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**EXAMINING ATROCITIES AGAINST HAZARAS OF AFGHANISTAN IN THE CONTEXT
OF GENOCIDE AND PROSPECTS OF A TRANSITIONAL JUSTICE PROCESS**

by

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Table of Contents

INTRODUCTION 2

CHAPTER ONE..... 2

HISTORICAL CONTEXT 2

THE PATTERN OF DELIBERATE ATTACKS AGAINST HAZARAS OF AFGHANISTAN FROM 2014..... 6

1. EXECUTION OF HAZARA TRAVELLERS..... 7

2. KIDNAPPING AND HOSTAGE-TAKING 7

3. BOMBINGS IN PUBLIC PLACES 8

4. ATTACKS ON RELIGIOUS SITES AND CEREMONIES 8

5. ATTACKS ON EDUCATIONAL CENTRES 9

6. HOSPITAL MASSACRE..... 9

7. DEVELOPMENTS OF ATTACKS 10

CHAPTER TWO 10

I. DEBATES AND ALARMS ON RISKS OF A “HAZARA GENOCIDE” 10

II. DEFINING GENOCIDE 12

1. ‘WITH INTENT’ 13

2. CONTEXTUAL ELEMENT 13

3. ‘IN WHOLE OR IN PART’ 14

4. PROTECTED GROUPS 14

5. GENOCIDAL ACTS..... 14

III. EXAMINING “HAZARA GENOCIDE” 15

1. INTENT TO DESTROY HAZARAS 15

2. CONTEXTUAL ELEMENT IN THE CASE OF HAZARAS 17

3. DESTRUCTION OF HAZARAS IN PART 18

4. HAZARAS AS A PROTECTED GROUP; ETHNIC-RELIGIOUS COMMUNITY 18

5. GENOCIDAL ACTS AGAINST HAZARAS..... 18

IV. PROSPECTS OF A TRANSITIONAL JUSTICE PROCESS 19

CONCLUSION..... 22

ABBREVIATIONS 24

BIBLIOGRAPHY 25

Introduction

The Afghan state's war against the Hazara people in the 1890s wounded the country's social fabric, a wound that still calls for healing. The official state policy of persecution of Hazaras significantly getting momentum in the 1880s sowed the seeds of lasting discrimination against them at the societal level, which is extended until today, the effects of which will be revisited throughout this paper.

There are widespread real and perceived discrimination against Hazaras in all spheres of their social and political life, from seeking employment to day-to-day interactions. The Afghan state's persecution of Hazaras in the late 19th century, killing, enslaving and displacing thousands of them, and instituting the mentality of looking down on them at the societal level continues today to create an enabling environment for radical groups to perpetrate atrocities against the group. This paper explores whether targeted attacks against Hazaras of Afghanistan in recent years amount to genocide. Then, it discusses, regardless of a genocide determination, what a prospective transitional justice process can offer to address the problem. Chapter One provides a historical overview and discusses a selected number of deliberate attacks against the Hazaras that show a pattern from 2014 onwards. Chapter Two examines whether atrocities against Hazaras amount to genocide considering the facts against the applicable international law and provides a transitional justice perspective to address the problem.

Chapter One

Historical Context

Hazaras are an ethnoreligious minority assumed to constitute the third-largest population of Afghanistan.¹ They live mainly in the rigid snow-peaked central highlands of the country with less irrigable lands and poor to non-existent infrastructure. Hazaras speak a distinct dialect of the Persian language called Hazaragi. As they form the country's most significant Twelver Shiite population, it is not unusual to hear people use the words Shiite and Hazara interchangeably.² It is unclear how and when they settled in their present-day habitat, mainly in the central highlands of Afghanistan called Hazarajat, converted to Shia Islam and adopted the Persian language.

The question of the origins of Hazaras is important because it has become the ground for discrimination against them. The state and society have long considered and treated Hazaras as outsiders. While the origins of Hazaras are unclear, references to them as distinct people inhabiting specific geography started to appear in historical texts in the mid-14th century,

¹ Ibrahim, N. [2017] *The Hazaras and the Afghan State, Rebellion, Exclusion and the Struggle for Recognition*, Hurst & Company, p. 6

² Monsutti, A. [2007] *The other Shiites, from the Mediterranean to Central Asia (Worlds of Islam; v. 2)*, Peter Lang AG, International Academic Publishers, p. 189

indicating that they have lived in their present-day habitat, the Hazarajat, and surrounding areas at least since then.³ Hazaras have lived in these lands long enough to be recognised as indigenous inhabitants. Because of their distinctive facial features coupled with assumed descent from Cengiz Khan's Mongolian army and a Shiite faith, Hazaras have faced one of the world's lengthiest and worst persecutions.

For most of its history, the Hazara people, known for internal divisions and fights among its various tribes, lived autonomously and were governed mainly by its numerous mirs and begs - the Hazara chiefs.⁴ Towards the end of the nineteenth century Amir Abdurrahman Khan, known as the iron king, sought to bring all territories of present-day Afghanistan under his rule. However, facing the rebellious Hazaras and conquering their lands was difficult since the vast central regions, the Hazarajat, had always been independent. After several years of smaller-scale fighting between the 'Afghans'⁵ and the Hazaras and sending out threatening letters asking the Hazaras to accept Amir's rule, most Hazara tribes declined to accept his terms because of years of intimidation and persecution inflicted on them.⁶ The Amir finally obtained a *fatwa* (a religious declaration) to announce Hazaras as *Kafirs* (non-Muslims) and declared *jihad* (Islam's doctrine of holy war) against them. One of Amir's proclamations reads:

“...In order to extirpate these irreligious people so that not a trace of them remains in those places and throughout the mountains and their properties be distributed among the Ghilja'i and Durrani tribes, the royal court has approved as its policy that a triumphant army made up of regular and tribal forces from every part of the kingdom of the God-given government should descend upon the soil of the rebel tribes of the Hazarajat so that not a soul of those wayward tribes be safe nor escape and that the boys and girls be taken captive (and made slaves) by every member of the tribes of the mujahideen of Afghanistan. Therefore there will be a system of conscription imposed on the tribes of Afghanistan, which will be detailed in (individual) proclamations... Nor should it be allowed to happen in the process of conscription that a person be able to pay money so that someone else is taken in his place. This is because that evil tribe of infidels (the Hazarahs) is incited by religious solidarity (ham millatī, as Shi'ites) and plundering and killing them is, therefore, an obligation which should also be based on religious solidarity (of the Sunnis)...”⁷

More than a century later, Islamic State-Khorasan Province (ISKP) statements against Hazaras resemble those of the Afghan state in the 1890s. This will be discussed in Chapter Two. From

³ Poladi, H. [1989] *The Hazaras*, Mughal Publishing Co., p. 23

⁴ Ibrahimi, N. [2012] *Shift and Drift in Hazara Ethnic Consciousness. The Impact of Conflict and Migration*, Crossroads Asia Working Paper Series, No. 5, p. 3

⁵ Today, the word Afghan refers to the nationality of all people of Afghanistan, while originally, it was synonymous with Pashtun. Unless used in direct quotations, Afghan does not refer to all people of Afghanistan in this paper. This is to avoid historical confusion as Afghan refers to Pashtun in older literature, including some used in this paper.

⁶ Hazarah, F.M.K. (1913) [Siraj al-tawarikh. English] *The history of Afghanistan* translated by R.D. McChesney and M.M. Khorrami [2013] Koninklijke Brill NV, Volume 3, p. 986

⁷ Ibid, pp. 770-1

1890 to 1893, the Afghan state killed, enslaved, and forcibly displaced thousands of Hazaras, grabbed their lands and destroyed their livelihoods - the details of which are recorded by the Afghan state's royal court.⁸ The Amir also suppressed his dissenting Afghan tribes, but it was only in the case of the Hazaras that he not only pronounced them as non-believers and declared *jihad* but also mobilised the Sunni population against them on an unprecedentedly large scale. He allowed the aligned forces to commit horrible atrocities.

The Amir was successful in creating a new inter-subjective “imagined community”. Harari says, “The inter-subjective is something that exists within the communication network linking the subjective consciousness of many individuals. If a single individual changes his or her beliefs, or even dies, it is of little importance.”⁹ Before the Afghan – Hazara war of 1890 – 1893, Hazaras were divided among themselves, and so were the Pashtun tribes. Moreover, neither was the whole population of Tajiks, Uzbeks, and other ethnic groups, a united Sunni front mobilised to kill, loot, and enslave Shiite Hazaras.

Hazaras were the only significant Shiite population, but a hostile united Sunni front did not exist against them. The elements - differences in ethnicity and faith - were there, but Abdurrahman Khan’s campaign against Hazaras baked and gave shape to this malevolent ‘imagined community of Sunnis against Shiite Hazaras’ that did not exist before. This, to a large extent, brought together the divided Hazara tribes. Although the 1890 – 1893 conflict was mainly an Afghan – Hazara war, other Sunni populations also contributed by force or by will. The spoils of war, namely the Hazara lands and enslaved people, enticed many to attend the war.¹⁰

Afghanistan was a country in shaping; externally, it was shaped by negotiating and agreeing on its borders with the British,¹¹ and Russian empires,¹² and internally, it was partially built on the blood of Hazaras, what some call internal colonisation.¹³ During Abdurrahman Khan's reign consolidated power under a tight central government also established Pashtun supremacy over other ethnicities.¹⁴

According to Kakar, “The Hazara war had all elements of a foreign war. It was for these reasons that for the first time all the Sunni population rallied to the Amir. It increased his power and prestige, and infused sense of unity among his subjects.”¹⁵ The killings of Hazaras were

⁸ Ibrahimi, [n 1] pp. 77-82

⁹ Harari, Y.N. [2015] *Sapiens A Brief History of Humankind*, Vintage, p. 132

¹⁰ Ibrahimi, [n 1] p. 76

¹¹ Hanifi, S. M. [2012] *Quandaries of the Afghan Nation*, Harvard University Press, p. 92

¹² Ibrahimi, Y. [2018] *State formation in Afghanistan: a theoretical and political history*, *Central Asian Survey*, 37:1, DOI: 10.1080/02634937.2017.1399653, pp. 172-174

¹³ Ibrahimi, [n 1] p. 89

¹⁴ *Ibid*

¹⁵ *Ibid*, p. 175

followed by the destruction of their property, wealth, forts, gardens, and trees.¹⁶ The state's policy was stirred toward destroying Hazaras' political, social, and economic structures during and after the war. Ibrahimy believes that "the mass killing, enslavement, destruction and displacement that occurred during the war can best be considered as the prime example of genocide in the history of modern Afghanistan. In its ferocity and extent, it is comparable only to genocides such as the Armenian Genocide of 1915 and the Rwandan genocide of 1994."¹⁷ A more recent understanding of genocide in the case of Hazaras will be discussed in the next chapter.

In an estimate of 1881, The Hazara community consisted of 132,000 families.¹⁸ But the Hazara population shrunk significantly during and after the 1890-1893 war. According to Temirkhanov, "the Hazaras responded in three different ways: a group of 7,000–10,000 families submitted to the authority of the Amir under his terms; another group of 10,000–15,000 families left the country; all others continued to fight until they were defeated."¹⁹ Nonetheless, the war of nerves inflicted on Hazaras never ended after the 1890s. The defeated Hazaras and the victorious Pashtuns, according to Ibrahimy, "progressively developed a relationship that resembled a social hierarchy in a caste system, with the Hazaras being the lowest caste."²⁰

From the ashes of that war, the Hazaras, degraded to nonentities, limped as a traumatised people carrying what would be best described by Ricoeur as collective 'wounded memory' or even 'sick memory' that calls for healing. A kind of memory that, according to him, entails the flaw of "too much memory here and not enough memory there."²¹ It seems that the Pashtuns, as the victors, choose to abuse their collective memory by selectively remembering (reading atrocities as the state's legitimate response to rebellion only) while the victimised Hazaras remain chained to their past and continue to hyper-reflect. One aspect of this can be seen in how the King is remembered today. He is *Padshahi-i- Zalim* (the oppressor king) in the collective memory of Hazaras; elderly Hazaras still refer to him by this title.²² It is reasonable to think that in absence of recognition of Hazaras' suffering and without having the means of revisiting their past while anchored in a legally, politically, and socially safe space, healing is out of reach.

The centralisation campaign of Abdurrahman Khan had a long-standing effect on the political thinking of Pashtun elites. For example, according to Ahady, the author of 'The Decline of the Pashtuns in Afghanistan', Pashtuns are unhappy with the attitude of "minorities" toward the state's identity by not acknowledging its Pashtun character as the only Pashtun state in the world: "Most other ethnic groups in the region have their own state. No ethnic minority can seriously question the Persian character of Iran, the Turkish character of Turkey, the Tajik

¹⁶ Hazarah [n 6] p. 819

¹⁷ Ibrahimy [n 1], p. 79

¹⁸ Ibid, p. 67

¹⁹ Ibid, p. 81

²⁰ Ibid, p. 86

²¹ Ricoeur, P. [2004] *Memory, History, Forgetting*, The University of Chicago Press, p. 79

²² Abbasi, K. [2019] *There is Death in Immobility: An Auto-Ethnography of the Identification Process of Transnational Young Hazaras*. PhD Thesis submitted at the Graduate Institute, p. 49

character of Tajikistan, and the Uzbek character of Uzbekistan. The Pashtuns argue that the same should hold for Afghanistan.”²³ This prescription for Afghanistan is problematic. First, Pashtuns are the largest population, not the majority.²⁴ Second, if, say, in Iran, no ethnic minority can question the Persian character of Iran (because the state is oppressive), it does not mean they do not have the right to question it. Ahady’s account, and views like that in general, are not a formula for peace and reconciliation but a recipe for further miseries by emboldening the Pashtun ethnic supremacy.

Such arguments cannot speak for all Pashtuns, but they do speak for what is dominant in the psyche of the Pashtun society. It is as if King Abdurrahman Khan’s imagined idea of Pashtun dominance over others by centralisation of power continues to live in the spirit of the Pashtun society. The traces of this kind of political thinking are evident in Pashtun radical groups (i.e., the Taliban) and some of their progressive-looking nationalists alike. One can argue that the Taliban’s taking over of the governments in 1996 and 2021 were significantly stirred by the fear of the “decline of the Pashtuns.” Because both in the 1990s and 2000s, the Pashtun’s monopoly of power was loosening. A combination of ethnic and religious radicalisation has added to the complexity of the Afghanistan conflict.

Today, according to Giustozzi, the Taliban’s de facto government is following Abdurrahman Khan’s model of state-building,²⁵ who successfully consolidated the state power but at the cost of irreversibly sowing the seeds of ethnic animosities. With the re-emergence of the Pashtun-dominated Taliban, Pashtun’s ethnic hegemony is increasingly becoming the most potent driving force of the conflicts in Afghanistan today. The country is experiencing the worst Pashtun vs non-Pashtun divides and tensions since the civil conflicts of the 1990s.

The pattern of deliberate attacks against Hazaras of Afghanistan from 2014

As the previous section has shown, security conditions for Hazaras have been dreadful under successive Afghanistan governments. The United Nations Assistance Mission in Afghanistan (UNAMA) has been reporting civilian deaths since 2009, with the numbers of those killed constantly increasing. The majority of the casualties, precisely 64%, have been reported to be caused by anti-government elements, namely the Taliban, responsible for around 39% of the total casualties. An additional 9% were attributed to Islamic State-Khorasan Province (ISKP), whereas the remaining losses cannot be associated with a specific non-state actor.²⁶

²³ Ahady, A-ul-H. [1995]. The Decline of the Pashtuns in Afghanistan, *Asian Survey*, 35 (7), <<https://doi.org/10.2307/2645419>>, pp. 633–4

²⁴ Ibrahimi [n 1]

²⁵ امان، م. [۲۰۲۲] لشکرکشی طالبان و 'جنگ چریکی جبهه مقاومت'؛ چه بر سر غیرنظامیان آمده است؟ بی بی سی فارسی، <<https://www.bbc.com/persian/afghanistan-61411212>> Accessed 05.08.2022

²⁶ Afghanistan: Record number of women and children killed or wounded [2021], UN, <<https://news.un.org/en/story/2021/07/1096382>> Accessed 05.08.2022

A significant increase in violence against civilians, especially minority groups, followed the national elections in 2014, in which no candidate was able to achieve an absolute majority.²⁷ The controversial election ended with the establishment of the National Unity Government (NUG), which put achievements concerning human rights, education and social equality in jeopardy. As a consequence of the state's failure to secure its territory, deliberate attacks on children and civilians, including government, human rights and humanitarian workers, increased.²⁸ Besides the apparent targeting of civilians, sectarian-motivated attacks recorded in 2014 dramatically exacerbated the country's security conditions for Hazaras. Given these developments in light of the historical context and taking into account the scope of the paper, the following six parts categorically list a selected number of the most horrific attacks against Hazaras from 2014 onwards, and Part 7 discusses how the pattern of attacks is evolving.

Given the absence of international monitoring and humanitarian organisations in rural provinces and districts outside the capital, reporting on incidents of attacks relies entirely upon reports and coverage from internal sources. This leads to different narratives communicated by national media about attacks and incidents and makes it particularly hard to provide a holistic record of all civilian casualties. Due to this lack of data collection, it is unclear how many deaths, internally displaced persons (IDPs), and physical damage to houses have been caused in recent years by parties to the conflict. Known, on the other hand, are how the radical groups are trying to inflict terror over Hazara residence areas and public places. Constant attacks on schools, mosques, educational centres, demonstrations, public transport or highly frequented streets demonstrate ruthless interference and marginalisation of daily life for Hazara people.

1. Execution of Hazara travellers

On 25 July 2014, armed men affiliated with the Taliban militant group stopped two minibuses after a road patrol in the Ferozkoh area of the western Ghor province. They demanded all passengers get off the bus. The militants separated Hazaras from the other travellers and executed them by the roadside after blindfolding some and tying the hands of others. The corpses were left behind in the heat of the day. This killing cost the lives of 14 Hazaras, eleven men and three women, of which two were newlywed couples travelling with family members.²⁹

2. Kidnapping and hostage-taking

A hostage-taking by Taliban militants took place on 23 February 2015 in Zabul. 31 Hazara workers travelling home from jobs in Iran were abducted from a bus in southern Zabul province, which was on its way to Kabul. One female passenger described after the incident how “the

²⁷ Report of the UN High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights in 2014, <https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_48_en.doc> Accessed 05.08.2022

²⁸ Afghanistan: Record number of women and children killed or wounded, [2021], <<https://news.un.org/en/story/2021/07/1096382>> Accessed 05.08.2022

²⁹ Cunningham, E. [2014] Afghan gunmen kill 14 Shiite travellers on road from Kabul, Washington Post, <https://www.washingtonpost.com/world/war-zones/afghan-gunmen-kill-more-than-a-dozen-shiite-travelers-on-road-from-kabul/2014/07/25/1223520e-2a00-413e-8f83-b028b2b484bf_story.html> Accessed 05.08.2022

gunmen first collected all cell phones and national ID cards from the passengers, separated males from females, then Hazaras from non-Hazaras, and finally took away 31 Hazara men, leaving the other passengers on the road.”³⁰ Three days later, the militants released one Tajik from Ghazni while holding the other 30 hostages for over two months. With the video showing the beheading of one of the hostages, protesters in Kabul demanded that their government become more active in freeing the men. Only after long mediations between Hazara and Pashtun elders and after the execution of another five men the remaining hostages were freed and able to rejoin with family members.³¹

3. Bombings in public places

One of the deadliest incidents in recent years was the twin suicide bombing on a peaceful demonstration of Hazara people in Dehmazang square, Kabul, on 23 July 2016, protesting a governmental decision to reroute electricity lines. Two suicide bombers caused at least 85 deaths and more than 400 injured Hazara demonstrators. After the attack, the ISKP claimed responsibility, making this their first attack against civilians in Kabul and marking the beginning of overt suppression of civic demonstrations afterwards.³²

As people in the western neighbourhood of Dasht-e-Barchi in Kabul lined up with their children to register their names for a parliamentary vote, a suicide bomber detonated his explosive on 22 April 2018 at an identity card registration centre. In an area heavily populated by the Hazara community, this incident left 69 people dead and more than 100 wounded.³³

During the Persian New Year celebration, Nowruz, on 21 March 2019, three remote-controlled bombs killed six Hazaras and wounded 23. The explosions happened close to Kabul University and the Shia Karte Sakhi shrine, where many people gather yearly to celebrate the traditional holiday. The attack marks the one-year remembrance of a suicide attack during Nowruz celebrations at the same place, killing 33 Hazaras.³⁴ ISKP has claimed responsibility for all the attacks listed in this section.

4. Attacks on religious sites and ceremonies

³⁰ Suroush, Q. [2015] Hazaras in the Crosshairs? A scrutiny of recent incidents, <<https://www.afghanistan-analysts.org/en/reports/war-and-peace/hazaras-in-the-crosshairs-a-scrutiny-of-recent-incidents/>> Accessed 01.08.2022

³¹ Afghanistan Hazara kidnapped passengers released [2015], <<https://www.bbc.com/news/world-asia-32686953>> Accessed 01.08.2022

³² Isis claims responsibility for Kabul bomb attack on Hazara protesters [2016], <<https://www.theguardian.com/world/2016/jul/23/hazara-minority-targeted-by-suicide-bombs-at-kabul-protest>> Accessed 01.08.2022

³³ Afghanistan: Kabul voter centre suicide attack kills 57 [2018], <<https://www.bbc.com/news/world-asia-43855884>> Accessed 01.08.2022

³⁴ Blasts in the Afghan capital Kabul kill six during new year festival [2019], <<https://www.aljazeera.com/news/2019/3/21/blasts-in-afghan-capital-kabul-kill-six-during-new-year-festival>> Accessed 01.08.2022

A suicide bombing targeted Baqer ul-Uloom on 22 November 2016, a mosque in the Hazara-dominated western neighbourhood of Kabul, as people gathered to commemorate Arbaeen, the end of 40 days of mourning. Thirty-three deaths and 64 injured were reported, including many children participating in the event. ISKP claimed responsibility.³⁵

On 1 August 2017, two gunmen entered the Shia Jawadia Mosque in Herat during evening prayers and shot 33 worshippers. More than 64 have been wounded as explosives were detonated inside the building by one of the attackers. Herat was long considered one of the more peaceful cities in Afghanistan. However, with the rise of the ISKP, they have exacerbated attacks and claimed responsibility for the explosions.³⁶

5. Attacks on educational centres

A deliberate attack on students occurred on 15 August 2018 in Mawoud Educational Centre, a tuition centre in the Hazara-populated Dasht-e-Barchi neighbourhood of Kabul, killing at least 34 students aged 10 to 18 and wounding 56. The students were studying to prepare for their university entrance exam when the suicide bomber entered the classroom from a rear entrance and made the bomb detonate inside the centre. The blast was so powerful that it wiped the roof completely off the building.³⁷ In another attack in the same area on 24 October 2020, a suicide bomber detonated his explosives on the street outside the Kawsar-e-Danish tuition centre, killing at least 24 students and wounding 57.³⁸ ISKP has claimed responsibility for both.

The deadliest attack in 2021 occurred at Sayed ul-Shuhada high school in Dasht-e-Barchi on 8 May, when the students left the institution to return home. A car bomb and two other explosions caused the death of at least 85 young Hazara girls, who were studying at the institution, while it left around 150 injured. The bombs were placed to target the afternoon classes of female students. Until now, no group has claimed responsibility, but ISKP has launched several attacks in the same area in the past.³⁹

6. Hospital massacre

Twenty-four women, newborn babies and nurses were killed during an attack on a maternity hospital in the neighbourhood of in Dasht-e-Barchi in western Kabul on 12 May 2020. Ten mothers in the hospital managed to flee to safe rooms before the three shooters, dressed as police officers, could murder them. Médecins Sans Frontières ran the hospital, and their patients

³⁵ Deaths as suicide bomber attacks Shia mosque in Kabul [2016] <<https://www.aljazeera.com/news/2016/11/22/deaths-as-suicide-bomber-attacks-shia-mosque-in-kabul>> Accessed 01.08.2022]

³⁶ Herat mosque blast: IS says it was behind Afghanistan attack [2017], <<https://www.bbc.com/news/world-asia-40802572>> Accessed 01.08.2022

³⁷ Kabul suicide bomber kills 48 in tuition centre attack [2018], <<https://www.bbc.com/news/world-asia-45199904>> Accessed 01.08.2022

³⁸ Sediqi, A.Q & Hakimi, O. [2020] Suicide bombing at Kabul education centre kills 24, students among the victims, <<https://www.reuters.com/article/afghanistan-blast-idUSKBN27A05U>> Accessed 01.08.2022

³⁹ Ghani, K. & Hadid, D. [2021] <<https://text.npr.org/995402965>> Accessed 01.08.2022

were primarily mothers and babies from the Hazara community as it was located in a Hazara neighbourhood. The maternity ward closed its doors after the attack, stating that similar attacks will likely occur in the future. The Taliban deny responsibility for the attack.⁴⁰

7. Developments of attacks

The pattern of the attacks on the Hazara community has evolved. It is self-evident that the list is not exhaustive and can be completed by listing numerous other massacres committed against civilians in Afghanistan. Remarkable, however, is that shortly after the establishment of the NUG, many attacks were committed only by the Taliban on highways and in rural provinces. In contrast, the last years have seen an increase in more targeted bombings on daily life in Hazara areas. Moreover, the ISKP became one of the leading actors orchestrating significant attacks against the Hazara people, contributing to the continued suffering of the Hazaras.

Chapter Two

Do atrocities against Hazaras amount to genocide?

In this chapter, Part I gives an overview of how the genocide debate opened regarding the situation of Hazaras. Part II discusses genocide in international law literature and case law. Part III analyses its applicability to the situation of Hazaras, and Part IV provides a transitional justice perspective to address the issue.

I. Debates and alarms on risks of a “Hazara genocide”

Following the 8 May 2021 explosions at the gates of Sayed-ul-Shuhada Girls High School in Kabul, the victims’ families published a statement calling the mass killing a genocide and asking the international community to recognise it as the same.⁴¹ The wide-scale attacks on Hazaras have sparked national and international calls for action. Thousands of people inside and outside Afghanistan have continuously protested the former Afghanistan government’s failure to protect Hazaras, indifference to addressing their situation, and reluctance to investigate the incidents, prosecute the perpetrators and prevent further afflictions.⁴² Also, people from inside and outside Afghanistan have protested online, posting thousands of tweets using the hashtag #StopHazaraGenocide to call for prevention, accountability and recognition

⁴⁰ MSF Afghan maternity ward to close after the deadly gun attack [2020], <<https://www.bbc.com/news/world-asia-53059022>> Accessed 01.08.2022

⁴¹ Families of the Victims: the bombing of Sayed-ul-Shuhada High School is a genocide [2021], <<https://www.etilaatroz.com/124097/attack-on-shohada-school-should-be-recognized-as-example-of-genocide/>> Accessed 01.08.2022

⁴² See, for example, Afghan Hazara killings spur thousands to march in Kabul [2015], <<https://www.bbc.com/news/world-asia-34783511>> Accessed 01.08.2022

mainly. Media organisations widely covered these demands and organised debates asking whether the systematic attacks on Hazaras amount to genocide.⁴³

Following the explosions at the girls' school, the Afghanistan Independent Human Rights Commission (AIHRC) published a courageous statement on 9 May recognising for the first time that “Yet again, this massacre targeted Hazaras in Dasht-e-Barchi”⁴⁴ and asked for special protection for Hazaras in line with International Human Rights Law, especially for Hazaras of the Dasht-e-Barchi neighbourhood. The statement indicated that the Hazaras are at risk of genocide: “The Afghan government has an obligation under International Humanitarian Law (IHL) and International Human Rights Law to protect the population at risk of war crimes, crimes against humanity, ethnic cleansing or genocide and international law oblige the government to take measures to end and prevent genocide and war crimes, crimes against humanity and persecution on the basis of ethnicity and gender.”⁴⁵ The statement also called for “An expert and fully resourced, independent team of United Nations (UN) investigators to carry out a fact-finding mission into the massacre and unclaimed targeted attacks on civilians.”⁴⁶ It was the first time the constitutionally mandated Commission published a statement containing explicit language calling for urgent action to protect Hazaras and provide redress to the victims. Twenty domestic and international human rights groups echoed and supported AIHRC's call for a UN fact-finding mission in Afghanistan through a Joint Letter to the High Commissioner for Human Rights.⁴⁷

Similarly, a European Parliament resolution echoed AIHRC's calling for “a credible and transparent investigation under UN auspices into the recent attack which targeted a girls' school, killing 85 people, mostly girls between the age of 11 and 17 and the attack on 12 May 2020 on the maternity wing of the Dasht-e Barchi hospital in Kabul supported by Médecins Sans Frontières; invites the EEAS, Commission and the Member States to consider urging the UN Human Rights Council to establish a commission of inquiry into serious violations of international humanitarian law in Afghanistan”.⁴⁸

On 14 July 2021, Genocide Watch issued a genocide emergency for Afghanistan. Their statement reads, “Taliban units are already carrying out genocidal massacres against ethnic and religious minorities. They especially target the Shi'ite Hazaras”.⁴⁹ The following month, the United States Holocaust Memorial Museum stated that they are “deeply concerned about grave

⁴³ BBC Persian debate on the topic <<https://youtu.be/e1tVVCIZMXk>>; Afghanistan International interview <https://youtu.be/3j_DgfHZXWA> Accessed 01.08.2022

⁴⁴ Press Statement on Sayed Ul Shuhada School Girls Massacre, AIHRC [2021] <https://www.aihrc.org.af/home/press_release/9122> Accessed 01.08.2022

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Joint Open Letter to the High Commissioner for Human Rights [2021] <<https://www.hrw.org/news/2021/07/02/joint-open-letter-high-commissioner-human-rights>> Accessed 01.08.2022

⁴⁸ European Parliament resolution of 10.06.2021 on the situation in Afghanistan (2021/2712(RSP))

⁴⁹ Genocide Emergency: Afghanistan [2021], <<https://www.genocidewatch.com/single-post/genocide-emergency-afghanistan>> Accessed 01.08.2022

threats facing many segments of Afghan society, including women and girls. In particular, we are concerned about ethnic and religious minorities, specifically the Shi'a minority who belong predominantly to the Hazara ethnic group, which faces a risk of crimes against humanity or even genocide".⁵⁰

Furthermore, a bicameral inquiry is ongoing by the British parliamentarians called the "Inquiry into the situation of Hazaras in Afghanistan and Pakistan." The website for this Inquiry states that it followed warnings from Amnesty International, the United States Holocaust Memorial Museum and Genocide Watch, highlighting growing violence against the Hazaras and the risk of a possible genocide. The stated goals of the Inquiry are to:

1. Consider the situation of the Afghan Hazara, in Afghanistan and in Pakistan and map the crimes perpetrated against the group; identify the assistance available to the community and their shortfalls;
2. engage the UK Government and international actors with recommendations on assistance to the community;
3. identify justice and accountability avenues for legal recourse and engage with the evidence gathered."⁵¹

Lastly, on 30 April 2022, in an open letter to the UN, 42 leading academics, human rights defenders, authors, and journalists, including the former chairs of the Afghanistan Human Rights Commission, wrote to express their grave concern about crimes against humanity and possible acts of genocide perpetrated against Hazara people and demand the UN to act to protect Hazaras under the Taliban-occupied Afghanistan.⁵²

All these alarms and debates, the historical context of Hazara persecution, and relentless attacks aimed at all aspects of the social and political lives of Hazara people dictate that the risk of Hazara genocide should be taken seriously by the international community in the absence of the rule of law in Afghanistan. That being said, is there a genocide, legally speaking?

II. Defining genocide

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Rome Statute provide that:

"...genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical

⁵⁰ The United States Holocaust Memorial Museum, Museum Statement on the Hazara [2021], <<https://www.ushmm.org/information/press/press-releases/museum-statement-on-the-hazara>> Accessed 01.08.2022

⁵¹ Inquiry into the situation of Hazaras in Afghanistan and Pakistan, <<https://www.hazarainquiry.com/>> Accessed 01.08.2022

⁵² Appeal to the UN to Protect Hazaras in Afghanistan, <<https://www.fairobserver.com/politics/appeal-to-the-un-to-protect-hazaras-in-afghanistan/>> Accessed 01.08.2022

destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

Elements of the Crime of Genocide

The above definition should be read in conjunction with the ICC Elements of Crimes document that serves as an interpretational tool for judges and prosecutors. The following lines deconstruct the elements of the crime of genocide.

1. ‘with intent’

The brief definition in Article 6 contains a special intent requirement. The International Criminal Tribunal for Rwanda (ICTR) Trial⁵³ and Appeal⁵⁴ Chambers have affirmed that genocide is a crime that requires a specific intent by which the perpetrator clearly seeks to produce the act charged. However, this specific intent is not required in acts of complicity in genocide.⁵⁵ In *Karadžić*, the ICTY Appeal Chamber noted that when assessing evidence of genocidal intent, a compartmentalised analysis is not fit for a proper inquiry. And instead of looking into each of the relevant genocidal acts to determine whether an accused intended to destroy a protected group, “a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state”⁵⁶

Direct proof of genocidal intent is usually not achievable. Still, it can be inferred from the “general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy.”⁵⁷

2. Contextual element

The Elements of Crimes in relation to Article 6 also introduces a ‘contextual element’ not present in the Statute: “The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.” And further build on it that

"The term 'in the context of' would include the initial acts in an emerging pattern; The term 'manifest' is an objective qualification; Notwithstanding the normal requirement for a mental element provided for in article 30, and recognising that knowledge of the

⁵³ Prosecutor v. Akayesu, 2 September 1998, note 5. Also note 7, 26 February 2007, para. 188.

⁵⁴ Prosecutor v. Ntakirutimana et al., note 6, para. 364; Prosecutor v. Niyitegaka, note 6, para. 54.

⁵⁵ Prosecutor v. Krstić, note 6, paras. 135–144; Prosecutor v. Ntakirutimana et al., note 6, para. 500.

⁵⁶ Prosecutor v. Karadžić, IT-95-5/18-AR98bis.1, 11 July 2013, para 56.

⁵⁷ Ibid, para 80.

circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis."

This suggests a plan, policy, or existential threat requirement, while in *Jelusic*, an ICTY Trial Chamber stated that a conviction for genocide was 'theoretically possible' when an individual perpetrator could execute the crime while acting alone.⁵⁸ There appears to be a degree of controversy as to whether this contextual element constitutes part of genocide. However, in *Bashir*, the majority of the Pre-Trial Chamber held the view that to trigger genocide, the threat against the existence of the protected group should be real rather than latent.⁵⁹

3. 'in whole or in part'

The 'in whole' is more self-explanatory, while the 'in part' construct poses some challenges in interpreting genocide. According to *Schabas*, the expression 'in whole or in part' intends to, first, avoid the extension of genocide to isolated racially motivated acts and second, maintain that "the offender need not intend to destroy the entire group but only a substantial portion of it."⁶⁰ Although there is no numerical threshold set in the Genocide Convention or Rome Statute for what constitutes destruction in part, in *Karadžić*, the ICTY Trial Chamber has equated 'in part' with 'substantial'. An assessment of substantiality includes the numeric size of the targeted portion and its prominence in relation to the overall survival of the group— "If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial..."⁶¹ An ICTY Trial Chamber in *Tolimir* held that killing three community leaders was genocide because this endangered the group's survival.⁶²

4. Protected groups

When drafting the Rome Statute, proposals to add social, political and linguistic groups to protected groups under genocide definition were rejected. An ICTR interpretation of the list maintains that the four protected categories of national, ethnic, racial and religious groups hold a degree of permanence and stability as they are determined by birth.⁶³

5. Genocidal acts

⁵⁸ Prosecutor v. Jelusic', Case No. IT-95-10-T, Judgment, 14 December 1999, para. 100

⁵⁹ Prosecutor v. Bashir, Case No. 02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 125.

⁶⁰ Triffterer, O. & Ambos, K. [2015], The Rome Statute of the International Criminal Court, A Commentary, 3rd Edition, C.H.BECK.Nomos, pp. 133-4.

⁶¹ Karadžić, [n 56], para 66.

⁶² Prosecutor v. Tolimir (IT-05-88/2-T), Judgment, 12 December 2012, para. 782.

⁶³ Triffterer & Ambos [n 60] p. 135.

The genocide definition remained limited to five acts of physical and biological destruction and omitted concepts of cultural genocide or ethnic cleansing.⁶⁴ This paper focuses only on acts of genocide of a) killing and b) causing serious bodily or mental harm.

a. Genocide by killing

The only elaboration by Elements of Crimes is that “killed” holds the same meaning as “caused death”.

b. Genocide by causing serious bodily or mental harm

The Elements of Crimes notes, “This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.” According to Schabas, the International Law Commission's comment that ‘the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part’ is not well formulated. He asserts that as long as 1) harm is inflicted and 2) with an intent to destroy a group in whole or in part, the crime has happened, and an assessment of the harm to endanger the group’s survival is irrelevant.⁶⁵

III. Examining “Hazara genocide”

1. Intent to destroy Hazaras

Genocide determination is a judicial process. For example, to assess whether atrocities against Hazaras amount to genocide, the genocidal intent of the alleged perpetrators must be established beyond a reasonable doubt,⁶⁶ by a competent court. Nevertheless, a non-judicial assessment is open to public debate.

The alleged perpetrators of atrocities against Hazaras within the scope of this discussion are the Taliban and ISKP. The following lines provide a snapshot of their anti-Hazara statements. The Taliban have historically engaged in atrocities against Hazaras - the most notorious being the August 1998 Hazara massacre in the Mazar-I-Sharif city. Mullah Manan Niazi, the Taliban governor for Mazar-I-Sharif leading the killings, stated on several occasions, including in mosque speeches and radio broadcasts, that.

⁶⁴ Ibid, pp. 136-7.

⁶⁵ Ibid, p. 138.

⁶⁶ Questions and Answers on the Crime of Genocide [2019], ICJ Global Redress and Accountability Initiative <<https://www.icj.org/wp-content/uploads/2018/08/ICJ-Genocide-QA-Summary-Final-Mar-2019-ENGLISH-1.pdf>> p. 5

“Hazaras are not Muslim, they are Shi’a. They are kofr [infidels]...”⁶⁷ and “If you do not show your loyalty, we will burn your houses, and we will kill you. You either accept to be Muslims or leave Afghanistan.”⁶⁸ And “wherever you go we will catch you. If you go up, we will pull you down by your feet; if you hide below, we will pull you up by your hair.”⁶⁹

On 23 July 2016, thousands of Hazaras gathered in Dehmazang square of Kabul and protested a government decision to reroute TUTAP (a mega power project), bypassing the Hazara regions. The peaceful demonstration, organised under the name of the Junbesh-e-Roshnayi movement, composed of young Hazara intellectuals, students, workers, and activists, including men, women and children, was hit by suicide bombings killing at least 85 and injuring 413 people.⁷⁰ - almost all victims were Hazaras. The ISKP claimed responsibility and posted the following statement:

“... With God’s, the Lofty and Almighty, assistance, two soldiers of the Caliphate (Najeeb Allah al-Khurasani and Talhat al-Khurasani—May God receive them in paradise) were able to attack with hand grenades a group of rejectionist polytheists in the city of Kabul. They killed and injured a number of them, after which they detonated their explosive vests in the midst of those remaining. This led to the death [in perdition] of about 70 and the injury of more than 200 apostates. This blessed operation comes in response to their participation with the Nusayris⁷¹ in the war on the Sunnis in the land of Syria, and in order to purify the land of Khurasan⁷² and all other lands of the Muslims of the impurity of their polytheism. Praise be to God, Lord of the Worlds.”⁷³

In tens of attacks on Hazaras in the following years, the ISKP has used the same language and tone. For example:

“By the grace of God Almighty, the soldiers of the Caliphate targeted two buses of the infidels in (District 3) in the city of (Kabul) yesterday by detonating two explosive

⁶⁷ The Massacre in Mazar-I Sharif, [1998] Human Rights Watch, Vol. 10, No. 7 (C), <<https://www.hrw.org/report/1998/11/01/afghanistan-massacre-mazar-i-sharif>>

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Special Report: Attack on a Peaceful Demonstration in Kabul on 23 July 2016 [2016], UNAMA, <https://unama.unmissions.org/sites/default/files/23_july_suicide_attack_against_peaceful_demonstration_-_18_oct_2016.pdf> para. 2

⁷¹ Nusayris is a derogatory term to designate Shiites in Syria. This ISIL statement refers to Shiite Hazaras of Afghanistan fighting in Syria against them.

⁷² Historical reference to the name Khorasan; encompasses parts of modern-day Afghanistan, Central Asia, Pakistan, and Iran.

⁷³ ISIL/Daesh Claim of responsibility is annexed in the UNAMA report: <https://unama.unmissions.org/sites/default/files/23_july_suicide_attack_against_peaceful_demonstration_-_18_oct_2016.pdf> Annex 1.

devices separately, which led to their destruction, leaving more than 33 rawafidh dead and an injured, and praise and gratitude be to God.”⁷⁴

These statements show that ISKP refers to Hazaras as *rawafidh* plural of *rafida* (apostates, infidels), a derogatory term by which Sunni jihadists designate Shiites. Because the words Hazara and Shiite are used interchangeably (the majority of Hazaras identify as Shiites, and the most significant Afghanistan Shiite population are Hazaras, making the two identities inseparable.) use of *rawafidh* in the Afghanistan context almost always refers to Hazaras. Also, Hazaras are easy targets for jihadist groups, including ISKP, because of their distinct Asiatic facial features. For example, in June 2021, ISKP fighters entered the premises of the HALO Trust land mine clearing charity in Baghlan province of Afghanistan, singled out and separated the Hazara workers from non-Hazaras and opened fire on them.⁷⁵

Intent can also be inferred from circumstantial evidence, such as the general context of the culpable acts; the scale of such acts; knowing the long-term impact of the acts on the survival of the targeted group; its systematic nature; repetition; the means used; singling out members of the protected group and targeting them; and use of derogatory language.⁷⁶ The preceding anti-Hazara statements by ISKP and Taliban contain 1) claim of responsibility for the attacks,⁷⁷ 2) threats to further killing and harm (purifying the land of Khorasan), 3) derogatory language (*rawafidh*, *kofr*) and 4) direct and public incitement. Thus, they may clearly seek to produce the genocidal acts, and their statements may constitute declared genocidal intent to destroy Hazaras in part.

2. Contextual element in the case of Hazaras

As ISKP have materialised their threats by continued attacks, their statements can be read as evidence of a plan or policy. Their conduct, therefore, may have taken place in the context of a manifest pattern of similar conduct directed against Hazaras, and that threat to the existence of Hazaras is real and not merely latent, fulfilling the contextual element of genocide. Also, looking at anti-Hazara sentiments in historical context, the preceding localised ISKP statements today are similar in tone and language to the anti-Hazara proclamations of the Afghan King in the 1890s (discussed in Chapter One) and that of the Taliban in 1998 (mentioned above). That is to say, because of enduring discrimination against Hazaras, it is now integrated into IS's global jihadist campaign adding a new dimension to the conflict. The ISKP was founded in

⁷⁴ ISKP Takes Credit for Blasts on Buses Carrying Shi'a Hazara in Kabul, <<https://ent.siteintelgroup.com/Statements/iskp-takes-credit-for-blasts-on-buses-carrying-shi-a-hazara-in-kabul.html>> Accessed 01.08.2022

⁷⁵ Rahim, N & Ives, M. [2021] Attack in Afghanistan Kills 10 From Charity That Clears Land Mines, The New York Times, <<https://www.nytimes.com/2021/06/09/world/asia/afghanistan-land-mines-halo-trust.html>> Accessed 01.08.2022

⁷⁶ Questions and Answers on the Crime of Genocide [n 67] p. 7

⁷⁷ For more examples, see: ISKP Claims 23 Casualties Among Shi'a Hazara in 2 Bomb Blasts in Kabul, <<https://ent.siteintelgroup.com/Statements/iskp-claims-23-casualties-among-shi-a-hazara-in-2-bomb-blasts-in-kabul.html>>; ISKP Claims 14 Casualties in MIED Blast on Bus Transporting Shi'a Hazaras in Herat <<https://ent.siteintelgroup.com/Statements/iskp-claims-14-casualties-in-mied-blast-on-bus-transporting-shi-a-hazaras-in-herat.html>>

2014 by the Afghanistan and Pakistani Taliban defectors in the first place; therefore, both have a strong ideological resemblance.⁷⁸

3. Destruction of Hazaras in part

When assessing the substantiality of the targeted portion numerically, there is no official count of Hazara casualties. However, putting the total deaths and physical harm together from the series of attacks listed in Chapter One, one can argue that it is numerically substantial. In terms of the prominence of the targeted portion to be counted as substantial, the killed Hazara-born infants and mothers in a maternity ward, students, workers, protesters, and young intellectuals were arguably prominent for the overall survival of Hazaras.

4. Hazaras as a protected group; ethnic-religious community

The war in Afghanistan has spared no community; the whole country is devastated. However, as the first chapter clarified, Hazaras are an ethnic-religious minority and atrocities against them are carried out on ethnic and religious grounds. The long-standing atrocities against Hazaras and the structural discrimination and violence against them at the state and societal levels have created an enabling environment for the jihadist groups to target them.

5. Genocidal acts against Hazaras

a. Killing

A reading of the facts provided in Chapter One shows that the Taliban and ISKP have killed Hazaras over a sustained period by singling them out on the highways, massacring them in gyms, schools, public transport commuting to and from Hazara neighbourhoods, voting centres, mosques and even infants and mothers in a maternity ward. These killings seem to constitute the *actus reus* of genocide. These atrocities have not ceased and continue to take place.

b. Causing bodily or mental harm

The Elements of Crimes provides that this conduct includes but is not limited to torture, rape, sexual violence or inhuman or degrading treatment. Courts have the authority to determine case-by-case what other acts may constitute this conduct. With the targeted attacks by the Taliban and ISKP, scores of Hazaras have died and many more injured. Whether these injuries qualify as ‘genocide by causing bodily or mental harm’ needs thorough investigations. However, it should be noted that the means of the attacks have mentally devastated the whole urban Hazara community. Hazaras no longer feel safe in schools, gyms, mosques, maternity wards, and public transport. Particularly, countless targeting of Hazara public transport vehicles in the middle of

⁷⁸ Doxsee, C. [2021] Examining Extremism: Islamic State Khorasan Province (ISKP), CSIS, <<https://www.csis.org/blogs/examining-extremism/examining-extremism-islamic-state-khorasan-province-iskp>> Accessed 01.08.2022

the cities have created an ever-present fear and trauma. The mental harm of this means of atrocity is unspeakable.

Also, it is worth mentioning again the fate of the Junbesh-e-Roshnayi movement. This movement emerged in response to discriminatory government policies and was the product of years of accumulated investment of Hazara people in education and confidence in civic ways of pursuing their rights. I believe the aftereffects of the 23 July bombings were so mentally devastating that Hazaras never again regained the strength to mobilise another movement in that scale and depth to reinstate their demands for justice and fight discrimination. Today, Hazara activism is reduced to online campaigns. The 23 July 2016 bombings and numerous attacks in the following years and the ensuing trauma have hurt Hazaras' collective vitality and energy in driving social and political changes – ingredients that are important for their physical and intellectual survival.

Regardless of any crime type determination, the focus should be on stopping the atrocities against Hazaras and recognising the Hazara suffering in its true nature. The next part discusses what a prospective transitional justice process can offer to address the problem.

IV. Prospects of a Transitional Justice Process

According to the UN definition, transitional justice “is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁷⁹ Transitional justice also “seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy.”⁸⁰ Transitional justice is also about a society’s effort to “restore decency and trust in a human landscape disfigured by degradation and loss.”⁸¹

Folding back the history of human rights violations since 1979 in Afghanistan, one can see that a balance between peace and justice was never sought in any negotiations to end the conflict. After 2001, not only were the perpetrators of wide-scale human rights abuses never held accountable, but they were appointed to key government positions, and some made their way to Parliament. Joining hand, they adopted the National Stability and Reconciliation Law, known as the Amnesty Law, in 2007, which was aimed at preventing the prosecution of individuals responsible for human rights abuses and war crimes committed from 1978 to 2001.⁸² AIHRC’s painstakingly documented 800 to 1000-page never-published report named ‘Conflict Mapping in Afghanistan Since 1978’ did not win the government's support to initiate a transitional justice

⁷⁹ Guidance Note of The Secretary-General UN Approach to Transitional Justice [2010], <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> p. 2

⁸⁰ What is Transitional Justice? [2009] ICTJ, <<https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>>

⁸¹ Haldemann, F. [2008] Another Kind of Justice: Transitional Justice as Recognition, Cornell International Law Journal Vol. 41, p. 676

⁸² Gossman, P, & Kouvo, S. [2013] Tell Us How This Ends Transitional Justice and Prospects for Peace in Afghanistan, AAN, p. 8

process in Afghanistan⁸³, arguably for the lack of courage in Afghanistan's leaders to face the truth. To address the country's abusive past, the former Afghanistan government did not go beyond symbolic gestures like announcing 10 December, International Human Rights Day, as National Victims Day in Afghanistan.⁸⁴

Today, the de facto Taliban government, effectively controlling Afghanistan, has failed to establish a political and legal system that recognises the people of Afghanistan as right-bearers or to respond to atrocities or hold the perpetrators to account— they are one of the primary perpetrators in the first place. They have un-admittedly abolished the 2003 constitution and all the legal reforms achieved at a high cost.

Not surprisingly, transitional justice was a hot topic of debate only in the first decade of this century in Afghanistan when people lived in relative peacetime, and the society felt to some degree that they had transitioned from conflict to peace and from a repressive regime to a fragile democracy in shaping.⁸⁵ In August 2021, Afghanistan experienced a reverse transition, from a dying democracy to a repressive Taliban rule. Thus, one can only discuss transitional justice for Afghanistan as a prospect and aspiration.

In this aspirational thinking, if ever the right conditions are reinstated for a transitional justice process in Afghanistan, drawing from the work of Haldemann, *Transitional Justice as Recognition*, this paper argues that a holistic transitional justice process composed of retributive and restorative measures with recognition at its centre has the potential to address the complexity of Afghanistan conflict, including the situation of Hazaras. From the rebellion against the Afghan King in the late 19th century to involvement in civil conflict in the late 20th century and civic activism in the past two decades, the Hazara struggle has been for recognition.

Haldemann, drawing conclusions from the works of Axel Honneth's *The Struggle for Recognition* and Avishai Margalit's *The Decent Society*, provides that "recognition, as a principled commitment to the reduction of humiliation and moral cruelty, is a central factor in restoring a minimally decent order in the aftermath of mass atrocity."⁸⁶ Honneth, cited by Haldemann, says that

"To this extent every human subject is dependent, in an elementary way, on a context of social forms of interaction that are regulated by normative principle of mutual recognition; and the absence of such recognition relation will be followed by experience of disrespect or humiliation that cannot be without damaging consequences for the single individual's identity formation."⁸⁷

⁸³ Rashid, A. [2012] *The Cloak of Silence: Afghanistan's Human Rights Mappings*, AAN <<https://www.afghanistan-analysts.org/en/reports/rights-freedom/the-cloak-of-silence-afghanistans-human-rights-mappings/>> Accessed 01.08.2022

⁸⁴ Kouvo, S. [2010] *What comes after remembering? Some thoughts after National Victims Day in Afghanistan*, AAN, <<https://www.afghanistan-analysts.org/en/reports/war-and-peace/what-comes-after-remembering-some-thoughts-after-national-victims-day-in-afghanistan/>> Accessed 01.08.2022

⁸⁵ Gossman, P, & Kouvo, S. [n 84], p. 2

⁸⁶ Haldemann [n 81], p. 692

⁸⁷ *Ibid*, p. 684

Honneth then opens his argument of recognition by determining three interdependent dimensions of the relationship with self: 1) Self-confidence as a prerequisite for an autonomous self is dependent upon intimacy, such as child-parent relationship, and friendship and love in adults. 2) self-respect, essential for self-realisation, is tied to being recognised as a right-bearing equal citizen and 3) self-esteem is finding one's life socially meaningful and important.⁸⁸ Moreover, Margalit believes that a decent society is "one whose institutions do not humiliate people."⁸⁹

Comparing the above moral standards against the reality in Afghanistan gives us a disheartening picture. In August 2021, with the fall of Kabul to the Taliban and the start of American evacuation flights, fearing the Taliban's degrading behaviours in the 1990s, people rushed to the Kabul airport, trying their chances to board planes and escape. Some who did not make it inside stayed on a plane's fuselage, and as it took off, they dropped. Among them was Zabi, 17.⁹⁰ His free fall raises existential questions; what made him do that? Maybe fear of suppression and humiliation. In Afghanistan today, the Taliban's Vice and Virtue Ministry is a humiliating machine policing private lives and hurting people's dignity in creatively new ways. It is commonplace to see their staff riding bikes equipped with loudspeakers telling people what to wear.⁹¹

For Hazaras, social behaviour towards them was so demeaning that some resorted to *taqiyyah* (a doctrine of Shiism that allows its followers to dissimulate under certain conditions) to hide their faith and declare themselves as Sunni to remain safe where necessary.⁹² Another humiliating campaign of the Taliban toward Hazaras was the destruction of Buddha statues in the primarily Hazara province of Bamyán in 2001⁹³ with no regard for generations of Bamyánis who had for centuries woke up to the view of Bamyán Buddhas carved in the mountain in the centre of the city. The statues were part of their identity.

This paper argues that recognition, through first establishing the truth, is one of the prime things a comprehensive transitional justice can offer to victims of the Afghanistan conflict, including Hazaras. This can be the first step toward healing. Retributive justice measures can then build on this and judicial and security sector reforms to strengthen the rule of law and ensure guarantees of non-repetition. For Hazaras today, recognition would mean acknowledgement

⁸⁸ Ibid, pp. 685 – 6

⁸⁹ Ibid, p. 687

⁹⁰ Butler, G. & Sadat, H. [2022] His Son Fell from a US Plane During the Taliban Takeover. A Year On, Life Is 'Hell.', Vice, <<https://www.vice.com/en/article/4ax3vd/kabul-plane-death-taliban-takeover>> Accessed 10.08.2022

⁹¹ A Review of Taliban's Vice and Virtue Ministry, Violating People's Liberties and Grappling with Women's Clothing (in Persian), [2022], Etilaatroz, <<https://www.etilaatroz.com/142342/an-overview-of-the-activities-of-the-ministry-of-enjoining-the-good-and-forbidding-evil-violation-of-citizens-freedom-and-conflict-over-womens-issues/>> Accessed 10.08.2022

⁹² Abbasi [n 23] p. 151

⁹³ Afghanistan, Destruction of the Bamiyan Buddhas [2001], <<https://casebook.icrc.org/case-study/afghanistan-destruction-bamiyan-buddhas>> Accessed 10.08.2022

from others that they belong to Afghanistan; are not outsiders; are equal citizens; are free to practice their faith; have suffered from atrocities and discrimination perpetrated by the state and the society at large.

Regarding prospects of retributive justice, it is important to recall what Hannah Arendt said when discussing the acts of punishing and forgiving in relation to mass atrocities or "radical evil": "All we know is that we can neither punish nor forgive such offenses and that they therefore transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance."⁹⁴

Concerning restorative justice, in the spirit of the African worldview of Ubuntu, in the words of Desmond Tutu, "the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense."⁹⁵

There are still hopes for holding the perpetrators of atrocities in Afghanistan accountable. The country joined ICC in 2003. The Court's jurisdiction is complementary to that of the national criminal jurisdictions (under Article 1 of the Rome Statute) and exercises its jurisdiction when the state in question is unwilling or unable to genuinely investigate and prosecute international crimes (under Article 17, 1 (a) of the Rome Statute). The Court's Appeals Chamber authorised the Prosecutor to commence an investigation into alleged crimes in relation to the situation in Afghanistan on 5 March 2020. Currently, the preliminary examinations are focused on crimes against humanity and war crimes allegedly committed in the context of armed conflicts.⁹⁶ With the atmosphere of fear created by the Taliban, it is understandable that ICC will face numerous challenges in gathering evidence and witnesses. This difficulty also dictates the need to investigate alleged international crimes committed in Afghanistan.

Conclusion

This paper explored concerns of a "Hazara genocide" and prospects of a transitional justice process in Afghanistan. It found that there are valid grounds for concern about "Hazara genocide" considering the Taliban and ISKP conduct and statements and the history of discrimination against Hazaras. Chapter One first provided a historical context of atrocities and discrimination against Hazaras and argued that they are discriminated against on ethnic and religious grounds compounded by an assumption that they are outsiders of Mongolian descent. King Abdurrahman's mass killings of Hazaras in the late 19th century destroyed their social and political agency and economic lives. The anti-Hazara war so irreversibly wounded the inter-ethnic relationships in general and Pashtun-Hazara relations in particular, a wound that still calls for healing. The King's genocidal campaign led to structural discrimination toward Hazaras and reduced them to an inferior cast. Then, Chapter One discussed systematic attacks,

⁹⁴ Arendt, H. [1998] *The Human Condition*, The University of Chicago Press (2d ed.) p. 241

⁹⁵ Tutu, D.M. [1999] *No Future Without Forgiveness*, New York: Doubleday, p. 54 – 5

⁹⁶ The situation in the Islamic Republic of Afghanistan, ICC-02/17.

mainly by the Taliban and ISKP, against Hazaras from 2014 onwards, which make the basis of genocide discussion in Chapter Two.

Chapter Two asked whether deliberate attacks against Hazaras amount to genocide by starting from what sparked a “Hazara genocide” debate and referred to alarms issued by AIHRC, Genocide Watch, the United States Holocaust Memorial Museum and discussed The Hazara Inquiry by the British Parliament. Chapter Two Part II started with the genocide definition and discussed how the genocide doctrine and case law interpret genocidal intent and genocidal acts.

Drawing from case law and literature on genocide, Part III of Chapter Two argued that the Taliban and ISKP statements might constitute the *dolus specialis* or specific intent of genocide, and therefore, the killings and causing bodily and mental harm to the Hazara community may constitute the *actus reus* of genocide. It also discussed that because of their distinct looks, Hazaras are easy targets to the jihadist groups; they easily single Hazaras out from others and target them on discriminatory grounds. However, this paper is neither a full mapping of the problem nor a complete analysis and can only serve as a starting point for the topic it has sought to explore. Studies of atrocities in Afghanistan, including those against Hazaras, and avenues of action available under international law to protect people at risk need more detailed assessments.

Lastly, this paper briefly explored a holistic transitional justice aspiration for Afghanistan with a special focus on recognition. The contesting views about retributive and restorative justice and Hannah Arendt’s view of the impossibility of punishing the perpetrators and forgiving them demonstrate both the challenges and the need for a holistic transitional justice approach. That is to say, one cannot undo what is done to them and not know what they already know about their past, but the hatred ensuing from the perpetrator-victim relationship is too heavy a burden to carry.

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Abbreviations

AIHRC: Afghanistan Independent Human Rights Commission

ICC: International Criminal Court

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

IS: Islamic State

ISKP: Islamic State-Khorasan Province

NUG: National Unity Government

UN: United Nations

UNAMA: United Nations Assistance Mission in Afghanistan

US: United States

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