship.²⁵ It should be noted, however, that other interpretations of Sharia law go against such extremes, and would not rationalise the Taliban's attacks accordingly.²⁶ As a result, Taliban justifications should not be taken at face value, neither in respect of whether the reasoning underpinning the justification was warranted in theory, nor whether it was warranted in substance, such as an accurate depiction of what they in fact accused people of engaging in.

In respect of the latter, it is particularly significant that the Taliban perceived the threat of idol worshipping through a misconception, namely that the people visiting the statues were engaging in acts of prayer before them.²⁷ An example of this was seen through a gesture made by a visitor before one of the Buddha statues was mistaken by the Taliban as an act of prayer.²⁸

5.3 SHARED IDEOLOGY BETWEEN THE TALIBAN, ISKP AND AL-QAEDA

Historically, the Taliban has shared a similar ideology with other affiliated terrorist groups, such as ISKP and Al-Qaeda. The Taliban has harboured and still

¹⁴ Matthew Power, 'The Lost Buddhas of Bamiyan: Picking up the Pieces in Afghanistan', *Harper's Magazine* (March 2005) 67, 71.

¹⁵ Mousavi (n 3) 90.

¹⁶ Ahmadi (n 3) 51.

¹⁷ Ankita Haldar, 'Echoes from the Empty Niche: Bamiyan Buddha Speaks Back' (2012) 16(2) *Himalayan and Central Asian Studies* 53, 81–2.

¹⁸ Hussein (n 3) 26.

¹⁹ Mousavi (n 3).

²⁰ Pierre Centlivres, 'The Death of the Buddhas of Bamiyan' *Middle East Institute* (Web Page, 18 April 2012) <www.mei.edu/publications/death-buddhas-bamiyan>.

²¹ Luke Harding, 'Taliban Blow Apart 2,000 Years of Buddhist History', *The Guardian* (online, 4 March 2001) <www.theguardian.com/world/2001/mar/03/afghanistan.lukeharding>.

²² Ibid.

²³ Stephanie Hegarty, 'Bamiyan Buddhas: Should They be Rebuilt?' *BBC News* (online, 13 August 2012) <www.bbc.com/news/magazine-18991066>.

²⁴ Hussein (n 3) 39.

²⁵ Wangkeo (n 5) 251.

²⁶ Ibid 252.

²⁷ Ibid 251.

²⁸ Carla Power, 'Saving the Antiquities', *Newsweek* (online, May 2001) <www.newsweek.com/saving-antiquities-153083>.

provides safe haven to Al-Qaeda in Afghanistan.²⁹ For instance, the Taliban founder Mullah Omar was offered 'Bay'ah' (allegiance) by Osama bin Laden in 1998.³⁰ After the 9/11 attack, the Taliban refused to surrender bin Laden.³¹ Further, some intelligence reports even mention that Sirajuddin Haqqani, the de-facto Minister of Interior Affairs of Afghanistan and one of the leaders of the Taliban, is also a member of Al-Qaeda's wider leadership council.³² This points to a strong tie between the groups and that they share the same ideology.

Further, Al-Qaeda has always shown support for the Taliban publicly. For example, shortly after US soldiers left Afghanistan, Al-Qaeda's general command boasted that the Taliban's 'historic victory will open the way for the Muslim masses to achieve liberation from the despotic rule of tyrants who have been imposed by the West on the Islamic World'.³³

In recent years, much of the recruitment for ISKP was done through the ranks of the Taliban. For example, Mullah Abur Rauf, the former Taliban Governor of Paktia province, pledged allegiance to ISKP.³⁴ There are many more who have switched between the groups. Given the smooth transition of Taliban members to ISKP, it can be assumed that there is no clash in their ideologies.

5.3.1 Interpretation of Islam and Forms of Governance

According to the interpretation of Islam by the Taliban, ISKP and Al-Qaeda, whatever is written in the Holy Texts or sayings of 'Salaf-e-Saleh' (the first three generations of Muslims after the Prophet)³⁵ is valid and what is not cited is invalid and not legitimate.³⁶

Although the Taliban has some internal disputes, they widely follow a similar structure of governance to that of ISKP.³⁷ The Taliban and ISKP both share the goal of achieving ultimate power in their countries. They both have an 'Amir al-Momenin', a commander of the faithful that is on top of the organisation with absolute power. The current Amir al-Momenin for the Taliban is Haibatullah Akhundzada.³⁸ This commander is recognised as the highest authority after God and the Prophet. Every Muslim must obey his orders even if in disagreement. In this system of government, Taghalob, coming to power by force means overcoming or dominating by any means or form.³⁹ Both groups view democracy as un-Islamic. Notably, ISKP and the Taliban reject laws made by any human institution and only abide by Sharia law.⁴⁰

These terrorist groups aim to establish their 'Caliphate' by any means necessary.⁴¹ They believe that opposing them means opposing God and the Prophet. Any person or group who disagrees must be suppressed and removed even with the use of violence.⁴² The use of fear is a common way that these groups seek to control people who do not share similar beliefs. The reasoning is that fear will prevent people from rebellion, munity, riot, or any form of opposition. This includes significant destruction of heritage sites.

29 In addition, the former leader of Al-Qaeda (Ayman al-Zawahiri) was killed in a drone attack in Kabul after the Taliban had already taken over the country. This emphasises the politics of the Taliban towards terrorist groups: see Jason Burke, 'Al-Qaida Enjoying a Haven in Afghanistan Under Taliban, UN Warns', *The Guardian* (online, 3 June 2022) <<https://www.theguardian.com/world/2022/jun/03/al-qaida-enjoying-a-haven-in-afghanistan-under-taliban-un-warns>>; Mohamed Mokhtar Qandil, 'The Killing of al-Zawahiri: Repercussions for the Taliban', *Fikra Forum* (online, 16 August 2022) <www.washingtoninstitute.org/policy-analysis/killing-al-zawahiri-repercussions-taliban>.

30 Driss El-Bay, 'Afghanistan: The Pledge Binding al-Qaeda to the Taliban', *BBC News* (online, 7 September 2021) <www.bbc.com/news/world-asia-58473574>.

31 Yaqoob-Ul-Hassan, 'Taliban and Al-Qaeda: The Unbreakable Relationship' (2022) 46(2) *Strategic Analysis* 211, 214.

32 Thomas Joscelyn, 'U.N. Report Cites New Intelligence on Haqqanis' Close Ties to Al Qaeda', *The Long War Journal* (online, 7 June 2021) <www.longwarjournal.org/archives/2021/06/u-n-report-cites-new-intelligence-on-haqqanis-close-ties-to-al-qaeda.php>; Parwiz Karokhail, 'Differences Emerge in Taliban Leadership as Interior Minister Makes Public Criticism', *Arab News* (online, 13 February 2023) <www.arabnews.com/node/2250366/world>.

33 Bryce Loidolt, 'How the al-Qaeda-Taliban Alliance Survived' (2022) 64(3) *Survival* 133, 133.

34 Mairaj ul Hamid and Sher Hassan, 'ISIS and Taliban: U.S. Strategies and Prospects' (2022) 40(1) *Pakistan Journal of American Studies* 88, 93.

35 John L Esposito, *Islam: The Straight Path* (Oxford University Press, 1998).

36 Mohammad Moheq, 'Taliban and ISIS: Seven Similarities, Seven Differences' (2019) 47(3) *Journal of Socialist Theory* 495, 495.

37 Mirwais Balkhi, 'The Caliph v The Emir al-Mu'minin: Which Islamic Model of Statehood Will the Taliban Adopt?' *Fair Observer* (online, 19 May 2022) <www.fairobserver.com/world-news/the-caliph-v-the-emir-al-muminin-which-islamic-model-of-statehood-will-the-taliban-adopt/>.

38 Ibid.

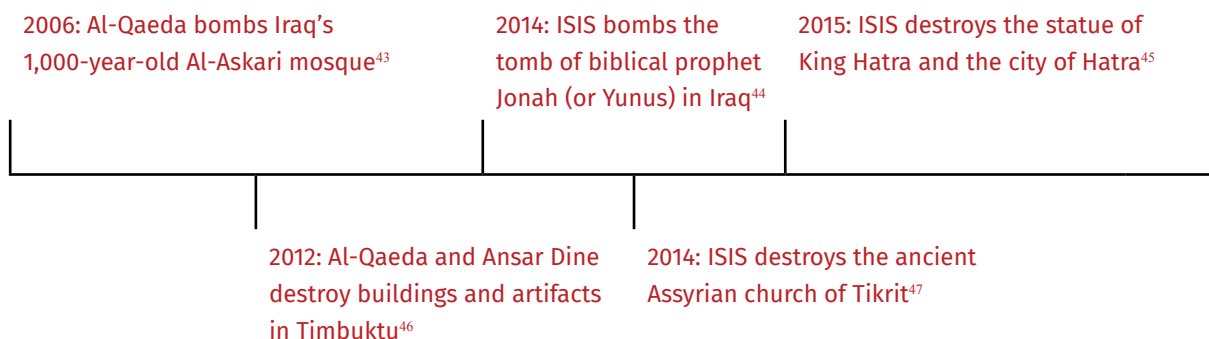
39 Moheq (n 36) 496.

40 'Recognition and the Taliban', *Brookings Institution* (Web Page, 30 September 2022) <www.brookings.edu/articles/recognition-and-the-taliban-2/>.

41 Though there are some internal disputes among the Taliban concerning whether to establish a caliphate, see Balkhi (n 37).

42 Moheq (n 36) 496.

5.3.2 Similar attacks by the Taliban and Affiliated Terrorist Groups



⁴³ Michael Crowley, 'How the Fate of One Holy Site Could Plunge Iraq Back into Civil War', *Time Magazine* (online, 26 June 2014) <<https://time.com/2920692/iraq-isis-samarra-al-askari-mosque/>>.

⁴⁴ Eyder Peralta, 'Video Shows Islamic State Blowing Up Iraq's Tomb Of Jonah', *NPR* (online, 25 July 2014) <www.npr.org/sections/thetwo-way/2014/07/25/335192229/video-shows-islamic-state-blowing-up-iraqs-tomb-of-jonah>.

⁴⁵ Chris Johnston, 'Isis Militants Destroy Remains of Hatra in Northern Iraq', *The Guardian* (online, 8 March 2015) <www.theguardian.com/world/2015/mar/07/isis-militants-destroy-hatra-iraq>; Graham Bowley and Robert Mackey, 'Destruction of Antiquities by ISIS Militants Is Denounced', *The New York Times* (online, 27 February 2015) <www.nytimes.com/2015/02/28/world/middleeast/destruction-of-antiquities-by-militants-is-denounced.html>.

⁴⁶ 'Timbuktu Shrines Damaged by Mali Ansar Dine Islamists', *BBC News* (online, 30 June 2012) <www.bbc.com/news/world-africa-18657463>.

⁴⁷ 'Islamists Destroy 7th Century Church, Mosque in Tikrit, Iraq', *Assyrian International News Agency* (online, 25 September 2014) <www.aina.org/news/20140925012701.htm>.

The above attacks are reminiscent of the destruction of the Buddhas by the Taliban in 2001 and demonstrate a trend of destruction on the part of the group sharing the kind of ideology discussed above.

5.3.3 Cultural Cleansing

Cultural cleansing, or cultural homogenisation, is recognised as a state-led policy aimed at cultural standardisation.⁴⁸ Organisations like the Taliban and Al-Qaeda embrace this approach by forcing their ideology on the population they govern in order to generate fear as well as to finance various criminal activities.⁴⁹ Both groups have declared themselves as the new defender of the Sunni Muslim faith.⁵⁰ Additionally, the use of icons to depict religious figures is deemed un-Islamic by both ISIS and the Taliban.⁵¹ They believe that other cultures are irrelevant and need to be eradicated to favour the implementation of their version of Islam.⁵²

As mentioned at the start of the Chapter, cultural property is an essential part of the identity of a population, often local to particular groups and/or regions. ISIS has used the destruction of religious images and objects to assert their domination over the populations in several regions of the world where they have also inflicted severe physical and mental violence.⁵³ This has corresponded with general attempts at garnering public attention.⁵⁴ They claim that the destruction amounts to purification of

their territory by signifying that the territory will be governed along Islamic lines.⁵⁵ The events mentioned above show that ISIS is willing to destroy any culture that does not share similar values.

5.4 DESTRUCTION OF CULTURAL PROPERTY AND NEED FOR ACCOUNTABILITY

As this Chapter has outlined, the Taliban is in essence like ISIS and Al-Qaeda. All groups have destroyed cultural property with little to no accountability, relying upon similar justifications of being the voices of the only culture which is 'pure'. This includes the Taliban's destruction of the Buddhas of Bamiyan for which the Taliban has never faced accountability despite the global outcry which the destruction generated. This, as well as other destruction of cultural property should form the subject of investigation and prosecution as part of efforts to hold members of the Taliban to account through the principle of UJ.

The Buddhas may, for example, be considered in the context of the persecution of the Hazara people discussed in the previous Chapter of the Handbook as adding to the evidence of continued and persistent targeting of this ethnic and religious group. The destruction of cultural property is in fact relevant in the context of several international crimes punishable before international courts and tribunals and which many states across the world have also recognised as possible to prosecute through the principle of UJ.

Before the International Criminal Court ('ICC'), the destruction of cultural property was one of the issues considered by the Court in the *Al Mahdi* case.⁵⁶ Following a guilty plea by the accused, the case resulted in the conviction of the accused of, inter alia, intentionally directing attacks against historical monuments and buildings in the city of Timbuktu, Mali.⁵⁷

⁴⁸ Daniele Conversi, 'Cultural Homogenization, Ethnic Cleansing, and Genocide' (Oxford Research Encyclopaedia of International Studies, 30 November 2017) <<https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-139;jsessionid=92E56C3A1A1382239A393CF0A0980874?rskey=zPnUJl&result=1>>.

⁴⁹ 'UN Security Council Adopts Historic Resolution for the Protection of Heritage', UNESCO (Press Release, 24 March 2017) <<https://en.unesco.org/news/security-council-adopts-historic-resolution-protection-heritage>>.

⁵⁰ Javid Ahmad, 'The Taliban's Religious Roadmap for Afghanistan', *Middle East Institute* (online, 26 January 2022) <www.mei.edu/publications/talibans-religious-roadmap-afghanistan>.

⁵¹ Antoine Dib and Milagros Aurora Revilla Izquierdo, 'Terrorism and the Loss of Cultural Heritage: The Case of ISIS in Iraq and Syria' in Olimpia Niglio and Eric Yong Joong Lee (eds), *Transcultural Diplomacy and International Law in Heritage Conservation* (Springer, 2021) 377, 380.

⁵² Mehdi J Hakimi, 'The False Inclusivity of the Taliban's Emirate', *Al Jazeera* (online, 26 October 2020) <www.aljazeera.com/opinions/2020/10/26/the-false-inclusivity-of-the-talibans-emirate>.

⁵³ Nicole Winchester, 'Targeting Culture: The Destruction of Cultural Heritage in Conflict', *UK Parliament* (Web Page, 14 December 2022) <<https://lordslibrary.parliament.uk/targeting-culture-the-destruction-of-cultural-heritage-in-conflict/>>.

⁵⁴ For example, the attack on Palmyra by ISIS was primarily to gain public attention: Emma Cunliffe and Luigi Curini, 'ISIS and Heritage Destruction: A Sentiment Analysis' (2018) 92(364) *Antiquity* 1094–1111.

⁵⁵ Zack Beauchamp, 'Why ISIS is Destroying Syrian and Iraqi Heritage Sites', *Vox* (online, 19 August 2015) <www.vox.com/2015/3/11/8184207/islamist-monuments>.

⁵⁶ *Prosecutor v Al Mahdi (Judgment and Sentence)* (International Criminal Court, Trial Chamber VIII, Case No ICC-01/12-01/15, 27 September 2016).

⁵⁷ *Ibid* [62]–[63], [111].

THE PROSECUTOR V AHMAD AL FAQI AL MAHDI (AL MAHDI CASE)

Ahmad Al Faqi Al Mahdi was alleged to have been a member of the movement Ansar Eddine, associated with Al-Qaeda and connected to the Islamic Court of Timbuktu.⁵⁸

The trial before the ICC commenced on 22 August 2016, where a guilty plea was entered into for the charge of intentionally directing an attack against Mali's historical monuments.⁵⁹ Al Mahdi was found guilty of co-perpetrating the intentional attacks in 2012 against historical monuments and buildings in Timbuktu, Mali.⁶⁰

On 27 September 2016, Al Mahdi was sentenced to 9 years of imprisonment.⁶¹ On 25 November 2021, the sentence was shortened by time spent in custody, setting the completion date to 18 September 2022.⁶²

The *Al Mahdi* case was the first time that the ICC considered the crime of intentionally attacking cultural heritage.⁶³ It has been recognised as a 'landmark case' in terms of its approach to crimes against cultural heritage and consideration of the role of international justice in cases concerning this crime.⁶⁴

Despite the significance of the *Al Mahdi* case, concerns have been raised over its application as a precedent for future cases.⁶⁵ Al Mahdi entered a guilty plea, and there was a large amount of evidence of his involvement in the intentional attacks, highlighting the gravity of these intentional attacks.⁶⁶ In other cases, there may not be a guilty plea entered into and a lack of documented evidence unlike in the Al Mahdi case.

While the specific destruction of the Buddhas of Bamiyan took place before the *Rome Statute of the International Criminal Court* ('Rome Statute') entered into force and may therefore not be considered by the ICC, it could still be considered in UJ proceedings. Further, other past and future instances of destruction could feed into criminal investigations in the context of international crimes, both at the domestic level through the principle of UJ and internationally with respect to the ongoing ICC investigation into the situation in Afghanistan.

⁵⁸ Ibid [31].

⁵⁹ Karolina Wierczyńska and Andrzej Jakubowski, 'Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case' (2017) 16 *Chinese Journal of International Law* 696, 699.

⁶⁰ *Prosecutor v Al Mahdi (Judgment and Sentence)* (n 56) [62]–[63].

⁶¹ Ibid [111].

⁶² Ibid [111].

⁶³ Wierczyńska and Jakubowski (n 59) 696.

⁶⁴ Ibid 696–7.

⁶⁵ Comment, 'Prosecutor v. Ahmad Al Faqi Al Mahdi: International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage' (2017) 130(7) *Harvard Law Review* 1978, 1981–5.

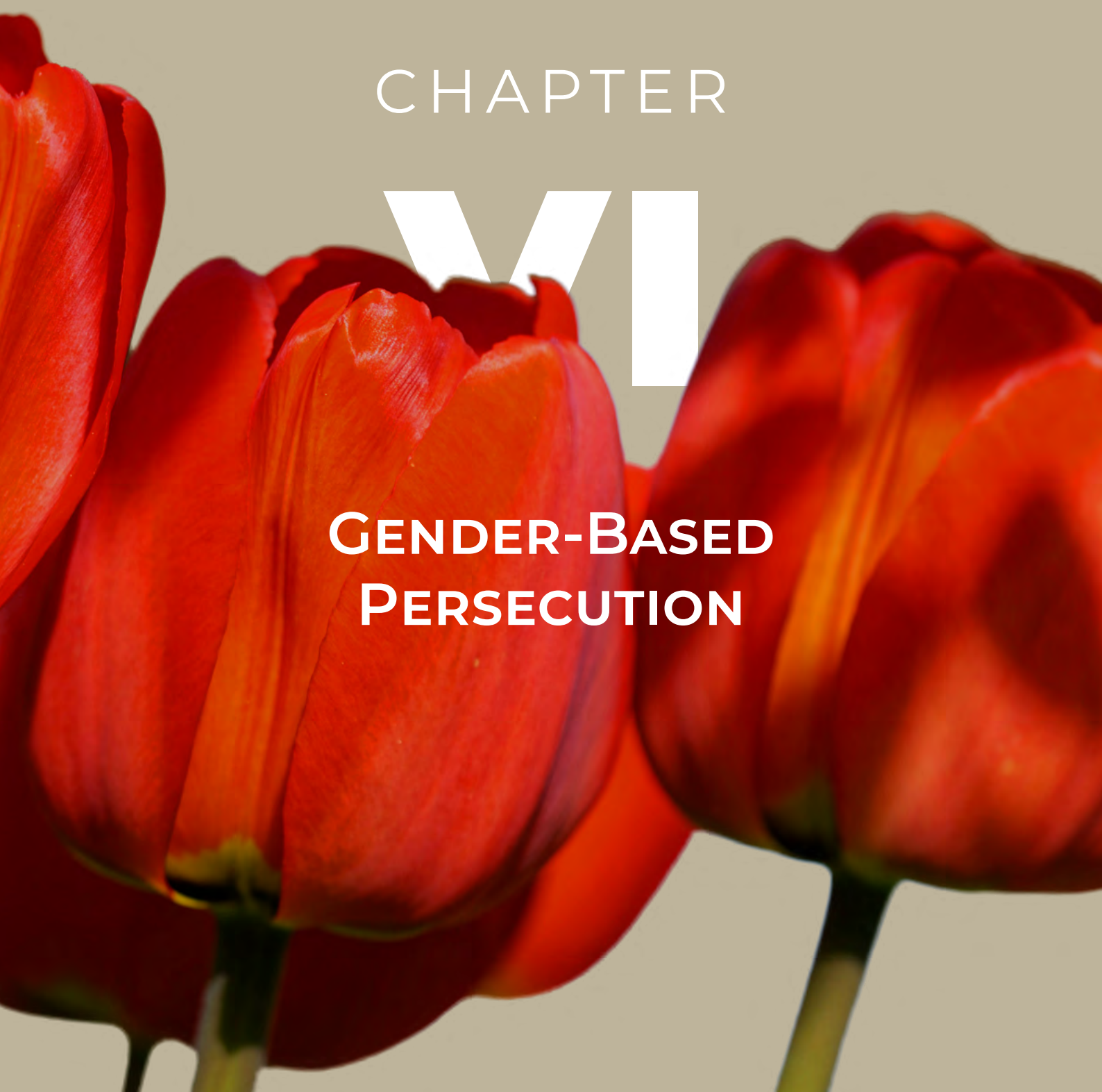
⁶⁶ Ibid 1982.

PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER

VI

GENDER-BASED PERSECUTION



Part 2 continues by focusing on the Taliban's systematic and brutal oppression of women and girls. The Chapter discusses the extremist ideology which underpins the Taliban's acts which includes, as the only country in the world, the formal exclusion of women from education (beyond the sixth grade). As the Chapter observes, the Taliban's present treatment of women and girls is reminiscent of their first reign of terror in the late 1990s, demonstrating that the Taliban, despite any assurances to the contrary, very much maintain an unacceptable stance on gender which seek to eviscerate women and girls from public life.

The specific targeting of women underlines the importance of looking at the actions of the Taliban with an intersectional lens, recognising how their conduct particularly targets certain identities, in addition to the pain and suffering caused to the civilian population as a whole. This is crucial for potential UJ prosecutions which will likely include allegations of international crimes which contain gender elements.

The Chapter does not comprehensively cover all aspects of the Taliban's oppression of women. Instead, it provides a general overview and considers current calls for reforms at the international level to recognise the gravity and extent of the treatment of women and girls in Afghanistan by the Taliban.

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6.1 WOMEN DURING THE FIRST REIGN OF TERROR (LATE 1990S)

The rise of the Taliban in the 1990s brought extremist values, particularly the oppression of women's rights, across Afghanistan. As discussed in Chapter 1 of this Part of the Handbook, the Taliban established a stronghold in southern Afghanistan and had control over much of Afghanistan by September 1996, including the capital.¹ Not as much information is documented about this first reign of terror as the current repeat of many of the oppressive practices from the late 1990s. The following largely draws upon some of the key findings from the Human Rights Watch report *Humanity Denied: Systematic Violations of Women's Rights in Afghanistan* from 2001 and a few other sources from the turn of the century.²

6.1.1 Public Life

In the late 1990s, the Taliban issued orders (known as 'edicts') that prohibited women from working outside the home, attending school, and even leaving their homes unless accompanied by a male relative.³ In public, women were required to wear a burqa (a garment meant to cover the whole body, with only a small net to see and breathe through).⁴ Women were also forbidden from wearing white shoes and socks, as white is the colour of the Taliban flag.⁵ Men who stood up and supported women's rights, such as participating in girls' education or allowing women to work, were also punished.⁶ The rights to freedom of association, peaceful assembly and freedom of movement of women were all violated by the Taliban's edicts.⁷

The Taliban brutally enforced these orders through the Ministry for the 'Promotion of Virtue and the Prevention of Vice'.⁸ This Ministry answered directly to the Supreme Leader of the Taliban, Mullah Muhammad Omar. Ministry staff would patrol public areas and beat women who they perceived to be in violation of the rules.⁹

Examples include the punishment of women for wearing socks that were not sufficiently opaque; for showing their wrists, hands, or ankles; and for not being accompanied by a male relative.¹⁰ Beatings were often carried out with a metal cable and included further threats of violence and verbal harassment.¹¹ These punishments were cruel, degrading and inhumane, did not follow due process, and had no right of appeal.¹²

6.1.2 Access to Healthcare

In 1997, the Taliban created separate hospitals for men and women in Kabul and forced the majority of hospitals to turn away female patients.¹³ As a result, the half a million of women living in the capital only had access to one hospital, the Rabia Balkhi facility, which had 35 beds and lacked crucial medical equipment and clean water.¹⁴

The Taliban also extended their prohibition against women working outside the home to female medical workers in all hospitals but the Rabia Balkhi facility.¹⁵ Later, the Taliban partially changed its segregation order to allow more hospitals to accept women, provided they were kept in separate wards and were treated by female workers.¹⁶

1 Lindsay Maizland, 'The Taliban in Afghanistan,' *Council on Foreign Relations* (online, 19 January 2023) <www.cfr.org/background/taliban-afghanistan>.

2 Human Rights Watch, *Humanity Denied: Systematic Violations of Women's Rights in Afghanistan* (Report, 2001) <www.hrw.org/reports/2001/afghan3/afgwrdr1001.pdf>.

3 Ibid 6–7.

4 Ibid 12.

5 Paul McGeough, 'From the Archives, 2001: The Taliban's War on Women,' *The Sydney Morning Herald* (online, 10 September 2021) <www.smh.com.au/world/asia/from-the-archives-2001-the-taliban-s-war-on-women-20210901-p58nvy.html>.

6 Farooq Yousaf and Dean Peacock, 'Challenging Stereotypes: Afghanistan's Male Advocates for Gender Equality,' *Women's International League for Peace and Freedom* (online, 14 April 2023) <www.wilpf.org/challenging-stereotypes-afghanistans-male-advocates-for-gender-equality>.

7 Human Rights Watch, *Humanity Denied* (n 2) 10.

8 Ibid 2.

9 Ibid 12–13.

10 Heather Barr, 'For Afghan Women, the Frightening Return of "Vice and Virtue"', *Human Rights Watch* (Web Page, 29 September 2021) <www.hrw.org/news/2021/09/29/afghan-women-frightening-return-vice-and-virtue>.

11 Human Rights Watch, *Humanity Denied* (n 2) 12–13.

12 Ibid 11.

13 Widney A Brown and Laura Grenfell, 'The International Crime of Gender-Based Persecution and the Taliban' (2003) 4 *Melbourne Journal of International Law* 347, 350.

14 Ibid.

15 Ibid.

16 Ibid.

Both female medical workers and patients suffered from severe restrictions, which affected the quality of healthcare available. For example, female doctors were required to wear religious dress and were often attacked while travelling to work.¹⁷ Female patients were questioned for travelling to hospitals and had difficulty doing so if no male relative was available to go with them.¹⁸ The quality of healthcare for women was poor due to the separation of male and female doctors and wards.¹⁹

Overall, the strict religious edicts by the Taliban had significant effects on access to good healthcare for women.

6.1.3 Access to Education

Not long after the Taliban first came to power, Mullah Omar ordered that women's and girls' education be 'temporarily suspended'.²⁰ This included, for example, the suspension of university education for the 4,000 female students at Kabul University.²¹

In response to the Taliban closing all schools to women and girls, many humanitarian organisations supported the creation of schools for girls in private homes.²² However, in 1998, the Taliban ordered the closure of all these schools and issued new rules to limit education to girls aged eight years and younger.²³

Religious studies of the Quran was the only subject to be taught in schools that remained open to female students.²⁴

6.2 WOMEN'S TREATMENT SINCE THE TALIBAN'S RETURN

The Taliban's return to power in 2021 signified a return to widespread and systematic oppression of women and girls reminiscent of the Taliban's first reign of terror summarised above. Since the takeover, the Taliban has issued and enforced many edicts, most of which specifically target women.²⁵ These edicts are issued by the Ministry for the 'Promotion of Virtue and the Prevention of Vice' which, as mentioned above, existed during the first reign of terror, and announced through the Taliban radio station, the Voice of *Shariat*.²⁶

Through the edicts, the Taliban has banned women from the public sphere, preventing and limiting their rights to education and work, freedom of expression and assembly, freedom of movement and public participation (such as accessing parks and public baths, restaurants), as well as access to health care and justice. The restrictions placed on women in Afghanistan by the Taliban are among the strictest in the world. For example, Afghanistan under the Taliban is the only country to formally ban education for women beyond the sixth grade.²⁷

6.2.1 Public Life

The international community started receiving reports of exclusionary practices towards women shortly after the Taliban takeover. Many women's rights activists and high-profile women have been harassed and are now in hiding or have been arrested.²⁸ Women's sports are no longer permitted.²⁹ From November to December 2021, the Taliban banned women from entering parks, funfairs,

17 Human Rights Watch, *Humanity Denied* (n 2) 12–14.

18 Ibid 15–16.

19 Ibid 15–17.

20 Human Rights Watch, "You Have No Right to Complain" *Education, Social Restrictions, and Justice in Taliban-Held Afghanistan* (Report, 30 June 2020) <www.hrw.org/report/2020/06/30/you-have-no-right-complain/education-social-restrictions-and-justice-taliban-held> 12.

21 Ibid 12–13.

22 Ibid 13.

23 Brown and Grenfell (n 13).

24 Ibid 351.

25 'Taliban Edicts Against Afghan Women and Girls', *Feminist Majority Foundation* (Web Page, 2023) <<https://feminist.org/our-work/afghan-women-and-girls/taliban-edicts>>.

26 'V. International Law', *Human Rights Watch* (Web Page) <<https://www.hrw.org/reports/2001/afghan3/afgwrdr1001-04.htm>>.

27 Sahar Fetrat, 'One Year On, the Taliban Still Attacking Girls' Right to Education', *Human Rights Watch* (online, 24 March 2023) <<https://www.hrw.org/news/2023/03/24/one-year-taliban-still-attacking-girls-right-education>>.

28 Barr (n 10).

29 'Afghan Women Speak of the Heartache of Being Barred from the Sports they Love', *ABC News* (online, 12 January 2023) <www.abc.net.au/news/2023-01-12/afghan-women-athletes-barred-from-play-fear-taliban-threats/101847578>.

gyms, and public baths.³⁰ In May 2022, women were forced to fully cover their faces in both public and private spaces, and were banned from inter-city travel without a male escort known as *mahram*.³¹

With the 2021 Taliban takeover, some women have stated that they feel safer and relieved knowing that indiscriminate attacks have subsided.³² However, this has come at the expense of their liberty.³³ The UN has stated that 20 years of progress for women's rights was erased overnight with the Taliban's return.³⁴ The international community has called on the Taliban to ease the restrictions placed on women with respect to international law.³⁵

6.2.2 Access to Healthcare

Banning women's education, freedom of movement, and employment means that the quality and access to healthcare for women has decreased. *Médecins Sans Frontières* has reported that the restricted movement of women without a *mahram* has critically impacted women's access to primary and secondary healthcare - those who do not have a relative who can fulfil the role of a *mahram* cannot travel for healthcare.³⁶ Lack of access is also further complicated by the decreasing number of female doctors and nurses who specialise in women's

medicine such as midwifery and gynaecology.³⁷ Because of this, hospitals have been forced to hire inexperienced doctors and medical students.³⁸ This situation is similar to the state of healthcare for women during the 1990s and does not demonstrate a change in the attitude and behaviour of the Taliban towards women and girls.

6.2.3 Access to Education

Afghanistan is currently the only country in the world that has formally banned women and girls from receiving an education (beyond the sixth grade).³⁹

In September 2021, the Taliban enforced classroom segregation based on gender.⁴⁰ Women were still able to attend university, but had to enter through separate entrances and were limited to learning in female-only classrooms.⁴¹ Women have since been banned from attending university.⁴² In March 2022, girls above year six were officially barred from attending school.⁴³ Overnight, millions of girls became child labourers against their will.⁴⁴ A year later, the Taliban promised to re-open schools following the international backlash that followed the ban but has (as of November 2023) maintained the ban.⁴⁵ Afghanistan's new academic year in 2023 saw the re-opening of schools for boys while hundreds and thousands of teenage girls were still barred from attending their secondary school

30 'Taliban Timeline: The Crackdown on Afghan Women's Education and Rights', VOA News (online, 21 December 2022) <www.voanews.com/a/taliban-timeline-the-crackdown-on-afghan-women-s-education-and-rights/6885387.html>.

31 Ibid.

32 Alison Davidian, 'Press Briefing: The Situation of Women and Girls in Afghanistan', UN Women (Web Page, 25 July 2022) <www.unwomen.org/en/news-stories/speech/2022/07/press-briefing-the-situation-of-women-and-girls-in-afghanistan>.

33 Ibid.

34 'Afghanistan: UN Experts Say 20 Years of Progress for Women and Girls; Rights Erased Since Taliban Takeover', Office of the High Commissioner for Human Rights ('OHCHR') (Web Page, 8 March 2023) <www.ohchr.org/en/press-releases/2023/03/afghanistan-un-experts-say-20-years-progress-women-and-girls-rights-erased>.

35 'Afghanistan: UN Committees Urge Taliban to Honour Their Promises to Protect Women and Girls', Office of the High Commissioner for Human Rights ('OHCHR') (Web Page, 30 August 2021) <www.ohchr.org/en/press-releases/2021/08/afghanistan-un-committees-urge-taliban-honour-their-promises-protect-women>.

36 Médecins Sans Frontières, 'Persistent Barriers to Access Healthcare in Afghanistan: The Ripple Effects of a Protracted Crisis and a Staggering Economic Situation' (Report, 2022) <<https://reliefweb.int/report/afghanistan/persistent-barriers-access-healthcare-afghanistan-ripple-effects-protracted-crisis-and-staggering-economic-situation#:~:text=It%20highlights%20some%20of%20the,existing%20restrictions%20placed%20on%20women>> 3-4.

37 Ibid 25.

38 Sana Atef, Mehssa Elham and Freshta Ghani, 'The Deadly Toll Inflicted by Taliban Restrictions on Female Midwives and Doctors', *Zan Times* (Web Page, 17 April 2023) <<https://zantimes.com/2023/04/17/the-deadly-toll-inflicted-by-taliban-restrictions-on-female-midwives-and-doctors/>>.

39 Sahar Fetrat, 'One Year On, the Taliban Still Attacking Girls' Right to Education', *Human Rights Watch* (online, 24 March 2023) <www.hrw.org/news/2023/03/24/one-year-taliban-still-attacking-girls-right-education>.

40 'Taliban Timeline: The Crackdown on Afghan Women's Education and Rights' (n 30).

41 Ibid.

42 'Taliban Bar Women from University Education in Afghanistan', AP News (online, 21 December 2022) <<https://apnews.com/article/afghanistan-taliban-3cea615c4d5d6d5d7da68b593a7546f2>>.

43 'Taliban Timeline: The Crackdown on Afghan Women's Education and Rights' (n 30).

44 Joshua McDonald, 'Photo Essay: From Students to Labourers: The Reality for Afghan Girls Living under the School Ban', *Save the Children* (Media Release, 7 December 2022) <www.savethechildren.org.au/media/media-releases/photo-essay-from-students-to-labourers>.

45 'Taliban Timeline: The Crackdown on Afghan Women's Education and Rights' (n 30).

classes.⁴⁶ Only Islamic schools (known as *madrasas*) are open for girls of all ages.⁴⁷

The way the Taliban approaches education is a clear repetition of their practices during the first reign of terror.

In August 2022, women protested against the suppression of their fundamental rights.⁴⁸ The Taliban attempted to stop this protest by beating women, firing in the air, and detaining them.⁴⁹ These demonstrations are now rare due to protesters fearing the treatment they may receive from the Taliban. Male students, teachers and lecturers have also been attacked and detained for supporting the right to education for women following the ban on women attending university.⁵⁰

6.2.4 Access to Employment

The ban on education for women and girls will have wide-ranging consequences on the future quality of employment.⁵¹ Young women are excluded from opportunities to acquire the skills necessary to participate in economic activities.⁵² This is especially dire as women were already in a vulnerable state regarding employment after the first Taliban takeover in the 1990s.

Female employment has dropped significantly since the Taliban's return to power.⁵³ Many women do not work and those who do tend to engage in activities such as home-based self-employment, farming, or

repairing of clothes.⁵⁴ Further, women have been advised by the Taliban to stay at home because Taliban fighters may mistreat them.⁵⁵ Female journalists, government workers and school teachers have either been dismissed or have lost their jobs.⁵⁶ Only a small number of female healthcare workers and teachers go to work,⁵⁷ but even they have largely not been paid because the healthcare and education sectors were almost entirely financed by foreign donors whose aid has since been cut off.⁵⁸

6.3 THE IMPORTANCE OF A GENDER-BASED LENS FOR ACCOUNTABILITY

Even prior to the Taliban's return to power, Afghanistan's justice system had a tendency to re-victimise women who had survived violence, punishing them for reporting crimes rather than providing remedies and reparations.⁵⁹ Under the Taliban, women have no access to a justice system.⁶⁰

The denial of access to education, healthcare, employment, freedom of movement and assembly, as well as gender-based discrimination constitute clear violations of international human rights law ('IHRL'). Afghanistan has ratified most of the core international human rights treaties,⁶¹ and the Taliban as a de facto authority has the responsibility

46 'Afghanistan School Year Starts Without Millions of Teenage Girls', *Al Jazeera* (online, 23 March 2023) <www.aljazeera.com/news/2023/3/23/afghanistan-school-year-starts-without-teenage-girls>.

47 Ibid.

48 Lynne O'Donnell, 'Taliban Mark a 'Black Day' for Afghanistan with More Violence Against Women', *Foreign Policy* (online, 15 August 2022) <<https://foreignpolicy.com/2022/08/15/afghanistan-taliban-women-one-year-anniversary-kabul-protest/>>.

49 Ibid.

50 'Teach Everyone Or No One': Afghan Men Join in Protests Against Taliban's Ban on Women's Education', *Radio Free Europe / Radio Liberty* (online, 29 December 2022) <www.rferl.org/a/afghanistan-taliban-ban-women-university-protests-men/32199112.html>.

51 International Labour Organization ('ILO'), 'Employment in Afghanistan in 2022: A Rapid Impact Assessment' (Briefing Note, 7 March 2023) <<https://www.ilo.org/media/7531/download>> 4–5.

52 Ibid.

53 Ibid.

54 Ibid.

55 Maggie Astor, Sharif Hassan and Norimitsu Onishi, 'A Taliban Spokesman Urges Women to Stay Home Because Fighters Haven't Been Trained to Respect Them', *New York Times* (online, 24 August 2021) <www.nytimes.com/2021/08/24/world/asia/taliban-women-afghanistan.html>.

56 Barr (n 10).

57 'Afghanistan: Taliban Deprive Women of Livelihoods, Identity', *Human Rights Watch* (Web Page, 18 January 2022) <www.hrw.org/news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity>.

58 Ibid.

59 Office of the High Commissioner for Human Rights ('OHCHR'), *In Search of Justice for Crimes of Violence Against Women and Girls*, (Report, 1 December 2020) <www.ohchr.org/sites/default/files/Documents/Countries/AF/UNAMA_OHCHR_Violence_Women.pdf> 19.

60 'Afghanistan Dispatch: Women's Ability to Access the Court System has been Completely Wrecked', *Jurist* (online, 13 March 2023) <www.jurist.org/news/2023/03/afghanistan-dispatch-womens-ability-to-access-the-court-system-has-been-completely-wrecked/>.

61 'Huquq and Human Rights', *Ministry of Justice* (Web Page) <<https://moj.gov.af/en/huquq-and-human-rights>>.

to uphold these obligations.⁶² The oppressive treatment of women and girls in Afghanistan also raises questions of international crimes, notably the crime against humanity known as gender-based persecution.⁶³ In fact, UN experts are confident that the Taliban's treatment of women 'could amount to' persecution.⁶⁴

A gender-based lens is for these reasons crucial for any actions, including UJ proceedings, which seek to hold the Taliban to account for atrocities that have taken place and continue to take place in Afghanistan. Yet, while UJ cases in both Germany and Switzerland were recently successful in holding perpetrators to account for sexual violence as a crime against humanity,⁶⁵ there has been an overall lack of UJ cases focused upon gender-based persecution. According to Trial International, this crime can often be deprioritised by prosecutors, require more specialised resources, and face significant evidentiary hurdles.⁶⁶ Further, under international law, the *Rome Statute of the International Criminal Court* ('Rome Statute') is (as of November 2023) the only treaty that recognises gender-based persecution (with the jurisdictional limitations that comes with this international agreement).⁶⁷

Recognising the need to strengthen gender-related elements of international crimes and responding to the gravity of the treatment of women in girls in countries like Afghanistan (as well as in neighbouring Iran), a global campaign to end gender apartheid has

been created by women from Afghanistan and Iran.⁶⁸ This campaign specifically calls for the definition of the crime of apartheid under international law (currently limited to apartheid on racial grounds)⁶⁹ to be expanded to include apartheid based on gender.⁷⁰ The advocacy takes place alongside the ongoing drafting at the UN of a convention on crimes against humanity.⁷¹ For a detailed legal analysis of why such an expansion of apartheid is necessary in addition to the existing crime of gender-based persecution, readers are referred to a recent legal brief by the Atlantic Council and Global Justice Center.⁷²

The above calls for reforms have generated important momentum for the need to prioritise ways to hold perpetrators to account for a variety of gender-based atrocities. The authors of this Handbook echo these calls and underline the importance for UJ proceedings to strengthen its gender-based lens.

62 'Comment by UN Human Rights Spokesperson Jeremy Laurence on Afghanistan', *Office of the High Commissioner for Human Rights* ('OHCHR') (Web Page, 29 March 2023) <www.ohchr.org/en/statements/2023/03/comment-un-human-rights-spokesperson-jeremy-laurence-afghanistan>.

63 *Rome Statute of International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7 ('Rome Statute') which defines 'crimes against humanity' to include 'persecution against any identifiable group', including on the grounds of gender - in connection with any act referred to in the article.

64 Gabrielle Tétrault-Farber, 'Taliban's Persecution of Women could be 'Crime Against Humanity' - UN Report', *Reuters* (online, 7 March 2023) <www.reuters.com/world/asia-pacific/talibans-persecution-women-could-be-crime-against-humanity-un-report-2023-03-06/>.

65 For an overview of these cases, see Anwar Raslan and Alieu Kosiah discussed in TRIAL International, 'Universal Jurisdiction Annual Review 2022' (Report, 4 April 2022) <https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf> 54.

66 Ibid 10.

67 Rome Statute (n 63) art 7.

68 See 'FAQS', *End Gender Apartheid* (Web Page) <<https://endgenderapartheid.today/>>; Patrick Wintour, 'Campaign Calls for Gender Apartheid to be Crime under International Law', *The Guardian* (online, 8 March 2023) <<https://www.theguardian.com/society/2023/mar/08/campaign-calls-for-gender-apartheid-to-be-under-international-law>>.

69 Rome Statute (n 63) art 7(1)(j); *International Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976).

70 'FAQS' (n 68); Wintour (n 68).

71 See, eg, 'UN Decision to Advance Crimes Against Humanity Treaty', *Human Rights Watch* (online, 18 November 2022) <www.hrw.org/news/2022/11/18/un-decision-advance-crimes-against-humanity-treaty>; Akila Radhakrishnan and Danielle Hites, 'Expanding Justice for Gender-Based Crimes with a Treaty on Crimes Against Humanity', *Just Security* (online, 29 September 2021) <www.justsecurity.org/78395/expanding-justice-for-gender-based-crimes-with-a-treaty-on-crimes-against-humanity/>.

72 Atlantic Council and Global Justice Center, 'Amending the Crime Against Humanity of Apartheid to Recognize and Encompass Gender Apartheid' (Legal Brief, 2023) <<https://endgenderapartheid.today/download/brief/Gender%20Apartheid%20Brief.pdf>>.

PART 2
AFGHANISTAN AND INTERNATIONAL CRIMES

CHAPTER
VII

WAR CRIMES
IN PANJSHIR



Part 2 of the Handbook concludes with an overview of allegations of international crimes in a particular region of Afghanistan. The Panjshir province is home to several resistance groups and has for this reason been subject to violent campaigns by the Taliban seeking to suppress opposition groups at all costs, including by attacking civilians.

In fact, Panjshir was the last province in Afghanistan to resist Taliban control, and was announced as captured by the Taliban three weeks after the Taliban's takeover of Kabul in August 2021.¹ Resistance groups had been holding out in the Panjshir province and the neighbouring Andarab district.

The Taliban has continued targeting both resistance groups and civilians in these areas.² Accounts of extrajudicial executions, arbitrary arrests and detention, as well as torture of civilians, have been reported from both the Panjshir province and neighbouring provinces, such as Baghlan and Takhar.

This Chapter provides an overview of Panjshir, including the political history of the province and its significant role as a home to various resistance groups opposing the Taliban. The Chapter then gives examples of reports of atrocities in Panjshir and surrounding areas, and the impacts that these acts have had on civilians. These incidents, like most of those outlined in Part 2 of the Handbook, have gone without accountability and will hopefully form the subject of investigations and prosecutions through the principle of UJ.

¹ James Oliphant and Stephen Coates, 'Taliban Claim Control of Panjshir, Opposition says Resistance will Continue' *Reuters* (online, 7 September 2021) <www.reuters.com/world/india/taliban-claim-control-panjshir-evacuation-flights-await-clearance-2021-09-06/>.

² Arwa Ibrahim and Usaid Siddiqui, 'Taliban Claims Victory in Panjshir as it Calls to End War', *Al Jazeera* (online, 6 September 2021) <www.aljazeera.com/news/2021/9/6/taliban-claims-complete-capture-of-panjshir-valley-live#:~:text=The%20Taliban%20has%20taken%20complete,weeks%20after%20taking%20over%20Kabul.>>.

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7.1 BACKGROUND ON PANJSHIR

7.1.1 Overview

Afghanistan has been affected by multiple and overlapping non-international armed conflicts. The conflict in Panjshir between the Taliban and the de facto authorities in the area, such as the National Resistance Front of Afghanistan ('NRF') amounts to a so-called 'non-international armed conflict' ('NIAC') between September 2021 to the present.³ In simple terms, this means that rules of international humanitarian law ('IHL') apply (specifically, those applicable to NIACs).⁴ The significance of this is that the treatment of civilians in Panjshir during this time raise concerns of both crimes against humanity which can take place both during armed conflicts and in peacetime (the elements of which are outlined in Part 1 of the Handbook) and war crimes (which only take place during armed conflict, for example, as severe breaches of IHL).

This Chapter does not provide a legal analysis of whether or not particular incidents amount to crimes against humanity and/or war crimes but outlines examples of reports which raise concerns of such crimes. Before doing so, the Chapter provides a brief background of the province in terms of its location and history of resistance. While the Taliban has undoubtedly commenced a second reign of terror in Afghanistan, it is important to acknowledge the existence of resistance. It is also important to highlight the brutal way in which the Taliban has sought to silence any form of opposition to their rule and ideology. What has taken place in Panjshir is an example of this which once again has gone without accountability.

7.1.2 The Province's Location

Panjshir is a province located in the northeastern part of Afghanistan, two hours north of the capital of Kabul.⁵ Panjshir is divided into seven districts, containing 512 villages.⁶ The Panjshir Valley, located within the Panjshir province, stretches across 120km and is protected by high mountain peaks rising 3,000 metres above the valley floor.⁷ Due to its geographical location, Panjshir is isolated and difficult to access, with only one road leading into the province.

*Map of the Panjshir Valley*⁸

Located in north-east Afghanistan, the population of Panjshir is approximately 170,000 people and is composed of Tajik, Hazara, Pashai, Nuristani, Ghilzai Pashtun and other minority groups.



3 Amnesty International, "Your Sons are in the Mountains": The Collective Punishment of Civilians in Panjshir by the Taliban (Report, 2023) <www.amnesty.org/en/documents/asa11/6816/2023/en/> 9.

4 Notably, Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8 ('Rome Statute'); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 3 ('GC I'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 3 ('GC II'); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 3 ('GC III'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 3 ('GC IV'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ('AP II'); International Committee of the Red Cross ('ICRC'), Customary International Humanitarian Law Study.

5 'Explainer: Panjshir - Afghanistan's Valley of Resistance', Al Jazeera (online, 23 August 2021) <www.aljazeera.com/news/2021/8/23/explainer-afghanistans-panjshir-valley>.

6 'About: Panjshir Province', DBpedia (Web Page) <https://dbpedia.org/page/Panjshir_Province>.

7 Paul Kerley and Lucia Blasco, 'Afghanistan: The 'Undeclared' Panjshir Valley - An Hour from Kabul', BBC News (online, 26 August 2021) <www.bbc.com/news/world-asia-58329527>.

8 'New Reports of Fighting in Afghanistan's Panjshir Trigger Fresh Claims of Taliban War Crimes', Radio Free Europe / Radio Liberty (online, 13 May 2022) <www.rferl.org/a/afghanistan-panjshir-taliban-atrocities/31848654.html>; 'Panjshir', European Union Agency for Asylum (Web Page, December 2020) <<https://euaa.europa.eu/country-guidance-afghanistan-2020/panjshir#:~:text=Panjshir%20is%20located%20in%20central,main%20ethnic%20group%20is%20Tajik.>>.

7.1.3 Armed Resistance Against Taliban

Panjshir has a long history of resistance against the Taliban.⁹ The area proved resistant to the Taliban forces throughout the civil war in the second half of the 1990s and early 2000s and is known for holding out against Taliban attacks in pursuit of the restoration of Afghanistan's Republic.¹⁰

Ahmad Shah Massoud was a politician and military commander raised in the Panjshir Valley and influential in leading Afghanistan's Mujahideen forces against the Soviet Invasion during the 1980s and fighting against the Taliban during the civil war in the 1990s.¹¹ Following the Taliban takeover in 1996, Massoud created the Northern Alliance, a movement that fought a defensive war against the Taliban advance between 1996 and 2001.¹²

Following the Taliban takeover of Kabul and various parts of Afghanistan in 2021, Massoud's son, Ahmad Massoud, succeeded in his position and continued using similar tactics as his father against the Taliban.¹³ Ahmad Massoud is the founder and leader of the de facto authority NRF mentioned above.¹⁴ The NRF continues the anti-Taliban resistance, previously furthered by the Northern Alliance. The NRF is primarily made up of Tajik fighters and former members of the Afghan National Defense and Security Forces ('ANDSF').¹⁵ Until August 2021, the NRF exercised control over the Panjshir Valley which was the last region to be controlled by the Taliban. As of December 2022, the NRF no longer maintains control over any territory, however, they continue to carry

out guerrilla attacks aligned with their intention to challenge the Taliban's rule of Afghanistan.¹⁶

7.2 ATROCITIES IN PANJSHIR

Following the brutality of the Taliban offensive, many allegations of international crimes on the part of the Taliban have been made concerning acts in these areas. Since exerting control over Panjshir in September 2021, the Taliban has been accused of being responsible for numerous atrocities, including reports of arrest, detention, torture and killing of civilians.¹⁷ This includes recent allegations of such acts in the northern parts of the province in connection with the ongoing conflict with NRF fighters. Many of these reports of violations from the northern districts of Panjshir have been collected through video and audio recordings.¹⁸

¹⁶ Jacob Zenn, 'Brief: National Resistance Front (NRF) Fails to Foment Unrest Against the Taliban', *The Jamestown Foundation* (online, 31 March 2023) <<https://jamestown.org/program/brief-national-resistance-front-nrf-fails-to-foment-unrest-against-the-taliban/>>.

¹⁷ ICRC (n 4) rr 89 and 156; Rome Statute (n 4) art 8(2)(c)(i); GC I (n 4) art 3; GC II (n 4) art 3; GC III (n 4) art 3; GC IV (n 4) art 3; AP II (n 4) art 4(2)(a).

¹⁸ Ahmad Mukhtar, 'Afghanistan War Rekindles, Claiming Lives and Sending Civilians Fleeing as Taliban Battles Panjshir Valley Resistance' *CBS News* (online, 16 May 2022) <www.cbsnews.com/news/afghanistan-war-taliban-resistance-panjshir-massoud-fighting-deaths-displaced/>.

⁹ Khalid Mafton, 'Do the Taliban Face Potent Armed Resistance in Afghanistan?' *VOA News: South and Central Asia* (online, 14 August 2022) <www.voanews.com/a/do-the-taliban-face-potent-armed-resistance-in-afghanistan-/6700348.html>.

¹⁰ Abubakar Siddique, 'Taliban Faces Rising Armed Resistance From Former Government Factions', *Radio Free Europe / Radio Liberty* (online, 27 April 2022) <www.rferl.org/a/taliban-resistance-former-government-factions/31823881.html>.

¹¹ Sandy Gull, *Afghan Napoleon: The Life of Ahmad Shah Massoud* (Haus Publishing, 2021) 261.

¹² Thomas Withington, 'The Early Anti-Taliban Team' (2001) 57(6) *Bulletin of the Atomic Scientists* 1, 13–15.

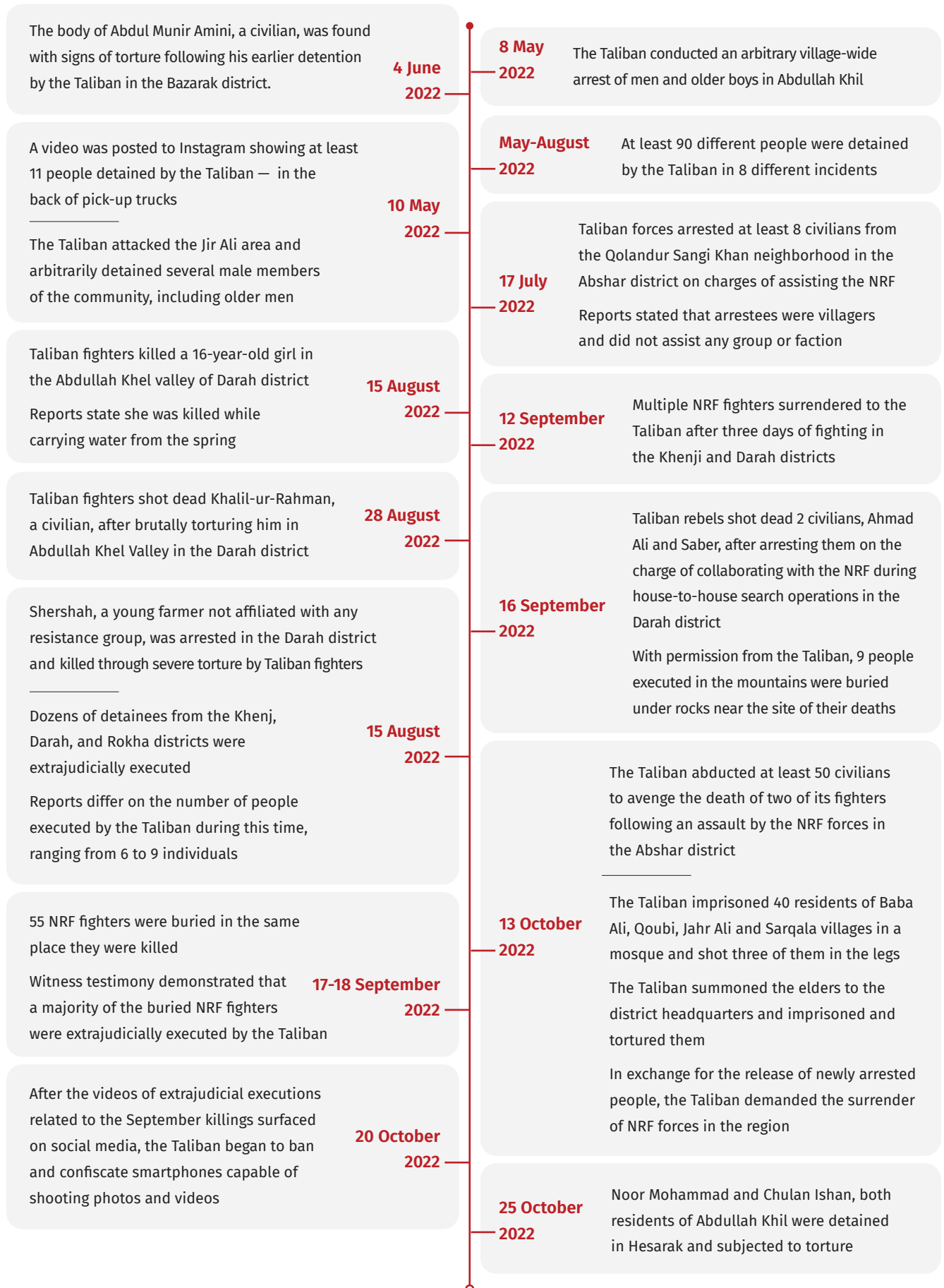
¹³ Luke Coffey, 'US has an Opportunity to Support the National Resistance Front of Afghanistan', *Hudson* (online, 21 September 2022) <www.hudson.org/node/45119>.

¹⁴ Amnesty International, 'Your Sons are in the Mountains' (n 3) 5.

¹⁵ Peter Mills, 'Taliban Struggles to Contain Afghan National Resistance Front' (2022) *Institute for the Study of War* 1.

Examples of Attacks Against Civilians

KEY EVENTS



7.2.1 Extrajudicial Executions

Amnesty International has reported a series of extrajudicial executions in the Khenj, Darah, and Rokha districts of the Panjshir province from 12 to 14 September 2022.¹⁹ The report estimates that dozens of individuals from the Darah and Khenj districts were executed, and another dozen individuals from the Rokha district were killed after being detained by the Taliban.²⁰

Accounts of the executions and supporting evidence were compiled through witness testimonies and digital open-source information, such as video evidence and satellite imagery.²¹ The exact numbers remain unknown, with a UN report listing a total of 48 individuals who were unlawfully killed within the area.²² Despite speculation surrounding the exact number of executions committed across the districts within Panjshir, it has been reported that civilians were detained, tortured and ultimately deprived of their lives.²³

7.2.2 Arbitrary Arrests and Detention

Multiple sources state that the Taliban has arbitrarily arrested and detained civilians in an attempt to intimidate local populations within the Panjshir area.²⁴ While the exact number of civilians who have been detained by the Taliban remains unknown, many local people accused by the Taliban of maintaining affiliations with the NRF have been arbitrarily arrested and detained.²⁵ Arrests also extend to the family members of individuals suspected of having ties to the NRF.²⁶

Another documented incident is the Taliban's treatment of a 40-year-old farmer, Munir Ahmad. Ahmad was subject to arrest whilst living in Bazarak district and tortured to death by the Taliban on 2 June 2022.²⁷ A radio channel also reported that the Taliban detained more than 100 civilians in the Paryan district in one week.²⁸

During May 2022, many boys and men (all civilians) of Abdullah Khil—an area containing many small villages within the Darah district—fell victim to an arbitrary village-wide arrest conducted by the Taliban.²⁹ House-to-house searches were made as a consequence of the ongoing tensions between the Taliban and NRF, and approximately 200 people were unlawfully arrested according to Amnesty International.³⁰ Unfortunately, this is just one example of mass arrests that have occurred within Panjshir.

7.2.3 Torture and Ill-treatment

Amnesty International has reported a number of instances where civilians arrested by the Taliban were tortured to death.³¹ This includes two farmers from the Darah district who were in Rokha district in search of their cattle. Both men were taken by the Taliban and brutally beaten shortly before their deaths. Another man was reported by media as arrested, detained and subsequently tortured to death in the Bazarak district on accusations of being a member of the NRF.³² The Taliban told local news that the man died of a heart attack.³³ Amnesty reports that evidence of the wrongful deaths of all three men was shared on social media after the bodies were recovered.³⁴

In addition to the deaths from torture noted above, other instances of torture and ill-treatment which did not result in death have also been noted.³⁵ According to Human Rights Watch, this includes the unlawful detention and torture of residents in the area that the Taliban perceived as supporting the NRF.³⁶

¹⁹ Amnesty International, "Your Sons are in the Mountains" (n 3) 11.

²⁰ Ibid 13.

²¹ Ibid 11.

²² UN, *The Situation in Afghanistan and its Implications for International Peace and Security*, UN GAOR, 77th sess, UN Doc A/77/636-S/2022/916 (Report, 7 December 2022) 7.

²³ 'Taliban Detaining and Torturing Civilians in Afghanistan, says Human Rights Watch', *Euronews*, (online, 10 June 2022) <www.euronews.com/2022/06/10/taliban-detaining-and-torturing-civilians-in-afghanistan-says-human-rights-watch>.

²⁴ 'Afghanistan: Taliban Torture Civilians in Panjshir: Collective Punishment Over Armed Group's Actions Is Unlawful', *Human Rights Watch* (Web Page, 10 June 2022) <www.hrw.org/news/2022/06/10/afghanistan-taliban-torture-civilians-panjshir>.

²⁵ Amnesty International, "Your Sons are in the Mountains" (n 3) 24.

²⁶ 'Taliban Accused of Forced Evictions as Fighting Intensifies in Northern Afghanistan', *Radio Free Europe / Radio Liberty* (online, 7 June 2022) <www.rferl.org/a/taliban-forced-evictions-northern-afghanistan/31887719.html>.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Amnesty International, "Your Sons are in the Mountains" (n 3) 25.

³⁰ Ibid.

³¹ See generally *ibid*.

³² 'Some Residents of Bazarak: A Civilian Died as a Result of Torture by the Taliban', *Radio Free Europe / Radio Liberty* (online, 5 June 2022) <<https://da.azadiradio.com/a/31884143.html>>.

³³ Ibid.

³⁴ Amnesty International, "Your Sons are in the Mountains" (n 3) 21.

³⁵ Ibid 10; 'Afghanistan: Taliban Torture Civilians in Panjshir: Collective Punishment Over Armed Group's Actions Is Unlawful' (n 24).

³⁶ 'Afghanistan: Taliban Torture Civilians in Panjshir: Collective Punishment Over Armed Group's Actions Is Unlawful' (n 24).

7.2.4 Forced Displacement

The ongoing conflict in Panjshir is isolated and localised, and has forced thousands of people to flee their homes.³⁷ Many individuals flee from their homes due to orders from the Taliban; others flee due to threats and violence.³⁸ Eyewitness accounts confirm that the harm indiscriminately directed at civilians has forced mass displacement across the region.³⁹

An account from a local resident of Panjshir's Dara district stated that 'people were beaten and killed by the Taliban', and 'people are fleeing with their families out of fear'.⁴⁰ According to local sources, four villages in Shatal district have been abandoned as a result of forced displacement.⁴¹ Additionally, media reported that residents from the Khwaja Bahauddin district in the Takhar province stated that more than 400 families have been displaced as a result of Taliban orders (an allegation denied by the Taliban).⁴² Many civilians, including women and children, were according to villagers ordered to leave their homes without being granted the right to claim their belongings.⁴³

With limited telecommunication services available, these individuals are forced to flee without allowing their voices to be heard or being able to adequately contact loved ones. Displacement continues to affect millions of people in Afghanistan, many of which have been run out of Panjshir due to security incidents.

37 Amnesty International, "Your Sons are in the Mountains" (n 3) 32.

38 Ibid.

39 'Taliban Claim Control of Panjshir, Opposition Says Resistance will Continue', *Reuters* (online, 7 September 2021) <www.reuters.com/world/india/taliban-claim-control-panjshir-evacuation-flights-await-clearance-2021-09-06/>.

40 'Taliban Accused of Forced Evictions as Fighting Intensifies in Northern Afghanistan' (n 26).

41 Saboor Bayat, 'Forced Migrations: Four Villages Deserted in Shutol Panjshir', *BNN News* (online, 12 July 2023) <<https://bnn.network/conflict-defence/forced-migrations-four-villages-deserted-in-shutol-panjshir/>>.

42 'Taliban Gives 3-Day Eviction Warning to 400 Families in Takhar, Say Local Sources', *Afghanistan International* (online, 10 June 2022) <www.afintl.com/en/202210061400>.

43 Ibid.

7.2.5 Searches and Seizure of Civilian Property

In connection to the arbitrary arrests discussed in the previous section, the Taliban has been reported as having conducted numerous house-to-house search operations in many parts of Panjshir, including Annaba and Rakheh districts.⁴⁴ These searches infringed the privacy of civilian residents, many of whom had no connection to any resistance groups. According to newspaper *Kabul Now*, sources state that private properties in the Shotul and Anaba districts continue to be seized, with approximately 500 acres of land being seized across the two districts.⁴⁵

In addition, the Taliban has utilised school facilities for both interrogation processes and the detention of people from villages in Darah.⁴⁶ The Taliban has also seized many homes and turned them into military posts and barracks.⁴⁷ According to Amnesty International, a media site reported that as of March 2023, the Taliban may have bases set up in as many as 28 schools across the Panjshir Province.⁴⁸ The Taliban has also imposed restrictions affecting livestock and irrigation management in methods such as denying shepherds access to their traditional grazing lands.⁴⁹

44 Hasht-E Subh, 'House-to-House Search Operations in Panjshir, Taliban Torture and Arrest Innocent Civilians' *8AM Media* (online, 12 November 2022) <<https://8am.media/eng/house-to-house-search-operations-in-panjshir-taliban-torture-and-arrest-innocent-civilians/>>.

45 'Taliban Continue Seizing Private Properties in Panjshir Province', *Kabul Now* (online, 25 January 2023) <<https://kabulnow.com/2023/01/taliban-continues-private-property-seizure-in-panjshir-province/>>.

46 Amnesty International, "Your Sons are in the Mountains" (n 3) 5.

47 'Taliban Accused of Forced Evictions as Fighting Intensifies in Northern Afghanistan' (n 26).

48 Amnesty International, "Your Sons are in the Mountains" (n 3) 30.

49 Ibid 33–4.

7.3 RESISTANCE AND ACCOUNTABILITY

As the abovementioned incidents underline, ‘thousands of people [in Panjshir] are being swept up in the Taliban’s continued oppression’.⁵⁰ The armed conflict and ongoing clashes between the Taliban and opposition groups such as the NRF have dramatically impacted the lives and well-being of civilians in the area. Further, the reports of numerous civilian casualties as a result of acts such as unlawful arrests and detention by the Taliban have had significant further impacts upon the civilian population, including but not limited to forced displacement.

The way in which civilians have been targeted in Panjshir, often in the context of searches for what the Taliban perceives to be members of opposition forces have raised concerns on the part of human rights organisations of collective punishment of the civilian population in the area, a war crime under international law.⁵¹ While a detailed legal analysis of such claims falls outside the scope of this Chapter, the numerous reports of civilian targets in connection with searches for members of resistance groups are concerning and ought to drive actions for accountability, including through the principle of UJ. Further, the brutal and disproportionate response of the Taliban to resistance is problematic from a broader perspective and ought to worry the international community.

The resistance both literally and symbolically associated with the mountains of Afghanistan, including the mountainous Panjshir province, ends this Part of the Handbook and ties it together with the beginning of the Handbook whose cover portrays these very mountains. While those who resist or those associated with resistance have been met with violence, there remain voices of opposition both inside and outside of Afghanistan. By listening to these voices and ensuring that victim-survivors are a core part of investigations, case-building and court processes, UJ has the potential to amplify and hopefully realise their calls for accountability.

⁵⁰ ‘Afghanistan: Taliban’s Cruel Attacks in Panjshir Province Amount to War Crime of Collective Punishment’, *Amnesty International* (Web Page, 8 June 2023) <www.amnesty.org.au/afghanistan-talibans-cruel-attacks-in-panjshir-province-amount-to-war-crime-of-collective-punishment/>.

⁵¹ For examinations of the crime of collective punishment in this context, see Amnesty International, “*Your Sons are in the Mountains*” (n 3) and ‘Afghanistan: Taliban Torture Civilians in Panjshir: Collective Punishment Over Armed Group’s Actions Is Unlawful’ (n 24).



Part 3

SELECTED UNIVERSAL JURISDICTION FRAMEWORKS

PART 3 OVERVIEW

PART 3 STRUCTURE

This Part of the Handbook turns to consider the structure and application of UJ in the following jurisdictions:

- i. Australia;
- ii. New Zealand;
- iii. The Netherlands;
- iv. Norway;
- v. Germany; and
- vi. The United Kingdom (divided into England and Wales; Northern Ireland and Scotland).

Many states across the world have enacted national laws to allow for UJ prosecutions for one or more of the international crimes of genocide, crimes against humanity and war crimes. The selected jurisdictions covered in this Part of the Handbook are examples that illustrate both the challenges and potentials of UJ with reference to jurisdiction-specific legislation, arrangements, and case studies. The jurisdictions selected **are therefore by no means the only jurisdictions** where accountability for atrocities in Afghanistan can be sought.

Further, jurisdictions where UJ has not been prominent may also come to recognise the principle as applicable. For example, as of June 2023, the Constitutional Court of Indonesia is considering a petition to allow for cases to be brought under the principle of UJ.¹

Readers may be interested in the UJ framework in only one or a few of the selected jurisdictions. The format and structure have been made largely the same for each of the annexes to allow for easy comparison between one or more jurisdictions.

They each provide a basic overview of the status of UJ in the state; the relevant legislation that sets out the UJ framework, specifically which international crimes that are covered; as well as the size of the diaspora from Afghanistan (if numbers are available). Each annex also includes any challenges to UJ which are specific to that state. These challenges may be found in more jurisdictions as well but are worth underlining in particular jurisdiction(s), for example as it has presented challenges in past cases brought under the principle of UJ. Each annex contains a case study which gives an example of a prominent UJ case in that jurisdiction, including the basic facts of the case, the legislation applied, challenges faced and the outcome. The annexes all end with a summary of useful resources available in that jurisdiction that readers may wish to consult. These are by no means an exhaustive list and merely examples. Readers are encouraged to seek out further information from jurisdiction-specific organisations and lawyers directly.

Before turning to the specific jurisdictions selected, this Overview of Part 3 will make a few general observations of the importance of individual case studies of UJ 'in action' across different jurisdictions more broadly, mentioning some of the high-profile cases which some of the annexes will go on to examine in more detail, as well as certain cases that have been brought in jurisdictions not covered by the Handbook.

¹ Chris Gunness, 'Indonesia's Constitutional Court on Verge of Making History', *The Jakarta Post* (online, 23 February 2023) <<https://www.thejakartapost.com/opinion/2023/02/23/indonesias-constitutional-court-on-verge-of-making-history.html>>.

WHY SPECIFICITY IS IMPORTANT

Examples of specific UJ frameworks and cases that have been brought against alleged perpetrators in those jurisdictions allow the Handbook to illustrate both the power and drawbacks of the principle of UJ. It demonstrates that it is not solely an academic exercise but may have real and tangible outcomes. It may also present advantages to accountability pursued through other platforms, such as the International Criminal Court ('ICC') (as discussed in Part 1 Chapter 7 of the Handbook).

As the case against the Iranian official in Sweden demonstrates, UJ allows for accountability to be sought for atrocities that were committed a long time ago. The crimes for which Hamid Nouri was convicted took place in 1988. This allows for the consideration of crimes which took place much earlier than the coming into force of the *Rome Statute of the International Criminal Court* ('Rome Statute') (on 1 July 2002).

Studying the structure and operation of UJ in practice with respect to specific jurisdictions also allows for a more detailed understanding of some of the specific challenges that may be present in one (or a few) jurisdictions but not in others. While many challenges for UJ will be similar, each jurisdiction is unique. The politics of the day in a particular jurisdiction is also something that will play a role, as was noted in Part 1 Chapter 1 of the Handbook.

A NOTE ON IMMUNITIES

The question of immunities is an issue which has tended to arise in many jurisdictions in the context of UJ and might be considered a common challenge to bringing a case. A detailed summary of the challenge presented by the issue of immunities was outlined in Part 1 Chapter 3 of the Handbook and will not be repeated here.

Rather than mentioning the issue of immunities as a potential challenge in each of the following jurisdiction-specific annexes, it suffices to note the following. While the Handbook recognises the potential and indeed state practice that immunities are often raised in the context of UJ prosecutions, it is less likely to pose an issue in the context of accountability for the three international crimes that the Handbook focuses on with respect to alleged atrocities on the part of members of the Taliban. International crimes of this nature can be described as gross violations of human rights from which no immunity is afforded, even to a head of state. This is in line with the general principle enshrined in the Rome Statute that no official capacity 'shall in no case exempt a person from criminal responsibility'.² Further, as underlined at the start of this Handbook, the Taliban is not the legitimate Government of Afghanistan.

² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 27 ('Rome Statute').

ANNEX I

UNIVERSAL JURISDICTION IN AUSTRALIA



Australia recognises UJ for the international crimes covered in this Handbook. Australia is also home to one of the world's largest diaspora communities from Afghanistan. Since the Taliban's violent return to power in 2021, the Australian Government has increased the number of visas to applicants from Afghanistan between 2021 to 2026.¹ Yet, Australia has so far a limited record of holding perpetrators to account for the international crimes covered in this Handbook through the principle of UJ. It is hoped that the large number of diaspora can encourage legal action for atrocities committed in Afghanistan.

¹ 'Afghanistan Update', *Department of Home Affairs* (Web Page, 22 February 2023) 1 <<https://www.home-affairs.gov.au/help-and-support/afghanistan-update>>.

QUICK FACTS

- Common law
- Dualist system
- Constitutional monarchy with parliamentary democracy
- Large diaspora community

WHAT INTERNATIONAL CRIMES ARE COVERED BY UJ?

- Genocide;
- Crimes against humanity;
- War crimes; and
- Torture.

WHAT IS THE RELEVANT LEGISLATION?

The *International Criminal Court Act 2002* (Cth) amended the *Criminal Code* to incorporate international crimes recognised by the International Criminal Court ('ICC') into Australian law.²

The international crimes explored in this Handbook can be found in division 268 of the *Criminal Code Act 1995* (Cth) ('Criminal Code'), with the exception of the crime of torture which is covered in division 274 of the Act.³

It is important to underline that in Australia, the temporal limitation of jurisdiction of the ICC (meaning that the ICC can only consider crimes committed after the entry into force of the *Rome Statute of the International Criminal Court* ('Rome Statute')) has been applied to UJ prosecutions under division 268, with the result that Australian courts only have jurisdiction over the crimes of genocide, crimes against humanity and war crimes committed after 1 July 2002.

HAVE UJ CASES BEEN BROUGHT?

There are two high-profile attempts to bring UJ prosecutions in Australia. The first involved the then President of Sri Lanka, Mahinda Rajapaksa.⁴ The second, covered in more detail in the case

study below, involved the then State Counsellor of Myanmar (an equivalent role to Prime Minister), Aung San Suu Kyi.⁵

In both instances, the attempted prosecutions were initiated by private persons (so-called private prosecutions) in the Magistrates' Court for alleged atrocities that had been committed in Sri Lanka and Myanmar respectively by actors with no links to Australia.

CHALLENGES FOR UJ CASES IN AUSTRALIA

Australia allows for both public and private prosecutions, meaning criminal complaints can be made by both the state and private individuals. Neither of the private prosecutions mentioned above went beyond the initial stages as the Attorney-General ('AG') refused to provide consent for the prosecutions to proceed. In Australia, the AG is responsible for legal affairs and national security, as well as being the legal adviser to the government.⁶ Prosecution of international crimes requires the AG's written consent and the AG's decision to consent or not is not reviewable by a court.⁷ While other circumstances where the complaint does not involve a current head of state may present more political incentive for cases to receive the AG's consent or be pursued by the AG directly, the requirement for the AG's consent still presents a specific challenge to UJ cases in Australia.⁸ However, even though consent is a requirement, it is worth noting that the relevant divisions do expressly state that a person may still be arrested, as well as charged and remanded in custody or released on bail before consent is provided.⁹

2 'International Criminal Court (Consequential Amendments) Bill 2002', Parliament of Australia (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r1607>.

3 Criminal Code Act 1995 (Cth): genocide (div 268.3-268.7); crimes against humanity (div 268.8-268.23); war crimes (div 268.24-268.101); torture (div 274.1-274.7) ('CCA').

4 Michael Gordon, 'Sri Lankan President Accused in Australian Court', *The Sydney Morning Herald* (online, 25 October 2011) <<https://www.smh.com.au/world/sri-lankan-president-accused-in-australian-court-20111024-1mgea.html>>.

5 Ben Doherty, 'Aung San Suu Kyi Cannot be Prosecuted in Australia Christian Porter says', *The Guardian* (online, 17 March 2018) <<https://www.theguardian.com/world/2018/mar/17/aung-san-suu-kyi-cannot-be-prosecuted-in-australia-christian-porter-says>>.

6 'Attorney-General's Department', Australian Government (Web Page) <<https://www.directory.gov.au/portfolios/attorney-generals/attorney-generals-department>>.

7 CCA (n 3) div 268.122.

8 'No War Crimes Case Against Sri Lanka Leader', *ABC News* (online, 25 October 2011) <<https://www.abc.net.au/news/2011-10-25/mcclelland-sri-lanka-decision/3600104>>.

9 CCA (n 3) div 268.121(3); div 274.3(2).

Immunity is another hurdle that has been raised in UJ cases in Australia. For commentary on immunities, please refer back to the introduction to Part 3 of the Handbook.

CASE EXAMPLE: THE STATE COUNSELLOR OF MYANMAR

In connection with her visit to Australia in March 2018, the then leader of Myanmar, Aung San Suu Kyi, was the subject of a private prosecution in the Melbourne Magistrates' Court over crimes against humanity committed against the Rohingya people in Myanmar. The Rohingya ethnic group is a religious minority in Myanmar and there have been many reports of systematic discrimination and violence against members of the group, including extrajudicial killings, forced displacement and sexual violence.¹⁰

As mentioned above, it is up to the AG to consent or not for the prosecution of international crimes. When the AG did not consent to the private prosecution of Aung San Suu Kyi, the applicant brought the issue of the AG's consent before the High Court, the highest court in Australia.¹¹ The High Court confirmed that the AG's discretion is very broad and not subject to review.¹² For example, the AG does not need to consider any factors or guidelines when making a decision whether or not to consent. Additionally, the case established that private citizens are not allowed to initiate prosecutions without the AG's consent.¹³

Ultimately, citizens cannot initiate UJ prosecutions without the consent of the AG, a key hurdle that must be overcome to effectively establish UJ in Australia. Political (dis)incentives also play a particularly significant role for UJ cases in Australia as it may determine whether or not such consent will be forthcoming.¹⁴

In the case of Afghanistan, there are already ongoing investigations into the conduct of Australian forces in the country. The prosecution of members of the Taliban may be even less politically sensitive and may not involve the additional hurdle of immunities presented in the case against the then heads of state of Sri Lanka and Myanmar.

The presence of both Australian lawyers with interest and practice in international criminal justice, as well as a large diaspora community from Afghanistan with support among some groups of politicians could present future opportunities for UJ cases in Australia despite the various challenges, notably AG consent.



USEFUL RESOURCES

- **The Australian Centre for International Justice:** Non-profit organisation that helps victim-survivors of gross human rights violations and their families by providing legal advice and representation before Australian authorities, international bodies, courts and tribunals.
- **Refugee Legal and Asylum Seeker Resource Centre:** Non-profit organisations that provide legal advice and casework services to asylum seekers, refugees and disadvantaged migrants in the community across Australia.

<https://acij.org.au/>
<https://refugeelegal.org.au/>
<https://asrc.org.au/>

¹⁰ Doherty (n 5); 'Aung San Suu Kyi', *TRIAL International* (Web Page, 27 July 2020) <<https://trialinternational.org/latest-post/aung-san-suu-kyi/>>.

¹¹ *Taylor v Attorney-General* [2019] 30 HCA 14.

¹² Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2011) 13(1) *Melbourne Journal of International Law* 4, 4–6.

¹³ *Taylor v Attorney-General* (n 11) 42.

¹⁴ Leonard Lewis, 'The Politics of Universal Jurisdiction', *Human Security Centre* (Web Page, 15 October 2015) 6 <<http://www.hscentre.org/global-governance/politics-universal-jurisdiction/>>.

ANNEX II

UNIVERSAL JURISDICTION IN NEW ZEALAND



New Zealand recognises UJ for the international crimes covered in this Handbook. The diaspora community from Afghanistan living in New Zealand is relatively small. According to the 2018 census, it amounted to 5,250 people.¹ However, with the Taliban's resurgence in 2021, New Zealand committed to expanding its Refugee Quota Program.² During 2022, another 1,729 people were evacuated from Afghanistan to New Zealand.³

1 '2018 Ethnic Group Summaries: Afghani Ethnic Group', *Stats NZ Tatauranga Aotearoa* (Web Page, 2018) <www.stats.govt.nz/tools/2018-census-ethnic-group-summaries/afghani>.

2 Immigration New Zealand, 'New Zealand Refugee Quota Program', *Supporting Refugees and Asylum Seekers* (Web Page, 2023) <www.immigration.govt.nz/about-us/what-we-do/our-strategies-and-projects/supporting-refugees-and-asylum-seekers/refugee-and-protection-unit/new-zealand-refugee-quota-programme>.

3 New Zealand Red Cross, 'First Anniversary of Afghan Evacuees Arriving in New Zealand' (Press Release, 22 August 2022) <www.redcross.org.nz/about-us/news/our-stories/first-anniversary-of-afghan-evacuees-arriving-in-new-zealand/>.

QUICK FACTS

- Common law
- Dualist system
- Constitutional monarchy with parliamentary democracy
- Relatively small diaspora community

WHAT INTERNATIONAL CRIMES ARE COVERED BY UJ?

- Genocide;
- Crimes against humanity;
- War crimes; and
- Piracy.

While piracy is covered under section 92 of the *Crimes Act 1961* (NZ), the international crimes of genocide, crimes against humanity and war crimes are found in sections 9, 10 and 11 of the *International Crimes and International Criminal Court Act 2000* (NZ) ('ICCA') respectively, with UJ being established under section 8(1)(c).⁴ As this provision enables criminal complaints to be made in respect of these international crimes regardless of where, or by whom they were committed, the jurisdiction is considered to be a form of 'pure UJ'.

In New Zealand, pure UJ is distinguished from extraterritorial jurisdiction. Cases involving extraterritorial jurisdiction will typically feature a need for a connection to New Zealand, for example, that the alleged perpetrator or the victim-survivor(s) be New Zealand citizens or residents.⁵

Regardless of whether a crime can be prosecuted under pure UJ or extraterritorial jurisdiction, as a matter of practical significance, New Zealand is unlikely to pursue cases unless an alleged perpetrator is present in its territory.⁶

CHALLENGES FOR UJ CASES IN NEW ZEALAND

New Zealand allows for both public and private prosecutions, meaning criminal complaints can be made by both the State and private individuals. However, under section 13 of the ICCA, proceedings for the international crimes covered under sections 9, 10 and 11 require the consent of the Attorney-General ('AG'). In cases where complaints are brought by private individuals, the requirement of the AG's consent corresponds with its function to be responsible for the government's administration of the law.

Whilst the AG's consent is required for a case to go to court, the initial arrest of a suspect does not require AG consent. Balancing the concerns surrounding indefinite detention, the 'arrest first, seek consent later' method has been justified as a viable safeguard to prevent criminal suspects fleeing the country before proceedings can be initiated against them.⁷

⁷ Treasa Dunworth, 'From Rhetoric to Reality: Prosecuting War Criminals in New Zealand: The Ya'Alon Case' (2007-2008) 5 *New Zealand Yearbook of International Law* 163, 175.

⁴ *Crimes Act 1961* (NZ) s 92; *International Crimes and International Criminal Court Act 2000* (NZ) ss 9–11.

⁵ For example, mercenary activities are indictable under the *Mercenary Activities (Prohibition) Act 2004* (NZ) regardless of where the offence took place. Similar extraterritorial offences include torture under s 3 of the *Crimes of Torture Act 1989* (NZ), and terrorist acts under s 6A(1) of the *Terrorism Suppression Act 2002* (NZ). Several other crimes can also be charged under the *Crimes Act 1961* (NZ), including sexual and labour exploitation of minors (s 98AA), organised crime (s 98A), smuggling migrants (s 98C), human trafficking (s 98D), bribery or corruption of the judiciary and public officials (ss 100–105), conspiring to defeat justice (s 116), corrupting juries and witnesses (s 117), coerced marriage or civil union (s 207A), money laundering (s 243), causing disease or sickness in animals (s 298A) and contaminating food, crops, water or other products (s 298B).

⁶ Marnie Lloyd, 'IHL and ICL through a Foreign Policy Lens' in *A to Z of New Zealand Law* (Thomson Reuters, 2021) 36.9.2.2 [3].

CASE EXAMPLE: THE YA'ALON CASE

Moshe Ya'alon was a former Israeli general who visited New Zealand in 2006. His involvement in the assassination of Hamas military wing leader Salah Shehadeh in 2002 was an ongoing subject of unsuccessful activism.⁸ In the operation of the Israeli Defense Force, a bomb was dropped on Shehadeh's house in the Al Daraj neighbourhood of Gaza City, killing 15 civilians and injuring 150.⁹

While Ya'alon was travelling in New Zealand, a private prosecution was attempted by Shehadeh's neighbour, resulting in Ya'alon being issued an arrest warrant by Judge Deobhakta in the Auckland District Court.¹⁰ The war crimes alleged were found in both section 11(1) of the ICCA and section 3(1) of the *Geneva Conventions Act 1958* (NZ), but jurisdiction to enable his arrest was only expressly provided in section 13(2) of the ICCA.

In response to Ya'alon's arrest warrant, New Zealand's AG at the time did not provide consent for the prosecution and Ya'alon was promptly released.¹¹ Grounds for the decision included advice from the government's legal office claiming insufficient evidence to justify pursuing the case.¹² The AG also highlighted the inactivity of other countries as a persuasive point of reasoning.¹³

LIMITS ON THE AG'S DISCRETION

While the Ya'alon case demonstrated the AG's discretionary powers, there are certain limitations on such powers. This includes the requirements for the AG to act in the public interest, in the interests of justice, not to act with flagrant impropriety and to exercise discretionary powers in promotion of the policies and objects of legislation.¹⁴



USEFUL RESOURCES

- **Community Law Centres: Free legal advice, assistance and representation:**

<https://communitylaw.org.nz/>

- **New Zealand Red Cross: Settlement support, employment support and trauma counselling for asylum seekers, convention refugees and other vulnerable migrants:**

<https://www.redcross.org.nz/>

8 Another person also sought prosecution of Ya'alon in the UK courts, but to no avail after the general found out and cancelled his visit: James Meikle, 'Israeli Minister Moshe Ya'alon Turned Down UK Visit Over Arrest Fears', *The Guardian* (online, 15 December 2009) <<https://www.theguardian.com/world/2009/dec/14/israeli-moshe-yaalon-visit-arrest>>.

9 'Ex-Israeli Army Chief Praises NZ for Wiping Arrest Warrant', *New Zealand Herald* (online, 3 December 2006) <www.nzherald.co.nz/nz/ex-israeli-army-chief-praises-nz-for-wiping-arrest-warrant/ONHXR6GJTUVY7XA2ZD4UCCNWJ4>.

10 *Ex Parte Application for Issue of Warrant to Arrest Lieutenant General Moshe Ya'alon of Israel* (District Court, Auckland, Civ-2006-004, 27 November 2006).

11 *Wakim v Ya'alon* (District Court, Auckland, Civ-2006-004, 27 November 2006, Judge Deobhakta).

12 New Zealand Government, 'Comment on Moshe Ya'alon Case' (Press Release, 2 December 2006).

13 Ibid.

14 For a full discussion, see Dunworth (n 7) 176–87.

ANNEX III

UNIVERSAL JURISDICTION IN THE NETHERLANDS



The Netherlands recognises UJ for the international crimes covered in this Handbook. The Netherlands has been a promising venue for prosecutions of international crimes generally. Further, some of the relatively few convictions for international crimes that took place in Afghanistan have been before Dutch courts.¹ The Netherlands also has a large diaspora community from Afghanistan.²

1 Ehsan Qaane, 'Conviction of an Afghan War Criminal: A Trial Years Later and Far From the Scene', *Afghan Analysts Network* (Web Page, 27 April 2022) <<https://www.afghanistan-analysts.org/en/reports/war-and-peace/conviction-of-an-afghan-war-criminal-a-trial-years-later-and-far-from-the-scene/>>.

2 Statistics Netherlands, 'Population; Sex, Age, Generation and Migration Background, Jan 1; 1996-2022', *CBS Statline* (Web Page, 31 May 2022) <<https://opendata.cbs.nl/statline/#/CBS/nl/dataset/37325/table?dl=7902A>>.

QUICK FACTS

- Civil law
- Monist system
- Constitutional monarchy with representative parliamentary democracy
- A diaspora community of approximately 55,000³

3 Ibid.

WHICH INTERNATIONAL CRIMES ARE COVERED BY UJ?

- Genocide;
- Crimes against humanity;
- War crimes;
- Enforced disappearance;
- Torture;
- Violations of the laws and customs of war; and
- Aggression.

WHAT IS THE RELEVANT LEGISLATION?

UJ in The Netherlands is legislated by the *International Crimes Act* ('ICA').⁴ ICA articles 3 to 8(b) criminalise the above-listed crimes.⁵ The ICA defines these crimes, largely using the definitions from the *Rome Statute of the International Criminal Court* ('Rome Statute').⁶

The Criminal Code sets out the modes of liability,⁷ which extend to international crimes.⁸ The ICA adds a sixth mode of liability, that of 'command responsibility', which broadens the scope for prosecuting UJ to a superior who permits, or fails to prevent, a subordinate from committing a crime.⁹

⁴ *Wet Internationale Misdrijven* [International Crimes Act] (Netherlands) 19 June 2003 [tr United Nations] ('ICA').

⁵ Included in ICA s 4 as a crime against humanity but as a stand-alone crime under s 8(a).

⁶ *Rome Statute of International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 6-7 ('Rome Statute').

⁷ *Wetboek van Strafrecht* [Criminal Code] (Netherlands) 3 March 1881 [tr Hans-Heinrich Jeschek].

⁸ Open Society Justice Initiative and TRIAL International, 'Universal Jurisdiction Law and Practice in the Netherlands' (Briefing Paper, April 2019) <<https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf>> 4.

⁹ ICA (n 4) art 9(1).

HAVE UJ CASES BEEN BROUGHT?

In 2005, Heshamuddin Hesam and Habibullah Jalalzai were tried and convicted for torture committed in Afghanistan during the 1980s civil war,¹⁰ during which they were high-ranking members of Khadamat-e Aetla'at-e Dawlati ('KHAD'), (Afghanistan's state intelligence agency from 1978 to 1996). In the related case of Abdullah Faqirzada,¹¹ The Hague District Court affirmed the principle that UJ did not have to exist in The Netherlands at the time crimes were committed.¹² UJ was not used to convict people of Afghanistan in The Netherlands again until the case of Abdul Arif in 2022. However, there have been many cases brought against persons from other countries.

Recent cases listed below have primarily involved the prosecution of those who have committed crimes in the context of an armed conflict, which are considered war crimes:¹³

- Eshetu Alemu: Sentenced to life imprisonment for war crimes committed in Ethiopia during the 'Red Terror'.¹⁴
- Abu Khuder: Military commander sentenced to 20 years' imprisonment for war crimes committed in Syria.¹⁵
- Ahmad Al-Y: Military commander sentenced to 6 years' imprisonment for war crimes committed in Syria.¹⁶

¹⁰ See final judgements on appeal, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], LJN: BG1476, 8 July 2008, [tr International Crimes database] ('Hesam'); Hoge Raad der Nederlanden [Supreme Court of the Netherlands], LJN: BC7418, 8 July 2008, [tr International Crimes Database] ('Jalalzai').

¹¹ Rechtbank Den Haag [The Hague District Court, the Netherlands], LJN: BA9575, 25 June 2007, [tr International Crimes Database] ('Abdullah').

¹² Ibid 20 [1].

¹³ ICA (n 4) arts 5-7.

¹⁴ Gerechtshof Den Haag [The Hague Court of Appeal, the Netherlands], ECLI:NL:GHDHA:2022:1674, 8 June 2022 [tr International Crimes Database] ('Alemu').

¹⁵ Rechtbank Den Haag [The Hague District Court, the Netherlands] ECLI:NL:RBDHA:2021:7533, 16 July 2021, [tr Trial International] ('Khuder').

¹⁶ Rechtbank Den Haag [The Hague District Court, the Netherlands] ECLI:NL:RBDHA:2021:10538, 16 July 2021, [tr Trial International] ('Al-Y').

ARE THERE ANY SPECIAL ARRANGEMENTS FOR UJ CASES?

The ICA clarifies that there is no statute of limitations for prosecuting international crimes, meaning there is no time-limit from when a crime is committed to when it must be brought to court.¹⁷ This differs from other European jurisdictions and has proven advantageous for obtaining a conviction, with the above cases involving prosecutions of crimes committed decades earlier.

The existence of ‘command responsibility’ as a mode of liability is also a special feature of the Dutch system. Judges only need to be satisfied that defendants induced, assisted or failed to prevent a crime in the context of a war to be convicted of a war crime.¹⁸

Private individuals and non-governmental organisations (‘NGOs’) also have the ability to refer cases for investigation to the Public Prosecution Service in The Netherlands. If a Prosecutor declines to investigate or later to proceed with a prosecution, the referee must be notified and can appeal the Prosecutor’s decision with the Court of Appeal.¹⁹ This is a unique opportunity for NGOs and advocates to help shape prosecutorial discretion. The Public Prosecution Service has a dedicated ‘International Crimes Team’ that works in partnership with the ‘Public Prosecutors’ Office’, created with a mandate to investigate war crimes.²⁰

CHALLENGES FOR UJ CASES IN THE NETHERLANDS

An investigation cannot be opened into international crimes allegedly committed by non-nationals against non-nationals outside of the Netherlands (crimes with no ‘nexus’) unless the suspect has been identified and is present in the country.²¹ This requirement has proven to be a challenge because the investigation ceases as soon as the suspect leaves the country. For this reason, many cases fail as the suspect leaves the country before they are arrested.²² Prior and ongoing investigations are permitted when there is a ‘nexus’, namely for the crime to be committed against a citizen, or the crime to be committed by a citizen of The Netherlands.²³

¹⁷ ICA (n 4) art 13. Although the lack of a time-bar does not apply with respect to violations of the laws and customs of war, as referenced in article 7(1), nor to offenses referenced in article 9 that relate to violations of the laws and customs of war.

¹⁸ Open Society Justice Initiative and TRIAL International (n 8) 8.

¹⁹ Human Rights Watch, *The Legal Framework for Universal Jurisdiction in the Netherlands* (Report, 2014) <www.hrw.org/sites/default/files/related_material/IJ0914Netherlands_0.pdf> 4–5.

²⁰ Netherlands Public Prosecution Service, ‘When was the International Crimes Team Formed?’, International Crimes (Web Page) <www.prosecutionservice.nl/topics/international-crimes/when-was-the-international-crimes-team-formed>.

²¹ Permanent Mission the Kingdom of the Netherlands to the United Nations, *The Scope and Application of the Principle of Universal Jurisdiction* (Statement, 12 October 2022) <www.un.org/en/ga/sixth/76/universal_jurisdiction/netherlands_e.pdf> 1–2.

²² Open Society Justice Initiative and TRIAL International (n 8) 11; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2004) 171.

²³ Permanent Mission the Kingdom of the Netherlands to the United Nations (n 21).

CASE EXAMPLE: AHMAD AL-Y

Ahmad al-Y is a Syrian national and former commander of the militant group Ahrar al-Sham.²⁴ In 2015, a video posted on Youtube pictured al-Y humiliating and degrading deceased bodies by kicking and spitting on them.²⁵ German authorities flagged al-Y when he tried to apply for asylum in 2015 and passed this information to Dutch police in 2019.²⁶ In October 2019, al-Y arrived in the Netherlands as an asylum seeker and was arrested.²⁷

The Hague District Court determined that The Netherlands had jurisdiction over the alleged war crimes committed outside the Netherlands as al-Y was present in the country at the time of his arrest.²⁸ On 21 April 2021, al-Y was found guilty of the war crime of assault on personal dignity and membership of a terrorist organisation.²⁹ He was sentenced to 6 years imprisonment.³⁰

On 6 December 2022, The Hague Court of Appeal acquitted al-Y of charges of the war crime of assault on personal dignity under article 6(1)(c) of the ICA.³¹ The conviction for membership of a terrorist organisation was upheld and a prison sentence of 5 years and 4 months was imposed on al-Y.³²

This decision has since been appealed on law to the Supreme Court.³³



USEFUL RESOURCES

■ The Public Prosecution Service:

Explanations of international crimes with a contact address to share information on possible international crimes:

<https://www.prosecutionservice.nl/topics/international-crimes/>

■ The T.M.C. Asser Instituut and The Amsterdam Centre for International Law have contributed to UJ reports, research and panel discussions alongside other Europe-based UJ organisations:

<https://www.asser.nl/>
<https://acil.uva.nl>

²⁴ TRIAL International, *Universal Jurisdiction Annual Review 2023* (Report, 2023) <https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf> 74.

²⁵ Rechtbank Den Haag [The Hague District Court, the Netherlands] ECLI:EN:RBDHA:2021:5336, 21 April 2021 [7.4] ('The Hague District Court al-Y'); TRIAL International (n 24).

²⁶ *The Hague District Court al-Y* (n 25) [44.21]; TRIAL International (n 24).

²⁷ 'Syria', *Netherlands Public Prosecution Service* (Web Page) <www.prosecutionservice.nl/topics/international-crimes/what-cases-have-been-prosecuted/syria>.

²⁸ *The Hague District Court al-Y* (n 25) [3.4.1]; ICA (n 4) art 2.

²⁹ *The Hague District Court al-Y* (n 25) [9]; TRIAL International (n 24) 74.

³⁰ *The Hague District Court al-Y* (n 25) [9].

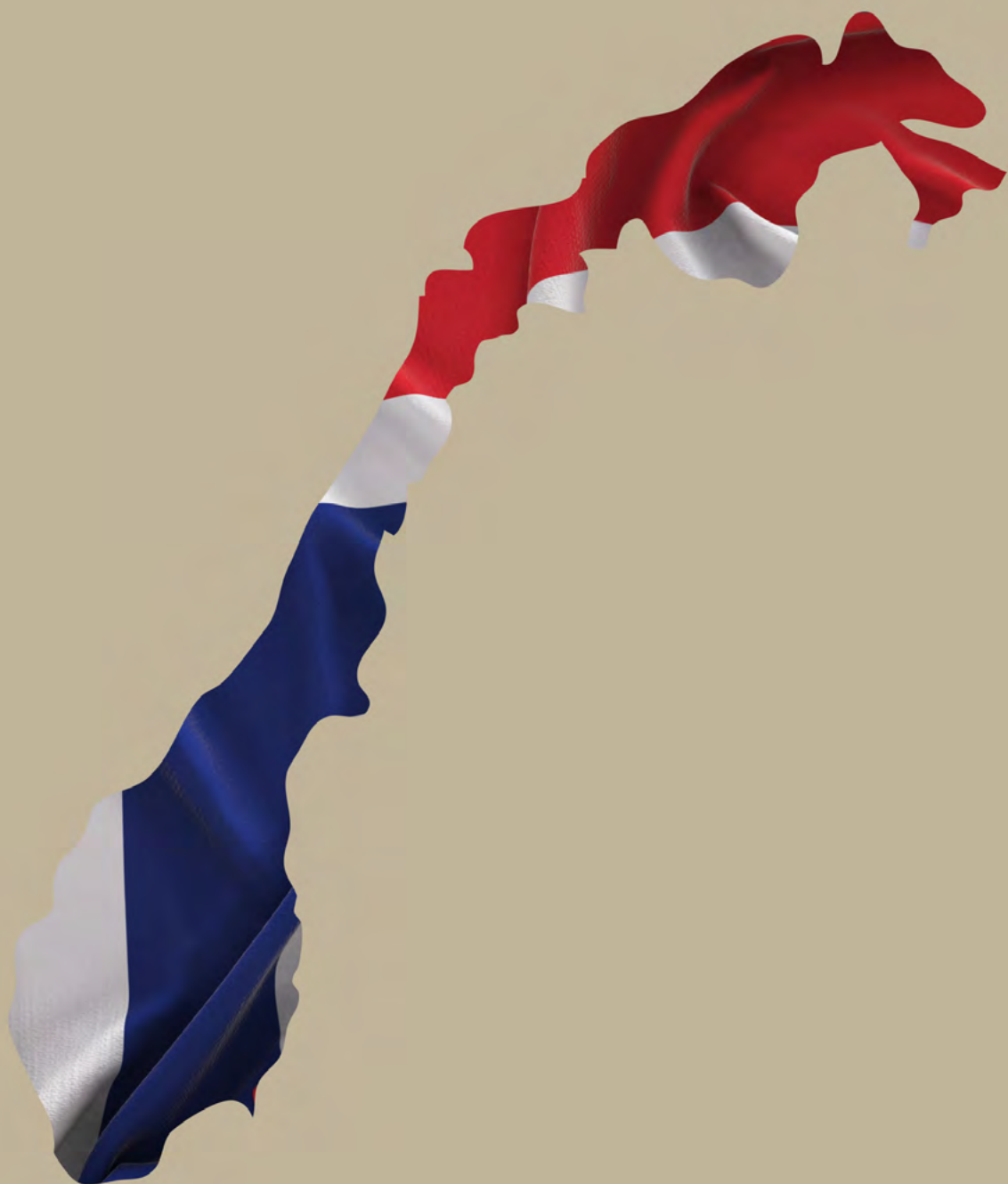
³¹ Gerechtshof Den Haag [The Hague Court of Appeal, the Netherlands] ECLI:EN:GHDHA:2022:2421, 06 December 2022 ('The Hague Court of Appeal al-Y').

³² Ibid.

³³ TRIAL International (n 24).

ANNEX IV

UNIVERSAL JURISDICTION IN NORWAY



Norway recognises UJ for the international crimes covered in this Handbook. The country is committed to working with other states on international criminal law matters.¹ In doing so, Norway's judicial and investigative authorities have for this reason become known for their role in advancing global justice.² In 2017, the number of persons from Afghanistan living in Norway was estimated to be 15,983.³

¹ Julia Selman-Ayetey, 'Universal Jurisdiction: Conflict and Controversy in Norway' in Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 269.

² Ibid.

³ Embassy of the Islamic Republic of Afghanistan, Norway (Web Page) <www.afghanistanembassy.no/norway/>.

QUICK FACTS

- Civil law
- Dualist system
- Constitutional monarchy with parliamentary democracy
- Diaspora from Afghanistan approximately 15,983

WHAT INTERNATIONAL CRIMES ARE COVERED BY UJ?

- Genocide;
- Crimes against humanity; and
- War Crimes
- What is the Relevant Legislation?

The relevant legislation pertaining to UJ in Norway is set out in the Penal Code.⁴ For the core international crimes of genocide, crimes against humanity and war crimes, the Penal Code grants Norway authority to prosecute residents, nationals and non-nationals suspected of the international crimes.⁵ This applies even when the crimes were committed abroad.⁶

HAVE UJ CASES BEEN BROUGHT?

UJ has been explored in cases involving the illegal deprivation of civilians' liberty⁷ and complicity in genocide.⁸

ARE THERE ANY SPECIAL ARRANGEMENTS FOR UJ CASES?

The National Criminal Investigation Service, also known as 'Kripos', is a specialised unit consisting of 11 police officers within Norway's National Police Directorate.⁹ Its International Crimes Section is tasked with investigating international crimes.¹⁰

CHALLENGES FOR UJ CASES IN NORWAY

RETROACTIVITY

As set out under Article 97 of the Norwegian Constitution, no law shall have retroactive effect.¹¹ This means that a complaint cannot be made against someone for a crime committed before the relevant legislation came into effect. As highlighted in *Public Prosecutor v Mirsad Repak* (2008), genocide, crimes against humanity and war crimes under Chapter 16 of the Penal Code cannot be prosecuted if committed before the date the 2005 Penal Code came into effect on 7 March 2008.¹²

PUBLIC INTEREST REQUIREMENT

Under sections 5 and 6 of the *Penal Code*, prosecutions of international crimes must be in the public interest.¹³ The seriousness of the crime, or whether any existing connections between the crime, the victims and the offender to Norway, are criteria that may be considered in determining public interest.¹⁴

¹¹ *The Constitution of the Kingdom of Norway* (Norway) art 97.

¹² Selman-Ayetey (n 1) 275.

¹³ *The Penal Code* (n 4) ss 5-6.

¹⁴ Open Society Justice Initiative and TRIAL International, 'Universal Jurisdiction Law and Practice in Norway' (Briefing Paper, January 2019) 23.

⁴ *The Penal Code* (Norway) ss 101-7 ('Penal Code').

⁵ *Ibid* s 5.

⁶ Selman-Ayetey (n 1) 271.

⁷ *Public Prosecuting Authority v Mirsad Repak*, Case No 08-018985MED-OTIR/08, 2 December 2008 (Oslo District Court, Norway).

⁸ *Public Prosecuting Authority v Sadi Busingo*, Case No 13-041556ASTBORG/02, 16 January 2015 (Borgarting Court of Appeal, Norway).

⁹ Justice Beyond Borders, Norway (Web Page) <<https://justicebeyondborders.com/country/norway/>>.

¹⁰ *Ibid*.

CASE EXAMPLE: PUBLIC PROSECUTING AUTHORITY V MIRSAD REPAK¹⁵

Mirsad Repak, a Croatian Defence Forces member, was part of the Dretelj detention camp in Bosnia Herzegovina. Repak was alleged to have unlawfully deprived eighteen civilians of their liberty and subjected them to mistreatment through psychological abuse and violence.¹⁶

In 1993, Repak fled Bosnia Herzegovina to seek asylum in Norway, and in 2001 became a Norwegian citizen.¹⁷ Repak was arrested by Norwegian authorities on 8 May 2007, with the aid of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), in line with their investigations into individuals living in Norway suspected of committing war crimes.¹⁸

After the 2005 Penal Code came into effect, Repak was charged with 21 offences, including 18 unlawful deprivation of liberty offences accounting for crimes against humanity and war crimes under the 2005 Penal Code.¹⁹ He was found guilty on 11 counts of war crimes by unlawfully depriving civilians of their liberty during his involvement in the Dretelj detention camp.²⁰

On appeal, Norway's Supreme Court upheld the view that both crimes against humanity and war crimes were unable to be applied retrospectively.²¹ Repak's sentence was raised to eight years for illegally depriving civilians in the Dretelj detention camp of their liberty.²²

¹⁵ *Public Prosecuting Authority v Mirsad Repak* (n 7).

¹⁶ *Selman-Ayetey* (n 1) 272.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid* 273.

²¹ *Ibid* 274–5.

²² 'The Public Prosecuting Authority v Mirsad Repak', *International Crimes Database* (Web Page) <www.internationalcrimesdatabase.org/Case/36>.

CONTROVERSY SURROUNDING THE INVITATION OF ANAS HAQQANI

Despite Norway's commitment to advancing global justice and upholding human rights, controversy arose when the Norwegian Government invited a Taliban delegation to visit Norway.²³ A Norwegian citizen filed a complaint against one of the delegates, Anas Haqqani, alleging crimes against humanity and war crimes on account of his involvement in the Haqqani Network's attacks against civilians, including the Norwegian citizen himself and his family in Afghanistan.²⁴ Haqqani was formerly convicted and had confessed to the alleged crimes in Afghanistan. The complaint was filed with the Norwegian police during the official visit but Haqqani managed to leave the country.²⁵

Norway's Prime Minister Jonas Gahr Støre responded to criticism of Norway's invitation of Haqqani by stating that he was unaware of his presence until the Taliban was in Norway.²⁶



USEFUL RESOURCES

- **The Norwegian Organisation for Asylum Seekers: An independent membership organisation that provides free legal aid across such areas as family immigration and asylum cases:**

<https://www.noas.no/en/legal-aid/>

- **The Norwegian National Register of Interpreters: A platform for individuals in need of Persian Interpreters in Norway:**

<https://www.norge.no/en/service/norwegian-national-register-interpreters-nasjonalt-tolkeregister>

²³ Anas Haqqani is the younger brother of Sirajuddin Haqqani, the head of the Haqqani Network. Anas Haqqani has held the second-in-command position of the Haqqani Network, and has been involved in fundraising and assisting with decisions.

²⁴ 'Taliban on Norway Visit Reported to the Police', SVT (online, 24 January 2022) <www.svt.se/nyheter/inrikes/taliban-pa-norgebesok-polisanmald-1?fbclid=IwAR3cFFNM5NYXhcBAukcOBoFLcCfaAUEQ6lRAIag0yPUTV8JCPJodvXcRxbg>.

²⁵ *Ibid.*

²⁶ Johannes Theodor Fjeld, 'Støre Visste Ikke at Haqqani Kom til Norge', *Dagbladet* (online, 24 January 2022) <www.dagbladet.no/studio/nyhetsstudio/5?post=83577>.

ANNEX V

UNIVERSAL JURISDICTION IN GERMANY



Germany recognises UJ for the international crimes covered in this Handbook. Germany is one of the few countries in the world to have 'pure' UJ whereby there is no requirement for a link between the alleged crime, the suspect, the victim-survivor and Germany.¹ A number of high-profile UJ cases resulting in convictions have taken place before German courts. Germany also has a large diaspora from Afghanistan, including 183,631 refugees as of 2022.²

1 Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany* (Report, 2014) <www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf>.

2 UNHCR, *Refugee Data Finder* (Report, 2022) <www.unhcr.org/refugee-statistics/download/?url=dShX01>; 'Who is Actually the Afghan Diaspora in Germany?', *Verband Afghanischer Organisationen in Deutschland* (Web Page, 2021) <<https://vafo.ngo/en/startseite/afghanische-diaspora/>>.

QUICK FACTS

- Civil law
- Monist system
- Federal and parliamentary democracy
- Large diaspora community

WHAT INTERNATIONAL CRIMES ARE COVERED BY UJ?

- Genocide;
- Crimes against humanity;
- War crimes;
- Aggression; and
- Failure to prevent subordinate offences, to properly supervise subordinates or omitting to report crimes by subordinates.

WHAT IS THE RELEVANT LEGISLATION?

The legal framework for UJ in Germany is found in the *Code of Crimes Against International Law* ('CCAIL').³ The CCAIL came into force on 30 June 2002 and provides UJ over genocide, crimes against humanity, war crimes and crimes of aggression.⁴ Also included is the crime of failing to prevent offences committed by subordinates as a military commander or civilian superior,⁵ as well as for failing to properly supervise subordinates or omitting the report of a crime committed by subordinates.⁶ The definitions of the crimes are in accordance with the *Rome Statute of the International Criminal Court* ('Rome Statute').⁷ Under section 1 of the CCAIL, UJ is available in all cases 'even when the offence was committed abroad and bears no relation to Germany'.⁸

HAVE UJ CASES BEEN BROUGHT?

Many UJ cases have been brought before the German courts in response to atrocities in a number of different contexts. Structural investigations may be opened where evidence is gathered to determine suspects' identities.⁹

One example is the case against Syrian doctor Alaa M for allegedly committing crimes against humanity in Syria, including torture, murder and sexual abuse of people in military hospitals.¹⁰ The case commenced in January 2022 and involved the calling of witnesses and civil parties to give evidence.¹¹

Other trials and convictions have been brought against individuals who have returned to Germany and are from terrorist organisations such as ISIS and Jabhat al-Nusra.¹² Recently, two persons were indicted on the basis of UJ for their crimes committed abroad during their involvement in ISIS.¹³

ARE THERE ANY SPECIAL ARRANGEMENTS FOR UJ CASES?

Specialised units under the Federal Police have been created to investigate international crimes under the CCAIL.¹⁴ Additionally, the Federal Prosecutor General runs multiple structural investigations to investigate large scale crimes, and often initiates investigations based on information received from the German Migration Authority. These specialised units aim to gather and preserve evidence of offences under the CCAIL in order to prepare for future proceedings.¹⁵ In the Raslan case, they provided key information over a number of years, such as by testifying as witnesses and experts on several occasions.¹⁶ As of 12 October 2022, German prosecutors are running over 100 investigations into international crimes with the intent to hold those who commit atrocities accountable for their crimes.¹⁷

³ *Code of Crimes Against International Law* (Germany) ('CCAIL').

⁴ Ibid genocide (s 6); crimes against humanity (s 7); war crimes (ss 8–12); aggression (s 13); and failure to prevent subordinate offences (s 4).

⁵ Ibid s 4.

⁶ Ibid ss 14–15.

⁷ *Rome Statute of International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 6–8 ('Rome Statute').

⁸ CCAIL (n 3) s 1.

⁹ 'Structural investigation', *European Center for Constitutional and Human Rights* (Web Page) <www.ecchr.eu/en/glossary/structural-investigation/>.

¹⁰ 'Proceedings Against Doctor Alaa M: Coming to Terms with Crimes in Syria Continues', *European Center for Constitutional and Human Rights* (Web Page, 2021) <www.ecchr.eu/en/case/proceedings-military-doctor-alaa-m-syria/>.

¹¹ TRIAL International, *Universal Jurisdiction Annual Review 2023* (Report, 17 April 2023) <https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf> 55.

¹² Permanent Mission of the Federal Republic of Germany to the United Nations, *The Scope and Application of the Principle of Universal Jurisdiction* (Statement, 12 October 2022) <www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_germany.pdf> 2.

¹³ TRIAL International (n 11) 61–2.

¹⁴ Permanent Mission of the Federal Republic of Germany to the United Nations (n 12) 1.

¹⁵ Ibid.

¹⁶ 'Inside the Raslan Trial #58: The Raslan Verdict in Detail', *Syria Justice and Accountability Centre* (Web Page, 18 February 2022) <<https://syriaaccountability.org/inside-the-raslan-trial-the-raslan-verdict-in-detail/#:~:text=The%20judges%20held%20that%20Anwar,vio%20as%20crimes%20against%20humanity.>>>.

¹⁷ Permanent Mission of the Federal Republic of Germany to the United Nations (n 12).

Although torture, rape and enforced disappearance may constitute crimes against humanity and war crimes, they are not defined as separate crimes under the CCAIL.¹⁸ Crimes such as murder or rape, unless part of a widespread or systematic attack and therefore fall under crimes against humanity,¹⁹ are subject to a double criminality requirement under sections 6 and 7 of the German Criminal Code.²⁰ This means that the alleged acts must be considered as criminal in that other jurisdiction as well. These crimes can only be prosecuted as stand-alone offences under the Criminal Code.

For genocide, crimes against humanity and war crimes under the CCAIL, and crimes for which Germany has a treaty obligation to prosecute, there is no need for double criminality, nor are there subsidiarity requirements. For example, if a crime under the CCAIL was committed in Afghanistan, but was not criminalised under domestic law, the case can still be investigated and tried in Germany.

According to section 5 of the CCAIL, the statute of limitations does not apply to serious criminal offences pursuant to the Act or the execution of sentences imposed on their account.²¹

CHALLENGES FOR UJ CASES IN GERMANY

German prosecutors have wide discretion as to which cases to pursue. They may consider whether or not the alleged crimes have a connection to Germany, though this is not necessary.²²

Furthermore, if an international court is already pursuing a suspect, the Public Prosecution Office may decide not to prosecute that alleged perpetrator.²³ One example is the case of Colonia Dignidad, where German prosecutors declined to prosecute a former cult leader who worked with the former Chilean President Augusto Pinochet in the alleged torture, detention and murder of regime critics.²⁴ This was

despite the fact that the accused was a German national living in Germany and subject to an Interpol arrest warrant on behalf of Chile, and had testified about their crimes in other cases concerning Colonia Dignidad.²⁵ This case also demonstrates the difficulties in prosecuting offences that are not separately defined in the Criminal Code and CCAIL.²⁶

²⁵ Mirka Fries, 'Re: Review of Germany during the Committee against Torture's 66th Session', *European Center for Constitutional and Human Rights* <www.ecchr.eu/fileadmin/Juristische_Dokumente/20190225_ECCHR_Letter_to_CAT.pdf> 1.

²⁶ Ibid 2.

¹⁸ CCAIL (n 3) ss 7–8.

¹⁹ Ibid.

²⁰ Strafgesetzbuch [German Criminal Code] (Germany) ss 6–7.

²¹ CCAIL (n 3) s 5.

²² Strafprozeßordnung [German Code of Criminal Procedure] (Germany) § 153f.

²³ Ibid.

²⁴ 'Colonia Dignidad Remains a Dark Chapter of German Legal History', *European Center for Constitutional and Human Rights* (Web Page) <www.ecchr.eu/en/case/colonia-dignidad-remains-a-dark-chapter-of-german-legal-history/>.

SYRIAN CASE EXAMPLE: ANWAR RASLAN

Anwar Raslan was the head of intelligence at a detention centre in Syria between 2008 and 2012. Anwar was informed of the deaths occurring in his branch, and was allegedly aware of the torture being conducted by his guards outside of the interrogations, which included sexual harassment and physical assault.²⁷

In December 2012, Anwar and his family defected from the Syrian Government.²⁸ In 2014, he travelled to Germany and was granted a visa, and thereafter political asylum and refugee protection.²⁹ Anwar was arrested in 2019 and charged for his role in the torture and abuse of over 4,000 detainees held under his command between April 2011 and September 2012.³⁰ In January 2022, the Higher Regional Court of Koblenz found Anwar guilty of crimes against humanity and he was sentenced to life imprisonment.³¹

According to Human Rights Watch, the trial arose through individual and group efforts.³² It was prompted in part by the arrival of hundreds of thousands of Syrians fleeing their own country, bringing personal accounts and stories of the atrocities committed by the Assad regime.³³



USEFUL RESOURCES

- European Center for Constitutional and Human Rights: An independent organisation that litigates, researches and coordinates legal advocacies to utilise UJ:

<https://www.ecchr.eu/en/>

- Handbook Germany: Online legal aid for newcomers to Germany with translations including Persian and Pashto to assist with lodging visa and asylum applications, as well as other options:

<https://handbookgermany.de/en/legal-aid/>

27 'Inside the Raslan Trial #58: The Raslan Verdict in Detail' (n 16).

28 Christoph Reuter and Fidelius Schmid, 'The Devil's Colonel', *Spiegel Abroad* (online, 23 April 2020) <www.spiegel.de/ausland/koblenz-prozess-gegen-geheimdienstoffizier-anwar-raslan-aus-syrien-des-teufels-oberst-a-f2127ff5-99ea-4fe0-8ccd-a2c1edaa7fc6>.

29 Jonas Schreijäg, Oliver Schröm and Sulaiman Tadmory, 'Asylum for Torture Boss?' *Panorama* (online, 24 September 2020) <<https://daserste.ndr.de/panorama/archiv/2020/Asyl-fuer-syrischen-Folterchef-folter114.html>>.

30 'Anwar Raslan', *TRIAL International* (Web Page, 17 April 2023) <<https://trialinternational.org/latest-post/anwar-raslan-and-eyad-al-gharib/>>.

31 'Inside the Raslan Trial #58: The Raslan Verdict in Detail' (n 16).

32 'How an Alleged Syrian Intelligence Officer was Put on Trial in Germany' *Human Rights Watch* (online, 2020) <www.hrw.org/feature/2022/01/06/seeking-justice-for-syria/how-an-alleged-intelligence-officer-was-put-on-trial-in-germany>.

33 Jenny Hill, 'German Court Finds Syrian Colonel Guilty of Crimes Against Humanity', *BBC News* (online, 13 January 2022) <www.bbc.com/news/world-europe-59949924>.

ANNEX V

UNIVERSAL JURISDICTION IN THE UK



The United Kingdom ('UK') is separated into three jurisdictions: (i) England and Wales; (ii) Northern Ireland; and (iii) Scotland. Each jurisdiction recognises UJ differently. While all jurisdictions recognise UJ over the international crimes concerned in this Handbook, the UK does not promote 'pure' UJ, as there is a requirement for some sort of connection to the UK even though it differs between crimes and jurisdictions.¹ In 2019, it was estimated that there were 79,000 Afghanistan-born migrants living in the UK.²

¹ European Union, 'Universal Jurisdiction: Law and Practice in England and Wales' (Briefing Paper, 2022) 4.

² Peter William Walsh and Madeleine Sumption, 'Afghans Refugees in the UK', *The University of Oxford Migration Observatory* (Web Page, 21 October 2021) <<https://migrationobservatory.ox.ac.uk/resources/commentaries/afghan-refugees-in-the-uk/>>.

QUICK FACTS

- Common law
- Dualist system
- Constitutional monarchy with parliamentary democracy
- A relatively large diaspora
- Divided into three jurisdictions: England and Wales; Northern Ireland; and Scotland

WHAT INTERNATIONAL CRIMES ARE COVERED BY UJ?

- Genocide;
- Crimes against humanity;
- War crimes;
- Torture; and
- Grave contraventions of the *Geneva Conventions*.

WHAT IS THE RELEVANT LEGISLATION?

The international crimes listed above are regulated differently depending on the jurisdiction. For example, relevant legislation applicable to England and Wales and Northern Ireland include the *War Crimes Act 1991*,³ the *International Criminal Court Act 2001* ('ICCA'),⁴ the *Criminal Justice Act 1988* ('CJA')⁵ and the *Geneva Conventions Act 1957* ('Geneva Act').⁶ International crimes in Scotland are regulated under the *International Criminal Court (Scotland) Act 2001*.⁷

HAVE UJ CASES BEEN BROUGHT?

There have been cases brought to the UK courts through the principle of UJ. The first case brought in the UK was the Pinochet case in 2001.⁸ This case was discussed in detail in Part 1 Chapter 3 of the Handbook. Of relevance to this Handbook, two cases have also been brought under section 134 of the CJA.

This includes *R v Faryadi Sarwar Zardad*, a case against a warlord from Afghanistan (residing in the UK) sentenced to prison for conspiracy to commit torture and conspiracy to take hostages (discussed in detail in the case study towards the end of the Annex).⁹

The second case was *R v Kumar Lama* held in 2014.¹⁰ Kumar Lama was a colonel in the Nepalese Army who was charged with two counts of torture. The alleged offences occurred in 2005, during the Nepalese civil war. Lama's long trial ended with acquittal on one count and the jury not able to come to a decision on the second count.

The UK Supreme Court also considered the question of 'official capacity' in *R v Reeves Taylor v Crown Prosecution Service* which involved allegations of torture allegedly committed by Agnes Reeves-Taylor, the wife of Charles Taylor, during the Liberian civil war of the 1990s.¹¹ The definition of torture in section 134 of the CJA requires that the infliction of serious mental or physical suffering be committed by or with the instigation, consent or acquiescence of a 'public official or person acting in an official capacity'.¹² As Agnes Reeves Taylor was a member of the armed group, the National Patriotic Front for Liberia, and therefore not a 'public official', the crucial point of law was whether a member of a non-state armed group could be 'person acting in an official capacity'.

The UK Supreme Court determined in the affirmative, only where the accused was a member of a non-state armed group which exercised *de facto* governmental control over a territory. In the Court's opinion, enjoying *de facto* governmental control reached well beyond the notion of military control, and included the establishment of an administrative apparatus, prisons and the administration of justice, among other factors.¹³ The Court thus set an extremely demanding threshold for applying the terms 'persons acting in an official capacity' to members of non-state armed groups.

CHALLENGES FOR UJ CASES IN THE UK

A number of legal and practical challenges exist for UJ cases to be brought in the UK. Several of these were recently identified in a report by REDRESS and the Clooney Foundation for Justice calling for reforms to enhance the potential of cases to be pursued through the principle of UJ in England and

3 *War Crimes Act 1991* (UK) ('WCA'). Limited to those committed during a specified period of the Second World War in the German-held territories.

4 *International Criminal Court Act 1967* (UK) s 51 (England and Wales), s 58 (Northern Ireland) ('ICCA').

5 *Criminal Justice Act 1988* (UK) c 33, s 134 ('CJA').

6 *Geneva Conventions Act 1957* 5 & 6 Eliz 2, c 1 ('GCA').

7 *International Criminal Court (Scotland) Act 2001*, c 17 s 1 ('ICCA Sc').

8 *Pinochet* (No. 3) [2000] 1 AC 247.

9 *R v Faryadi Sarwar Zardad* [2007] EWCA Crim 279; 2007 WL 261182.

10 *KL v R* [2014] EWCA Crim 1729.

11 *R v Reeves Taylor (AP) (Appellant) v Crown Prosecution Service (Respondent)* [2019] UKSC 51.

12 CJA (n 5).

13 *R v Reeves Taylor* (n 11) [78].

Wales.¹⁴ For example, one practical challenge is that investigations into international crimes usually do not start until a suspect is identified and present in the UK.¹⁵ One of the legal challenges is the nexus requirement which the Handbook discusses below.¹⁶

NEXUS REQUIREMENT

The UK does not have ‘pure UJ’ because the alleged offender must have some sort of nexus to the UK. Each crime has a different nexus requirement.

Torture under CJA and contraventions of the Geneva Conventions under the GCA do not require that the suspect is a UK citizen or resident.¹⁷ However, for an arrest warrant to be issued, the offender must be, or is anticipated to be, in the UK.

UK courts have jurisdiction over the crimes of genocide, war crimes, and crimes against humanity only if the alleged offender:

- a. is or was a UK national, or was a UK resident at the time of the crime; or
- b. became a UK national/resident after the crime was committed, and still resides in the UK

This provision narrows the UK jurisdiction’s scope to allow complaints to be held against an alleged offender.

FULL CODE TEST

Before bringing a suspect to court in England, Wales and Scotland, a prosecutor must be satisfied that there is sufficient admissible, reliable and credible evidence for there to be a realistic possibility of conviction. In addition, there must be a public interest in trying the accused. This is called the ‘Full Code Test’.¹⁸

¹⁴ REDRESS and Clooney Foundation for Justice, ‘Global Britain, Global Justice: Strengthening Accountability for International Crimes in England and Wales’ (Report, October 2023) <<https://redress.org/wp-content/uploads/2023/10/Global-Britain-Global-Justice-report.pdf>>.

¹⁵ Ibid 12, 56–7.

¹⁶ Ibid 10, 42–5. For a complete list of the challenges and recommendations for reforms identified in the above-cited report, we refer readers to the report itself.

¹⁷ GCA (n 6) c 1, s 1; CJA (n 5).

¹⁸ See ‘The Code for Crown Prosecutors’, *The Crown Prosecution Service* (Web Page, 26 October 2018) <www.cps.gov.uk/publication/code-crown-prosecutors>.

The Full Code Test in Northern Ireland requires the evidence to sufficiently provide a reasonable prospect of conviction.¹⁹ This requirement has a lower threshold than the one in England, Wales and Scotland.²⁰

ATTORNEY-GENERAL’S CONSENT

The Attorney-General (‘AG’) must give consent for the proceedings to begin.²¹ There is little guidance for the AG to determine whether consent should be given. To date, the AG has not refused consent regarding cases involving torture, war crimes or crimes against humanity.

CASE EXAMPLE: A WARLORD FROM AFGHANISTAN²²

Faryadi Sarwar Zardad ran a military base in Afghanistan between 1992 and 1996. Zardad had a checkpoint where his men would frequently stop vehicles to torture the travellers, holding them as hostages and seeking to obtain ransom.²³

After the Taliban took over in 1998, Zardad fled to the UK seeking political asylum with falsified documents and a fake name; however he was tracked down by the BBC in an exposé in 2000.²⁴ After the exposé, the Revolutionary Association of the Women of Afghanistan launched an international campaign to urge the UK Government to bring Zardad to court.²⁵ He was arrested in 2003.

Zardad was tried for torture under the CJA.²⁶ The main question of law was whether Zardad was a ‘public official’ under section 134, and the admissibility of video

¹⁹ See ‘The Code for Prosecutors’, *Public Prosecution Service* (Web Page, 1 July 2016) <www.ppsni.gov.uk/publications/code-prosecutors>.

²⁰ See ‘Prosecution Code’, *Crown Office and Procurator Fiscal Service* (Web Page, 1 May 2001) <www.copfs.gov.uk/publications/prosecution-code/html/>.

²¹ CJA (n 5) c 33, s 135; GCA (n 6) c 1 s 1A(3)(a); ICCA (n 4) ss 51, 53(3), 58.

²² *R v Faryadi Sarwar Zardad* (n 9) [1]–[41].

²³ Ibid [6].

²⁴ ‘Faryadi Sarwar Zardad: UK Deports Warlord Who Tortured Afghans’, *BBC News* (online, 14 December 2016) <www.bbc.com/news/world-asia-38304594>.

²⁵ Susannah Price, ‘Afghan Activist’s Killers Hanged’, *BBC News* (online, 7 May 2002) <http://news.bbc.co.uk/2/hi/south_asia/1973184.stm>.

²⁶ CJA (n 5).

evidence at trial.²⁷ Zardad's counsel argued that Zardad's group was not part of the Government of Afghanistan and was actively working against it, meaning that he could not be a 'public official'.²⁸ However, this argument was rejected and Zardad was found to have acted in a 'public capacity'.²⁹

Another point raised concerned the admissibility of video evidence. The defence complained that admitting the evidence would be unfair because the subject of the video was dissimilar in appearance to Zardad. All submissions regarding admissibility by the defence were rejected by the trial judge.³⁰

Zardad was convicted of conspiracy to commit torture and conspiracy to take hostages and sentenced to 20 years' imprisonment for each count, to run concurrently. The Court of Appeal dismissed Zardad's appeal application.³¹

BRINGING A UJ CASE IN EACH JURISDICTION

The Metropolitan Police Counter Terrorism Command has a war crimes team that investigates allegations of war crimes, crimes against humanity, genocide and torture. They work alongside the main intelligence agency, MI5, to investigate such allegations. The different branches are as follows:

- In **England**: (depending on area) Counter Terrorism Policing North East, North West, West Midlands, South West, East Midlands, South East, Eastern, and Command (the main branch found in Metropolitan London)
- In **Wales**: Counter Terrorism Policing Wales
- In **Northern Ireland**: Police Service of Northern Ireland
- In **Scotland**: Police Scotland

²⁷ Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005. Written answer by the AG to Mr Boateng, Parliamentary Question 19 July 1993, Hansard, <www.publications.parliament.uk/pa/cm199293/cmhansrd/1993-07-19/Writtens-3.html>.

²⁸ *R v Faryadi Sarwar Zardad* (2004) Central Criminal Court (Old Bailey) T2203 7676 (Treacy J) [3].

²⁹ *R v Faryadi Sarwar Zardad* (n 9) [8].

³⁰ *Ibid* [27].

³¹ *Ibid* (Keene J) [1].

For more on how to report, including a secure online form and phone number:

<https://www.counterterrorism.police.uk/what-you-can-do/>

After a police investigation, the case can be brought to a prosecuting authority. The different authorities are:

- In **England and Wales**: The Crown Prosecution Service

<https://www.cps.gov.uk/>

- In **Northern Ireland**: Public Prosecution Service

<https://www.ppsni.gov.uk/>

- In **Scotland**: Crown Office and Procurator Fiscal Service

<https://www.copfs.gov.uk/>



USEFUL RESOURCES

- **UN Refugee Agency: Access to find legal assistance in the UK:**

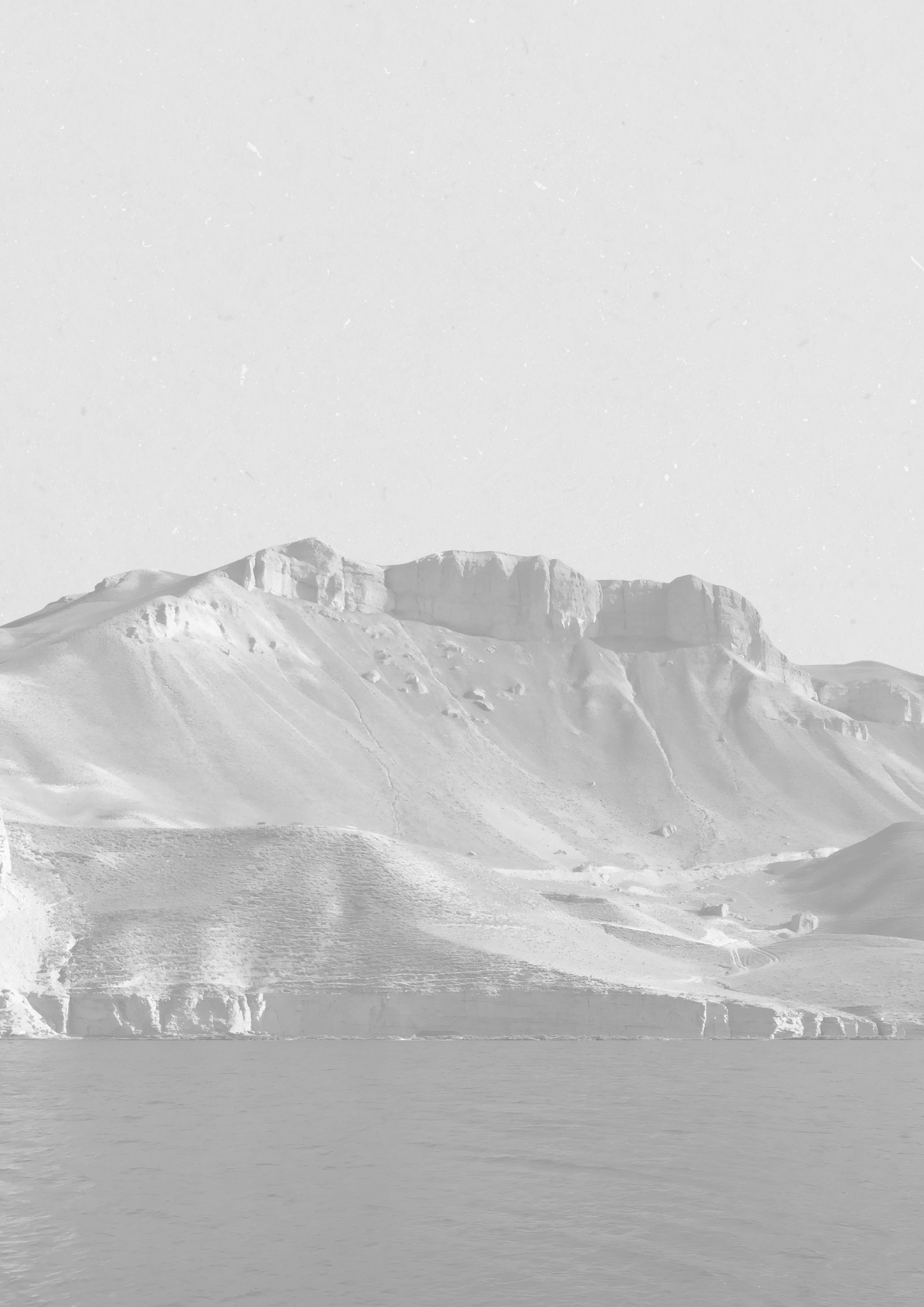
<https://help.unhcr.org/uk/legal-assistance/>

- **UK Government: An online test to check eligibility for legal aid:**

<https://www.gov.uk/check-legal-aid>

- **UK Pro Bono Directory: A directory on UK pro bono services, including the Afghan Pro Bono Initiative:**

https://www.amerainternational.org/pro_bono_listing/united-kingdom-pro-bono-directory/



**HUMAN BEINGS ARE MEMBERS OF A WHOLE,
IN CREATION OF ONE ESSENCE AND SOUL.
IF ONE MEMBER IS AFFLICTED WITH PAIN,
OTHER MEMBERS UNEASY WILL REMAIN.
IF YOU HAVE NO SYMPATHY FOR HUMAN PAIN,
THE NAME OF HUMAN YOU CANNOT RETAIN.**

SA'ADI SHIRAZI, 'BANI ADAM' (HUMAN BEING)