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POLICY BRIEF SERIES

Justice Deferred, Justice Denied: The Architecture of Impunity in Afghanistan

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Afghanistan is often described as the graveyard of empires,[1] a land whose history is inseparable from the violence of successive foreign interventions. Yet the phrase, with grim inaccuracy,[2] aestheticizes what is, at its core, a sustained record of atrocities. From the Soviet Union's decade-long occupation beginning in 1979, through the factional civil wars of the 1990s, the Taliban's first period of governance, and the two-decade American-led military presence that ended in August 2021, followed by Taliban's return to power, Afghan civilians have borne the overwhelming cost of conflicts over which they had no meaningful control. Across each of these periods, grave violations of international humanitarian law and human rights were committed: mass killings, systematic torture, enforced disappearances, deliberate destruction of civilian infrastructure, and the persecution of entire communities on grounds of ethnicity, religion and perceived political loyalty.[3]

What distinguishes Afghanistan's tragedy is not only the scale of these crimes but the near-total failure to establish any meaningful accountability for them. The legal architecture has, in formal terms, existed: Afghanistan acceded to the Rome Statute of the International Criminal Court ('ICC') in May 2003, and its 2017 Penal Code codified crimes against humanity and war crimes for the first time in Afghan domestic law. Yet prosecution has remained largely performatively theoretical. Perpetrators of the worst crimes of the Soviet period, the civil war era, and the post-2001 conflict have occupied government ministries, commanded armies, and negotiated peace agreements. Amnesty was legislated before accountability could be attempted. The Taliban's return to power in 2021 foreclosed even the incomplete mechanisms that had begun to take shape.

This policy brief concerns crimes committed during the Soviet occupation (1979–1989), the civil war (1992–1996), and the Taliban era (1996-2001), evaluates domestic and international accountability efforts between 2001 and 2021, and assesses the structural barriers that have sustained impunity and their implications for any future prospect of justice and reconciliation in Afghanistan.

1. Soviet Crimes in Afghanistan: 1979–1989

The Soviet Union's decision to invade Afghanistan on 27 December 1979[4] was the culmination of a sequence of political crises set in motion by the April 1978 Saur Revolution, in which the People's Democratic Party of Afghanistan ('PDPA') seized power.[5] The PDPA government's imposition of radical Marxist-Leninist reforms, female education, land redistribution, and abolition of the traditional bride price, on a predominantly rural and devoutly Muslim society, generated fierce resistance and a series of regional uprisings.[6] The regime's violent suppression of dissent, conducted through its secret police and resulting in the imprisonment and extrajudicial killing of thousands, deepened the crisis rather than resolving it.[7] Internal factional conflict between the Khalq and Parcham wings of the PDPA erupted at the highest levels: following a September 1979 palace coup, Hafizullah Amin seized power and had his predecessor, Nur Muhammad Taraki, killed.[8] Moscow, alarmed by Amin's independent course and fearing the collapse of a client state on its southern border, resolved to intervene directly.

On the night of 27 December 1979, KGB-administered poison incapacitated Amin at a palace luncheon.[9] Soviet Alpha special forces then stormed the Tajbeg presidential palace in Kabul, killing Amin and his guard in the assault.[10] Babrak Karmal, flown in from Soviet Tajikistan, was installed as head of state, lending a veneer of Afghan sovereignty to what was, in effect, a military occupation.[11] What followed was a decade-long counter-insurgency war that, by the time Soviet forces withdrew under the 1988 Geneva Accords,[12] had produced between 500,000 and two million Afghan deaths, displaced over five million into Pakistan and Iran, and inflicted destruction on the country's agricultural and social infrastructure from which it has never fully recovered.[13] The crimes committed during this occupation were not incidental by-products of war, but the operational expression of Soviet counter-insurgency doctrine.

Soviet air power was the defining instrument of the occupation. Between 1979 and 1989, Soviet forces conducted sustained aerial bombardment campaigns across rural Afghanistan using Antonov AN-26 aircrafts fitted with cluster bomb dispensers, Sukhoi Su-25 ground attack aircrafts and Mil Mi-24 attack helicopters.[14] The targets were not military installations. They were villages, *bázárs*, irrigation systems, agricultural land and medical facilities. Entire provinces – Herat, Kandahar and the Panjshir Valley – experienced carpet-bombing operations that rendered vast agri-

1 Milton Bearden, "Afghanistan, Graveyard of Empires", in *Foreign Affairs*, 2001, vol. 80, no. 6, p. 17.

2 Alexander Hainy-Khaleeli, "Why we need to stop calling Afghanistan 'The Graveyard of Empires'", in *Ajam Media Collective*, 24 August 2021.

3 The Afghanistan Justice Project, "Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001", July 2005 (https://www.legal-tools.org/doc/8761bd/).

4 Joseph Collins, "The Soviet Invasion Of Afghanistan: Methods, Motives, And Ramifications", in *Naval War College Review*, 1980, vol. 33, no. 6, pp. 53–62.

5 Javier Gil Guerrero, "The Carter Administration and the Dilemmas of the 1978 Saur Revolution in Afghanistan", in *The International History Review*, 2025, vol. 47, no. 6, p. 1030.

6 Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2nd ed., Yale University Press, New Haven, 2002, pp. 103–139.

7 *Ibid.*

8 "Taraki Yields Afghan Presidency and Party Posts to Prime Minister", *The New York Times*, 17 September 1979.

9 Christopher Andrew and Oleg Gordievsky, *KGB: The Inside Story*, Harper Collins, 1990, p. 574.

10 Henry S. Bradsher, *Afghanistan and the Soviet Union*, Duke University Press, Durham, 1983, p. 183.

11 Alvin Rubinstein, "The Soviet Union and Afghanistan", in *Current History*, 1983, vol. 82, no. 486, pp. 318–338.

12 Paul Leiws, "Accord Completed on Soviet Pullout", *The New York Times*, 9 April 1988.

13 M. Hassan Kakar, *Afghanistan: The Soviet Invasion and the Afghan Response, 1979-1982*, University of California Press, Berkeley, 1995, pp. 231–230.

14 Edward B. Westermann, "The Limits of Soviet Airpower: The Failure of Military Coercion in Afghanistan, 1979–89", in *Journal of Conflict Studies*, 1999, vol. 19, no. 2, p. 39.

cultural zones uninhabitable.[15] The Panjshir Valley alone was subjected to five major Soviet military offensives between 1980 and 1988, each accompanied by intensive aerial bombardment targeting civilian settlements.[16] Soviet aircraft dropped over 2.5 million tons of ordnance during the occupation, with roughly 80 per cent impacting civilian-populated areas. These were not failures of proportionality; they were its deliberate inversion.

The on-field operations followed a consistent and documented pattern. In Kohistan, in February 1982, sweep operations killed over 2,000 civilians.[17] In Kunduz Province that same year, approximately 1,500 civilians were executed during a single Soviet operation.[18] The predominantly Hazara regions of central Afghanistan experienced systematic massacres on grounds of ethnicity and suspected political sympathy; between 1981 and 1987, an estimated 8,000 to 10,000 Hazara civilians were killed by Soviet forces and Afghan government units.[19] The Panjshir Valley recorded documented killings exceeding 50,000 civilians across the occupation period.[20]

The Soviet-supervised secret police apparatus, the KHAD – reorganized under direct Soviet guidance and commanded from 1980 to 1985 by Dr. Najibullah – institutionalized torture as standard interrogation practice.[21] By 1985, KHAD employed over 25,000 full-time agents and operated detention facilities across every major Afghan city.[22] Soviet advisers participated directly in interrogation sessions, trained Afghan counterparts in torture techniques, and reviewed reports documenting methods employed: ice water immersion, electrical current applied to sensitive areas, stress positions maintained for days and systematic beatings.[23] Between 1978 and 1989, documented enforced disappearances exceeded 20,000 individuals.[24] Families received no information on their relatives' fate; officials systematically denied knowledge of arrests. Declassified Afghan security service records subsequently revealed that hundreds of detainees were summarily executed in prison without trial.[25] Records for Pul-e Charkhi Prison alone acknowledged approximately 12,000 executions at that facility between 1978 and 1989.[26]

The Soviet military strategy incorporated forced displacement not as a collateral consequence of combat operations, but as an explicit counter-insurgency objective. Soviet commanders designated extensive regions as operational areas. Within these zones – encompassing Kandahar, Helmand, Uruzgan, and Paktia provinces, as well as the Hazara heartlands of central Afghanistan – Soviet forces and Afghan government units systematically destroyed villages through bombing and ground assault, poisoned water sources, salted agricultural land, burned crops, and killed livestock. Declassified Soviet military orders explicitly identify depopulation as a strategic aim; commanders calculated civilian displacement as an intended operational outcome. The consequences were generational: regions depopulated between 1980 and 1989 remained abandoned for decades; survivors who fled to Pakistan and Iran were largely unable to return or recover property. Between three and five million Afghans became refugees during the occupation, representing approximately 25 to 30 per cent of the pre-invasion population.[27] Taken together, these patterns of systematic killings, institutionalized torture, enforced disappearances, and deliberate mass displacement constitute crimes against humanity under international law and grave breaches of the Geneva Conventions. The deliberate targeting of ethnic Hazara communities additionally raises serious questions under the Genocide Convention. The failure to investigate any of these crimes represents not merely a legal deficit, but a foundational injustice upon which subsequent cycles of violence in Afghanistan have been built.

2. Crimes During the Civil War and First Taliban Regime: 1992–2001

The Soviet withdrawal under the 1988 Geneva Accords did not bring peace to Afghanistan; it inaugurated a new and in some respects equally devastating phase of violence.[28] The collapse of the Soviet-backed Najibullah government in April 1992 triggered a scramble for Kabul among the Mujáhidín factions that had, with American and Pakistani support, fought the occupation.[29] What followed was a civil war of exceptional brutality, conducted by forces with no functioning chains of accountability, governed by neither the laws of war nor any domestic legal order.[30]

The factional fighting that engulfed Kabul between 1992 and 1996 resulted in the deaths of an estimated 50,000 civilians in the capital alone.[31] Forces commanded by Ahmad Shah Massoud, Gulbuddin Hekmatyar, Abdul Rashid Dostum, and Abdul Ali Mazari subjected the city to sustained rocket and artillery bombardment with no demonstrable military justification. Residential districts, *bázárs* and hospitals were struck repeatedly.[32] Systematic looting of civilian property was conducted on a factional basis, with ethnic dimensions. Hazara communities in western Kabul were subjected to targeted killings, rape and property destruction by Pashtun-dominated forces, while Tajik and Uzbek militias conducted equivalent abuses against communities perceived as enemy-aligned.[33] Rape was deployed systematically as a weapon of factional warfare.[34] Mass executions of civilians were carried out by multiple factions, with bodies left in public spaces as instruments of communal terror.[35] Despite these crimes meeting the definitional threshold for crimes against humanity, no commander has ever faced any accountability. Many of those responsible subsequently occupied senior positions in the post-2001 government, undermining any prospect of genuine transitional justice.

3. Taliban Governance as Systematic Persecution: 1996–2001

The Taliban's capture of Kabul in September 1996 ended the factional civil war but substituted it with a system of governance that constituted a sustained crime against humanity. Taliban rule was characterized by the systematic persecution of women, ethnic and religious minorities, and perceived political opponents through organized coercion and public violence.[36] Women were prohibited from employment, education and independent movement without a male guardian; violations were punished by public flogging.[37] Girls' schools were closed across Taliban-controlled territory.[38] Music, television and most forms of public assembly were banned and enforced by the Ministry for the Promotion of Virtue and Prevention of Vice, the religious police whose members conducted beatings in public spaces.[39] These policies did not constitute merely repressive governance; their systematic character, the deliberate targeting of identifiable groups, and their enforcement through organized state violence met the criteria for persecution as a crime against humanity under Article 7 of the Rome

15 Kakar, 1995, pp. 112–113, see *supra* note 13.

16 Edward Girardet, "Guerrillas survive biggest attack yet as Soviets roar into Panjshir Valley", in *The Christian Science Monitor*, 22 June 1982.

17 Bradsher, 1985, pp. 431–433, see *supra* note 10.

18 Jeri Laber and Barnett Rubin, *A Nation is Dying: Afghanistan Under the Soviets, 1979-87*, Northwestern University Press, 1988, pp. 22–34.

19 Human Rights Watch, "Blood-Stained Hands Past Atrocities in Kabul and Afghanistan's Legacy of Impunity", 6 July 2005 (https://www.legal-tools.org/doc/cdd7e4/). See, Hannibal Travis, "Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq", in *Northwestern Journal of International Human Rights*, 2005, vol. 3, no. 1, p. 11.

20 Bradsher, 1985, pp. 431–433, see *supra* note 10. See also, Robert Kaplan, "Afghanistan Post Mortem", *The Atlantic*, 1 April 1989.

21 Amnesty International, "Afghanistan: Torture of Political Prisoners", November 1986, p. 6 (https://www.legal-tools.org/doc/ty5tij1l/).

22 *Ibid*.

23 *Ibid*., p. 40.

24 "The Afghanistan Death List – Afghans killed by the state in 1978-79", in *The Polynational War Memorial*, 27 August 2014.

25 United Nations Assistance Mission in Afghanistan, "Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on the Elimination of Torture", 24 August 2017 (https://www.legal-tools.org/doc/9gj6a19d/).

26 Bilal Saraway, "Kabul's prison of death", *BBC News*, 27 February 2006.

27 Bradsher, 1985. pp. 319–320, see *supra* note 10.

28 Paul Leiws, "Accord Completed on Soviet Pullout", *The New York Times*, 9 April 1988.

29 Human Rights Watch, "Blood-Stained Hands Past Atrocities in Kabul and Afghanistan's Legacy of Impunity", 6 July 2005 (https://www.legal-tools.org/doc/cdd7e4).

30 *Ibid*.

31 Human Rights Watch, "Paying for the Taliban's Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan", 9 April 2002 (https://www.legal-tools.org/doc/jjc14w2u/).

32 Human Rights Watch, 2005, Part III, see *supra* note 19.

33 Mehdi J. Hakimi, "Relentless Atrocities: The Persecution of Hazaras", in *Michigan Journal of International Law*, 2023, vol. 44, no. 2, pp. 157–217.

34 Human Rights Watch, 2005, pp. 62–70, see *supra* note 19.

35 *Ibid*., Part III.

36 Amnesty International, "Women in Afghanistan: The Back Story", 3 July 2023 (https://www.legal-tools.org/doc/wtipu6tt/).

37 *Ibid*.

38 *Ibid*.

39 M. Bashir Mobasher, Mohammad Qadam Shah and Shamshad Pasarlay, "The Constitution and Laws of The Taliban 1994–2001: Hints from the Past and Options for the Future", International Institute for Democracy and Electoral Assistance, 2022, p. 143.

Statute.

The Hazara community suffered the most extreme violence during the Taliban period.[40] The Taliban's ideological hostility to the predominantly Shí'ah Hazara population produced episodes of mass killing amounting to genocide. The worst documented incident was the massacre at Mazar-i-Sharif in August 1998, when Taliban forces captured the city and conducted systematic killings of Hazara civilians over three days.[41] Estimates of the death toll range from 2,000 to 8,000 persons.[42] The subsequent 1998 massacre in Bamiyan Province[43] followed a similar pattern, which culminated in the demolition of the Bamiyan Buddhas in 2001, an act of deliberate cultural annihilation.[44] These massacres occurred without any investigation, prosecution or acknowledgment of criminal responsibility.

The United States-led intervention following the 11 September 2001 attacks dislodged the Taliban regime within two months, but inaugurated a new cycle of abuses. In south-east Afghanistan, a pattern of arbitrary arrest, torture and extortion was conducted by Afghan military forces and militia commanders operating under American patronage,[45] many of whom had themselves been perpetrators during the 1990s civil war and were reinstated as partners in the counter-terrorism effort. The Bagram detention facility became the site of documented prisoner deaths through torture as early as December 2002.[46] The Maywand District murders (2009–2010),[47] the Kandahar massacre of 2012[48] in which 16 civilians, including nine children were killed, and the findings of Australia's Brereton Report – which identified credible evidence that Australian Special Forces unlawfully killed 39 civilians and prisoners between 2007 and 2013, established that crimes against civilians were not confined to any single party in the conflict.[49]

4. Domestic and International Accountability Efforts: 2001–2021

4.1. Afghanistan's Accession to the Rome Statute (2003)

Afghanistan's accession to the Rome Statute on 1 May 2003 represented the most significant formal commitment to international criminal accountability in the country's history. Under the complementarity principle, Afghan national courts retained primary responsibility, with the ICC intervening only where the domestic system proved unable or unwilling to act.[50] In 2006, the ICC's Office of the Prosecutor opened a preliminary examination into the situation in Afghanistan of potential crimes committed by all parties to the conflict, namely, the Taliban, Afghan national security forces, and international coalition forces, including the United States. In November 2017, the Prosecutor sought a formal investigation.[51] Following an improper initial refusal in April 2019,[52] the Appeals Chamber authorized proceedings in March 2020. However, the investigation's scope was subsequently narrowed. In September 2021, the Prosecutor announced that investigative resources would be focused primarily on crimes committed by the Taliban and the Islamic State Khorasan Province, effectively deprioritizing the investigation of crimes by Afghan government forces and coalition actors.[53] This decision, reached under sustained American diplomatic and legal pressure, reflects an institutional capitulation that undermined the ICC's claim to impartiality.

4.2. The Afghanistan Independent Human Rights Commission

The Afghanistan Independent Human Rights Commission ('AIHRC'), established under the Bonn Agreement of 2001 and given a constitutional mandate in 2004, represented the most sustained domestic effort to document and address human rights violations across Afghanistan's conflict history.[54] Operating under severe constraints, including inadequate funding, threats to staff, and the presence in government of individuals it was mandated to investigate, the AIHRC conducted field investigations, documented abuses by all conflict parties, and produced landmark reports on human rights violations across all conflicts periods.[55] The Commission advocated for the establishment of a formal transitional justice process, including a truth-seeking mechanism, vetting of public officials, and institutional reform of the security sector.

The AIHRC's 2005 report, *A Call for Justice*, found that the majority of Afghans surveyed supported accountability measures, a finding that directly challenged the political narrative, advanced by powerful actors within the Karzai government, that accountability would destabilize the peace process. The Commission's recommendations were largely ignored.[56] AIHRC commissioners faced intimidation; its offices were attacked; and its budget was kept at levels insufficient for any meaningful investigation programme. The Commission's work nonetheless constituted the most credible body of documentation of past crimes produced within Afghanistan, and its reports remain a foundational source for any future accountability process. The Taliban's return to power in 2021 resulted in the AIHRC's effective dissolution.[57]

4.3. Accountability Sacrificed for Political Settlement *via* the 2009 Amnesty Law

The most significant domestic obstacle to accountability was the National Reconciliation, General Amnesty and National Stability Law ('Amnesty Law'), enacted in 2009.[58] The law granted immunity from prosecution to all individuals who had participated in armed conflict prior to the establishment of the interim administration in 2001. Its passage was driven by former Mujáhidín commanders who dominated the legislature and faced potential exposure under any accountability mechanism. The Amnesty Law was more "a political instrument than a functioning legal text",[59] marked by fundamental ambiguities in its definition of those covered (individuals or factions), the temporal scope of immunity granted, and the crimes excluded. The law contains no explicit carve-out for crimes against humanity, genocide, or grave breaches of the Geneva Conventions, the categories of crime that international law places beyond any lawful amnesty.

Under international law, amnesties covering genocide, crimes against humanity, and grave breaches of international humanitarian law are impermissible.[60] The Rome Statute's Preamble affirms that it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes. Article 6(5) of the 1977 Additional Protocol II, which the Afghan law sought to invoke as authority for amnesty, applies only to ordinary combatants in non-international armed conflict and cannot be

40 Hakimi, 2025, see *supra* note 33.

41 *Ibid.*

42 Human Rights Watch, "The Massacre in Mazar-I Sharif", November 1998 (https://www.legal-tools.org/doc/qpfsb44b/).

43 Human Rights Watch, "Massacres of Hazaras in Afghanistan", 1 February 2001 (https://www.legal-tools.org/doc/uyjdx5zz/).

44 Mehdi J. Hakimi, "The Afghan State and the Hazara Genocide", in *Harvard Human Rights Journal*, 2024, vol. 37, pp. 81–115.

45 Human Rights Watch, "'Today We Shall All Die': Afghanistan's Strongmen and the Legacy of Impunity", 3 March 2015 (https://www.legal-tools.org/doc/qlw6sko6/).

46 Amnesty International, "USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review", 18 February 2009 (https://www.legal-tools.org/doc/036e3ptu/).

47 Thomas Gregory, "Disappearing Bodies: Visualising the Maywand District Murders", in Christina Hellmich and Lisa Purse (eds.), *Disappearing War: Interdisciplinary Perspectives on Cinema and Erasure in the Post-9/11 World*, Edinburgh University Press, 2017, pp. 73–91.

48 "US soldier kills Afghan civilians in Kandahar", *BBC News*, 11 March 2012.

49 Stephen Hare, "Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces", in *ICRC* (available on its web site).

50 See Abdul Mahir Hazim, "A Critical Analysis of the Rome Statute Implementation in Afghanistan", in *Florida Journal of International Law*, 2019, vol. 31, no. 1, pp. 1 ff.

51 ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33 (https://www.legal-tools.org/doc/2fb1f4/).

52 Luca Poltronieri Rossetti, "The Pre-Trial Chamber's Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion?", in *Journal of International Criminal Justice*, 2019, vol. 17, pp. 585–608.

53 ICC, *Situation in the Islamic Republic of Afghanistan*, Office of the Prosecutor, Request to authorise resumption of investigation under article 18(2) of the Statute, ICC-02/17-161, 27 September 2021 (https://www.legal-tools.org/doc/pzfuq9/).

54 Human Rights Watch, "Afghanistan: Constitutional Process Marred by Abuses", 8 January 2008 (https://www.legal-tools.org/doc/0wrtjqnl/).

55 Afghanistan Independent Human Rights Commission, "A Call for Justice – A National Consultation on Past Human Rights Violations in Afghanistan", 25 January 2005 (https://www.legal-tools.org/doc/051e31/).

56 *Ibid*.

57 "Afghanistan: Stay home, female Kabul government workers told", *BBC News*, 19 September 2021.

58 Afghanistan, National Reconciliation, General Amnesty, and National Stability Law, 13 December 2009 (https://www.legal-tools.org/doc/7825c2/).

59 Patricia Gossman, "Amnesty and the Peace Process in Afghanistan", in *International Network to Promote the Rule of Law*, February 2019.

60 Anja Seibert-Föhr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, 2009, pp. 3–4.

read to extinguish individual criminal liability for international crimes.[61] In practice, the law provided immunity not only to low-level combatants but to senior commanders with documented responsibility for mass atrocities, several of whom held ministerial portfolios at the time of the law's enactment. The political will to prosecute was clearly absent; the Amnesty Law formalized that absence in statute.

4.4. The 2017 Penal Code: Reform Without Implementation

Afghanistan's revised Penal Code, which entered into force in 2017, represented a significant technical advance in domestic law.[62] For the first time, Afghan national legislation defined and established punishments for war crimes and crimes against humanity in terms consistent with the Rome Statute framework. The Code criminalized war crimes – including wilful killing, torture and sexual violence – and crimes against humanity – including murder, persecution and enforced disappearance. Implementation, however, was negligible. The judicial infrastructure required to prosecute international crimes – including specialized investigative capacity, prosecutorial expertise, witness protection mechanisms, and a genuinely independent judiciary – did not exist. The Afghan courts that did function operated under severe political pressure and were pervasively corrupt.[63] The 2009 Amnesty Law remained in force and in direct tension with the new Code's provisions. No prosecution under the Penal Code's war crimes or crimes against humanity provisions was ever successfully concluded before the Taliban's return to power.[64] Afghanistan met its obligations under the Rome Statute selectively at best: selective accountability, targeting the crimes of present enemies while immunizing those of past allies, and perpetuating rather than resolving the injustices that fuel continued conflict.

5. The Impunity Architecture: Structural Barriers to Justice

The fundamental obstacle to accountability in Afghanistan has never been primarily legal. The Rome Statute framework, and, after 2017, the domestic Penal Code together provided, at least in formal terms, a functioning basis for prosecution. The obstacle has been political: the deliberate construction of an impunity architecture in which those with the greatest exposure to criminal liability held, simultaneously, the greatest institutional power – not an accident of the post-2001 settlement, but its defining feature. Commanders responsible for documented atrocities during the 1992–1996 civil war controlled the defence and interior ministries, the intelligence services, and the major regional military formations of the post-2001 state.[65] They sat in the parliament that passed the 2009 Amnesty Law. They governed provinces where victims of their past crimes continued to live. The Afghan judiciary, chronically underfunded, institutionally weak, and operating in an environment of pervasive armed intimidation, lacked both the independence and the capacity to bring cases against figures of this kind even where political will had existed.[66] Prosecutors who pursued politically sensitive cases faced threats; judges who delivered inconvenient verdicts were transferred or worse. Under these conditions, the formal existence of accountability mechanisms, a signed treaty, a codified penal statute and a human rights commission was largely theatrical.

International actors also bear substantial responsibility for the perpetuation of Afghan impunity. The United States, which exercised dominant influence over the post-2001 political settlement, consistently prioritized counter-terrorism objectives and short-term stabilization over the transitional justice mechanisms that Afghan civil society and the AIHRC advocated.[67] Building the post-2001 security forces around existing Mujáhidín structures with documented records of abuse, prioritizing expediency over accountability, proved self-defeating: the warlord networks that were incorporated into the state in 2001–2002 in the name of stability subsequently operated as predatory actors, generating civilian grievances that fuelled Taliban recruitment and undermined the legitimacy of the government the international community was ostensibly building.

A recurring argument deployed against accountability in Afghanistan has been that prosecution is incompatible with the peace negotiations required to end active conflict. This argument was advanced during the Hezb-i-Islami agreement of 2016, the various rounds of Taliban talks, and the lead-up to the Doha Agreement of 2020.[68] The logic is that armed actors resist settlement if prosecution awaits. But the argument collapses as a principal basis for permanent impunity. Article 6(5) of Additional Protocol II, the provision cited as international legal authority for post-conflict amnesty, does not extend to perpetrators of international crimes.[69] The obligation of amnesty cannot cover war crimes, crimes against humanity or genocide; international law is unambiguous on this point. The deeper problem is that the peace-versus-justice framing misrepresents what sustained impunity actually produces.

Afghanistan's experience across four decades suggests that accommodating perpetrators does not purchase durable peace; it purchases temporary reduction in violence while preserving the grievances and power structures that generate renewed conflict. The Rome Statute's principle of universal application was designed precisely to resist this instrumentalization of justice. Its erosion in the Afghan case has costs that extend well beyond Afghanistan's borders.[70]

6. Conclusion

Four decades of conflict in Afghanistan have produced crimes of extraordinary gravity and accountability of virtually none. Neither the current Taliban government nor the former international occupiers will accept accountability for their respective crimes; the political and institutional preconditions for any functioning transitional justice mechanism within Afghanistan do not currently exist. This does not, however, extinguish the legal obligations of the Rome Statute, nor the ICC's jurisdiction over crimes committed on Afghan territory. Impunity is a condition, not a verdict. The question is not whether accountability remains legally possible – it does, but whether the international community possesses the will to pursue it. Continued inaction is not a neutral position. It is a choice with consequences for Afghan victims, for the integrity of the international legal order, and for the prospects of any future peace in one of the world's most battered societies.

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61 Yasmin Naqvi, "Amnesty for War Crimes: Defining the Limits of International Recognition", in *International Review of the Red Cross*, 2003, vol. 85, no. 851, pp. 583–625.

62 Afghanistan, Penal Code, 15 May 2017 (https://www.legal-tools.org/doc/3zbeq0l1/).

63 Mobasher, Shah and Pasarlay, 2022, see *supra* note 39.

64 *Ibid*.

65 Ashley Jackson, "The Cost of War: Afghan Experiences of Conflict, 1978—2009", in *Oxfam International*, 2009, pp. 7–12.

66 International Crisis Group, "Reforming Afghanistan's Broken Judiciary", 17 November 2010 (https://www.legal-tools.org/doc/06qdpzal/).

67 Patricia Gossman, "Transitional Justice and DDR: The Case of Afghanistan", in *International Center for Transitional Justice*, June 2009.

68 Barnett R. Rubin, "Transitional Justice and Human Rights in Afghanistan", in *International Affairs*, 2003, vol. 79, no. 3, pp. 567–581.

69 Naqvi, 2003, pp. 583–625, see *supra* note 61.

70 Human Rights Watch, "US Sanctions on the International Criminal Court", 14 December 2020 (https://www.legal-tools.org/doc/as3qn42l/).

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