

**RESEARCH MEMORANDUM**

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**Amnesty and the Peace  
Process in Afghanistan**

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**February 2019**

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**Drafted By:**  
Patricia Gossman

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**INPROL**

**Submitted By:**

United States Institute of Peace, Afghanistan Team

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**Note:**

All opinions stated in this Practitioner's Guide have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.

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## I. Introduction

The question of how to reconcile the need for peace in Afghanistan with the need for accountability and justice, and the state's obligations to provide these, has been long debated in Afghanistan. Over more than 40 years of war, both the promulgations of amnesties and their denial have fueled continuing conflict. This paper seeks to unpack Afghanistan's international and national legal obligations concerning prosecuting serious crimes; the Government of Afghanistan's legal framework for prosecuting serious crimes; its Amnesty Law and its application; and what these might mean for amnesty in a peace deal with the Taliban. While a blanket amnesty is not reconcilable with Afghanistan's obligations under its domestic law or international law, aspects of Afghanistan's pluralistic legal system could offer some measure of accountability.

The National Reconciliation, General Amnesty and National Stability Law, which came into force in 2009, grants judicial immunity to "all political and enemy sides involved in hostilities with one another before the creation of the interim administration," (2002) as well as insurgents who were in opposition to the government at that time provided that they cease fighting, join a national reconciliation process, and agree to respect the Afghan Constitution and other laws.<sup>1</sup>

Given that in a peace settlement, the Taliban may demand some revisions to the constitution, thus changing the existing pre-conditions, an agreement with the Taliban could include an explicit amnesty provision, much like that included in the agreement with Hezb-i Islami in 2016. As noted below, the 2009 law and the 2016 agreement are ambiguous on precisely what acts and entities (individuals or groups) are covered by the amnesties, but within Afghanistan's legal community the agreement is seen as a blanket amnesty.

Both the 2009 law and the 2016 Hezb-i Islami agreement exclude from amnesty those against whom there are *huquq-ul-ibad* (the rights of people, specifically Muslim believers) claims (see page 7 for additional information on *huquq-ul-ibad*). However, both the law and the agreement pre-emptively provide immunity before any such claim. No cases have been brought that have tested the law.

There have been other complicating developments. Afghanistan's revised Penal Code came into force in 2017, a year after the Hezb-i Islami deal and eight years after the Amnesty Law. Its provisions, which now incorporate war crimes and crimes against humanity as part of Afghan law, are at variance with the terms of these amnesties, as are Afghanistan's international obligations. The International Criminal Court (ICC) prosecutor has requested permission from the court's judges to open an investigation into possible war crimes and crimes against humanity in Afghanistan.

Finally, a factor that has not played much of a role in any discussions thus far about amnesties but could, if effectively channeled, is public opinion. In a statement on December 11, 2018, President Ghani announced the formation of an advisory board on peace that would include, among others, representatives of the families of war victims.<sup>2</sup> It remains to be seen whether this or other actions by civil society will influence the terms of a peace settlement.

This paper discusses:

- *International law/treaties to which Afghanistan is a party*
- *The proposed International Criminal Court investigation of crimes in Afghanistan*
- *Afghan domestic law on serious crimes including under sharia*
- *Ḥuqūq Allāh [the rights of God]/Ḥuqūq al-ʿIbād : the question of harm for whom and amnesty*
- *The 2009 Law on National Reconciliation, General Amnesty and National Stability*
- *The Amnesty provision in the peace deal with Hezb-e Islami (Hekmatyar)*
- *Domestic and international legal limitations options on an amnesty in a Taliban peace agreement*

## **II. Afghanistan’s Obligations Under International Customary Law and Amnesty in a Peace Agreement**

When the US invaded Afghanistan in 2001, the war fell under the rules governing an international armed conflict, meaning that the four Geneva Conventions and Additional Protocols applied. After the establishment of the Afghan Transitional Administration in June 2002, the United Nations reclassified the continuing conflict as a non-international armed conflict between the government of Afghanistan and its armed forces (supported by international military force) and non-state armed opposition groups (al Qaeda and the Taliban). The International Committee of the Red Cross concurred with this reclassification,<sup>3</sup> as did the Office of the Prosecutor of the International Criminal Court when it began its preliminary investigation.<sup>4</sup> As a practical matter, international humanitarian law on the means and methods of warfare is largely the same whether concerning an international or non-international armed conflict. A key difference is that during an international armed conflict, captured soldiers from national armed forces and associated militias must be given the full protections afforded prisoners-of-war.

As a non-international armed conflict, all parties to the conflict in Afghanistan

have been bound by international humanitarian law set out in treaties and in the rules of customary international law. The most important treaty law is Common Article 3 to the Geneva Conventions of 1949, to which all members of the coalition are party. Common Article 3, as discussed below, sets forth minimum standards for all parties to a non-international armed conflict. Afghanistan is also party to Protocol II to the Geneva Conventions, which provides further protections for combatants and civilians during non-international armed conflicts.

Article 3 common to the 1949 Geneva Conventions requires humane treatment for all persons not taking active part in hostilities.<sup>5</sup> Afghanistan is also a party to the 1977 Additional Protocol II to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts.<sup>6</sup> As with Common Article 3, Additional Protocol II affirms the responsibilities of all parties to the conflict to afford basic protections to those not taking part in the hostilities.<sup>7</sup>

All parties to the conflict, including the Taliban, have committed acts which violate Common Article 3 and the Additional Protocol, specifically in carrying out attacks on civilians. The Taliban have committed a great number of such violations, specifically through targeted assassinations of civil servants and other political figures, and through mass casualty suicide attacks. Afghan national security forces, particularly the police and National Directorate for Security (NDS), have also committed violations of these laws through summary executions of civilians and torture (including sexual assault). Afghanistan's laws criminalizing torture align with the UN Convention against Torture, to which Afghanistan is a party. Afghanistan has also vowed to ratify the Optional Protocol to the Convention against Torture. Afghanistan is also party to the International Covenant on Civil and Political Rights (ICCPR).

Afghanistan became a party to the Rome Statute on May 1, 2003, thus accepting the court's jurisdiction over war crimes and crimes against humanity should the government of Afghanistan prove unable or unwilling to investigate these crimes.<sup>8</sup> Under the Statute, there is no impunity; the most responsible perpetrator(s) must be prosecuted either by a national court or by the ICC.<sup>9</sup>

Thus, Afghanistan's international law obligations conflict with any blanket amnesty that would cover the most serious crimes as identified by the ICC. According to the ICC's preliminary report on Afghanistan, for the Taliban these include murder; intentionally directing attacks against the civilian population; intentionally directing attacks against humanitarian personnel; and conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities. For members of the Afghan national security forces, these include torture, sexual violence, and forced disappearances.<sup>10</sup>

## **A. The International Criminal Court Investigation**

In November 2017, the Prosecutor of the ICC, Fatou Bensouda, formally filed a legal submission asking for permission from the ICC's Judges to open an investigation in Afghanistan in the period since July 1, 2002.<sup>11</sup> In her application, the Prosecutor concluded that as of 2013, she had obtained sufficiently credible and detailed information on approximately 200 incidents to reach the conclusion that crimes against humanity and war crimes had been committed in Afghanistan since May 2003.<sup>12</sup> If the court decides that "there is a reasonable basis to proceed" with opening an investigation under Article 15(4), the Office of the Prosecutor (OTP) could investigate other alleged crimes (beyond these 200) that fall within the scope of the court's inquiry.

According to the OTP, there is a reasonable basis to believe 1) that members of the Taliban and affiliated armed groups have been responsible for crimes against humanity and war crimes; 2) that members of the Afghan National Security Forces (ANSF), in particular members of the National Directorate for Security and the Afghan National Police, engaged in systemic patterns of torture and cruel treatment of conflict-related detainees in Afghan detention facilities; and 3) that US armed forces and members of the Central Intelligence Agency committed acts of torture, cruel treatment, outrages upon personal dignity, rape, and sexual violence against conflict-related detainees in Afghanistan and other locations.<sup>13</sup>

The report further noted that the Government of Afghanistan had instituted only a limited number of proceedings against alleged perpetrators.<sup>14</sup> Afghanistan has not referred any cases to the ICC. The OTP's November 2017 application concludes that given:

"the absence of relevant national proceedings against those who appear to be most responsible for the most serious crimes within the situation, the potential cases that arise from an investigation of the situation would be admissible. Taking into account the gravity of the crimes and the interests of the victims, there are no substantial reasons to believe that an investigation would not serve the interests of justice."<sup>15</sup>

Should the ICC go ahead with the investigation and issue arrest warrants, these would name specific individuals rather than groups. As of this paper's publication, the ICC Pre-Trial Chamber judges still had not issued a decision on whether to open an investigation.

The acts under consideration by the ICC are crimes under both Islamic and international law, including killing of non-combatants, taking hostages, rape, torture, and willful destruction of civilian property. There would be no conflict between Islamic and international law in prosecuting those responsible for such acts.<sup>16</sup>

### III. Afghanistan's Domestic Laws on Serious Crimes Including Under Islamic Law (Sharia)

#### A. Afghanistan's Penal Code

Afghanistan began overhauling its 1976 Penal Code in 2012; the revised version became law in August 2017.<sup>17</sup> The Criminal Procedure Code was revised in 2014. These laws explicitly incorporate ICC Rome Statute crimes and exempt them from statutes of limitation.<sup>18</sup> The 2017 penal code incorporates provisions on war crimes, crimes against humanity, genocide, and the crime of aggression - the four core international crimes within the subject matter jurisdiction of the ICC. Chapter Two, "Crimes Against Humanity," and Chapter Three, "War Crimes," of the Penal Code describe these crimes in accordance with the Rome Statute. For most of these crimes the punishment is the most severe available. For example, Article 265 (1) states that accomplices of perpetrators of suicide attacks are liable for "grade one continued imprisonment or capital punishment." Article 266 states that those detonating or disseminating lethal explosive devices in public places, or possessing, importing, transferring, etc. explosive substances for the purpose of suicide attacks shall also be liable for "grade one continued imprisonment or capital punishment." With the incorporation of Rome Statute crimes into the 2017 Penal Code, the Office of the Attorney General of Afghanistan established a war crimes unit responsible for handling such cases.

The concept of *qisas* in sharia is important in discussing the question of amnesty. *Qisas*, broadly considered, represents retributive justice in cases of murder or intentional bodily harm.<sup>19</sup> A *qisas* offense is treated as a common law tort or an offense against the person, rather than an offense against the state. All Islamic schools of jurisprudence agree that *qisas* may be demanded only when the killing is unjust and the murderer acted intentionally.<sup>20</sup> While a sharia judge can convict someone of a *qisas* offense, *qisas* is considered a rightful claim of the victim (or in cases of death, the victim's next of kin). Therefore it is for the victim or their family to determine whether to forgive or impose a punishment, and what that punishment should be, including physical punishment (including the death penalty), or compensation (*diyat*).<sup>21</sup> Under *qisas*, justice can be achieved through punishment or a combination of pardon and compensation, after which the perpetrator may resume life in society.<sup>22</sup>

Sections of the Penal Code relevant to serious crimes include a provision for *qisas*, by which the immediate heirs of the victim can demand execution (in the case of intentional murder) or grant forgiveness either with *diyat* or without. In all cases, the *qisas* decision pre-empts any other decision. Under *qisas* the relatives of a murder victim have the authority to forgive after (not

before) the conviction by a court. Commutations and pardons for those convicted of intentional murder are not permitted unless the victim's inheritors themselves waive the convict's punishment. The burden is on the state to seek out that waiver.<sup>23</sup> Under Afghanistan's 1976 Penal Code, any act of murder was first governed by Islamic Law. Article 394 of the Penal Code provided that intentional murder was first subject to *qisas*, and only if that charge was dropped by the victim's relatives or disqualified in some way, would the defendant be sentenced in accordance to provisions of Article 547 of the 2017 Penal Code.<sup>24</sup>

Afghanistan's new penal code also stipulates that perpetrators of *qisas* crimes shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic sharia.<sup>25</sup> The definition of war crimes and crimes against humanity in the 2017 Penal Code does not mention *qisas*, thus leaving ambiguous whether the same provisions apply. For example in the case of the crime of murder, the Afghan Penal Code of 2017 still gives *qisas* punishment priority in the law. Only if the conditions for *qisas* are not met, or are revoked for any reason, would the perpetrator then be sentenced according to the provisions of the code.<sup>26</sup>

## **B. Afghanistan's Code of Criminal Procedure**

Afghanistan's Code of Criminal Procedure (CPC) describes the obligations incumbent on Afghanistan's judicial and security institutions to initiate a criminal case after complaints have been registered, official agencies report a crime, or after a crime has been reported by the media (Art. 56).<sup>27</sup>

In ordinary cases the statute of limitations for a criminal case (Art. 72) provides that a felony case is dismissed after 10 years. However, crimes provided in the Statute of the International Court of Justice and Final Document of Diplomatic Conference of Rome—which were not legally defined in the previous Penal Code—are exempted from the statute of limitations. Theoretically anyone could file a complaint under articles 340-341 of the 2017 Penal Code, which define war crimes, even if the incident occurred more than 10 years earlier.

Article 79 of the CPC also makes reference to amnesties, noting that if amnesty is granted, a criminal case is dismissed and with it all penalties. However, it also states that an amnesty shall not violate others' rights. In parallel with the Penal Code, the Anti-Torture Law of 2017 expands the definition of the crime of torture under domestic law to make it broadly compatible with the definition set out in the Convention against Torture. It includes an annex, which was drafted by the Justice Ministry in cooperation with the Afghan bar association and other nongovernmental organizations in the Detention Working Group, providing for "restitution, rehabilitation, and compensation" for victims of torture by state security forces, thereby creating

a new avenue for holding the government accountable.<sup>28</sup>

The Afghan constitution forbids anyone convicted of "crimes against humanity" (*jarayim-i zad-i bashari*) from becoming president or holding other offices.

### **C. Huqūq Allāh/Huqūq al-‘Ibād: The Question of Harm for Whom**

Islamic law discerns two broad categories of crimes, *huqūq Allāh*, those that transgress "God's rights," and *huquq al-‘ibad* and *huquq al-adamiyyin*, those that transgress the rights of believers and other people. In some ways, *huquq Allah* represents "public law" in the sense that cases concerning questions of a religious or moral nature are considered in the interests of the common good. *Huquq al-‘ibad* and *huquq al-adamiyyin* concern crimes considered to be of a private matter between one individual and another that should be settled without undue state interference.<sup>29</sup> However the distinctions "public" and "private" do not translate precisely in the context of sharia law.

In the case of individual murder, the argument for ascribing the crime to *huquq al-‘ibad* has been that the harm done concerns a private interest: the victim's relatives and heirs. At the same time, different schools of thought within sharia jurisprudence have sometimes argued that two interests can be at stake at the same time. When a crime occurs, both the immediate victim and the greater community have an interest in seeing justice: the victim to be compensated, and society to exact punishment in order to deter further crime. As Emon has observed, "[t]o negate one because of the other would jeopardize both the public's interest in deterring [crime] and the individual's security."<sup>30</sup>

Whether there is opening for seeing crimes against humanity and war crimes as straddling both is not clear. Afghanistan recognizes the Hanafi school of jurisprudence which defines murder only as *huquq al-‘ibad*. In any case, there has been no official or public debate on the issue in Afghanistan and given the sensitivities around the involvement of powerful political figures in past war crimes, the subject until now has been largely taboo.

### **D. Afghanistan's National Reconciliation, General Amnesty and National Stability Law**

Afghanistan's Parliament passed the National Reconciliation, General Amnesty and National Stability Law in 2007; it became law in December 2009. The substance of the amnesty appears in Article 3, which states:

(1) All political factions and belligerent parties who were involved in one way or another in hostilities before establishing of the Interim Administration shall be included in the reconciliation and general

amnesty program for the purpose of reconciliation among different segments of society, strengthening of peace and stability and starting of new life in the contemporary political history of Afghanistan, and enjoy all their legal rights, and shall not be legally and judicially prosecuted. (2) Those individuals and groups who are still in opposition to the Islamic Republic of Afghanistan and cease enmity after the enforcement of this resolution and join the process of national reconciliation and respect the Constitution and other laws and abide them shall enjoy the benefits of this resolution. (3) The provisions set forth in clause (1) and (2) of this article shall not affect the claims of individuals against individuals based upon *huquq ul-ibad* (rights of people) and criminal offenses in respect of individual crimes.

The law, with its many preambles, reflects a political position; the legal text includes some ambiguities. The first clause of Article 3 mentions factions and belligerent parties (which may or may not mean individuals); it does not mention crimes as such, but involvement “in one way or another in hostilities.” As written, it could be read as forbidding taking legal action against any group for having played a role in fighting before 2002, rather than for any specific crimes. The second clause does mentions individuals in the context of fighting against the new government. An Afghan lawyer who was reached for comment said the common understanding of hostile parties in Afghanistan includes groups as well as individuals, and that the law is seen as granting immunity for anything done in the context of the war.<sup>31</sup> The third clause was included after the draft was reviewed by the President’s Office.<sup>32</sup> Afghanistan has no constitutional court that could provide a forum for challenging the law. The law may have been applied at the appeals court level, but there is no case law available to verify this.<sup>33</sup> At the time the amnesty became law, Afghanistan’s Penal Code did not define war crimes such as those covered by the amnesty.

## **E. The 2016 Hezb-I Islami Agreement**

The 2016 Hezb-i Islami agreement with Gulbuddin Hekmatyar included an amnesty for him and members of his party who had been in exile. Under the agreement, the government agreed to release Hezb-e Islami prisoners who have been imprisoned for political and military activities, recruit eligible commanders from Hezb-e Islami into the ANSF, support refugee returns from Hezb-i Islami families, and request the UN to remove Hezb-e Islami leaders from its sanctions list. In return, Hezb-e Islami agreed to stop fighting, to end its association with international terrorist organizations, and to adhere to the Afghan Constitution. Under Article 11 of the agreement, it guaranteed judicial immunity for the leader and members of Hizb-e Islami with regard to past political and military acts. As with the 2009 Amnesty Law, the peace deal does not cover those against whom there could be *huquq-ul-ibad* claims.<sup>34</sup> After the peace deal was signed, Attorney General Mohammad Farid Hamidy said that the government would review the cases of those Hezb-i islami prisoners serving prison sentences, and that release would not be possible for all. The

slow pace of prisoner releases has been a source of complaints by the Hezb-i Islami leadership. As with the 2009 Amnesty Law, the 2016 agreement with Hezb-i Islami contravenes Afghanistan's international obligations to prosecute serious crimes. In its 2017 report on protection of civilians, the UN Assistance Mission to Afghanistan (UNAMA) noted this:

The peace agreement – which could act as a precedent for future talks with the Taliban – granted a broad amnesty to Hekmatyar and other members of Hezb-i-Islami (Gulbuddin), which would prevent the domestic prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights. Such amnesties are inconsistent with Afghanistan's obligations under international law, as well as with the norms upheld by United Nations policy. Moreover, broad amnesties encourage impunity and may undermine efforts to secure genuine and lasting peace and reconciliation. Furthermore, the peace agreement failed to recognize the right to the truth of victims of gross violations of human rights and their families. UNAMA underlines that peace negotiations at every level must uphold the protection of women's rights.<sup>35</sup>

## **F. Amnesties in Afghan History: Pre- and Post-Bonn Agreement**

The original draft of the Bonn Agreement, which was written by the UN, stated that the interim administration could not decree an amnesty for war crimes or crimes against humanity. This paragraph nearly caused the talks to break down after a number of powerful faction leaders told their supporters that the paragraph was aimed at discrediting the mujahedin.<sup>36</sup> Ultimately the paragraph was removed, opening the way for parliament to draft the Amnesty Law in 2007.

In a sharp contrast to what the faction leaders at Bonn were arguing for themselves, those in positions of power in 2002 refused to agree to an amnesty for Taliban leaders who requested “immunity from arrest in exchange for agreeing to abstain from political life.”<sup>37</sup> That failure helped fuel the insurgency.

## **IV. Potential Limitations on Amnesty that May Be Effected by Other Nations**

Over the last years, a number of national courts have tried Afghans for war crimes committed in Afghanistan on the basis of universal jurisdiction. As of December 2018, no trials were underway, but investigations had been underway in the Netherlands, Norway, Germany, and Denmark, and possibly other states. Convictions were obtained in two cases in the Netherlands, those of Hesamuddin Hesam. and Habibullah Jalalzoy,<sup>38</sup> and one in the UK, that of

Faryadi Sarwar Zardad, in 2005.<sup>39</sup>

Some individual members of the Taliban and the Haqqani Network are on various sanctions list, including the Office of Foreign Assets Control list, as Specially Designated Global Terrorists. Other sanctions lists tend to be based on this one. In addition, the Taliban as an entity has been officially declared a terrorist organization by Canada and Japan, but not the US or the UN. The US has declared the Haqqani Network a terrorist organization. Gulbuddin Hekmatyar and some other members of Hezb-I Islami were on the sanctions list, and removing their names was one of the demands agreed to in the peace agreement. The Taliban have also insisted on removal of the names of senior officials from these lists as a condition of an eventual peace negotiation.<sup>40</sup>

## **V. Conclusion: Amnesties, the Duty to Prosecute, and Victim’s Rights**

Afghanistan’s international commitments on the duty to prosecute leave no ambiguity. It has ratified all the relevant treaties and covenants, most importantly for this context, the Rome Statute. While Article 6(5) of the 1977 Additional Protocol II provides that “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict,”<sup>41</sup> this does not include international crimes as defined in the Rome Statute. Under international law, grave breaches of international humanitarian law and crimes against humanity may not be covered by an amnesty.<sup>42</sup> Under the Rome Statute, war crimes are not limited to acts committed in international armed conflicts, and its Preamble states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>43</sup>

Afghanistan’s domestic legal obligation to prosecute serious crimes is also unambiguous. Afghanistan’s national implementing legislation for crimes under the Rome Statute became part of its Penal Code in 2017. Afghanistan’s revised Penal Code for the first time defines and determines punishments for war crimes and crimes against humanity, including acts which the government has accused the Taliban of carrying out. These crimes were not defined at the time of the 2009 Amnesty Law or the 2016 Hezb-i Islami agreement. However, like many countries, Afghanistan may meet its obligations under the Rome Statute selectively or unevenly, or disregard them altogether. There has been little implementation of the Penal Code’s provisions with respect to serious crimes, and this also selectively.

Afghanistan’s 2009 Amnesty law is more a political statement than a legal text. There are ambiguities in its definition of those covered (individuals versus factions) and for what potential crimes (unspecified). Unusual in an amnesty law, it is proactive as well as retroactive, granting judicial immunity to those

currently fighting the government for an unspecified time into the future, while also granting immunity to those who fought before the government was created. The first draft was revised in 2007 to incorporate the third clause under Article 3, that the law “shall not affect the claims of individuals against individuals based upon *huquq ul-ibad*.” The 2016 Hezb-i Islami agreement also excludes those against whom there are *huquq-ul-ibad* claims, and it is likely any amnesty with the Taliban would also include this provision. There is an argument to be made that the law errs in pre-emptively providing immunity before any *qisas* decision in that under *qisas*, the relatives of a murder victim have the authority to forgive after (not before) the conviction by a court. That part of the law could be challenged by a sharia court. However, as it stands, the law has not faced any legal challenges, and despite the lack of clarity regarding acts committed by the belligerent forces, it is broadly understood in Afghanistan to constitute a blanket amnesty.

For a peace agreement with the Taliban, as for the agreement with Hezb-e Islami, the 2009 Amnesty Law already provides immunity from prosecution for those who agree to lay down their arms and recognize Afghanistan’s Constitution. If a peace agreement also entails a rewriting of the Constitution, it is not clear whether that would affect the amnesty provision, but likely not. From an international perspective, it is important to note in discussing amnesty in any peace settlement that such an amnesty would extend to the Taliban what already exists in law for other Afghan political figures and security forces on the government side. While the Taliban have not publicly commented on the 2009 Amnesty Law, or the amnesty provisions in the 2016 Agreement, they have accused both the US and the ANSF of potential war crimes.

While the political will to prosecute is clearly lacking, the problem of how to craft an appropriate amnesty in a peace deal with the Taliban is complicated by the fact this has not been one war, but multiple overlapping and related conflicts within a 40-year war. Those who benefitted from the 2009 amnesty confirmed in law what had already existed in fact since the war began. Aside from a very few cases prosecuted internationally and domestically, the worst crimes of the 1978-80 period, the crimes under the Soviet occupation, and the crimes of the 1990s have gone unpunished. A selective process of accountability also entails the risk of perpetuating injustice.

There are alternatives. An amnesty provision in a deal with the Taliban could spell out precisely the legal criteria for what is amnestied and what kinds of acts are covered by the immunity provided, for example: taking up arms against the state, carrying out hostile acts against the national armed forces, etc. Such acts are typically covered in peace settlements. This would be consistent with Additional Protocol II’s call for the “broadest possible amnesty,” so long as this is not extended to war crimes. In such a defined amnesty, acts that are defined as serious crimes (murder, torture) or crimes

against humanity under Afghan law would not be interpreted as included in this amnesty.

However limiting an amnesty for the Taliban while maintaining the existing amnesty for everyone else could be politically untenable. The idea of a limited amnesty would prompt scrutiny of the existing 2009 Amnesty Law, which might only be possible if there is support from Islamic jurists with respect to the current lack of clarity on *qisas*. Under *qisas*, justice can be achieved through punishment or a combination of pardon and compensation, after which the perpetrator may resume life in society.<sup>44</sup>

The preamble to the 2007 draft of the Amnesty Law also offers a possible opening. It states:

It is clear that the end of every war is peace and every reconciliation can be based on the standards appropriate to the beliefs, culture and national traditions of the country in question. The government and the people of Afghanistan, in order to reach a sustainable reconciliation and put an end to the war and destruction can utilize two types of examples and procedures: 1. On the basis that they are Muslims, from the deeds of the great Prophet of Islam, who after the conquest of Mecca pardoned all those persons who had fought against Islam and the Muslims; 2. Being among the third world countries due to the level of political life and government system, following the example of reconciliation in South Africa and the neighboring country of Tajikistan on the basis of reconciliation and forgiving each other.

Both points deserve to be further explored if those who drafted the law continue to see them as good examples. Following Muhammad's conquest of Mecca, he did pardon all those who fought against him, in much the same way that Additional Protocol II recommends a broad amnesty for all those who took up arms. The Tajikistan amnesty covered all those who committed crimes against the state or who engaged in military "confrontation."<sup>45</sup> But neither provided a blanket amnesty; the Tajikistan agreement explicitly rejects any amnesty for those cases.

A Taliban amnesty would be part of a broader political settlement that would entail revisions to the Constitution and a restructuring of political institutions and power sharing. While it is impossible to say at this point what kind of a settlement will be achieved, the fact that the Taliban have legitimate concerns about war crimes committed by government forces might also provide an opening to discuss whether or how to find alternative means to address these crimes through truth-telling mechanisms, community reconciliation programs, lustration, or other non-judicial mechanisms.

## VI. Endnotes

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<sup>1</sup> National Reconciliation, General Amnesty, and National Stability Law, <http://dkiafghanistan.um.dk/da/~media/dkiafghanistan/Documents/Other/National%20Reconciliation%20and%20Amnesty%20Law.ashx>.

<sup>2</sup> “Govt Announces High Advisory Board For Peace,” ToloNews, December 11, 2018, <https://www.tolonews.com/index.php/afghanistan/govt-announces-high%C2%Aoadvisory-board%C2%AO-peace>.

<sup>3</sup> International Committee of the Red Cross, “Commentary of 2016: Article 3: conflicts not of an international character,” [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#\\_Toc465169867](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169867).

<sup>4</sup> Office of the Prosecutor, International Criminal Court, “Report on Preliminary Examination Activities 2016,” November 2016, p. 44, [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>5</sup> In addition to persons not taking part in the hostilities, this includes members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. Serious violations of Common Article 3 include murder, mutilation, torture, taking of hostages, intentionally directing attacks against the civilian population, attacking medical facilities; rape and sexual slavery; and conscripting or enlisting children under the age of fifteen years into armed forces.

<sup>6</sup> As the Taliban have an established command structure and control a considerable territory, Additional Protocol II is applicable to them in their fight with the Afghan government.

<sup>7</sup> International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09>.

<sup>8</sup> The findings of the Situation Analysis Section of the Office of the Prosecutor, published in the preliminary examination reports, [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf).

<sup>9</sup> The ICC has complementary jurisdiction over these crimes. This means the country’s judiciary is authorised to address these crimes first. However, if it is unable or unwilling to do so, then the ICC can claim jurisdiction. A member state can transfer its jurisdiction to the ICC by requesting its intervention; alternatively, the ICC can initiate, by *proprio motu* (Latin for ‘own initiative’), jurisdiction if a member state is unable or unwilling to prosecute the alleged crime (article 13, Rome Statute). The Office of the Prosecutor must establish the unwillingness or inability of the Afghan government to prosecute these crimes before the ICC can launch an investigation.

<sup>10</sup> International Criminal Court, *Report on Preliminary Examination Activities 2017*, December 4, 2017, [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf).

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<sup>11</sup> [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF).

<sup>12</sup> Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>. See para 3, OTP application to open an investigation: [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF).

<sup>13</sup> See para 4, OTP application to open an investigation: [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF).

<sup>14</sup> These were the prosecutions of only two NDS officials (in relation to one incident). In its 2017 report on torture in Afghanistan’s police and National Directorate of Security (NDS) detention facilities, UNAMA found that 39 percent of detainees interviewed reported torture or ill-treatment, up from 35 percent in 2015, despite the government-announced National Plan on the Elimination of Torture. United Nations Assistance Mission to Afghanistan, “Treatment of Conflict-Related Detainees,” April 2017, [https://unama.unmissions.org/sites/default/files/treatment\\_of\\_conflict-related\\_detainees\\_24\\_april\\_2017.pdf](https://unama.unmissions.org/sites/default/files/treatment_of_conflict-related_detainees_24_april_2017.pdf).

<sup>15</sup> Prosecutor’s application, para.6., paras 261-267.

<sup>16</sup> D. Julian Veintimilla, “Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal Against the Assad Regime and ISIL,” *Cornell International Law Journal*, Vol. 49, 2016, <https://www.lawschool.cornell.edu/research/ILJ/upload/Veintimilla-final.pdf>, p, 511.

<sup>17</sup> United Nations Office on Drugs and Crime, “New Penal Code adopted in Afghanistan,” <https://www.unodc.org/afghanistan/en/frontpage/2015/new-penal-code-adopted-in-afghanistan.html>.

<sup>18</sup> Until 2017, despite its obligations as an ICC member state, Afghanistan’s national laws did not cover international crimes.

<sup>19</sup> Penal Reform International, “Sharia law and the death penalty,” 2015, p. 11, <https://cdn.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf>. There is a debate among Islamic jurists about whether retributive justice helps break a cycle of violence by forcing the offender to accept punishment commensurate to the crime and having the state enforce it, or whether the revenge aspect perpetuates a violent cycle. *An Introduction to the Criminal Law of Afghanistan*, p. 4. *Qisas* came about to limit “the vicious blood feuds that defined pre-Islamic Arabia, where feuding would pass from generation to generation. *Qisas* ended this practice by allowing the victim of a *qisas* offense to inflict the same injury on the wrongdoer ... but nothing more.” *Ibid.*, p. 100.

<sup>20</sup> Afghanistan Legal Education Project, *An Introduction to the Criminal Law of Afghanistan*, Stanford University Law School, [https://www-cdn.law.stanford.edu/wp-content/uploads/2016/03/ALEP-Criminal-Law-2d-Ed\\_English.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2016/03/ALEP-Criminal-Law-2d-Ed_English.pdf), p. 4.

<sup>21</sup> If the victim’s family takes this course of action, an alternative discretionary (*ta’zir*) punishment can be enforced (usually imprisonment).

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The system of victim forgiveness and restitution was established by sharia law as a means of achieving justice without losing another life. Ibid., p. 13.

<sup>22</sup> Ibid., p. 14.

<sup>23</sup> “Qisas allows victims and their families to serve in the unique position as decision maker with regard to punishment. They can determine if the wrongdoer should receive the same injury she inflicted, or if compensation is an appropriate substitute. Victims may also forgive an offender completely.” Ibid., p. 101.

<sup>24</sup> Ibid., p. 106.

<sup>25</sup> Afghanistan Penal Code 2017, Book One, Part One, Chapter One, Article 2.

<sup>26</sup> “If in the crime of murder, the conditions for application of “Qisas” are not available or due to doubts or any other reason “Qisas” punishment is revoked, the perpetrator shall be sentenced according to provisions of this chapter.” Afghanistan Penal Code 2017, Book One, Part Seven, Chapter One, Article 546.

<sup>27</sup> Article 56 states: “A criminal case shall be initiated based on one of the following reasons: 1. Witnessing of a crime while being committed and in other conditions of evident crime; 2. Call for help or rescue; 3. Informing detective or investigation authorities of the occurrence of crime or noticing the signs of crime by individuals or appealing for compensation incurred due to a crime by plaintiff; 4. Complaint of agencies or individuals when in accordance with law initiation of a criminal case is dependent upon complaint; 5. Request of official agencies in case initiation of a criminal case is dependent upon initiating an official request; 6. Notification from an agency, organization or other legal persons that a crime has been committed in the area; 7. Observance of signs of a crime by the prosecution office; 8. Broadcasting and publication of issues relevant to the committed crime by mass media; 9. Individual statements against oneself.” As an example of point 8: Following a report in *The Guardian* newspaper that Afghanistan Football Federation officials had sexually assaulted players on the women’s team, the attorney general initiated a criminal investigation. See *Tolonews*, “Probe Underway on AFF Sexual Abuse Allegations,” December 31, 2018, <https://www.tolonews.com/afghanistan/probe-underway-aff-sexual-abuse-allegations>. In December 2016, Ahmad Ishchi accused Vice-President Dostum of kidnapping and sexual assault. The attorney general initiated a criminal investigation, but although Dostum was indicted, he was never arrested because of a lack of political will to hold such a powerful politician accountable. Mujib Mashal, “‘No Shame’: Afghan General’s Victory Lap Stuns a Victim of Rape,” *New York Times*, August 7, 2018.

<sup>28</sup> Patricia Gossman, “Afghanistan’s Torture Victims Deserve Redress,” Human Rights Watch, August 7, 2017, <https://www.hrw.org/news/2017/08/07/afghanistans-torture-victims-deserve-redress>.

<sup>29</sup> Hamid M. Khan, “Islamic Law, Customary Law, and Afghan Informal Justice,” United States Institute of Peace, March 2015, <https://www.usip.org/sites/default/files/SR363-Islamic-Law->

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[CustomaryLaw-and-Afghan-Informal-Justice.pdf](#).

<sup>30</sup> Anver M. Emon, “Techniques and Limits of Legal Reasoning in Shari’a Today,” *Berkeley Journal of Middle Eastern & Islamic Law*, Vol. 2:1, 2009, p. 115, [https://www.law.utoronto.ca/documents/emon/Techniques\\_of\\_Rights\\_Reasoning\\_in\\_Sharia.pdf](https://www.law.utoronto.ca/documents/emon/Techniques_of_Rights_Reasoning_in_Sharia.pdf).

<sup>31</sup> Email communication between lawyer and author, December 1, 2018. Given the sensitive nature of the subject, it has not been possible to seek out the views of Islamic jurists in Afghanistan.

<sup>32</sup> Emily Winterbotham. ‘Healing the Legacies of Conflict in Afghanistan. Community Voices on Justice, Peace and Reconciliation’. Afghanistan Research and Evaluation Unit, Kabul, January 2012, p. 67.

<sup>33</sup> Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, Afghanistan Analysts Network, February 2013, p. 31, [http://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](http://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf).

<sup>34</sup> “Additionally, the Government of the Islamic Republic of Afghanistan is committed to the release of the prisoners and detainees of Hizb-e-Islami of Afghanistan who have been imprisoned for political and military activities and against whom there are no *haq-ul-abd* [right of people – as opposed to right of God] claims, based on the list agreed by the Executive Commission, through a special legal commission that will include representatives from Hizb-e-Islami, in the earliest possible timeframe which is no longer than two months.” “Full Text of Agreement Between Goira & Hezb-E-Islami of Afghanistan Led by Gulbuddin Hekmatyar,” September 26, 2016, <http://bakhtarnews.com.af/eng/politics/item/25074-full-text-of-agreement-between-goira--hezb-e-islami-of-afghanistan-led-by-gulbuddin-hekmatyar.html>.

<sup>35</sup> United Nations Assistance Mission in Afghanistan, *Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2016*, p. 11, <https://www.ohchr.org/Documents/Countries/AF/ProtectionCiviliansAnnualReport2016.pdf>.

<sup>36</sup> Barnett Rubin, “Transitional Justice and Human Rights in Afghanistan,” *International Affairs* 79 (3) (2003), p. 570.

<sup>37</sup> Anand Gopal, “Flash to the Past: Missed Opportunities for Reconciliation,” Afghanistan Analysts Network, November 15, 2010, <https://www.afghanistan-analysts.org/flash-to-the-past-missed-opportunities-for-reconciliation/>.

<sup>38</sup> Netherlands Office of the Public Prosecutor, International crimes, “What cases have been prosecuted,” <https://www.om.nl/onderwerpen/international-crimes-o/what-cases-have-been/afghanistan/>. A third suspect, Abdullah Faqirzada, was tried and acquitted in 2011.

<sup>39</sup> Trial International, “Faryadi Sarwar Zardad,” <https://trialinternational.org/latest-post/faryadi-sarwar-zardad/>. Zardad was sentenced to 20 years imprisonment in the UK, but deported to

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Afghanistan after serving 11 years.

<sup>40</sup> The UN Security Council has periodically removed from the sanctions list former members of the Taliban who agreed to participate in the Afghan government's reconciliation efforts. BBC News, "Afghanistan: UN drops Taliban names from sanctions list," July 16, 2011, <https://www.bbc.com/news/world-south-asia-14171925>.

<sup>41</sup> International Committee of the Red Cross, "Practice Relating to Rule 159: Amnesty," IHL Database, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule159\\_sectiona](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule159_sectiona).

<sup>42</sup> International Committee of the Red Cross, "Amnesties and International Humanitarian Law: Purpose and Scope," [file:///C:/Users/gossmap/Downloads/170545\\_amnesties\\_factsheet\\_october\\_2017\\_clean\\_en.pdf](file:///C:/Users/gossmap/Downloads/170545_amnesties_factsheet_october_2017_clean_en.pdf).

<sup>43</sup> Jan Wouters, "The Obligation to Prosecute International Law Crimes," International Institute of Law, Catholic University of Leuven, p. 603, <https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>.

<sup>44</sup> Ibid., p. 14.

<sup>45</sup> Conciliation Resources, "Key Elements of the Tajikistan peace Agreement," *Accord*, [https://www.conciliationresources.org/downloads/Accord%2010\\_15Key%20elements%20of%20the%20Tajikistan%20peace%20agreement\\_2001\\_ENG.pdf](https://www.conciliationresources.org/downloads/Accord%2010_15Key%20elements%20of%20the%20Tajikistan%20peace%20agreement_2001_ENG.pdf), 2001, p. 65.