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Accountability and Justice as the path to Peace

A Transitional Justice approach for Afghanistan's conflict with the ICC and the UN leading the way

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Victims are the first people who want peace but peace should come with justice. We do not want revenge or to wash blood with blood but at least these criminals should come and publicly apologize to the people of Afghanistan.

Testimony from a man whose brother was arbitrarily detained, tortured and murdered by the Taliban, speaking at the Victims' Jirga Justice, Kabul, 9 May 2010 (Kuovo and Mazoori, 2011: 492)

Summary

Afghanistan has not experienced peace or stability in decades. Efforts have been made to salvage the country from conflict, yet with little to no success. Against this background, this study aims to analyze transitional justice efforts in the country, seen as the only plausible option for escaping deteriorating situations, like the one in which Afghanistan stands.

Transitional Justice is understood as the set of mechanisms implemented by countries and international organizations aimed at ensuring a transition of a country from an authoritarian to a democratic regime. It is directly linked to nation-building and sustainable development and its goals are vast, extending from truth-seeking, victim recovery and reparations, to institutional reforms and the strengthening of democracy and the rule of law.

The present work draws on the historical foundations and legal, social and economic characterization of the decades-long Afghan conflict to assess the human rights and international humanitarian law violations committed, and to further reach two main goals: demonstrating that Afghanistan can only achieve sustainable peace and stability if the crimes of the past and present are dealt with and accountability is pursued; and proposing the implementation of a transitional justice approach in Afghanistan in which the International Criminal Court and the United Nations play a leading role. This study argues that coordinating two of the most influential international institutions in a Transitional Justice approach was the missing piece of the puzzling challenge that has been trying to salvage Afghanistan from a history of conflict and crimes.

Key-words

Afghanistan – Transitional Justice – International Criminal Court – United Nations – Accountability – International Humanitarian Law – International Human Rights Law

Resumo

O Afeganistão não conhece paz ou estabilidade há décadas. Apesar das tentativas postas em prática para salvar o país de conflito, estas tiveram pouco ou nenhum sucesso. Neste contexto, este estudo visa analisar os esforços de justiça de transição no país, considerados a única opção plausível para escapar de situações deteriorantes, como a situação em que o Afeganistão se encontra.

A justiça de transição é entendida como o conjunto de mecanismos implementados por países e organizações internacionais com vista a assegurar a transição de um país de um regime autoritário para um regime democrático. Está diretamente ligada a *nation-building* e ao desenvolvimento sustentável, e os seus objetivos são vastos, estendendo-se desde a procura pela verdade, recuperação das vítimas e reparações para as mesmas, até reformas institucionais e fortalecimento da democracia e do estado de direito.

O presente trabalho baseia-se nas bases históricas e na caracterização legal, social e económica do conflito afegão, que já dura há décadas, para avaliar as violações de direitos humanos e de direito internacional humanitário cometidas e para alcançar, ainda, dois objetivos principais: demonstrar que o Afeganistão só pode alcançar a paz sustentável e estabilidade se os crimes do passado e do presente forem reconhecidos e a responsabilização for posta em prática; e propor a implementação de uma abordagem de justiça de transição no Afeganistão, na qual o Tribunal Penal Internacional e a Organização das Nações Unidas desempenham um papel de liderança. Este estudo argumenta que coordenar duas das instituições internacionais mais influentes numa abordagem de justiça de transição é a peça que faltava no enigmático desafio que tem sido tentar salvar o Afeganistão do seu legado de conflito e crimes.

Palavras-chave

Afeganistão – Justiça de Transição – Tribunal Penal Internacional – Nações Unidas – Responsabilização Criminal – Direito Internacional Humanitário – Direitos Humanos

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O corpo da dissertação ocupa um total de 183 734 caracteres.

The body of the dissertation occupies a total of 183 734 characters.

CHAPTER 1

1. Introduction

Afghanistan is at the edge of no return. Years and years of occupation and war, combined with insufficiently addressing the root causes of the tensions, and the lack of a much-needed accountability for the crimes committed, have left the country longing for peace and aching for truth.

Since the emergence of chaos in Afghanistan, around the second half of the 20th century, efforts have been made throughout the years in order to improve the deteriorating situation into which the country was rapidly falling. This marked the moment when transitional justice came into the picture, a series of processes and mechanisms adopted by countries and international organizations in order to ensure a transition from an authoritarian to a democratic regime. This involved a whole other panoply of processes, all in the name of "dealing with the past", pursuing justice and achieving long-term stability and peace. Despite the fact that little progress was made, the different attempts at improvement, some undeniably unsuccessful, others barely, have left a legacy scarred by failure, on the one hand, yet also a handbook of guidelines and steps to avoid, on the other.

Today, Afghanistan is clearly running out of time. In summer 2021, after President Joe Biden announced US troops' withdrawal from the country, a window was left open and the Taliban seized the opportunity and started to conquer territory. History was repeating itself. In August, after the Taliban entered the capital, the government collapsed and they eventually took control of Kabul and Afghanistan as a whole. As a consequence, the country is now in ruins and, with no light at the end of the tunnel, Afghans are starting to lose hope. If they wish to stand a chance at having a stable and prosperous future, they have to face their past.

Against this background, the present work will have two main aims. The first one is to examine the violations of International Humanitarian Law and International Human Rights Law in Afghanistan during the conflict and the lack of accountability mechanisms attached thereto. The second aim is to understand how a transitional justice approach lead by the International Criminal Court and the United Nations could serve to take into account the different complexities of the Afghan situation and of the country itself and

deal with all the gaps that have been disregarded in previous approaches and which have led Afghanistan to where it currently stands.

The first chapter consists of an introduction which offers a contextualization and lays out the historical background of the armed conflict in Afghanistan. It considers the revolution of the late 1970s and consequent Soviet occupation, goes through the civil war and militia appearance, continues with the formation of the Taliban, their defeat by the Northern Alliance and subsequent reconstruction efforts, and end with the present day. The second part of the first chapter deals with the legal, social and economic characteristics of the country, describing its legal foundations connected to what most authors regard as "legal pluralism", as well as its social and economic indicators.

The second chapter draws lines and sheds light on some important aspects related to the applicable international legal frameworks. It begins with an explanation of the premises and a distinction between International Humanitarian Law and International Human Rights Law. Afterwards, it presents an exposition of the complexities of the Afghan conflict and a legal characterization of it. It then proceeds with a section on accountability divided into two subsections: the first one about the crimes committed and its perpetrators; the second on accountability mechanisms and specifically the role of the International Criminal Court (ICC) in the Afghan case, as well as the root causes for its unsuccessful work in the country.

The last chapter focuses on lessons learned and proposes future solutions within the field of transitional justice. It thoroughly explains the main characteristics of the field of the latter and then reveals its footprint in Afghanistan and why this approach should be fully considered in this scenario. Finally, it looks at prospects for the country and solutions to its problems, and does so considering a transitional justice approach which combines the work of the ICC and the United Nations, who are thought as having a key role to play in achieving a prosperous and more peaceful future for Afghanistan.

2. Contextualization

2.1. Historical Background

Memories are ground in a mill of grievances and fear.

Gossman and Kuovo (2013: 36)

It should come as no surprise by now that the situation in Afghanistan is in great need of solutions and effective and immediate action. Before delving into further analysis, however, a proper contextualization is necessary in order to fully grasp the current Afghan dilemma and to understand where hope started to fade away for Afghan people.

As De Cock (2010: 98) puts it, the last fifty years have seen a drastic change in the strategic context in which military forces operate: interstate wars, which once dominated most of the globe, began to give away their place for other types of wars, like guerilla warfare. The conflict in Afghanistan, he states, mirrors this changing nature of war, making it even more difficult for the international community to know how to properly respond to these new threats: either through law enforcement or through war (De Cock, 2010: 98-99). The various layers of the conflict also add up to this density and to the slight chances of addressing past abuses.

In fact, and as shall be demonstrated further on, the complexities of the Afghan conflict are extraordinary. Yet, how did one get to where one stands today?

The conflict in Afghanistan is undoubtedly one of the longest conflicts in contemporaneity, as the country is being ravaged by war for 44 years (Bellal *et al*., 2011: 49; Gossman and Kuovo, 2013: 6). Nonetheless, it should be noted that, for the sake of the present work, the time span here considered regarding the history of the Afghan conflict will only start in the second half of the 1970s. Indeed, most scholars and experts find it most appropriate to divide the Afghan conflict into three phases, with the first one beginning with the 1978 revolution which was followed by Soviet occupation in 1979 (Nadery, 2007: 173). The *coup d'état* of April 1978 brought to power the People's Democratic Party of Afghanistan (PDPA) who implemented a variety of radical and authoritarian measures which, faced with popular discontentment and consequent uprisings, contributed to the deaths and disappearances of hundreds of people. When the

Soviet Union came into the picture, in December 1979, oppression continued and lead to large numbers of people fleeing the country (Gossman and Kuovo, 2013: 6).

The second phase of the conflict was triggered by the collapse of the Soviet-supported regime of Najib Ullah and was marked by the arise of the Mujahedin and militia forces which were once fighting against the Soviet troops. During this period of civil war, a series of atrocities against civilians were committed, when anarchy erupted and Kabul was taken (Nadery, 2007: 174; Gossman and Kuovo, 2013: 6). The rural areas of the country were devastated by the actions of warlords, bandits and drug lords (Johnson and Mason, 2007: 73). During these fights for power, Saudi Arabia invested heavily in the area, particularly through the funding of madrassas, religious boarding schools, in Pakistan. This lead to the creation of a network intended to educate the people based on a conservative version of Islam which was being taught and disseminated (Johnson and Mason, 2007: 73; Ibrahimi, 2017: 951).

It was in this climate of chaos and as a consequence of the teachings inside these madrassas that the well-known Taliban emerged, officially signaling the start of the third phase of the Afghan conflict, in 1994 (Nadery, 2007: 174; Ibrahimi, 2017: 247). The Taliban were able to gather support from people who saw them as liberators and saviors, particularly Pashtuns from Pakistan (Johnson and Mason, 2007: 74). Nevertheless, people's hope quickly turned into fear, because, in the words of Nadery (2007: 174), "while every Afghan citizen suffered under the Taliban regime, the primary victims of their rule were women and ethnic and religious minorities". They banned women from work and began to introduce severe punishments on those who presented resistance (Johnson and Mason, 2007: 74). By 2001, they had already taken control of most of the country (Gossman and Kuovo, 2013: 6). Little did the world know that history would repeat itself after only 20 years.

The brutalities committed during the Taliban rule are no secret, yet this will be discussed in another chapter later on. What is now worth talking about is how the Taliban managed to pull through, at least until 2001, despite the horrors which were being committed in plain sight. Following Johnson and Mason's thought:

> Understanding the Taliban requires more subtle analysis of Afghanistan's Soviet occupation and post-occupation experience, its Islamic traditions, Afghan ethno-linguistic and tribal phenomena, interlopers of the frontier

> border areas with Pakistan, and the context in which the Taliban rose (Johnson and Mason, 2007: 73).

The Taliban took control of the capital, Kabul, in 1996, thus instituting a very repressive regime based on the Islamic (Shariah) Law and an ideology based on the Deobandi School, and with a religious police patrolling the streets of the country (Johnson and Mason, 2007: 74). However, they initially emerged in reaction to the brutality of Mujahedin parties themselves, consequently enjoying some popularity in the beginning, given that, as previously mentioned, they were seen as the deliverers of stability to the country (Borthakur and Kotokev, 2020: 2). Their leader, Mullah Muhammad Omar, renamed the country. What once was an Islamic State - of Afghanistan - was now an Islamic Emirate. Yet, some authors, such as Johnson and Mason (2007), believe Pakistani support and tribal politics do not fully explain how the Taliban seized power in such a quick and effective manner, but rather the way they unconsciously made their way into people's minds with the "charismatic" and leader-centered movement of Mullah Omar (Johnson and Mason, 2007: 79-80).

Despite Taliban's relative initial popularity, from 1996 to 2001, their ruling was not free from resistance, and the most notorious group to stand ground against them was the Northern Alliance[1] (Gossman and Kuovo, 2013: 9; Johnson and Mason, 2007:74). In fact, and as denounced by Ibrahimi (2017), the Islamic Emirate of Afghanistan, at a certain point, started to lack popular internal support, and externally it was seen as an "unrecognized political organization" (Ibrahimi, 2017: 953). At the same time, the Taliban were thought to being linked to the Al-Qaeda (Immenkamp and Latici, 2021: 2).

It was within this scenario of distrust of the Northern Alliance towards the Taliban that the 2001 intervention led by the United States of America (hereafter, US) took place, toppling the Taliban regime. The air strikes and ground offense called *Operation Enduring Freedom*, whose merits are not to be discussed as they fall far from the scope of the present work, paved the way for an international effort in the direction of a

[1] The Northern Alliance, whose official name was United Front for the Salvation of Afghanistan, comprised all those who decided to join the fight against the Taliban, mainly ethnic groups in northern and central Afghanistan. It was supported by countries such as India, Tajikistan, Iran, Russia, Israel, Pakistan, Uzbekistan and the United States of America (Farr, 2022).

reconstruction of the war-torn country (Bellal *et al.*, 2011: 49; Gossman and Kuovo, 2013: 6).

After the intervention whose aim was said to be the reconstruction of the country, Hamid Karzai was appointed interim leader, becoming Afghanistan's president three years later through the country's first democratic elections (De Lauri, 2013: 261; Gossman and Kuovo, 2013: 6). The humanitarian project which then started to take place and extended through the first years of the new century, included a wide panoply of reforms concerning the armed and police forces, the disarmament of the militias, counter narcotics and a legal modernization (De Lauri, 2013: 261-267). Nonetheless, and as Ginty (2010) recalls, "the US-led rush to oust the Taliban left little space for serious thought on the nature of the post-Taliban polity", and the United Nations (UN) established that the state was to be reformed following liberal lines (Ginty, 2010: 587).

Despite the fact that Afghanistan finally seemed to be moving in the right direction, the defeat of the Taliban did not bring peace for long, as ethnic and political forces within the government of Karzai started to emerge, due to the fact that many warlords and faction leaders had assumed powerful positions in the new administration (Gossman and Kuovo, 2013: 6-9; Kuovo and Mazoori, 2011: 493; Ginty, 2010: 588). The post-Taliban government was unable to secure a monopoly of violence for the state because its security was dependent on certain warlords (Ginty, 2010: 588). With the memory of chaos on the horizon and getting closer each day, the Taliban began to resurge, representing opposition to the Afghan government and, consequently, to international forces (Kuovo and Mazoori, 2011: 494). As very bluntly put by Kuovo and Mazoori (2011):

> The consequences of these early political choices are today well known: the statebuilding process has been marked by corruption, an increase in organized crime and a state of impunity, leading to destabilization and the reemergence of conflict (Kuovo and Mazoori, 2011: 493).

One should note, however, that the Taliban movement which reappeared in the early 2000s was different from the previously topped one. The latter represented a fight for internal control, yet the former, post-2001, was aimed at freeing Afghanistan from external threats (Borthakur and Kotokey, 2020: 3). Indeed, these past twenty years, the Taliban have been attempting to recapture the country in order to protect what they believe are its values and traditions. Whatever stands in their way, is an obstacle and

should therefore be eliminated - this includes foreign forces and the Kabul government itself (Borthakur and Kotokey, 2020: 3).

These past twenty years have thus witnessed Afghanistan's situation getting more and more critical: from poverty, illicit drug trafficking, and corruption, to a government with little authority and a ruined economy (Johnson and Mason, 2007: 89). Human rights abuses were also peaking (Gossman and Kuovo, 2013: 6). Despite US presence and apparent stability, the conditions were being set for what was to develop last summer. The withdrawal of US troops in August 2021, after two decades of occupation in Afghanistan, left the devastated country in the hands of the Taliban, who swiftly regained control.

All in all, throughout these last decades of conflict, as exposed above, violations of human rights and international law have been committed by all sides. No accountability has been pursued (Gossman and Kuovo, 2013: 7-8). Certain commanders have been tried abroad, but trials have been few and far between, still (Gossman and Kuovo, 2013: 8-9). Despite the many attempts to reconstruct the country, it was in such bad condition that what came to happen last year was inevitable.

Today, the Taliban are in charge again, and fear is felt in the air. After their takeover of Kabul last August, they announced a cabinet and other key positions composed of only man and poorly diverse, being constituted of mainly Pashtuns (UNSC, 2022: 2). Women and girls have, once again, been deprived of their public life and their jobs, consequently denying them their freedom and rights. The country is at a cross-roads and history does not lie. On top of this, Afghanistan's economic and social indicators are not looking very promising either, as the next section will show. What do these numbers tell us about the situation in Afghanistan?

2.2. Legal, economic and social characteristics in Afghanistan

Following the historical background present above, a proper legal, economic and social characterization of the country is necessary in order to better find out solutions that fit the problem considering all the layers involved. This is what is partly missing in a few of the approaches which have been heretofore attempted to be put into practice.

Firstly, as explained by Mason (2011), like in other post-conflict countries, the efforts of having to rebuild Afghanistan and its institutions and structures are hampered by a bad legacy of the rule of law and justice (Mason, 2011: 149). However, and agreeing with him, the problem does not lie with a legal system which once functioned and which does not anymore, but with the country's many legal layers and regime changes (Mason, 2011: 149). In fact, and something which is not taken into account when considering Afghanistan, its legal system is so complex that one could not possibly ignore it when doing research and solution-finding to the country's legal instability. Like Swenson (2017) clearly supports, when attempting to improve the rule of law in Afghanistan, the US's approach did not successfully understand the country's legal pluralism, "in which two or more legal systems coexist in the same social field" (Swenson, 2017: 115). Regardless of the fact that the Taliban have brought some changes into the picture, which will be addressed in the following paragraphs, it is key to understand how Afghanistan's legal system is organized.

Afghanistan is characterized by its legal pluralism, which means there are essentially three main legal systems – customary, state/formal and religious, the *Shari'a* (Mason, 2011: 151-152). Customary law in Afghanistan is the set of rules and regulations which are founded in group norms and practices and which differ in every community, consequently being very scarcely codified (Mason, 2011: 153). Thus, customary law passes on orally among those who use it, mainly the older people of the communities, who, dependent on general agreement, can still choose to change the rules according to their own will, even ignoring precedents. The Pashtunwali is one of the most detailed customary laws, known as the "oral code of ethnic values and norms" (Mason, 2011: 153). It is composed of the jirgas and shuras, and it even presents some variations in each community (Mason, 2011: 153; Suhrke and Borchgrevink, 2009: 215). The idea behind it is that, through consensus, peace overcomes individual rights, even if this entails exchanging women in return for less grave criminal offences (Mason, 2011: 154).

Over customary law, there is Islamic Law – Shari'a, which means "the path to follow" – , at least in theory, which has strongly influenced the formal justice system (Mason, 2011: 152; Wardak, 2004: 323). It has two schools of jurisprudence: Hanafi, associated with the Sunni majority; and Jafari, associated with the Shi'ite minority (Suhrke and Borchgrevink, 2009: 215; Mason, 2011: 152). If the civil code does not eventually cover a certain matter, judges usually refer to the Hanafi jurisprudence (Mason, 2011: 152).

Furthermore, there are the Islamic judges and religious leaders, as well as those who are considered to be directly connected to the prophet, who can all refer to Shari'a and solve conflicts upon request (Mason, 2011: 152).

It should be noted that Islamic Law is not fully isolated from customary law, as the former is also often used informally (Mason, 2011: 152). However, customary law is usually more limiting than Islamic Law in issues such as women's and property rights, so the former generally ends up overruling the latter in informal situations. When the Taliban is in power, which currently is the case, Shari'a predominates (Mason, 2011: 152).

Nevertheless, almost all Constitutions in Afghanistan since the beginning of the twentieth century have recognized Islamic Law (Suhrke and Borchgrevink, 2009: 217), regardless of some variations. In 1923, Islamic Law was supposed to complement civil and criminal law. Eight years later, it changed to be given primacy. In 1964, the Constitution, which served as inspiration for the 2004 one, affirmed the subsidiary principle – Shari'a was to be applied when statutory law could not, and the repugnancy principle – Islam could not be overruled by any law. The 1987 Constitution re-established the repugnancy principle and re-introduced the complementarity one, and the same was done in 1990 (Suhrke and Borchgrevink, 2009: 217). Moreover, it should not be ignored that there was no intention to respect the values of the Universal Declaration of Human Rights or the United Nations Charter, as most conflicts involving these types of rights were most of the times left unsolved. Only in the 2004 Constitution were the two referred to, as the growing involvement of the international community also began to be felt (Suhrke and Borchgrevink, 2009: 217-221; Wardak, 2004: 320).

As for the judicial system, one cannot possibly deny that the legal system in Afghanistan is of relative complexity. On top of this, its judicial system it is also relatively full of problems. As Wardak (2004) very openly asserts:

> The role of the Afghan central government and its formal institutions of justice (courts, police, corrections, etc.) in maintaining social order in Afghan society has always been limited. This particularly applies to rural Afghanistan, where it is estimated that over 80% of the Afghan population live (Wardak, 2004: 326).

The formal justice system, besides being corrupt, costly and elitist, lacks capacity, and it is estimated that almost double the judges would be needed to tackle the demand. In many rural areas, once again, there is not even access to primary courts. Furthermore, certain

issues, such as women's rights, are ignored, and reconciliation and restoration are given away for retribution (Mason, 2011: 158-160; Wardak, 2004: 320; Suhrke and Borchgrevink, 2009: 218). This is why most people rely on the informal system and traditional methods to solve their legal issues, as it is more efficient and accessible, as well as more reliable. However, its impartiality is to be doubted, because there are interests involved, and certain issues are also purposedly ignored (Mason, 2011: 160, Wardak, 2004: 320). With the Taliban in power nowadays, religion is, once again, in the public sphere, and the domestic issues are to be kept private (Suhrke and Borchgrevink, 2009: 218). The Constitution was suspended when the Taliban regained control, and a legal vacuum emerged, with only a few decrees being issued (UNSC, 2022: 2). In the justice sector, the applicable legal framework remains ambiguous (UNSC, 2022: 3).

With regard to the socio-economic indicators, Afghanistan's position is also in an alarming state. As Suhrke and Bochgrevink (2009) regret: "the endless war has devastated a country that was already at the margins in terms of every indicator of human development", ranking as one of the poorest in the world and one of the lowest in terms of human development, with a high child mortality and low life expectancy rates (Suhrke and Borchgrevink, 2009: 255; Gaan, 2015: 20).

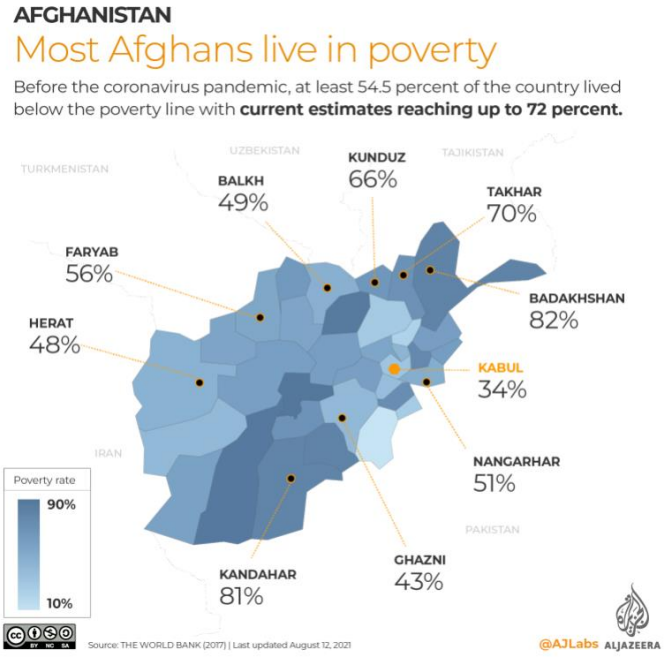

Figure 1: "Afghans living in poverty" (Haddad and Chughtai, 2021)

Access to healthcare and clean water is also scarce, and literacy, education and employment are far from the desired levels, as well, women and children being the most

affected (Suhrke and Borchgrevink, 2009: 255; Gaan, 2015: 19; Carbonari and Deledda, 208: 470-471). In addition, more than half of the country, around 23 million people, are food insecure, as observed in Figure 2 (Chughtai, 2022).

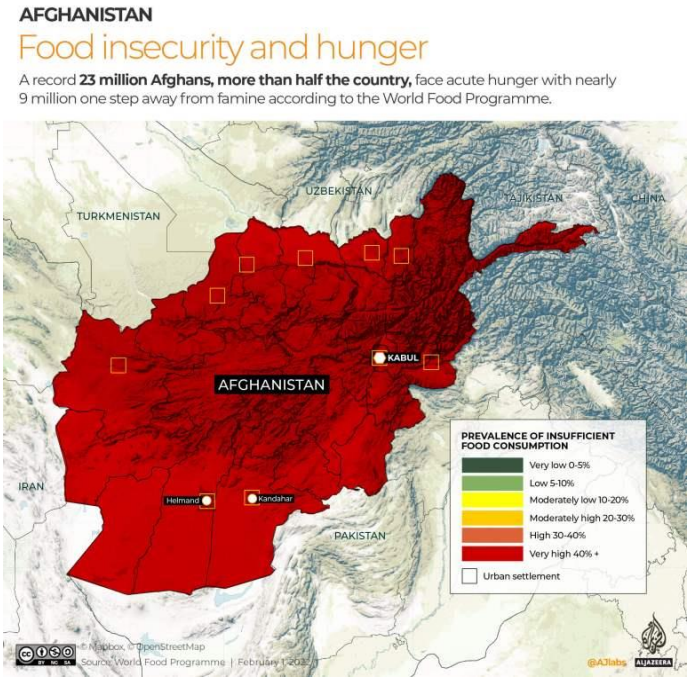

Figure 2: "Food insecurity and hunger in Afghanistan" (Chughtai, 2022)

The lack of overall security and freedom is also problematic. Afghanistan ranks high as one of the most heavily armed countries, which has an impact in every other sector of society (Suhrke and Borchgrevink, 2009: 255; Carbonari and Deledda, 208: 471).

In addition to these figures and indicators, there is the problem of narcotics and illicit drugs, particularly opium, which is intrinsically connected to economic interests (Gossman and Kuovo, 2013: 15). In fact, opium production remains currently at high levels and is of great importance to the Afghan economy, as it sustains the livelihood of many people (UNODC, 2021: 5-10). This adds up to the insecurity problem, of course. In the words of Mason (2011), "like the shark and the pilot fish (…), there is a continuing symbiotic relationship between insecurity, corruption and narcotics trafficking" (Mason, 2011: 176). Illicit drug revenues surpass government revenues and foreign aid combined (Suhrke and Borchgrevink, 2009: 255). As declared in the 2021 report by the United Nations Office on Drugs and Crime:

> The cultivation of opium poppy is driven by many socioeconomic and security-related factors, including multi-dimensional poverty, lack of licit economic opportunities, and limited access to markets. Most of the farmers

> who cultivate opium poppy live in villages with lower quality infrastructure, and with less advantaged living conditions (UNODC, 2021: 19).

The COVID-19 pandemic has unfortunately contributed to a worsening of the situation, as the economy suffered greatly from it (UNODC, 2021: 19). Afghanistan was already highly dependent on foreign aid, even to carry out its most basic tasks (Suhrke and Borchgrevink, 2009, p. 213). External aid accounts for 40% of Afghanistan's GDP (Watkins, 2021). For instance, almost all funding for the justice sector came from international sources, such as Western donors and international institutions (Swenson, 2017: 115; Dadabaev, 2020: 218). When Pilster (2020) expressed that "the importance of the international community is most acutely felt in its absence", he seemed to be looking into the future (Pilster, 2020: 136). International funding has been drastically cut, sanctions have been applied and resources have been frozen by the International Monetary Fund, leading to a decay of the country's already not favorable condition (Watkins, 2021). This has had tremendous consequences in various sectors, such as healthcare, employment, education and food (Stefansson *et al.*, 2021).

Despite all these problems, Afghanistan is still considered an important country strategically, being landlocked between South and Central Asia, and close to China, who can obviously play a central role in the region (Wardak, 2004: 320; Shahrani, 2018: 22). Scholars have even described the country as a "geographical pivot of history" and possibly a "hub of connectivity" (Shahrani, 2018: 22). Nonetheless, if its citizens are not provided with employment, education, health and an overall sustainable economy, the country, despite its potential, will remain a graveyard of devastation and a battlefield between powers (Gaan, 2015: 33-34; Wardak, 2004: 320). And the only way Afghanistan can become closer to achieving that is through an approach which takes into consideration all the particularities exposed above and works towards the transformation of the country by tackling its root problems.

3. State of the Art: Accountability and Transitional Justice approaches to Afghanistan's conflict

Despite the immense corruption, severe poverty, devastated economy, never-ending insurgency, and a few other problems, Afghanistan's value in geostrategic terms remains essential (Johnson and Mason, 2007: 89). Yet, as one certainly knows, in spite of the

country's geostrategic potential, most research on Afghanistan is, unfortunately, focused on its vast war scenario.

Indeed, Afghanistan's decades of raging conflict have put the country in the spotlight in scholar research, encompassing a wide panoply of topics. Still, for the purpose of the present study, the research efforts here reviewed will be concerning the Afghan conflict and the country's reconstruction efforts since the beginning of the 2000s. As declared by Rubin (2003), it was during this very period that the transitional justice discussion regarding the country began, "very slowly and tentatively" (Rubin, 2003: 573). This topic will deserve full attention further on, in a separate section of this study, yet a very brief outline ought to take place.

The concept of transitional justice emerged when academic investigation and human rights activism started to develop an interest for the study of how societies recovering from a period of dictatorship or civil war dealt with past legacies (Roht-Arriaza and Mariezcurrena, 2006: 1). As described by Naomi Roht-Arriaza, expert in the field, transitional justice can be described as the "conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes" (Roht-Arriaza and Mariezcurrena, 2006: 1). She notes, however, that the term is "a bit slippery" and the definition "somewhat problematic", because it implies a specific period of time after which a post-transitional state develops, and, in practice, the transition period may not be well-defined and may prolong itself for many decades (Roht-Arriaza and Mariezcurrena, 2006: 1). Roht-Arriaza also points out that "the universe of transitional justice can be broadly or narrowly defined", but, in broad terms, it includes anything that a society conceives to deal with conflict legacy and violations of human rights, "from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underly conflict" (Roht-Arriaza and Mariezcurrena, 2006: 2). With the beginning of the new millennium, it became generally accepted that some other transitional justice measures were necessary given the massive violations of human rights and humanitarian law, and national and international human rights advocates started to consider ending impunity as a key part of their agenda (Roht-Arriaza and Mariezcurrena, 2006: 9). The relationship between the local, national and international levels became more complex and multilayered, as well (Roht-Arriaza and Mariezcurrena, 2006: 10). Hence, the two-dimensional solution, which only

considered the national and international levels, was no longer sufficient to encompass transitional justice efforts, as these now stretched into the local level, in villages and neighborhoods, making use of different techniques influenced by local customary law which combined elements of amnesty, justice, truth-telling, reparations, etc. (Roht-Arriaza and Mariezcurrena, 2006: 11).

The above-mentioned elements are some of those included in transitional justice initiatives. However, these go way beyond truth-telling, reparations or amnesties. Transitional justice comprises issues such as gender justice, peace processes, institutional reforms, criminal justice and accountability, truth and memory, prevention, sustainable development goals, among others (ICTJ-a). As defined by the International Center for Transitional Justice:

> Transitional Justice refers to how societies respond to the legacies of massive and serious human rights violations. It asks some of the most difficult questions in law, politics, and the social sciences, and grapples with innumerable dilemmas (ICTJ-a).

Jeremy Sarkin, another leading author in the field of transitional justice, argues that "it is safe to say the transitional justice is now recognized as a maturing field", because "it has become customary to apply transitional justice measures in a range of settings to deal with the past" (Sarkin, 2016: 298). Still, as matured as it may be, transitional justice still faces criticism because it is perceived as unsuccessful in various circumstances (Sarkin, 2016: 302). Following the criticism, he suggests that its scope be broadened beyond 'dealing with the past' to include "processes and measures to engage with present day conflict, and human rights and humanitarian crisis", so that it can be applied more frequently and in more cases, after finding the right model for each society (Sarkin, 2016: 294-303). Transitional justice should, thus, according to Sarkin (2016), play a more direct and active role in countries where conflict is occurring, not only in those where it has ended (Sarkin, 2016: 304). In line with this, he goes on to say, "this is one benefit of the ICC [International Criminal Court] process as it often intervenes in conflict situations and does not wait for the conflict to end" (Sarkin, 2016: 304). In fact, one idea which, for more than ten years, has been endorsed by Sarkin is that the ICC should expand its role into transitional justice paradigms (Sarkin, 2011).

The debate around transitional justice has followed a rising tendency, with more and more research being added to the table, including a wide variety of case-studies, one of such

being Afghanistan. In fact, many authors started coming up with ideas and approaches to the situation in Afghanistan which were based on transitional justice. This means that they were, even if indirectly, attempting to look at the Afghan conflicting situation through the lens of transitional justice, by suggesting that the country should try to provide justice and security to its citizens by accounting for past abuses in order to strive for a peaceful and prosperous condition (Rubin, 2003: 567). Accounting for past abuses means, not only recognizing the suffering of victims and remembering the past, but also bringing all perpetrators, without exceptions, to trial so they can be prosecuted for their crimes (Nwoye, 2017: 574).

Overall, when writing about transitional justice, a call for ending impunity was the common denominator among almost all authors. Braithwaite and Wardak (2013) supported a "restorative justice approach to defeating impunity", one made with the foundation of the surviving communities (Braithwaite and Wardak, 2013: 193). Likewise, Nadery (2007), Atashi (2013) and Correa (2014) called for an end to impunity and for effective accountability of the crimes of the past (Nadery, 2007: 173; Atashi, 2013; 1050; Correa, 2014: 1). Méndez (1997) went further by stating that this accountability should be deemed useful both in transitions to democracy and as a solution to armed conflicts (Méndez, 1997: 257).

Specific suggestions and criticism were very much transverse to all the different works and research regarding the first decades of the 21st century in Afghanistan. As a matter of fact, most scholars were very blunt to characterize transitional justice approaches as failed attempts with no proper desirable long-term effects in the country. Despite recognizing some valuable efforts in the validation of victim's experiences, Kuovo and Mazoori (2011) claimed that efforts to encourage transitional justice and reconciliation with the Taliban have unfortunately become two sides of the same coin, blurring the lines of distinction. This consequently makes reconciliation harder to achieve and strengthens the root causes of the conflict, such as impunity (Kuovo and Mazoori, 2011: 496-502). Rubin (2003), while claiming that transitional justice should be both just and fair, condemned selective accountability and denounced it as a puppet of political agendas which emphasize polarization and division, rather than union and peace (Rubin, 2003: 575). Nadery (2007), in its turn, accused the fact of transitional justice and peace being kept separate as having undermined sustainable peace and security (Nadery, 2007: 174). As he stated:

> Rather peace at the cost of justice remains the core policy of the UN mission in Afghanistan and of the Afghan government (…). The policy of 'peace first, justice later' encouraged more violence by the local warlords and promoted a state of impunity (Nadery, 2007: 175).

Other authors were more stark in denouncing the negative role of certain actors and institutions in these difficult situations. Stan and Nedelsky (2014) metaphorically declared that the role humanitarian institutions can play in transitions "may be limited to that of a catalyst at best, and at worst, it could be playing the role of a proverbial canary down the coal mine" (Stan and Nedelsky, 2014: 1). Once again, Rubin (2003) condemned that, by the time of writing, human rights organizations in Afghanistan had never called for the creation of special or *ad hoc* tribunals to try criminals of war in the country, as had been done in other conflict situations (Rubin, 2003: 573). Still regarding international actors, Quie (2012) criticized the fact that they usually expect too much of their overloaded democracy agendas, making it hard to attain desirable goals (Quie, 2012: 556). In this respect, the topic of development aid was also brought up to the discussion. Carbonari and Deledda (2008) blamed the work done by NGOs and other international organizations and military bodies for spreading corruption, suggesting a "radical revision of the assistance program" (Carbonari and Deledda, 2008: 473-474).

The protection and promotion of human rights did not stand far from the debate on transitional justice in Afghanistan either. Many authors, such as De Lauri (2013), Bellal *et al.* (2011), Wardak (2004), Rubin (2003) and Danchin (2001), presented research in which a clear influence of the human rights culture in the field of transitional justice was seen. In Afghanistan, more particularly, given the cemented practice of human rights abuses, transitional justice was deemed as more necessary than ever.

The debate concerning Afghanistan is varied and widely-encompassing. Some opinions differ, others not so much. There is no doubt, however, that there is a cross-cutting ideia by most authors: that no one could have predicted the recent developments in the country. However, one thing is certain: if Afghanistan wishes to attain peace, it should do so through an approach to transitional justice, focused on combating impunity and reaching accountability, on reconciliation and negotiations, and through a proper monitoring of the developments in the country (D'Souza, 2009: 254; Friis, 2012: 268). Because if Afghans wish to, among other things, rebuild their justice system, for instance, which they should, despite it being a massive and dauting challenge, they have to create the conditions for an

effective implementation of policies and a place where these are tested and modified if needed (Friis, 2012: 268; Suhrke and Borchgrevink, 2009: 227). And, in order to do so, they first need to tackle a few internal problems: corruption, narcotics, security and impunity (Mason, 2011: 173).

To sum up, most of the research to date has been focusing on Afghanistan and its conflict. Even so, most of it has focused on the past unsuccessful transitional justice attempts and the failure involving accountability promotion internally and externally, from the end of the 1970s to the beginning of the 2000s period (Gossman and Kuovo, 2013: 4). What the discussion is currently lacking is research which takes into account recent developments in the country and which includes these events into a transitional justice approach, envisaging effective accountability mechanisms that could tackle past and current violations of international law and war crimes, and increase peace prospects for Afghanistan. And this can only be achieved if legitimate bodies, such as the International Criminal Court and the United Nations, take the lead in a combined attempt at putting transitional justice into practice in the country.

Is there support for transitional justice among Afghans? That depends on how you ask, and whom.

Gossman and Kuovo (2013: 47)

4. Research Objectives and Methodology

It is rather safe to affirm that the escalation of conflict and the growing violations of international law in Afghanistan have always been, in a way or another, subject of particular monitoring and scrutiny by humanitarian and human rights entities, and by the international community in general.

Nevertheless, despite the relatively extensive amount of academic research on the subject of Afghanistan and its war, only a few authors have suggested applying a transitional justice approach to the country's case. Even fewer have done so covering a period other than the dawn of this century. Certainly, the latest developments in Afghanistan have not yet been considered by academic researchers when regarding the country's situation, either.

The thesis will evolve around one main research question:

Taking into consideration the Taliban takeover of the country and the obvious consequences of such event,

how can Afghanistan benefit from a transitional justice approach in which the International Criminal Court and the United Nations play a leading role?

The present research will start with an examination of the applicable legal frameworks , namely International Humanitarian Law and International Human Rights Law, followed by an analysis of the Afghan conflict and its legal characterization. The subsequent section will be focused on accountability and divided into two subsections: the first one exposing the different actors involved in IHL and human rights violations, as well as the main provisions infringed; the second one presenting the International Criminal Court as an accountability platform and decoding the root causes for its lack of success. The last section of this thesis is aimed at looking into the future and finding solutions based, not only on transitional justice *per se*, but also on the ICC and the UN, who are thought as having a more important role to play. Most theorists seem to be oblivious of the potentialities of this association, and the field of transitional justice could benefit greatly if these two bodies led the way in transition efforts.

The goal is, overall, the suggestion of a combined approach in which both the ICC and the UN engage more directly in Afghanistan. The ICC, besides its role in accountability promotion, can also encourage long-term stability by fighting impunity and preventing other such crimes from occurring. The UN, through its agencies and its Assistance Mission in Afghanistan (UNAMA), which has been operating since 2002 and whose mandate was renewed for six more months in September 2021 – can also help promote sustainable regional solutions. In addition to the abovementioned, both entities would also indirectly draw attention and legitimacy to the Afghan case and work as transitional justice catalyzers.

In order to accomplish all this, two hypotheses are to be tested. (1) Given the latest events in Afghanistan, the country can only achieve long-term peace and stability if it deals with crimes of the past (and present) and strives for accountability. (2) A transitional justice approach, combining the works of the ICC and the UN, is seen as beneficial for the country and as the only plausible long-term solution to the crossroads situation in which the country stands today.

Therefore, the timeline subject of study commences with the Soviet invasion of the late 1970s and ends in the present day. Emphasis will inevitably be given to the events of the last two decades, as little research can be found on the early happenings of the conflict, yet the author believes a wide lens from which to analyze its point is more appropriate in order to meet some transitional justice requirements. As already exposed before, accountability and justice ought not to be selective and should thus encompass all perpetrators from all phases of the war.

In order to answer the research question and sustain the hypothesis, a qualitative research method will be put forward, with a literature review as the main one. The sources analyzed will be primary ones - international treaties and conventions, namely the Geneva Conventions and Additional Protocols, jurisprudence, and reports by a wide variety of entities, such as the UN Mission in Afghanistan, the UN High Commissioner for Human Rights, the UN Human Rights Office and the UN Secretary-General - and secondary ones, including scholarly literature, press releases, as well as news and opinion articles.

Finally, given the author's background in International Relations, a multidisciplinary approach will be employed. Inspiration will be grasped from the legal and the international relations fields, through the seizing of legal notions, namely that of transitional justice, and the analysis of international law documents and jurisprudence, and through the employment of a critical perspective and the proposal of solutions to the problem in question, respectively.

CHAPTER 2

5.

5.1. International Legal Frameworks: International Humanitarian Law and International Human Rights Law

Traditionally, International Humanitarian Law and International Human Rights Law have always been considered separate bodies of law, as they had distinct roots, different subject matters and they evolved independently (Droege, 2008: 501). The former was rooted in the relationship between States and in international law, it was based on notions of chivalry and civilized behavior from two parties at war, and stemmed from an idea of charity (Droege, 2008: 502-503). The latter was considered part of the internal affair of

States, so it was not seen as connected to armed conflicts like its counterpart (Droege, 2008: 503). This separatist idea started to lose popularity with the International Conference on Human Rights held in Teheran, in 1968 – the International Year for Human Rights - , which brough about a change in how the relationship between the two was perceived because, for the first time, the United Nations accepted the application of human rights in armed conflict (Droege, 2008: 505).

Nowadays, there is a vast amount of jurisprudence by international and regional bodies of human rights that recognizes the applicability of human rights to situations of armed conflict (Droege, 2008: 507). The International Court of Justice itself has reiterated the jurisprudence of such bodies, having made its first statement, with reference to the International Covenant on Civil and Political Rights, in the *1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. It then expanded its argument to the general application of human rights in armed conflict in the case *Democratic Republic of the Congo v. Uganda*, reiterating that international human rights law applies to acts done by a state in the exercise of its jurisdiction outside its own territory and especially in occupied territories (Droege, 2008: 509; Carrasco *et al.*, 2015: 54). Since then, affirmations that International Humanitarian Law and International Human Rights Law were merging or, at least, becoming complementary, became more frequent.

Regardless of one's vision on the relationship between the two, and to avoid the blurring of limits, a distinction between International Humanitarian Law and International Human Rights Law – hereafter, IHL and IHRL, respectively - is rather necessary, as "they both seek to protect human dignity, though they do so in different circumstances and in different ways" (American Red Cross, 2011:1).

International Humanitarian Law

IHL is also known as the Law of Armed Conflict or *Jus in Bello*. It regulates the conduct of war and all parties of a conflict are equally bound by it (McLeod, 2015: 30). As already mentioned, it only covers situations of armed conflict and applies only once the conflict has begun (ICRC, 2004: 1). IHL is, in general terms, the branch of international law that includes humanitarian principles and international treaties whose main purpose is to alleviate the suffering of those no longer taking direct part in the hostilities and to regulate the means and methods of warfare (American Red Cross, 2001: 1; ICRC, 2004: 1). As outlined in Article 38(1) of the Statute of the International Court of Justice, because IHL

is a branch of Public International Law, its sources include conventions and treaties between States, international customary rules – consisting of state practice accepted as law and considered as legally binding (*usus* and *opinion juris*) –, and general principles of law. Jurisprudence is also included, although it is not a source *per se*, but subsidiary means (ICRC, 2004: 1; McLeod, 2015: 45; Statute of the International Court of Justice, 1945: 26).

The roots of IHL are ancient, as "warfare has always been subject to certain principles and customs" (ICRC, 2004). Its codification began in the nineteenth century, when a Swiss businessman, Henry Dunant, after witnessing the horrors of the Battle of Solferino, in Italy, decided to write a book in which he proposed the protection of all those providing relief to the wounded in war (American Red Cross, 2001: 1). This led to the creation of the International Committee of the Red Cross (ICRC) that was responsible for the negotiations, in 1863, of what came to be the 1949 Geneva Conventions. This agreement, which now encompasses four conventions and three additional protocols, is considered the core basis of modern IHL (American Red Cross, 2001: 1). Other key international conferences, such as the 1899 and 1907 Hague Peace Conferences, for instance, were also relevant for the codification of modern IHL, and are said to have laid out the foundations for the Geneva Conventions, decades later (McLeod, 2015: 37).

Moreover, an important distinction made by IHL is the own notion of armed conflict which distinguishes between international and non-international armed conflicts – IACs and NIACs, respectively (ICRC, 2004: 1). According to the definition given by the International Criminal Tribunal for the former Yugoslavia in the case *The Prosecutor v. Dusko Tadic*, IACs are those where "these is a resort to armed force between States[…]" (Sassòli *et al.*, 2010: 22). This also includes "all cases of partial or total occupation of territory of a High Contracting Party, even if the said occupation meets with no resistance […]" (Sassòli *et al.*, 2010: 22). In other words, and as stated in Common Article 2, IACs exist when there is a minimum of two States involved, even if one of them is not recognized by the other, and also cases of partial or total occupation of territory (McLeod, 2015: 49). They are ruled by the regulations laid out in the four Geneva Conventions (1949) and in the First Additional Protocol (1977), which complements Common Article 2 and extends IACs to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right

to self-determination" (McLeod, 2015: 49; Geneva Conventions and Additional Protocol I).

Following this logic, NIACs are those which take place within the territory of one State and involve either armed forces fighting armed insurgents, or several armed groups fighting one another (ICRC, 2004: 1). The rules governing non-international armed conflicts are present in Common Article 3 of the Geneva Conventions and in Additional Protocol II (ICRC, 2004: 1). Article 3 represented the consensus reached by certain States on a collection of minimal guarantees to be respected during NIACs, but because it did not offer a clear definition of the concept, Additional Protocol II came into the picture (Sassòli *et al.*, 2010: 22-23). Common Article 3 forbids certain acts being committed against those people taking no active part in hostilities – violence, taking of hostages, outrages upon person dignity and the passing of sentences and executions without previous judgement (Reisman and Silk, 1988: 462). Additionally, under Common Article 3, there are two requirements for an armed conflict to be considered non-international: firstly, there has to be a minimum level of intensity; and secondly, non-governmental groups must be considered parties to the conflict – and they must possess organized armed forces and a command structure (Reisman and Silk, 1988: 462; Bellal *et al.*, 2011: 57). Additional Protocol II completes the minimum standards of protection provided by Common Article 3, and the former's threshold of application is higher (Álvarez, 2016: 6). Indeed, for Protocol II to apply, non-governmental forces must exercise such territorial control as to be able to "carry out sustained and concerted military operations and to implement this Protocol" (Additional Protocol II). Moreover, it applies only to armed conflicts that happen between governmental armed forces and dissident armed forces or other organized groups, following order from a responsible command (Reisman and Silk, 1988: 462; Bellal *et al.*, 2011: 59; Dinstein, 2021: 8; ICRC, 2008: 4; Álvarez, 2016: 6; Geneva Conventions and Additional Protocol II). Accordingly, there are three prerequisites for the applicability of Protocol II: there must exist an armed group exercising control over the territory of a signatory State; it must be following order from a responsible command; and its actions must have a certain level of gravity and duration, meaning sporadic acts are not included (Álvarez, 2016: 6-7).

Most States, with some exceptions, are parties to Additional Protocol II. Non-contracting parties, as long as certain important provisions of the Protocol are viewed as founded in

State practice and strengthened by *opinio juris*, hence proof of customary international law, are also bound by those provisions (Dinstein, 2021: 9).

In comparison, and agreeing with Bellal *et al.* (2011):

> The law applicable in non-international armed conflict has comparatively few rules, as is clear from a comparison of the limited number of provisions of Additional Protocol II with the extensive set of rules enshrined in the four Geneva Conventions and Additional Protocol I applicable to international armed conflicts (Bellal *et al.*, 2011: 59).

It should also be observed that Common Article 3 is not an equivalent to Common Article 2, as the former is narrower (Reisman and Silk, 1988: 462).

All in all, the legal foundational documents of IHL are the four Geneva Conventions of 1949, ratified by almost every country worldwide, which are applied in every case of declared war or armed conflict between nations, or when a nation is being occupied by foreign soldiers, even without armed resistance to that occupation (ICRC, 2004: 2). The Conventions provide safeguards for combatants or armed force members who are: wounded, sick, shipwrecked, prisoners of war, and civilians, as well as for medical staff and military priests and support workers (American Red Cross, 2001: 1; ICRC, 2004: 1).

Apart from the Geneva Conventions and its Additional Protocols of 1977 protecting the victims of armed conflicts, there are other IHL agreements which are now considered part of customary international law. These include, *inter* alia: the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, with its two protocols, the 1972 Biological Weapons Convention, the 1980 Conventional Weapons Convention and its five protocols, etc. (ICRC, 2004: 1). As declared by McLeod (2015), customary law is crucial, particularly given the fact that many important States have not ratified certain treaties (McLeod, 2015: 46-47). It should also be added that customary international law is also particularly relevant for NIACs since treaty provisions are fewer in those scenarios (Henckaerts and Doswald-Beck, 2005: xxxiv).

Great attention should be given to the fact that Afghanistan ratified all four Geneva Convention in 1956, yet only adhered to the Additional Protocols in 2009, meaning Protocol II only came into force in December of that year (Bellal *et al*, 2011: 52-53). However, the US, despite having ratified the four Geneva Conventions, only signed the

two Additional Protocols in 1977, and have not yet ratified them. This obviously raises issues when it comes to accountability.

IHL is also based on certain principles, apart from treaty and customary law (American Red Cross, 2001: 1; McLeod, 2015: 48). One essential principle is the principle of military necessity, which states that measures are only allowed as long as they contribute to the accomplishment of the desired military goals (Sassòli *et al.*, 2010: 8; McLeod, 2015: 48). Another important one is the principle of distinction, which provides that there must be a distinction between civilians and combatants, and between civilian objects and military objectives. Civilians and civilian objects can never be the targets of military operations, and, when in doubt, one must presume that the person is a civilian (Sassòli *et al.*, 2010: 21; McLeod, 2015: 48-51; Danchin, 2001: 39). Then, there is the principle of proportionality, which seeks to limit the damage caused by military operations, as it requires that the effects of war must be proportionate to the desired military goals (Sassòli *et al.*, 2010: 9; McLeod, 2015: 48). Attacks are forbidden if they cause incidental deaths or injury to civilians, or damage to their objects (Danchin, 2001: 39). Other principles include those of humanity, impartiality and neutrality (American Red Cross, 2001: 1).

Judicial decisions are considered as subsidiary means in the determination of IHL rules, and can emanate from international and domestic courts (McLeod, 2015: 48). The ICC is a good example of an international tribunal. In fact, besides the Courts decisions, its founding treaty, the Rome Statute, is also of particular relevance for IHL and its rules are considered by many as part of customary international law (Tan, 2021). In fact, one of the main assets of the Rome Statute is that it specifies the so-called war crimes, considered violations of IHL, and which are criminalized under international law – the crimes of aggression, genocide, crimes against humanity and war crimes (Tan, 2021: 66; McLeod, 2015: 43). In the 90s, despite initial controversy, it became accepted as customary that war crimes would also be applicable in cases of non-international armed conflict. So, in 1998, Article 8 of the Rome Statute provided the definition for war crime and listed the various grave violations of Common Article 3 of the Geneva Conventions and in the context of other laws and customs regarding non-international armed conflicts (Tan, 2021: 66). Jurisdiction over other serious violations of IHL is also provided for in the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor (Henckaerts and Doswald-Beck, 2005: 556).

In this context, international criminal law ought to be mentioned since individual violations of IHL give rise to criminal sanctions. And international criminal law anticipates specific violations of IHL and IHRL, requiring certain obligations on individuals, and also imposing duties on States concerning issues in which they usually have jurisdiction (Danchin, 2001: 45).

As far as IHL goes, a significant level of protection is afforded specifically to civilians, yet its scope is limited to acts being carried out in the context of an armed conflict. Consequently, it fails in fully addressing the harmful acts committed by armed non-state actors against civilians before or after the conflict or in cases where the minimum level of intensity has not been reached (Bellal *et al*, 2011: 63). In Afghanistan, these actions include interference with very important rights and freedoms (Bellal *et al*, 2011: 63). And is when International Human Rights Law – IHRL - comes into the picture.

According to Danchin (2001), there has been a steady convergence of IHL and IHRL, and that is why one no longer refers to the former as 'the laws of war', which reflects the influence of the human rights movement in IHL (Danchin, 2001: 18-19). This means the latter is being humanized (Danchin, 2001: 19) Some boundaries are even blurred between the two, as McLeod (2015) declares, for instance, regarding the ICC's jurisdiction of crimes against humanity, which, he states, also comprises crimes perpetrated during peacetime (McLeod, 2015: 43). Nevertheless, there are still stark differences worth mentioning.

IHRL applies not only in situations of conflict, as opposed to IHL, but it also applies in times of peace. So, the former applies in every circumstance and at all times, and the latter has a more restrictive scope of application (American Red Cross, 2011; Bellal *et al.*, 2011: 63). They both share the same goals: to protect the lives, health and dignity of individuals, although from different perspectives and with different origins, as explained previously (ICRC, 2015a).

International Human Rights Law

IHRL is a panoply of international norms and rules, established by both treaty and custom, laying out rights of individuals that must be protected and respected by States and other

actors[2]. It, thus, applies to everyone within the State's jurisdiction, so it binds only States, not individuals (ICRC, 2015a). It is also composed of *soft law*, various principles and standards which are not based on treaties (ICRC, 2015a).

Despite early traces of human rights law in the 18th century, IHRL has more recent origins than IHL, having earnestly originated only from the Second World War, within the United Nations (ICRC, 2015a; American Red Cross, 2011: 2). The 1948 Universal Declaration of Human Rights delineated IHRL for the first time, drafted as a "common standard of achievement for all peoples and nations", and presenting a range of basic political, civil, economic, social and cultural rights to be enjoyed by everyone around the world (OHCHR). Yet it was only in 1966 that IHRL fully came to life, with two specific treaties: the International Covenant on Civil and Political Rights[3] - and its two Protocols -, and the International Covenant on Economic, Social and Cultural Rights[4] (ICRC, 2015a). In this regard, Afghanistan acceded to both in 1983, but did not ratify them. These documents form the so-called International Bill of Human Rights (OHCHR). Furthermore, there are a number of universal and international Conventions, as well as regional ones, which have developed this body of law and in which IHRL is based upon (ICRC, 2015a; OHCHR). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1987 is also a relevant document, and Afghanistan was one of the ratifying States (Human Rights Watch, 2005: 103).

After the first generation on civil and political rights, and the second on economic, social and cultural rights, there is a set of human rights known as the "third generation", which involves certain universal rights – the right to development, peace and a healthy environment, among others -, although these have not yet been clearly defined or accepted (American Red Cross, 2011: 2). Some of them are currently being developed, such as the right to a healthy environment which was recently recognized as a human right by the UN Human Rights Council (Bachelet, 2021).

Moreover, there are a number of regional tribunals which implement the above-mentioned instruments and which consequently contribute to the enforcement and development of IHRL – the European Court of Human Rights, the Inter-American Court

[2] The traditional State-centric view is facing resistance from the now emerging discussion about the applicability of IHRL to other non-state actors and individuals (Berkes, 2021).
[3] United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407
[4] United Nations, Treaty Series, vol. 993, p. 3; depositary notification C.N.781.2001

of Human Rights, the African Court on Human and Peoples' Rights (American Red Cross, 2011: 2).

Additionally, it bears notice that, unlike IHL, IHRL allows the derogation from certain rules and obligations in certain exceptional circumstances and with limitations, such as situations or armed conflicts or other public emergencies – for instance, during the pandemics. However, there should be a necessity and proportionality requirement, and it should not be in contradiction with IHL. So, in the eventuality of a public emergency, various rights – such as the freedom of movement and the freedom of association, for instance – may be suspended if required by the situation. Some rights, nevertheless, such as the right to life, cannot be derogated from at any time and in any circumstance (ICRC, 2015a; American Red Cross, 2011: 1; Danchin, 2001: 20). However, this also contributes to some problems. As Danchin (2001) puts it, IHRL "has traditionally provided States with a wide discretion in implementing international obligations to respect and ensure rights" (Danchin, 2001: 45), and this obviously could lead to cases where they do not sufficiently take care about accountability, leading to the current situation.

Overall, IHRL deals with some matters IHL does not deal with, but there are also areas covered by both, like fair trials, torture, etc. Still, there are areas in which they sometimes contradict each other, like in the use of force (ICRC, 2015a). IHRL sees the use of force as a last resort towards the protection of life, while IHL recognizes its inherent use in war (ICRC, 2015a).

It should come as no surprise that the relationship and interaction between IHL and IHRL has been subject of great attention in the legal field and has caused much discussion (ICRC, 2015a). In fact, IHRL, on the one hand, which is supposed to be applied at all times, is what is commonly called the *lex generalis*, while IHL, on the other hand, represents the *lex specialis*, as its application is only triggered by a declaration of armed conflict (McLeod, 2015: 48). The International Court of Justice pronounced itself regarding the relationship between the two, and three interconnected propositions emerged from its statements: human rights law is applicable even during armed conflict; it is applicable in situations of conflict, subject only to derogation; and when both IHL and IHRL are applicable, IHL is the *lex specialis* (Hampson, 2008: 550). This means that, when in a conflicting situation, the two seem to be incompatible, IHL is supposed to prevail because it was created to deal particularly with armed conflict (ICRC, 2015a;

Danchin, 2001: 20). This obviously sometimes brings undesired situations to the table, yet one should keep in mind the distinct circumstances in which both IHL and IHRL developed and the means for which they were conceived (ICRC, 2015a).

In fact, contradictions seem to be more likely to appear than one could desire (Danchin, 2001: 19). And, as Sassòli (2007) puts it, "the more asymmetric a conflict is, the more difficulties arise for the implementation of IHL" and IHRL, for that matter (Sassòli, 2007: 57). As Danchin (2001) asserts, while IHL's aim is to impose constraints on the barbarity of war, it still allows for violations of certain human rights – denial of personal freedom when individuals are held as "prisoners of war", killing and wounding of combatants and of civilians as part of collateral damage for the military necessity, etc. (Danchin, 2001: 19-31). Which is why:

> It is of importance, therefore — as will be seen in the case of Afghanistan - to determine whether the threshold requirements of either an international or internal armed conflict have been met or whether states remain bound by the full array of international obligations that exist under human rights law and other regimes providing for the protection of the rights of the individual (Danchin, 2001: 19).

5.2. The armed conflict in Afghanistan: legal categorization and applicable law

The intricacy of the Afghan conflict has been stated and reinstated multiple times up to this point. Gossman and Kuovo (2013) reflect about this complex nature, claiming the situation in Afghanistan is not one of war, "but a series of conflicts with changing sets of political actors alternately in power or opposition" (Gossman and Kuovo, 2013: 6).

Furthermore, Afghanistan is faced with one problem which adds up to the abovementioned complexity: the country has moved through various phases of conflict throughout the years, causing the rise of a spectrum of different opinions on the legal nature of each phase. Undoubtedly, certain periods of conflict had a more preponderant international character, and others a more internal one (Danchin, 2001: 20). So, as Danchin (2001) indicates, there may be a "mix of international and internal dimensions such that the rules of humanitarian law apply in different ways" (Danchin, 2001: 28), and this is the case with Afghanistan.

In the 70s, before the events of 1979, the conflict was characterized by the ICRC as a non-international armed conflict (Reisman and Silk, 1988: 464). In 1985, the Special Rapporteur appointed by the UNHCR - the UN Refugee Agency -, explained in a 1985 report about the legal status of Afghanistan, that considering that the parties had not acceded to the Protocols, the conflict was to be regarded as a non-international one under Common Article 3 of the Geneva Conventions (Reisman and Silk, 1988: 479). He noted, however, that it was not clear whether the conflict was international or non-international, but that Afghanistan and the USSR, as parties to the Conventions, were, at least, bound by Common Article 3 (Reisman and Silk, 1988: 479). In 1987, the ICRC made no comments on the legal categorization of the conflict (Reisman and Silk, 1988: 480).

Contrarily, Reisman and Silk (1988) deem the conflict in Afghanistan of the end of the 1980s to be subject to the application of the Geneva and Hague Laws, under Common Article 2, consequently considering it an international armed conflict, and their opinion seems sufficiently well sustained to be agreed with. The basis for this lies in the fact that the USSR did not come into the country upon invitation from the Afghan government, as alleged, but invaded Afghanistan and installed themselves there (Reisman and Silk, 1988: 481-484).

> There is no way of excluding the operation of Common Article 2, paragraph 1, together with the corpus of the Hague Law, in the Afghan situation. No matter how the facts are viewed, forces of the Soviet Union entered Afghanistan and engaged in combat with loyal Afghan government forces, which brough about a change in government (Reisman and Silk, 1988: 482).

The period afterwards, marked by the civil war, was undoubtedly one of internal conflict, consequently falling under the label of a non-international armed conflict, according to Common Article 3 of the Geneva Conventions. There were hostilities, hence a significant level of violence, between different insurgent groups – the militia and the Mujahideen - and these events happened solely within the borders of one State. The Taliban and their subsequent established government added ashes to the fire, and the conflict which erupted between them and the Northern Alliance also constituted a NIAC (Bellal *et al*, 2011: 51; De Cock, 2010: 111; RULAC, 2021).

The nature of the following phase of the conflict, marked by the October 2001 US-led invasion of Afghanistan, changed. With the US coming into the picture, the conflict

switched into an international armed one, governed by the rules of Common Article 2 (Bellal *et al*, 2011: 51-52; De Cock, 2010: 107). When the US intervened, the Taliban were considered the *de facto* government in the country. As pointed out by De Cock (2010), it remains unclear what body of law to apply regarding the actions of Al-Qaeda, a transnational organized group fighting in the territory of Afghanistan (De Cock, 2010: 107-108). If they acted on behalf of the Taliban, then the doubts would be settled, because they would be considered a governmental limb. On the other hand, if there was no link between Al-Qaeda and the Taliban, then the story would not be the same. Moreover, Al-Qaeda is not a State or a signatory to the Geneva Conventions, so the conflict could not be considered an international one (Duxbury, 2007: 261). Thus, De Cock (2010), and in accordance with a decision by the US Supreme Court, considered the conflict with Al-Qaeda as meeting the requirements to be considered a non-international armed one (De Cock, 2010: 110). Nonetheless, the questions regarding this matter are moot, so taking a clear position is difficult.

As has already been explained in a previous section, when the Taliban were first toppled, Afghanistan got a glimpse of stability with the Karza government, yet one which did not last for long, as in the following years the country became submerged in tensions, as well. In the words of De Cock (2010), Afghanistan became, once again, a "theatre of multiple conflicts" (De Cock, 2010: 107). The violence involving the government forces, international military forces – like the troops of the International Security Assistance Force (ISAF) – and organized armed groups – *inter alia,* the reemerged Taliban and the Al-Qaeda – has met the threshold of necessary intensity to be considered an armed conflict (Bellal *et al.*, 2011: 54). Furthermore, the armed non-state actors operating in the country have demonstrated to be sufficiently organized so as to be bound by IHL. The Taliban, in particular, have a Code of Conduct, which evidences the existence of a command structure and rules within the group (Bellal *et al.*, 2011: 54). The question of whether Common Article 3 could be applied to such groups has been widely debated, as these non-state groups are sometimes regarded as "non-parties" to the conflict, yet State practice and case law have demonstrated otherwise. In any way, even if these groups were not to be considered bound by certain international rules, they were still bound by customary IHL, and Common Article 3 is part of customary international law (Bellal *et al.*, 2011: 55). Therefore, it can be said that armed non-state groups, including the Taliban, were bound by Common Article 3 during more than the first decade of the 2000s.

Nonetheless, the late entry into force of Additional Protocol II in Afghanistan, which only happened in 2009, raises more inquiries concerning its applicability to the conflict. The Taliban back then seemed to meet the necessary criteria for its application: as already stated, they were a group with command and they were organized in terms of authority and responsibility; they were able to conduct "sustained and concerted military operations"; and they controlled enough territory to be able to implement the Protocol (Bellal *et al.*, 2011: 56-58). This means Additional Protocol II could indeed be directly applied to the conflict in Afghanistan, at least to the hostilities between the government and the Taliban happening back then (Bellal *et al.*, 2011: 60). However, doubts still remain concerning other armed non-state actors. Still, it is undebatable that customary IHL bounds governmental armed forces, as well as armed non-state actors that meet the relevant criteria. This means these groups must also respect IHL principles, such as those of proportionality and distinction, for instance, as well as other IHRL rules (Bellal *et al.*, 2011: 62-63). As concluded by the ICRC study on IHL, the principles of distinction and proportionality are to be applied in both international and non-international armed conflicts (Sassòli, 2010).

Against this background, authors now speak of irregular warfare when examining the current Taliban rule of the country, as "within months, the conflict in Afghanistan became an insurgency in which traditional methods of warfare no longer sufficed" (Schmitt, 2009: 309; De Cock, 2010: 115). Despite this growing tendency to view current conflicts like the one in Afghanistan outside the traditional spectrum, such assessment ought to be made.

The US announcement of their intention to withdraw from Afghanistan in February 2020, although initially intended at announcing the removal of their troops from the country and a cease of Taliban attacks on US Americans, produced alarming results, especially for the protection of civilians and the implementation of human rights. After the official withdrawal from Afghanistan in August last year, the Taliban took control of the country and became the effective government of Afghanistan, exercising functions such as the maintenance of order and enforcement of law, which are usually the responsibilities of a government (RULAC, 2022). Therefore, nowadays, the Taliban government is engaged in "two parallel" non-international armed conflicts: against the National Resistance Front, supporters of the former government, and against the Islamic State-Khorasan Province, ISKP (RULAC, 2022). Thus, all parties to the conflict are bound by Common Article 3

and by Additional Protocol II, besides customary international law. And because some conflicts, which is the case, tend to last for years, and IHL presents certain gaps in some areas or subject-matters, as explained above, IHRL also applies to Afghanistan's case, which means the territorial State is obliged to prevent and investigate violations of human rights law, either committed by its agents and organs, or those under their direction and control, but also including those committed by non-state actors acting in its territory or jurisdiction (RULAC, 2022). The Taliban have been clearly failing in this regard, as their behavior has been threatening the human rights of Afghan people, particularly of women and children, but also of certain groups like the media. Many rights and freedoms – such as the right to an education and the freedom of expression – are being disrespected, and impunity seems to be widespread across the country (Bellal *et al.*, 2011: 74).

5.3. Accountability for past and present violations

The matter of accountability for violations came to be more valorized in the mid-1980s. Only when repressive regimes in Latin America started coming to an end, did acknowledgement of responsibility in international humanitarian law and human rights violations start being possible (Arthur, 2009: 334).

The process of implementing transitional justice requires more than a transition of society – there is a need for recognition of periods of violence, of identifying perpetrators and its victims, and of an allocation of accountability (Atashi, 2013: 1052).

In countries like Afghanistan, where violations have taken place and continue to take place, there is little appetite for accountability (Varney and Zduńczyk, 2020: 1). Nonetheless, pursuing justice and tackling the impunity gap are essential steps in a transition process, and relying on universal jurisdiction, through the ICC, as a justice mechanism is often the only possible venue towards fulfilling them (Varney and Zduńczyk, 2020: 1).

Transitional Justice efforts place great emphasis on accountability, and it is one of its main components. Moreover, identifying perpetrators and prosecuting specific individuals is also essential in the process of tackling impunity, avoiding accusations of collective guilt and seeking accountability (Nwoye, 2017: 577).

The following sections will delve into the theme of accountability as a central component of a transitional justice strategy in Afghanistan.

5.3.1. Who is to be held accountable?

The decades conflict in Afghanistan have been scarred by some gross human rights and humanitarian law violations which, as will be made clear further on in this section, are the responsibility of all actors that have come to play a role in the conflict.

> As the situation currently stands, there are violators of international humanitarian and human rights law on all sides and in relation to all phases of the armed conflict.
>
> Danchin (2001: 24)

Through the various stages of the war, all sides without exception – the Mujahideen and other factions, the Soviet forces and neighboring states, the Al-Qaeda and other terrorist groups, the Taliban, the Afghan government, and US-led military forces - have provenly committed either grave crimes, such as war crimes and crimes against humanity, or serious violations of human rights (Gossman and Kuovo, 2013: 6; Danchin, 2001: 18).

Reports and proof of such crimes vary depending on the phases of the conflict, being the first phase of Soviet occupation the least documented one, yet individual testimonies, independent commissions and international organizations have credibly reported widespread abuses in Afghanistan (Reisman and Silk, 1988: 459).

Despite the lack of documentation, it is acknowledged that, in the period after the seizure of power by the Soviets, Afghani people suffered the most grave and blatant violations, between 1979 and 1988 (Danchin, 2001: 25). Back then, when the abuses were being committed, almost no Afghans or international journalists reported them, and there were hardly any humanitarian organizations in the country (Mallinder, 2010: 168). In fact, most reports of abuses in Afghanistan during the years of tensions with the Soviets are based upon posterior refugee testimony (Reisman and Silk, 1988: 459).

During this time, violations included, among others: indiscriminate aerial bombing of civilian-habited areas by the Soviet air force; massacres and reprisals of civilians through rape, torture and arbitrary detention, by specialized units where resistance forces were operating; use of anti-personnel mines camouflaged as common objects; and the forcible

transference of Afghan children to the USSR for ‘education’ (Danchin, 2001: 25; Gossman and Kuovo, 2013: 7). These are grave breaches of international humanitarian law and go against the Geneva Conventions (which, due to the fact that this was an international armed conflict, apply in full) and violate non-derogable human rights norms (Danchin, 2001: 22). Adding up to this, customary humanitarian law rules are also violated, as certain weapons were used indiscriminately, thus violating the principles of proportionality and distinction, as civilians were directly or indirectly targeted, as well (Danchin, 2001: 25; Gossman and Kuovo, 2013: 7).

Furthermore, the Soviets renamed and modelled the Afghan Secret Police on the Soviet KGB, which reportedly engaged in summary executions, widespread and untrialed detentions and torture (Gossman and Kuovo, 2013: 7).

It was among this climate of chaos when, in 1988, Osama Bin Laden decided to form Al-Qaeda, meant to face the Soviets who they saw as opposing their goal of a pure country ruled by Islam. They were also responsible for several terrorist acts, particularly in 1996, as stated by the PBS News Desk (PBS, 2021). Terrorism was clearly considered in the drafting of the Geneva Conventions and Additional Protocols (Danchin, 2001: 28). And most acts criminalized as “terrorist” ones in domestic and international legislations dealing with terrorism are prohibited by IHL. Despite differences in the legal frameworks governing terrorism and IHL, any act classified as a terrorist act, under national or international law, is always penalized as criminal, consequently requiring prosecution (ICRC, 2015b).

In 1990, Afghan government forces employed a series of highly-unprecise missiles and other methods of warfare which inevitably placed civilians at risk, causing plenty of civilian casualties (Human Rights Watch, 1991). After the Soviet withdrawal, in 1989, and the collapse of the government they backed in 1992, arrests and detentions decreased, but did not cease, and bombings continued to kill civilians. The militias were particularly undisciplined and were very violent towards civilians. The Mujahedin committed what could be considered war crimes, as well, as stated by Gossman and Kuovo (Gossman and Kuovo, 2013: 8). The bombardment of Kabul during the conflict between factions from 1992 to 1996 is, according to Gossman and Kuovo (2013) frequently cited as “one of the most serious violations of international humanitarian law in the entire war”, in that period, when an estimated number of more than fifty thousand people died (Gossman and Kuovo, 2013: 8).

During this period, the factions fighting each other for control participated in summary executions, ethnic abductions, pillage, looting and the targeting of entire cities. Meanwhile, more than half a million people fled Afghanistan because of rocket and artillery attacks (Human Rights Watch, 2005: 35; Gossman and Kuovo, 2013: 8). Two particular events ought to be highlighted for their massive consequences. In February 1993, many local Hazara civilians were executed, used as slave labor, tortured and raped by forces of Shura-ye Nazar, the Supervisory Council of the North, and Ittihad-e Islami, part of the Mujahedin coalition supported by the US and Pakistan in the fight against the USSR and the government they backed (Gossman and Kuovo, 2013: 8). In May 1997, around three thousand civilians were made prisoners and summarily executed by Junbish soldiers, from one of Afghanistan's main political parties, who were following orders from General Malik Pahlawan. None of these people were tried for the crimes committed (Gossman and Kuovo, 2013: 8-9).

Over time, Wahdat, Ittihad, and Jamiat forces - factions representing the different political parties – intentionally and indiscriminately targeted civilians in West Kabul, even firing rockets into civilian homes (Human Rights Watch, 2005: 36). Hezb-e Islami forces, the most well-trained Mujahedin group at the time, did the same, regardless of the fact that they were thought to have the capacity to aim artillery at military targets, which means they chose not to do so (Human Rights Watch, 2005: 39). Overall, as indicated in a 2005 report by Human Rights Watch on the atrocities committed in Kabul, the militias and political parties which committed abuses during this period include the Jamiat, Ittihad, Hezb-e Islami, Wahdat, Harakat, and Junbish factions (Human Rights Watch, 2005: 109).

In particular, those indiscriminate attacks causing the death of civilians and intentional targeting of civilians and their objects amount to serious violations of international humanitarian law, which can lead to the commission of war crimes (Human Rights Watch, 2005: 35). Targeting entire cities and treating them as single military objectives is expressly prohibited in Article 51(5) of Additional Protocol I to the Geneva Conventions, and this is also part of customary IHL applicable to both IACs and NIACs (Additional Protocol I to the Geneva Conventions, 1977). Common Article 3 to the Geneva Conventions, applicable to non-international armed conflicts, also requires the humane treatment of civilians and detained combatants, thus murder, rape, torture, all these actions violate this provision (Human Rights Watch, 2005: 60). The Fourth Geneva Convention and Additional Protocol II explicitly prohibit rape (Human Rights Watch,

2005: 106). Additionally, deliberately killing civilians or abducting them can be considered a war crime or a crime against humanity (Human Rights Watch, 2005: 36; 60). There was also a disregard for international human rights law. Arbitrary arrests were common, some without charge or trial. Moreover, conditions for detainees did not meet the necessary legal standards, and some of these, while being interrogated, suffered from torture and rape, which also violate key human rights norms.

Furthermore, as codified in the Rome Statute of the ICC, commanders possess criminal liability for their crimes - the so-called direct responsibility -, and for those of their subordinates, if they know crimes are being committed and do not take action to stop them - command responsibility. Command responsibility is codified in Article 86 of Additional Protocol I and has been further developed by many international criminal tribunals (Human Rights Watch, 2005: 36; 107-109; Williamson, 2008: 305). Human Rights Watch, in its investigation, listed various specific Hezb-e Islami commanders which could be considered to be criminally responsible for these attacks: *inter alia*, Shir Alam, Mullah Ezat, Zalmay Tofan, Abdul Manan, Dr. Abdullah, and Noor Aqa (Human Rights Watch, 2005: 42; 61). One Hezb-e Islami Commander, Faryadi Zardad, who asked for asylum in Britain under a different name, was there tried for torture and hostage taking, convicted in 2005 and sentenced to twenty years in prison (Gossman and Kuovo, 2013: 8-9).

Interestingly, according to Human Rights Watch, many of the individuals responsible for the atrocities committed in the 80s and 90s and mentioned in the 2005 report "have also been involved in human rights abuses in the post-2001 period (Mallinder, 2010: 169).

As one can predict, the atrocities committed in the period considered above "did not occur in a vacuum", given the fact that many other countries were responsible for contributing to the militarization of Afghanistan and the fueling of its civil war, between the 1980s and the first years of the 1990s (Human Rights Watch, 2005: 123; Danchin, 2001: 25). As indicated by Human Rights Watch:

> Afghanistan was not hugely unstable, fractured, or militarized in 1978 […] But the decision of the Soviet Union in 1979 to invade and suppress the mujahedin uprising, and the Soviet Union's subsequent support for a series of brutal regimes through the 1980s, coupled with decisions by the United States, United Kingdom, Saudi Arabia, China, Iran, and Pakistan to support the mujahedin, ultimately made Afghanistan one of the most

> unstable, fractured, and militarized places in the world (Human Rights Watch, 2005: 123).

To support Afghan regimes in the 80s decade, the USSR spent between 36 and 58 billion dollars. The sum given by other countries to help the Mujahedin is estimated between 6 and 12 billion dollars. And this help did not end with the Soviet withdrawal, as the USSR continued to support the Afghan government and the US, Iran and Pakistan did not cease to assist the Mujahedin groups, either, throughout the 90s (Human Rights Watch, 2005: 123-124). This means countries which supported the regime indirectly have their own share of responsibility for the crimes committed: not only did they contribute with money and weapons to an escalation of the hostilities, but they also never did anything to resolve the situation in which Afghanistan presented itself after the USSR withdrew (Human Rights Watch, 2005: 124).

The emergence of the Taliban was a reaction to this anarchic period. In 1994, they instituted a repressive administration and imposed a panoply of restrictions particularly aimed at women and girls (Gossman and Kuovo, 2013: 9). According to Rubin (2003), "the principal war crimes and crimes against humanity during this period occurred during the battle between the Taliban and various components of the opposition Northern Alliance" (Rubin, 2003: 569). Facing resistance to their control, the Taliban responded with indiscriminate shelling, aerial bombardments, and the use of anti-personnel mines, killing civilians and non-combatants in general, and burning down entire villages (Gossman and Kuovo, 2013: 9; Danchin, 2001: 23). The Mazar-e Sharif massacre of 1998, one of the most serious ones led by the Taliban, killed more than two thousand civilians, while others were summarily executed. This event also resulted in the destruction of cultural and historical artifacts and sites, which also constitutes a crime and which, according to the 2347 Resolution of the UN Security Council and a decision by the ICC, is even considered a war crime (European Cultural Foundation). No Taliban commanders have been brought to justice, although some officials for specific incidents have been detained in Guantanamo (Gossman and Kuovo, 2013: 9).

The removal of the Taliban from the picture for a few years did not, contrarily to the expected, signify a time of peace or an end to grave human rights abuses and international humanitarian law violations (Gossman and Kuovo, 2013: 9-10). After the 9/11, agents of the Afghan intelligence service – the National Directorate of Security -, certain militia groups, some allied with the US, and the US itself were responsible for these violations,

which included killings, abductions, rape, forcible land grabs, arbitrary detention and illegal raids (Gossman and Kuovo, 2013: 11; UNAMA, 2011: 41). The Afghan forces also committed many violations of IHL and IHRL: various Taliban prisoners died of suffocation due to being sealed in truck containers while the Northern Alliance was transferring them to a prison near Mazar-i-Sharif. They were later buried in mass graves in Dasht-e Leili (Danchin, 2001: 23).

In addition, it is reported that grave abuses were particularly committed by the US and their allies against detainees, including deaths in custody, which can amount to crimes against humanity and war crimes (Gossman and Kuovo, 2013: 12).

> Photographs revealing the detainees kneeling, shackled, wearing blacked-out goggles and ear mufflers has raised questions about possible violations of 'humane treatment' and the 1984 Torture Convention (Danchin, 2001: 35).

Many incidents have been reported where an indiscriminate use of force by the US is evident. One specific instance happened in July 2008, when the US mistakenly bombed a wedding party in Nangahar, killing forty-seven civilians (Sturcke, 2008). One month later, they bombed the village of Azizabad, putting an end to the lives of ninety civilians. In 2009, a US bombardment in Farah killed one hundred and forty people (Gossman and Kuovo, 2013: 13). Thus, the US has been considered allegedly responsible for war crimes and IHL violations – such as the prohibition of causing unnecessary suffering - , regarding civilian casualties and the use of specific weapons, which date back to 2002, yet US Courts have taken no significant actions towards accountability (Danchin, 2001: 39-40; Marsi, 2021). Additionally, the US is not only bound by rules of IHL, but also by conventional and customary IHRL. They ratified, in 1992, the International Covenant on Civil and Political Rights, which demands that States, in times of war and peace, respect and ensure the rights recognized in the Covenant to every individual within its territory or subject to its jurisdiction. Denying due process to detainees, including the right of *habeas corpus*, and the entitlement to trial within reasonable time violates the Covenant (Danchin, 2001: 36-37).

Despite the Taliban defeat in 2001, it did not take long for them to resurge. Some Taliban fighters never really left the country and were now facing resistance from government and international troops. Less than five years after 9/11, they started a wave of raids and suicide attacks (PBS, 2021). Ever since then, the Taliban have been ravaging Afghanistan

with disputes and their oppressive ideology. Rubin (2003) sheds light on an especially relevant issue regarding Taliban behavior. She declares that one cannot forget that the Taliban choose no particular targets in their fight. Women and girls have rightly deserved most international concern, yet civilians and fighters are also victims of Taliban's actions (Rubin, 2003: 572). She recalls that the young men fighting in Afghanistan had lived in conflict their whole lives, raised on an ideology of jihad, used to resorting to arms, growing opium and smuggling (Rubin, 2003: 572). Bellal *et al*. (2011) also recognizes the high price which is being paid by civilians in the country, blaming the Taliban and other insurgent groups for showing little respect for human rights and the laws of armed conflict, by deliberately attacking civilians, aid workers and facilities, like schools for girls (Bellal *et al*., 2011: 50-51).

The beginning of 2013 saw a worsening of the insurgency, with the Taliban resorting to indiscriminate attacks, breaking the rules of IHL and committing war crimes (Gossman and Kuovo, 2013: 11). Interestingly, the actions by the Taliban breach their own Code of Conduct (Gossman and Kuovo, 2013: 12). However, in the same year, the United Nations Mission in Afghanistan (UNAMA) confirmed dozens of cases of war crimes which were also attributed to other entities, such as Pro-Government Forces, who were responsible for 71 cases (UNAMA, 2014: 73).

UNAMA started to collect information about abductions in 2015 (Badalič, 2019: 258). In two years, they recorded more than a thousand violent incidents by armed groups who were against the government, among them, the Taliban, considered the largest group. In 2017, out of 255 abductions, 215 were attributed to the Taliban (Badalič, 2019: 258). Thus, Taliban, violate the provision which prohibits hostage taking, a non-derogable norm recognized as part of customary international law in international and non-international armed conflicts (Badalič, 2019: 265; Third Geneva Convention, 1949). During these abductions, they also violate the provision forbidding "violence to life and person" and "murder of all kinds", a crucial norm present in all international human rights treaties and in humanitarian law ones (Badalič, 2019: 266; Third Geneva Convention, 1949). By torturing abductees, they violate the prohibition against torture and other forms of cruel treatment, present in IHL and IHRL treaties, considered a *jus cogens* norm. They even ignored their own prohibition of torture, in Article 15 of the 2010 edition of their Code of Conduct (Badalič, 2019: 267). Finally, they also violate the provision forbidding forced displacements. In NIACs, the displacement of civilians by belligerents must not

be ordered, unless military reasons or the security of the civilians so demand, according to Article 17 of Additional Protocol II (Badalič, 2019: 267; Additional Protocol II to the Geneva Conventions, 1977). Overall, in 2017, besides the abductions, the Taliban were responsible for 65% of civilian casualties, meaning around 4399 civilians were either killed or injured (UNAMA, 2018: 2).

In the summer of 2021, as a consequence of the US decision to leave Afghanistan, the Taliban strengthened their power and influence. Their reprisals now include summary executions of former officials of the country's security forces and raids on the homes of activists, media personnel, artists, singers, and Afghans helping foreign organizations (Human Rights Watch; Hazim, 2022a). They have also reimposed restrictions on Afghan women and girls, not only in the way they are allowed to dress, but also keeping them from working and from getting an education (Human Rights Watch; UN Human Rights Council, 2022: 7-8).

> I am painfully reminded that women live amid persistently dangerous and violent conditions despite years of international initiatives to advance peace building, women's rights, and equality in Afghanistan […]. I contend that countless rural and urban women are, for many reasons, unable to or lack the desire to enter the liberal public, and they may not even have the choice or desire to retreat from the interpenetrating spaces of customs, values, traditions, culture, and religion (Chishti, 2020: 581-584).

The actual depth and breadth of Taliban's crimes is extremely difficult to determine, as they put a lot of effort into making sure they have the silence of their victims and people, in general (Hazim, 2022a). Still, UNAMA's 2021 Mid-Year Report reported 2044 civilian casualties by the Taliban – among which, 699 were deaths –, almost 40% of a total of 5183 casualties between January and June last year (UNAMA, 2021: 3).

More recently, UN Secretary-General's Report of 15th June 2022 declared that, although there has been a decline in the number of security incidents and civilian casualties related to the conflict compared to 2021, since January 2022, UNAMA has documented at least 801 civilian casualties, with 275 civilians killed and 526 wounded (United Nations, 2022: 7).

All in all, Afghanistan has been a victim of many grave humanitarian and human rights violations, committed over more than four decades, by a variety of different actors

(Danchin, 2001: 22). Entire populations have been targeted and accountability has not been sufficiently pursued. In fact, the practice of impunity and the lack of accountability for past and present crimes are two of the main concerns regarding Afghanistan (Gossman and Kuovo, 2013: 48; Mason, 2011: 182) , and this stems also from a problem of deceived mentality. Not only are international legal standards misunderstood in Afghanistan, but people are also holding on to the idea that justice and stability are mutually excluding, when it is not the case (Gossman and Kuovo, 2013: 48). They believe that, in order to have peace, justice cannot be pursued, thus accountability is out of question (Nadery, 2007: 175). The question of accountability becomes even more intricate in the Afghan case. It is rather difficult to hold people responsible for their crimes in Afghanistan, as most of them are connected to powerful people and local officials, and the so-called warlords, as well (Gossman and Kuovo, 2013: 11).

Giving up justice for peace, Afghans lost both. As Rubin (2003) declared, “they might long for peace, but they also feared it”, as peace might even seem less secure than war (Rubin, 2003: 572).

Change is a must. The rule of law and the justice system in Afghanistan are groundless, and the crimes committed in the country were also facilitated by a wave of institutional failures (Gossman and Kuovo, 2013: 48). Nevertheless, seeking accountability is an important first step towards the achievement of transitional justice and only a competent and independent tribunal is able to suitably evaluate the differing situations and degrees of involvement of individuals and actors in the Afghan war (Danchin, 2001: 33). Among the possible accountability mechanisms available to prosecute international crimes committed in Afghanistan, there is a need to highlight the role that the International Criminal Court could potentially play in the road towards fighting impunity.

5.3.2. The International Criminal Court: preliminary steps towards accountability and fighting impunity

As it was previously mentioned, Afghanistan officially acceded to the ICC on 1 May 2001. The Rome Statute entered into force on 1 July 2002. As the Tribunal does not possess retroactive jurisdiction, it can only exercise it in Afghanistan over the crimes

listed in the Rome Statute from that date onwards – jurisdiction *ratione temporis* (Rubin, 2003: 574; ICC, 2021; Cormier, 2021: 51).

The establishment of the ICC contributed to the notion that international crimes – war crimes, genocide, crimes of aggression and crimes against humanity -, are imprescriptible and do not allow amnesties[5]. On the other hand, they ought to be prosecuted because the victims have the right to remedy (Gossman and Kuovo, 2013: 29). The so-called jurisdiction *ratione materiae* is exercised when the Court investigates and tries individuals charged with one or more of these four types of crimes, considered the most serious crimes world-wide (ICC, 2021; Cormier, 2021: 51). If the accused person either committed a crime on the territory of a State-party or is a national of one of them, the ICC exercises its jurisdiction *ratione personae* (Cormier, 2021: 51). It is important to point out that in no way is the ICC meant to replace national criminal systems and courts. Its role is based on the principle of complementarity, as it only prosecutes individuals when the respective State is unable or unwilling to do so (ICC, 2021; Nadery, 2007: 134). Additionally, the ICC's jurisdiction is not universal: when it cannot take certain cases, domestic courts can institute proceedings against perpetrators of international crimes, even if they are not committed in their territory, following the principle of universal jurisdiction (Nwoye, 2017: 570).

As stated in its website, the Court is a leading figure in the "global fight to end impunity" (ICC, 2021).

> *While the Court cannot be the panacea for the human rights ills of the world, it can set standards*.
>
> (Nadery, 2007: 134)

Nevertheless, its name has always been referred to with skepticism and its role seen as controversial and biased, in part because only individuals from the African continent have been judged (Nadery, 2007: 130).

Despite this, one of the cases which is being investigated for more than a decade now, since 2007, regards Afghanistan. In November 2017, the Prosecutor of the ICC requested

[5] Amnesties are every legal measure that impedes criminal prosecution and, in some cases, civil actions against individuals respecting specified criminal conduct committed before the adoption of the amnesty. Amnesties can also have the effect of retroactively nullifying legal liability, meaning forgiving one for a crime which has been already condemned criminally (OHCHR, 2009: 5).

an authorization from the Pre-Trial Chamber to commence an investigation into war crimes and crimes against humanity committed in the country since May 2003, and on the territories of other State-parties – Romania, Poland and Lithuania - to the Rome Statute since July 2002 (ICC, 2021; Cormier, 2021: 49). The Prosecutor wanted to investigate war crimes and crimes against humanity committed by the Taliban and its associates, and war crimes by the Afghan government forces, members of the US armed forces and the CIA for these crimes (Cormier, 2021: 45; Coalition for the ICC, 2017: 1). The Chamber, in what came to be considered a controversial decision, did not, however, authorize the investigation, in 2019, as it "would not serve the interests of justice" (Coalition for the ICC). On 5th March 2020, following an appeal by the Prosecutor against this decision, the Appeals Chamber decided to authorize the Prosecutor to commence an investigation into alleged crimes in Afghanistan. The Appeals Chamber's judgment amended the decision of Pre-Trial Chamber, which had rejected the Prosecutor's request for authorization for an investigation (ICC, 2020; Cormier, 2021: 45; Hazim, 2022a). A few weeks later, however, the then-government of Afghanistan chose to ask for a deferral of the investigation pursuant to Article 18(2) of the Rome Statute to Afghan authorities. The government wished to provide evidence that those responsible would be held accountable, and the ICC agreed to their request (Hazim, 2022a; Hilland and Gilfedder, 2021). Despite this request, it was reported by Human Rights Watch that less than nineteen percent of the cases the government claimed to be investigating made it to a national court (Hilland and Gilfedder, 2021; Marsi, 2021). The collapse of the Afghan government and the absence of prospects that the now in power Taliban would administer justice, caused the investigation into alleged crimes to proceed. Interestingly, the atrocities committed by the Taliban and the Islamic State came to be considered a priority in the investigation (Hazim, 2022a; Hilland and Gilfedder, 2021).

As the situation in Afghanistan was characterized by the Prosecutor as a non-international armed conflict, and it stills remains so, the crimes committed by the Taliban very likely amount to war crimes and crimes against humanity – as, in fact, it was concluded in the previous section of the present work (Hilland and Gilfedder, 2021). Regarding the criminal conduct of Afghan government forces and the US, the alleged crimes in the preliminary examination amount to war crimes, as well (Coalition for the ICC, 2017: 3).

In spite of the above-mentioned positive step concerning the restart of the investigation, the fact that the criminal conduct of the US and Afghan government forces was

deprioritized is a matter of grave concern. It revealed that the Court failed to stand its ground against US threats, which started in the moment the investigation was announced, and contributing to the perception that the ICC is not as impartial as it should be, especially considering the fact that the US is not even a State-party to the Statute (Zvobgo, 2021; Marsi, 2021). Furthermore, "there is no indication that the ICC has made any substantial progress in resuming its investigation since the announcement" of a resume of the investigation (Hazim, 2022a). Seeking accountability from the Taliban is one practical obstacle which needs to be kept into consideration: it is very unlikely that they would allow the Court to access the country, gather evidence and, eventually, arrest people, especially given the fact that the main people who are being investigated are the Taliban themselves (Hilland and Gilfedder, 2021).

Even before insecurity peaked and the main goal towards achieving relative stability became negotiation and a settlement deal with the Taliban, accountability had never been seriously contemplated in the country (Mason, 2011: 182). Some experts, like Patricia Gossman, claim the Court has even often rewarded, not punished, some of the gravest offenders (Gossman, 2020).

Furthermore, since the beginning, not enough small-scale efforts have been put into practice to try to coordinate relevant civil society organizations with the aim of providing pertinent information to the ICC. As Gossman and Kuovo (2013) explain, those organizations in the country who are aware of the investigation do not approach the Court in order to help and there is a perception that the ICC is choosing to ignore Afghanistan (Gossman and Kuovo, 2013: 42). Only in 2012 did a group of 15 networks and organizations decide to deliver a petition to the then-Prosecutor, promptly expressing their readiness to support the Court, yet also clearly criticizing its lack of action and demanding more transparency in the investigations (Gossman and Kuovo, 2013: 43). Ten years later, little progress has been achieved. Civil society organizations play a very important role, not only in the preliminary phases of the investigation by gathering information and sharing it with the Court, but also by representing the victims and contributing to the credibility of the ICC (Gossman and Kuovo, 2013: 42; Hilland and Gilffeder, 2021).

Another problem that seems to be delaying proper action in this case is what De Lauri (2013) called a "one-size-fits-all approach to accountability" from the ICC (De Lauri, 2013: 582), meaning an approach that is not adapted to the different vicissitudes and

features of the country. There should be, as supported by Nwoye (2017), a customized approach to accountability", not a copy-paste one (Nwoye, 2017: 549). The amount of resources the Court possesses, which is considered to be limited, is also a deterring factor in this whole situation, and it was actually pointed out as one of the reasons the ICC decided to limit the scope and nature of the investigation, excluding the crimes committed by the US and the Afghan government (Marsi, 2021). This is, of course, directly related to the criticism faced by the ICC, when its decisions are claimed to be politically natured. Related to these concerns, another key problem regarding international justice are public expectations: it is as if the Court is already bound to fail in the eyes of the population when they expect too little of it, or, on the contrary, too much (Fletcher and Weinstein, 2002: 602). Adding up to this, the lengthiness and intricacy of international legal proceedings is also a challenging factor (Hazim, 2022a).

These impediments consequently generate a wave of disbelief and a lack of credibility towards the Court.

> Given the challenges, it is unrealistic to have high expectations of the Court and anticipate an immediate arrest and prosecution of the alleged perpetrators (Hazim, 2022a).

The ICC is in urgent need of moving forward, overtaking these obstacles and reaching tangible effects, and there is a window of hope. As such, the Court needs is to demonstrate, not only a strong will, but also appropriate action.

For Afghanistan, the ICC represents a particularly preferable option when it comes to criminal prosecution – and the latter is, in its turn, a key element of transitional justice mechanisms (Gossman and Kuovo, 2013: 39). The justice system in Afghanistan, which is now actually altered due to the Taliban takeover, had become more corrupt, inaccessible and bureaucratic, causing a growing number of Afghans to start seeking to solve their problems outside of the Court structure, among elders and their families, where human rights and the actual law are not often respected (De Lauri, 2013: 269).

As the situation currently stands, there has been enough proof that the violations committed in Afghanistan cannot be dealt with nationally. The scope of solutions must be broadened and the appropriate institution to tackle these problems is the International Criminal Court. Indeed, for the thousands of Afghans who are fearful for their future, the

Court offers them hope that justice might, one day, be delivered (Gossman, 2020). As indicated by Hazim:

> Even a marginal effect from swift ICC action may have a big impact on potential victims, save some lives, lessen the suffering of the people, decrease the torture of innocents, and create some hope for justice in the future (Hazim, 2022a).

CHAPTER 3

5.4. Transitional Justice approaches and moving forward

5.4.1. Transitional Justice: an approach

Over the last decades, transitional justice has had a central role in the transformation process used by certain countries moving from authoritarianism or a critical time of conflict to democracy (Sarkin, 2021: 40). It is not, *per se*, a special form of justice, but rather a panoply of approaches aimed at reaching justice in extraordinary conditions, such as repressive rule or conflicts (Davis, 2010: 8). It is also, due to the political, legal and moral dilemmas inevitably linked to its theory, and to the realities it addresses *in loco*, an intricate field which deserves recognition and demystification (Saeed, 2015: 2).

The so-called 'Arab Spring' brought attention to a necessity of dealing with the past, and the way a country decides to do so and face past abuses became determinant for its prospects of achieving peace and stability (Sarkin, 2021: 39). Hence, transitional justice mechanisms emerged as a vital component of sustainable and balanced peace settlement and nation-building (Atashi, 2013: 1049). Although the measures now associated with it have been around for a very long time, only recently did they start to be justified through calls for human rights and international law to be respected and seen as having a link to democracy promotion (Arthur, 2009: 334). The UN Agenda for Peace, written in 1992, set the foundations for peace keeping to give away its place to comprehensive peace building, as a way of dealing with conflicts (Atashi, 2013: 1049). Since then, many peacekeeping operations led by the UN have implemented crucial changes and incorporated justice and accountability in their peace building mandates. The creation of the international criminal tribunals for Yugoslavia, Rwanda and Sierra Leone also constituted foundational steps in the sketching of transitional justice, which, little by little, was being created (Atashi, 2013: 1049). When managing conflict situations, some

structural issues – for instance, marginalization, inequality, economic disparity and bad resource distribution – , known for resulting in oppression and violence, were being ignored. The field of transitional justice emerged to tackle these problems and to address the need for equality, economic development, political participation and active involvement of the civil society, seen as necessary components for a stable and reconciled society (Atashi, 2013: 1050). From the human rights movement, the field of transitional justice borrowed the 'entrepreneurship', but it went further by attempting to systematize knowledge about the relationship between justice practices and society transitions, which, as Arthur (2009) puts it, "is no easy task" (Arthur, 2009: 358).

In the very detailed 2010 Guidance Note by the then Secretary-General of the United Nations, Ban Ki-moon, transitional justice was defined as:

> […] 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" (United Nations, 2010: 2).

Generally speaking, transitional justice is the umbrella for all the judicial and non-judicial practices which are used to deal with legacies of war crimes and human rights abuses, typically after major regime changes or prolonged conflict (Gossman and Kuovo, 2013: 2). These practices and processes originate from state obligations based on international law, which include obligations arising from treaties and customary norms (Gossman and Kuovo, 2013: 2).

Transitional justice usually pursues interlinked objectives which, because they are connected and mutually reinforcing, are more effective when a holistic approach is employed to help them work together (Davis, 2010: 8). The first aim is the recognition of the suffering of victims through truth-seeking, documentation and symbolic measures. Secondly, the use of retributive and restorative justice methods, both prosecutions and reparations, to hold perpetrators accountable for their crimes and end cycles of impunity and to help victims move on. Thirdly, through disarmament, security sector reform and vetting, the creation of conditions for institutional reform. Lastly, reconciliation through the above-mentioned and other additional measures (Gossman and Kuovo, 2013: 2). They do point out, however, and rather pertinently, that the goal is not to tick boxes to sustain international law commitments, but to acknowledge past wrongs and consequently prevent violence from occurring again (Gossman and Kuovo, 2013: 3). It is in this way,

that transitional justice is deeply connected to democratization and peace-building practices (Gossman and Kuovo, 2013: 3).

When it comes to recognizing the suffering of victims, truth or reconciliation commissions are a central component, as they are meant to investigate violations and help societies come to terms with their past and heal their wounds, through a humanization of the victims and a personalization of their treatment (Sálmon, 2006: 342-343; Sarkin, 2019: 1). As Sarkin (2019) explains, "these institutions play pivotal roles in a number of respects […]" (Sarkin, 2019: 2). They look into the causes of the violence, scrutinize the elements and parties in the conflict and investigate the gravest violations of international humanitarian and human rights law, being even able to, in certain circumstances, determine accountability and reparations (Sálmon, 2006: 342). Moreover, truth-seeking is very much related to criminal prosecutions because it is usually through the former process that serious violations are discovered and, even if ideally, prosecuted (Đukic´, 2007: 692). In transitional societies, where there is usually a fragile judicial system unable to deliver justice, in addition to many victims of serious crimes and many perpetrators, the need for justice is high, so, this impunity gap is usually filled in by international justice mechanisms, whose epitome is the International Criminal Court – ICC (Davis, 2010: 8-9).

Reparations and reconstruction are also a relevant phase, and Correa (2014) declares one cannot exist without the other (Correa, 2014: 25). Addressing the needs and rights of victims is directly connected to guaranteeing social, cultural and economic rights because peace and stability can only be achieved if victims are felt included and can carry on with their lives (Correa, 2014: 25). And reparations are only effective when accompanied by development policies and measures, as they are meant to address the conditions of the ostracized populations (Correa, 2014: 25). As follows, one can claim there is a strong link between transitional justice and human development, because the goals of the former – *inter alia,* recognizing the rights of victims, encouraging civic trust and strengthening the rule of law - are shared with a notion of the latter (Correa, 2014: 25).

> A society recovering from armed conflict needs to include these three goals as part of its development strategy if it wants that development to be sustainable (Correa, 2014: 25).

Another crucial step in a transition is disarming former combatants and reintegrating them into society, as part of a disarmament, demobilization and reintegration – DDR – strategy

(Gossman and Kuovo, 2013: 24). As it has been recognized, without a DDR strategy, new governments are not able to proceed with security sector reforms and subsequent steps. However, a downside of this strategy is that it is often linked amnesties, which could contribute to impunity (Gossman and Kuovo, 2013: 24). It should still be noted that amnesty laws may still be used as long as they contribute to reconciliations as a stable basis on which to proceed with democratization (Sálmon, 2006: 331). Along these lines, reconciliation is also at the core of transitional justice, and it usually begins with political negotiations and settlements which include all levels of society in order to achieve sustainable peace (Atashi, 2013: 1050). Yet sometimes, these negotiations result in peace agreements, but they tend to be rather fragile, and this is why there is often a choice of political peace in detriment of accountability, which can 'harm' a fragile society, and this is where amnesties come into the picture (Atashi, 2013: 1051).

Vetting - the process of assessing one's integrity and suitability for public employment - is also an important part of transitional justice institutional reform (UNAMA, 2017: 18). It prevents corruption and warlord and commander harboring, and when the prosecution of perpetrators is being hampered, vetting can serve as "justice light" by at least removing these people from public office (Gossman and Kuovo, 2013: 26).

Overall, transitional justice can help creating a more coordinated and thorough range of responses to serious violations because it fights impunity, delivers justice to victims and assists in the prevention of new violent occurrences (Correa, 2021: 10). A transitional justice strategy should include: truth-seeking, victim recovery, reparations, reintegration of the less serious perpetrators into society, strengthening the rule of law and democracy, institutional reforms if needed, and preservation of stability and peace (Nadery, 2007: 178). In Afghanistan, the term has been often misunderstood, seen as addressing solely matters of criminal liability, but it extends way beyond accountability purposes (Nadery, 2007: 178). The question which now arises is whether transitional justice can be implemented in situations of ongoing instability and violence and an absence of peace in the political sphere, instead of just on a post-conflict stage (Atashi, 2013: 1050). More specifically, could transitional justice be effectively implemented to Afghanistan, a country which has been devastated by conflict and which does not seem to be able to get rid of tensions and hostilities, particularly now that the Taliban are in control?

5.4.2. A history of failed moves and missed opportunities: Transitional justice attempts in Afghanistan

Despite its relatively recent naissance, transitional justice efforts have been attempted in Afghanistan, even if superficially and moderately, in the beginning of the 2000s. However, these efforts were hampered due to structural and implementation failures, which did not allow the country to properly experience the benefits Transitional Justice can bring in situations such as this one, where a conflict has been going on for decades.

After the events of 2001, and from the start of the state-building effort in the country, both the Afghan government and the US were mainly focused on the issue of stability, while neglecting the obvious justice deficit Afghanistan was facing (Gossman and Kuovo, 2013: 2). The UN also seemed to favor short-term security and stability, setting transitional justice efforts aside. As Gossman and Kuovo (2013) described, it was a "politics of accommodation" (Gossman and Kuovo, 2013: 2). Nevertheless, in December 2001, various prominent Afghan figures and international stakeholders, supported by UN efforts, met in Bonn, Germany, in order to decide on how to better govern the country. After the US invasion of Afghanistan, following the 9/11 attacks, a transition phase was deemed necessary before the establishment of a government, one preferably nationally agreed upon. The Bonn Agreement which resulted from that conference provided the legal framework until the adoption of a new Afghan Constitution (UN Peacemaker). It also envisioned the establishment of the Afghan Interim Authority (AIA), an entity with a six-month mandate meant to supervise the new Afghan Armed Forces which were to integrate all armed groups (Goodson, 2003: 87). The AIA would then be followed by a Transitional Authority established by a Loya Jirga in June 2002, and this would be the primordial step towards leading to a new constitution and a normalized government (Goodson, 2003: 87).

Nevertheless, unlike other peace accords carried out by the UN, the Bonn Agreement did not, include an agreement on transitional justice mechanisms, nor did it provide any mechanism to deal with past abuses (Nadery, 2007: 174; Rubin, 2003: 570). Adding up to this, the conference did not take place between a war winner and loser. On the contrary, every group was considered a 'loser', and the Taliban were not even included, hence there was no laying down of arms (Gossman and Kuovo, 2013: 3). Moreover, the voices of the victims were not heard, having been ignored by all those who promoted "peace first and

justice later" (Nadery, 2007: 174). This was the first major mistake of the Boon Agreement: there was no negotiation on how to create the foundations for a government capable of solving tensions, build new armed forces and a police service, and address past abuses for a national reconciliation (Rubin, 2003: 570). The only time the matter of justice for past atrocities came up was during the rather heated discussion over the idea of amnesties. The drafted agreement written by the UN declared that the AIA could not issue law amnesties for war crimes and crimes against humanity, and this nearly caused the end of the peace talks. In the end, the paragraph was unfortunately removed (Gossman and Kuovo, 2013: 17). As Rubin (2003) denotes, this resistance to the paragraph regarding amnesties reflects the struggle which defines the current political context concerning transitional justice (Rubin, 2003: 572).

Consequently, transitional justice was clearly not considered a priority (Gossman and Kuovo, 2013: 3). One of the key successful results of the Bonn Agreement was the establishment of the Afghanistan Independent Human Rights Commission (AIHRC), whose role was to protect and promote human rights all over the country (Stan and Nedelsky, 2014: 1; Mason, 2011: 268-269). It would do so via consultation and by receiving, investigating, and dealing with complaints, and by making recommendations about legislative or administrative actions, thus assuming a transitional justice role, in a certain way (Stan and Nedelsky, 2014: 1; Atashi, 2013: 1055; Gossman and Kuovo, 2013: 31). It also issued a specific report entitled 'A Call for Justice' based on national consultation, subsequently contributing to the drafting of a Government Action Plan focused on transitional justice, in 2005 – the Peace, Reconciliation and Justice in Afghanistan Action Plan (Rubin, 2003: 571; Gossman and Kuovo, 2013: 2; Stan and Nedelsky, 2014: 2). The Action Plan included five main measures to be completed in the course of three years and meant to address issues of past crimes and implant a philosophy of respect for human rights and accountability: giving dignity to victims; vetting and encouraging institutional reform; truth-seeking; reconciliation; and the establishing of a task force to make recommendations for an accountability process (Gossman and Kuovo, 2013: 31; AJO, 2013: 3).

Despite this initial promising step, and although the Karzai administration adopted the Plan, even if not entirely, its implementation efforts were almost nonexistent and it ended up being forgotten (Gossman and Kuovo, 2013: 2). Additionally, the AIHRC and other non-governmental organizations made serious efforts to collect some serious

documentation on human rights violations, yet this also remains unpublished, due to what Gossman and Kuovo (2013) call "a climate of intimidation" (Gossman and Kuovo, 2013: 2). The lack of government funding for the AIHRC and its reliance on international donations was also an impediment for further action (Stan and Nedelsky, 2014: 2; Atashi, 2013: 1055). Still, years after its inception, the Commission and its Transitional Justice Unit continued to do a remarkable amount of work in the area, contributing to the important task of raising public awareness, yet government implementation was a hindrance (Stan and Nedelsky, 2014: 3-4). At the same time, these steps were being taken among ongoing violence, so the conditions were also evidently not favorable (Atashi, 2013: 1055).

Overall, the Bonn Agreement was not as effective as it could have been. Parties were supposed to be allowed to work together towards reaching a political agreement, but instead, people were so eager to move forward to achieve stability that they disregarded political reconciliation (Atashi, 2013: 1054). Furthermore, many of the leaders who were supposed to be brought to the political process as legitimate actors assumed new roles in the political sphere and continued to behave in the corrupt way as they did in the past (Gossman and Kuovo, 2013: 14-15).

> What came out of the negotiations was not a peace accord, but a power-sharing agreement limited to the factions that had fought the Taliban, plus a few others (Gossman and Kuovo, 2013: 16).

> The Bonn Accords created an unequal and ethnically unbalanced power-sharing arrangement (Atashi, 2013: 1053).

The Loya Jirga, or gran assembly, of December 2003 continued the debate initiated two years before, where a heated discussion was also stirred, concerning the legacies of the past (Gossman and Kuovo, 2013: 17; Myre, 2013). Faction leaders were criticized as 'criminals' and called to be tried nationally or internationally by a particular delegate, who was later expelled from the meetings for having criticized the Mujahedin (Gossman and Kuovo, 2013: 17). Despite the fact that the Loya Jirga was publicized as an opportunity to honor democratic processes, it ended up being seen as a lost one and a moment when the warlords could have been outwitted, but were not (Gossman and Kuovo, 2013: 18-19). As criticized by Goodson (2003), "the warlord problem is one of the tallest hurdles in Afghanistan's path" (Goodson, 2003: 91). Once again, transitional

justice did not make its way through in Afghanistan, as it was seen by important international actors as possibly destabilizing (Gossman and Kuovo, 2013: 19). In addition, by setting accountability aside, other key areas such as the security sector were undermined (Gossman and Kuovo, 2013: 19).

- Security Sector

Concerning the security sector, an essential element in any post-conflict society wishing to transition, the DDR strategy should be mentioned (Rubin, 2003: 576). In Afghanistan, despite the early recognition that disarmament was integral to the reconstruction of the state, DDR was delayed by a couple of years after the Taliban fell and, since then, it was never fully implemented (Gossman and Kuovo, 2013: 24-25). Disarmament had support amongst almost all Afghans initially, but the presence of anti-Taliban forces in the country and US forces on the ground working with the militias, discouraged the process (Gossman and Kuovo, 2013: 24). And, as Gossman and Kuovo (2013) point out, "just as the Bonn Agreement was silent on justice, it was also silent on how to deal with the many arms and former combatants remaining after the fall of the Taliban". The language regarding this matter was very ambiguous in the Agreement (Gossman and Kuovo, 2013: 24; Sedra, 2010: 4). Nevertheless, there was indeed a DDR initiative promoted by the United Nations Development Program (UNDP), in May 2004, called the "Afghan New Beginnings Program", which had a three-year mandate, encompassed a hundred thousand officers and soldiers for disarmament and was meant to demobilize around sixty thousand fighters (Sedra, 2010: 6). Despite the expectations, there was, once again, resistance to DDR and the numbers were not met (Gossman and Kuovo, 2013: 25). And the fact is that, without an effective DDR, neither peace nor justice will prevail in Afghanistan (Rubin, 2003: 577). As Rubin (2003) articulates, "a state at peace is one where people have a reasonable expectation that justice may be done. Justice cannot be done in a state of war and collapse of institutions" (Rubin, 2003: 577).

Disarmament and demobilization efforts are usually accompanied by reforms in the security sector, which are needed for building a qualified police force and a good criminal justice system. As Sedra (2010) declared, the "security vacuum" in Afghanistan was the most serious obstacle to the implementation of DDR (Sedra, 2010: 8). However, and part of the reason why the DDR strategy in Afghanistan was unsuccessful these two strategies were performed separately and little was attained on security sector reform (Gossman and

Kuovo, 2013: 25-26; Sedra, 2010: 13). Generally speaking, there was not an integrated approach which combined all sectors. NATO and US forces in the country did succeed in managing the handover of heavy weapons from militias, yet small arms and their proliferation posed the biggest threat to stability in the country (Gossman and Kuovo, 2013: 26).

The compliance with disarmament and disbandment of illegal armed groups came to play an important role in the 2005 elections in Afghanistan, particularly in relation to vetting (Gossmand and Kuovo, 2013: 26-27). Vetting requires a thorough assessment of an individual's profile and background, inclusively of his personal and professional records (UNAMA, 2017: 18). It aims at excluding individuals with integrity deficits from public services, so as to establish civic trust and contribute to a legitimization of public institutions (UNAMA, 2017: 18). Assessing individuals' integrity and choosing qualified and DDR compliant candidates was seen as directly linked to human rights protection (Gossmand and Kuovo, 2013: 26-27). In fact, in a national consultation done in 2004 by the AIHRC when asked how they wanted to deal with the legacies of the past, Afghan people responded they wanted perpetrators to be prosecuted or, at least, removed from public positions to avoid corruption and further violations (Gossmand and Kuovo, 2013: 26). It should be noted, however, that the Afghan Constitution only forbids those convicted of the most serious crimes of running for election, and there are no constraints on candidates' participation based on their criminal records or human rights compliance (Gossman, 2009: 29). It was still hoped that the criterion of disarmament would disqualify the many illegal armed groups suspected of committing human rights abuses. Afterall, in the 2005 elections, only 17 candidates were disqualified in the early phases and 37 were excluded on the ballots, for different reasons, two of them related to having links to illegal armed groups and holding prohibited government positions (Gossman and Kuovo, 2013: 27). The small numbers of candidates disqualified ended up being a disappointment mainly due to the fact that the criteria were manipulated to serve political purposes. Moreover, those who were actually disqualified, remained in that position because they had no powerful supporters in the institutions which oversaw the vetting procedure. Despite this failure, the story would repeat itself in 2010 (Gossman and Kuovo, 2013: 27-28).

The ineffectiveness of the vetting and DDR strategies in Afghanistan in the early 2000s set the task of combating impunity in a stalemate. The 2007 Amnesty Law approved by

the Parliament and granting amnesty to all parties involved in the hostilities before 2001, represented an almost fatal act (Gossman, 2009: 31). Even acknowledging that this law was clearly against some of Afghanistan's international treaty obligations, including the Rome Statute, challenging this law was nearly impossible because the country's legal system and institutions were too frail (Gossman and Kuovo, 2013: 31; AJO, 2013: 3).

- Reconciliation efforts

Furthermore, reconciliation was largely kept separate from transitional justice attempts and especially from a human rights perspective (Atashi, 2013: 1051; Gossman and Kuovo, 2013: 43). Reconciliation, which should be implemented with the aim of truly building peace, was being applied only at a local level and premised on an idea of amnesty which was totally erroneous (Gossman and Kuovo, 2013: 43; Atashi, 2013: 1051).

> National-level reconciliation – currently interpreted as efforts towards peace talks with the Taliban – has developed in fits and starts (Gossman and Kuovo, 2013: 43).

At the same time, reconciliation was sought in a bottom-up approach, by urging combatants to reintegrate (Gossman and Kuovo, 2013: 43; Gossman, 2009: 31). In this regard, two particular reconciliation and reintegration programs are worth mentioning here. The 'Strengthening Peace Program' was established in 2005 and, with it, a Peace and Reconciliation Commission. Nevertheless, this program lacked clear criteria for reintegration and reconciliation, and there were no attempts at trying to coordinate this program with the Action Plan or the rest of disarmament programs (Gossman and Kuovo, 2013: 43-44). Adding up to this, this Program, not only did not foresee a way of dealing with human rights abuses, but it also provided amnesty to those who lay down their arms and accepted the Constitution (Gossman and Kuovo, 2013: 44). The Afghanistan Peace and Reconciliation Program was, in its turn, a much more complex program, but rather flawed, as well, as it lacked transparency and provided room for another quite unfortunate concept of 'political amnesty' (Gossman and Kuovo, 2013: 46; Gossman, 2009: 20).

- Documentation of past abuses

One cannot possibly deny that transitional justice has been attempted in Afghanistan, but efforts were hampered mainly due to an overall political unwillingness. However, there were other obstacles, as well, one of them being the poor documentation of alleged war crimes, particularly of the beginnings of the war, during the late 1970s – as has been

actually stated in a previous section of the present dissertation (Gossman and Kuovo, 2013: 19). Documentation became more comprehensive after the mid-1980s, with several efforts by the UN General Assembly and the Office of the High Commissioner for Human Rights (Gossman and Kuovo, 2013: 20). Still, the most notorious documentation efforts to date have been undertaken by the AIHRC, which investigated human rights violations and war crimes between 1978 and 2001, and post-2001 (Gossman and Kuovo, 2013: 20).

Over the past years, and particularly after it became clear that the Action Plan was not being implemented and after the adoption of the Amnesty Law, many Afghan civil society organizations working on transitional justice have grown more interest in documentation efforts, pressuring the AIHRC to release a report on the matter. Many of such entities have even initiated some documenting initiatives themselves, such as, for instance, Physicians for Human Rights[6] (Gossman and Kuovo, 2013: 23; 34). Moreover, the Institute for War and Peace Reporting[7] released a series of documentaries on Afghanistan (Gossman and Kuovo, 2013: 23; 34). Other documentation efforts were undertaken by the Afghan Justice Project[8], the Afghan Civil Society Forum Organization[9] and Afghanistan Watch[10] (Gossman and Kuovo, 2013: 23). The efforts of the Transitional Justice Coordination Group[11] ought to be mentioned as one of the most determined efforts for assisting in the implementation of transitional justice efforts in the country (Gossman and Kuovo, 2013: 34; Kuovo and Mazoori, 2011: 496). Since its creation, it has made use of the Action Plan to guide its activities. While calling for the Action Plan to be implemented, the Group advocated for inclusivity in the reconciliation process and for generalized consultation amongst Afghans (Kuovo and Mazoori, 2011: 497). Its work evolved into the establishment of a national network, which consequently climaxed in the organization of the Victims' Jirga of May 2010 (Gossman and Kuovo, 2013: 34). The 2010 Jirga marked the first time victims of war crimes came together and conveyed a common position to the national media (Kuovo and Mazoori, 2011: 498). The initial momentum of the Group eventually faded, but it continued its work at lower intensity, and it succeeded, at least, in bringing some transitional justice issues into the eye of the

[6] For further information, access https://phr.org/countries/afghanistan/.
[7] For further information on the documentary series, access https://iwpr.net/global-voices/afghanistan-forgotten-victims-documentary.
[8] For further information, access http://afghanistanjusticeproject.org/.
[9] For further information, access https://acsf.af/.
[10] For further information, access http://www.watchafghanistan.org.
[11] For further information, access https://tjcgafghanistan.wordpress.com/.

public through the media and ensuring public debate around them (Gossman and Kuovo, 2013: 35; Kuovo and Mazoori, 2011: 497). In fact, one of the advantages of the growing civil society engagement has been, not only the acknowledgement of the victims' suffering and exposing of the lack of willingness up to then to fill in the many gaps of the conflict, but also their consultation work with the public (Gossman and Kuovo, 2013: 33). By engaging with civilians, these organizations would know that the perceptions of the public drastically differ from those of political leaders (Dadabaev, 2020: 216). The former are more concerned, for instance, about economic stability and lack of proper living conditions, food security and shelter, which do not seem to be priorities to the latter (Dadabaev, 2020: 216). Unfortunately, these victims' organizations only started to emerge in the last decade and remain a weak force in Afghanistan, not only due to weak capacity and lack of expertise and coordination, but also because many Afghans stay oblivious of the scope of the devastation beyond their own communities (Gossman and Kuovo, 2013: 35; AJO, 2013: 7; Asian Development Bank, 2009: 2). This is why the task of uncovering history is such an important part of transitioning, and the philosophy of transitional justice has not completely faded in Afghanistan because of the work of civil society (AJO, 2013: 7). It is essentially important to a functioning democracy, due to the right to associate and the right of freedom of thought and expression (Asian Development Bank, 2009: 2).

- A Western approach to transitional justice

Besides the array of obstacles that have been mentioned above, and which makes the execution of transitional justice measures in Afghanistan an extremely demanding task, there is one particular element which deserves further attention. As indicated by De Lauri (2013), international organizations and foreign governments who have been trying to assist in the country are too worried about bringing their own vision of a successful transitioned society into Afghanistan, thus basically reproducing and copy-pasting a Western liberal model which obviously does not work in every country (De Lauri, 2013: 270). The specific characteristics of the country being subject to the transition are not being taken into account and "legal models are assuming more and more about what the shape and values of the justice system should be", rather than what it truly is (De Lauri, 2013: 270). This "legal transplantation" contributes to an alienation of the general public towards its country's own institutions (De Lauri, 2013: 270; 280). Afghanistan, a country ruled by legal pluralism and where religion has such a huge influence in the sociopolitical

arena and in society as a whole, must necessarily be regarded as a *sui generis* case and reforms must take that into account (Nadery, 2007: 177). At the same time, every operation and assistance mission ought to be well integrated with civilian structures and the military, in order for Afghans to fully grasp foreign intentions by seeing everyone working together to achieve the same goal (Carbonari and Deledda, 2008: 475). In particular, Atashi (2013) makes reference to an AIHRC report from 2002 which gives the impression that Afghans blame foreign involvements in the country instead of internal armed groups for past atrocities (Atashi, 2013: 1055).

- Legal and judicial reforms

As regards the legal and judicial system in Afghanistan, necessary reforms in these areas have been one of the priorities in Western agendas regarding support for the reconstruction of the country (Suhrke and Borchgrevink, 2009: 212). There were, however, many obstacles to such legal reforms, one of them coming from the main justice sector in Afghanistan, the informal system, as it did not recognize international standards and human rights norms. Hence, despite Western donors' and UN's efforts, some rights such as the rights of women and children were disregarded (Suhrke and Borchgrevink, 2009: 218-219). Most Afghans choose the "do it yourself" type of justice to resolve their legal problems, in part due to the difficulty in accessing judicial institutions, and because of the skepticism which has evolved around them throughout the years (De Lauri, 2013: 281). Meanwhile, without justice sector reform, progress in security and development areas is barely unattainable (Suhrke and Borchgrevink, 2009: 219). Furthermore, without an efficient judicial system that is based on due process and uncorrupt judges, law cannot be applied to individual cases in an effective way (Saeed, 2015: 4).

Notwithstanding physical reconstruction and legal training, most critical issues were left unaddressed – reform of the Ministry of Justice and the Supreme Court, education of legal personnel, updates of substantive law, and strategies for dealing with the informal system (Suhrke and Borchgrevink, 2009: 219). Obstacles included institutional rivalries – between the Ministry of Justice and the Western patrons, associated with the reformists, and the Supreme Court, with the conservatives –, insufficient resources and competing concepts of law (Suhrke and Borchgrevink, 2009: 219).

After 2001, the Ministry of Justice worked out a 10-year plan distributed along four areas: legal reform to update laws and develop a "modern, rule of law democracy"; institutional

development along with reform of the Ministry of Justice, the court system, education and infrastructure; delivery of legal aid and assistance and monitoring of judicial assistance; and consultations with traditional justice institutions (Suhrke and Borchgrevink, 2009: 212). Moreover, the reforms were to be inspired by "legal frameworks of modern and market-based democracies", respect international human rights standards and comply with the principles of Islam, as well (Suhrke and Borchgrevink, 2009: 212). In spite of this promising plan, reform was not accepted light-heartedly, conflicting views were exacerbated and thus change came very slowly. By 2007, the justice sector was the area in which reform was most needed (Suhrke and Borchgrevink, 2009: 212; 219). As explained above, Western help did not engage with Afghanistan's legal and religious traditions – in other words, with Islamic law (Suhrke and Borchgrevink, 2009: 213-214).

> Donors had failed to link reforms to 'the foundation for justice in Afghanistan' — i.e. Islamic law. 'Internationally supported rule of law programs tend to ignore or avoid issues of Islamic law. This negatively impacts the acceptance of these programs by Afghan society' (Suhrke and Borchgrevink, 2009: 214).

Another very staggering obstacle consisted of difficulties in communication (Suhrke and Borchgrevink, 2009: 220). Concerning legal training, for instance, there was a generalized agreement that it was necessary, but Afghan authorities and donors could simply not agree on what type of legal training. And this was crucial for Western donors, as they deemed legal training, especially in constitutional law, an important tool of statebuilding. They did not, however, have any interest in more education in Islamic Law (Suhrke and Borchgrevink, 2009: 220). For these reasons, legal and judicial reforms in Afghanistan were, consequently, left on an impasse. And with them, reforms in all the other sectors.

In conclusion, transitional justice was close to penetrating the Afghan society, but it unfortunately became very much entangled in the chaotic situation and multiplicity of actors engaged in it. Afghanistan would very much benefit from an approach to transitional justice, through the adoption of different strategies, encompassing institutional and legal reform, and including judicial and non-judicial mechanisms, along with promoting truth, reparations, reconciliation, accountability, and ensuring that violations and abuses are not repeated (Sarkin, 2021: 40). By doing so, Afghanistan

would be improving its prospects of peace and security, while contributing to a sustainable development of its society, as well. However, as Correa (2014) denotates, transitional justice "can hardly be tasked with addressing all the consequences of historical and recent injustices" (Correa, 2014: 25).

In fact, as remarked by Sarkin (2021): "how a society decides to deal with past human rights abuses is a critical determinant of whether that society achieves peace and stability" (Sarkin, 2021: 39). Dealing with the past includes establishing a thorough account of the past and working on the consequences of injustices (Sarkin, 2021: 41; Correa, 2014: 25). In other words, it means seeking the truth, fighting impunity and aiming for accountability for war crimes and crimes against humanity, as well as other kinds of human rights violations. Concerning the matter of accountability, the ICC, in particular, has a crucial role to play. Its universal jurisdiction can be put into practice in Afghanistan, and it has, indeed, started an investigation in the country, yet its role can extend way beyond that. Additionally, the Court's efforts can be maximized if it coordinates them with those of another relevant institution, the United Nations, whose work in Afghanistan has been remarkable.

To conclude, a widely-encompassing transitional justice approach is the only way out of instability for Afghanistan. The country needs an innovated path to follow which goes beyond the basic premises of traditional transitional justice mechanisms. The international community, along with the International Criminal Court and the United Nations must have a leading role to play in the transition of the country. For this reason, one must now delve into the set of recommendations on how to make Transitional Justice a fit candidate for solving the concerning situation in Afghanistan. Looking into future prospects, the following section will assess in which ways the ICC and the UN can be included in such an approach so as to allow the maximum harvest of benefits for Afghanistan and to contribute to an evolvement of the currently degrading situation into a sustainably stable one.

5.4.3. The role of the ICC and the UN in Afghanistan: how to get to a successful transition

- The International Criminal Court

As indicated above, Afghanistan is, once again, on the brink of collapse, "be it civil war or geographical disintegration" (Malikzada, 2022). However, there is still hope, and it relies on transitional justice efforts. It has been made clear by now that such mechanisms were not successfully executed in Afghanistan by reason of a variety of policy and implementation failures which have hampered progress in reconstruction and security in the country (Gossman, 2009: 32). Moreover, there are also certain sources of instability which were left unaddressed which have caused the perpetuation of violence in the country, and one of such sources is the lack of accountability for past crimes and human rights violations (AJO, 2013: 1). Tackling this problem and combating impunity to prevent future abuses is the first step the country must go through to successfully transition to a democratic regime based on the respect for human rights and the rule of law. Consequently, Afghanistan cannot achieve sustainable peace without addressing past and current human rights violations. Considering the present state of affairs and the absent justice sector in the country due to Taliban rule, this study argues the main feasible option through which Afghans can secure accountability is the international criminal justice system, specifically through the ICC.

Hence, it is argued that the ICC has a key role to play to make progress with prosecutions. Thus far, it has not formally charged anyone on the crimes committed in the country (AJO, 2013; ICC, 2020), and it can only do so with crimes committed after May 2003. Indeed, as presented in a previous section of this work, the ICC has been staggeringly ineffective and dysfunctional in Afghanistan. Although certain perpetrators have been charged abroad – namely, in the Netherlands and in the United Kingdom - for the crimes committed Afghanistan, international and far-reaching prosecutions are a necessary stage to avoid selectivity and partiality in the process of seeking accountability. Where the ICC does not have jurisdiction, foreign courts ought to fill in the gap. A Special Court could even be created, if not in Afghanistan, then abroad, to prosecute past perpetrators (Human Rights Watch, 2005: 127). In its 2005 report, Human Rights Watch suggested the creation of a tribunal constituted of Afghan and international judges and with an international prosecutor (Human Rights Watch, 2005: 127).

As important as trying perpetrators may be, it is argued that the role of the ICC in Afghanistan can be extended well beyond this task. In fact, and as put forward by Nwoye (2017), focusing solely on prosecutions as the main mode of transitional justice renders the process incomplete and ignores the complexities inherent to mid-conflict situations (Nwoye, 2017: 582). In this way, and as further advanced by Sarkin (2011), the ICC has a role to play other than the prosecutorial one within the transitional justice panorama: a role in restorative and informative justice (Sarkin, 2011: 131).

Accordingly, regardless of the challenges it faces and the lack of proper action so far, the ICC can still prove its worth with the conflict in Afghanistan (Hilland and Gildeffer, 2021). First of all, the Rome Statute anticipates, in Article 27, that immunities and other privileges which may be eventually enjoyed by officials and other perpetrators are not to impede investigation (Hilland and Gildeffer, 2021). This is of relevance, especially because some of these officials and related persons are actually protected nationally by amnesty laws guaranteed by the Taliban. Although the ICC Statute does not contain a provision specifically on this, it is rather clear that it is not bound by domestic laws. This reinforces its role and distinguishes the Court from other mechanisms of justice (Hilland and Gildeffer, 2021). Secondly, the amount of attention given to the conflict in Afghanistan after the Taliban takeover can be a revelation for the world and an opportunity for the ICC to play a leading role in fulfilling its mission in the country (Hilland and Gildeffer, 2021). Thirdly, the Court can make use of the fact that the conflict in Afghanistan is so encompassing and has such a wide array of perpetrators, by firmly making decisions and swiftly proceeding with investigations and ultimately sending the message that, despite some founded criticism, it is not to be dissuaded by political pressure from any of the parties to the conflict (Hilland and Gildeffer, 2021).

Resuming the investigations is showing the world, the victims and the Taliban that the ICC and the international community are not complacent with the situation in Afghanistan. Despite security matters, the ICC should try to secure physical presence in the country to collect data. Evidence can still come from open sources, especially given the fact that more and more documentation is being issued on this topic (Hazim, 2022a). UNAMA, for instance, continues to do an extensive job in collecting evidence, as well as other international and non-international human rights advocates and organizations. There are also many victims who have now presented themselves as available to speak out and give testimony. Nevertheless, direct evidence would prove a more valuable

resource in this case (Hazim, 2022a). Another important element is the dissemination of information and updates about the Afghanistan's case in the ICC and other cases where individuals have been held accountable for the crimes committed in Afghanistan (Gossman and Kuovo, 2013: 50). In this way, by collecting evidence *in situ*, relying on other sources for indirect data, and by disseminating information on the case, the ICC would be playing an informative role while being in coordination and collaboration with different entities and individuals, including civil society groups. The role the civil sector can play in a country wishing to transition is of great relevance, as explained in a previous section of this work: information gathering, truth-seeking and support mobilization are some of the many ways in which civil society can help in Afghanistan, and coordination with the ICC to contribute to the investigations is much needed (Atashi, 2013: 1059; Carobnari and Deledda, 2008: 478-479). Additionally, the recommencement of the investigations can bring other indirect advantages. It would hopefully plant the seeds to further growth of respect for human rights and international humanitarian standards which the Taliban have been neglecting, perhaps even leading them to refrain from committing further abuses, thus giving hope to the victims (Hazim, 2022a).

More broadly, the ICC should focus on shaping efforts domestically and internationally to end the vicious cycle of impunity in Afghanistan. And this will depend, not only on its own credibility and legitimacy, but also on the international community's sensitivity and political will (Nwoye, 2017: 567). As Nwoye (2017) elucidates, "the ICC has to steer delicately between sovereignty concerns and the pursuit of international accountability goals" (Nwoye; 2017: 567). This is, obviously, no easy task, but one the Court can surely assume. Furthermore, the Court could also offer support in truth-seeking, reconciliation and reparations processes, as very important steps in any country's transition (Sarkin, 2011: 131). The idea is that the ICC should be given more responsibility in the transitional process, besides its prosecutorial function. Understanding the potentiality of the Court is recognizing that, not only what it is doing is insufficient, but also that its actions can be extended beyond its obvious functions.

- <u>UN entities and agencies</u>

Another institution whose action is primordial in Afghanistan, and one with whom the ICC could be sharing efforts, is the United Nations. Various UN entities and agencies are present in Afghanistan – among which, there is the Human Rights Council, as well as

UNHCR and UN Women, focused on refugees and women, respectively. There is also UNAMA, created specifically for the country following the Bonn negotiations, whose job in assisting the Afghans has been highly recognized. This being said, although UN's footprint in Afghanistan, since 2001, grew heavier and more present, skepticism regarding UN's commitment started to emerge around a decade ago by cause of a debate that generated among the international community (Tanin, 55: 2011). With the Taliban's takeover last year, some development cooperation programs were suspended, but the UN remained on the ground and continued to work "at surge capacity to deliver humanitarian assistance and meet the basic needs of the Afghan population" (UNSC, 2022: 13). With the Taliban now in power, and despite the continuation of UN's presence in the country, the organization's role in helping Afghanistan transition is more important than ever before, and even more if it wants to prove its worth and confront the suspicions.

First of all, the UN should keep up its good work in data collecting and reporting of abuses and human rights violations. The efforts made towards comprehensive documenting have proven useful, so UN's various entities should keep striving for that, since one has seen how important this is in many ways for implementing a successful transitional justice approach – in particular, for truth-seeking efforts, for instance. Along these lines, mandating truth-commissions, when appropriate, to investigate violations of rights, could also be advantageous (United Nations, 2010: 10).). It could even contribute to an approach to justice that is gender-sensitive, because understanding the perspectives and experience of both men and women separately is crucial in order to avoid discrimination (Davis, 2010: 9). Such an approach would also bring light to the fact that men and women have different priorities and usually highlight political and economic and social rights in a different manner, so the UN should keep that in mind (Davis, 2010: 9). Moreover, having a more direct contact with the ICC, the UN could even help in the investigations for the prosecution of crimes under international law (United Nations, 2010: 10). In this regard, Hilland and Gilfedder (2021) suggested that the UN Human Rights Council should launch "a robust investigative mechanism" to document and preserve evidence of abuses, which could consequently enable further prosecution by the ICC (Hilland and Gilfedder, 2021). Furthermore, the UN should also promote good coordination with local and international actors in the country, including the ICC, because, as positive as the presence of multiple actors *in situ* is, it can also be detrimental and a hindrance when organization is absent. Good coordination, transparency and communication are essential,

not only for the delivery of aid, but also for the allocation of different types of reparations, in which the UN could intervene, as well. As regards reparations for victims, an important measure would be including symbolic measures of reparations, such as commemorations and memorials, and granting access to healthcare or education are all forms of reparations which the UN could help provide to Afghans (ICTJ-b; Tanin, 2011: 65).

Another key area in which the UN could be involved is in promoting cooperation between its Member-states, especially Afghanistan's neighboring countries: Pakistan, India and Iran. Promoting a regional meeting to generate the consensus around which peace will be built with these countries as sponsors is an opportunity for the UN to show the international community that it can do its job and be valuable for the situation in Afghanistan (Carbonari and Deledda, 2008: 476; Pilster, 2020: 137). It would also contribute to the maintenance of a stable environment for Afghanistan and would help to create the conditions for a productive transition (Carbonari and Deledda: 2008: 476). A collaborative efforts by Pakistan is particularly necessary, because the country is used by extremist groups for many illicit activities and attacks which consequently have repercussions in Afghanistan. Also, one should remember that a part of Taliban's roots are from Pakistan. In fact, a big number of Taliban supporters are still Pakistani, and it seems that the government itself supports Taliban's actions in Afghanistan, despite having denied it, since they have accredited Taliban diplomats in Pakistan (Saine and Rahmani, 2022).

At the national level, there are several ways in which the UN can offer its assistance and support. A necessary first step would be facilitating a dialogue and, ultimately, enabling an agreement with the Taliban, as a way to achieve sustainable peace. As presented in the 2022 Report of the Secretary-General in the 76th Session of the UN General Assembly, a negotiation between the *de facto* Afghan authorities, Afghan stakeholders and the international community is essential to address the many issues related to governance and human rights (UNSC, 2022: 12). As recognized by Pilster (2020), the international community is excellent at using diplomacy to defeat security problems, so mediation should make international and domestic hopes converge into a desirable and strategic agreement for all (Pilster, 2020: 134-135). However, he continues, "getting to peace through power-sharing is a long and fragile process. Negotiations to reach a peace agreement may take years and there is no guarantee for success" (Pilster, 2010: 134-135). At the same time, such dialogue with the Taliban must be carried out under appropriate

conditions, where there are motivations for the Taliban to consider compromise, as it is very unlikely that they will freely give up on their agendas (D'Souza, 2009: 257). Still, a UN-led agreement with the Taliban might be the only likely solution and an important first step towards a successful transition for the country. This could include the provision of certain incentives or immunities by the UN which, as long as they contribute to the ultimate desired goal and are not impediments to it, should not be seen as dealbreakers. If an agreement with the Taliban is necessary to establish the foundations around which transitional justice will be built, then concessions will have to come from both parts, but amnesties for war crimes, crimes against humanity, and other serious violations of human rights, should be avoided at all costs. Counting with the support from a potentially reborn AIHRC – which the Taliban shut down when they regained power – would be considered an ideal path. The important matter is assessing what one can abdicate from while still holding one's ground. For instance, as Pilster (2020) states, there might need to be an offering of aid and immunity or diplomatic recognition in exchange for peace (Pilster, 2020: 134-135). Still, if this meant there could be an inclusion of obligations regarding human rights protection and the tackling of impunity, then not all would be lost. It would also be convenient if the UN tried to demystify certain standards and ideas, such as human rights norms, which are very poorly understood in Afghanistan. Trying to define certain human rights norms while still respecting Afghan's – or, more precisely, Taliban's sensitivities –, could be a way through which the UN could tackle the situation (D'Souza, 2009: 334).

Only then, after reaching a dialogue with the Taliban, would the conditions for further action be hopefully instituted. Only then could Afghanistan proceed to attempting to establish credible social and political institutions. Indeed, a network of institutions with enough credibility to make effective decisions and to address different matters, such as governance issues, accountability, security sector reform and reconciliation is vital for the achievement of peace and justice in Afghanistan (Rubin, 2003: 576; D'Souza, 2009: 264). Before doing so, one important step to be taken which is included in the already mentioned DDR Strategy, is disarmament. An effective process of disarmament, demobilization and reintegration is essential for the successful implementation of institutional and political reforms (International Crisis Group, 2003: i). As Gossman (2009) puts it, "disarming the country's many armed factions is widely recognized as integral to the process of nation-building in Afghanistan" (Gossman, 2009: 33). The

Taliban are unlikely to disarm, yet this should be a theme for debate during negotiations, because the process becomes a lot less complicated when there are no arms involved, and this includes former combatants, as well. Disarming and demobilizing is, therefore, essential, and reintegration also plays an important part in making sure former combatants do not fall back into old habits.

The UN should commit to coordinating these processes with other transitional justice mechanisms in a broad and integrated manner, since success in DDR is directly linked to success in other institutions – the army, the judiciary and the police. Reforming abusive institutions is crucial, particularly in the security sector (Davis, 2010: 9). Rebuilding a national army and Ministry of Defense, and vetting the national police force – now under Taliban control – and other public positions are all key steps to be considered in this process (International Crisis Group, 2003: 5-6). Justice sector reform, through the establishment of a judicial system and the implementation of the rule of law are also critical measures towards tackling the precarious situations in which the Taliban are placing the country. Various Taliban leaders and serious human rights perpetrators are taking on the Afghan justice institutions, dismissing former government's employees and judges, and replacing them with their fighters who have no legal training or education in law or Sharia (Hazim, 2022b). The process of vetting becomes, once again, crucial for the appointment of independent and trained judges and legal workers who owe no loyalty to the Taliban or warlords (Human Rights Watch, 2005: 125). Given the current legal vacuum in Afghanistan, it is of great urgence that the UN, along with the ICC and other relevant international actors, when engaging with the Taliban, make sure to establish these measures as top priorities in their transitional justice agendas in order to proceed with successful reforms (Hazim, 2022b). These should be simple and adapted to the country's context, while also implemented with transparency (Gossman and Kuovo, 2013: 48). Effective and legitimate judicial and security systems which respect the rule of law and human rights are necessary foundations for the promotion of peace in a war-torn society, so this is something to strive for in Afghanistan (United Nations, 2010: 3). Institutional reform is necessary because it can transform the role of these institutions in society and, more importantly, it can positively affect the relationship these institutions have with the population (Davis, 2010: 10).

Additionally, other foundations need to be laid down, especially if reintegration is to successfully occur. The UN and the ICC ought to adopt an educative role in order to

reeducate Afghans and consequently contribute to a long-lasting "constituency and culture of peace" (D'Souza, 2009: 264). This would include reeducation about international standards and human rights norms, as mentioned previously, but also an eye-opening strategy regarding other issues which have been haunting the country, such as corruption and narco-trafficking. Regarding this last issue, the events of last August have contributed to an intensification of opium cultivation and increased its prices, leading to an escalation of drug trafficking, as well (UNSC, 2022: 11). Thus, UNAMA's commitment to counter-narcotics and anti-corruption measures is to be further continued and enforced by the UN. Raising awareness on these topics, and particularly on illicit drug-trafficking, is essential for Afghans in order to understand that they do not need to be dependent on such activities to sustain a livelihood. And it should be up to the UN, through the UNOC, the UN Office on Drugs and Crime, to show Afghans that there is no need for such dependency. Furthermore, the UN could also to provide Afghans with alternative sources of income, so that they don't have to resort to illicit activities – and this applies both to Afghans in general and to reintegrated ones. A big number of Afghans have even started selling their organs in the underground economy to be able to feed their children amidst the starvation and poverty crisis, which have increased since the Taliban took power (Iacobucci, 2022). Therefore, in order for these issues to be tackled, the UN needs to be involved. UN humanitarian assistance work is vital in making basic humanitarian services accessible to Afghans, and this includes food and drinking water, through the World Food Program, for example, but also healthcare, particularly for the people in rural areas (Tanin, 2011: 65). Once again, educating the population is also extremely necessary and should be one of the main priorities. Offering scholarships to children can allow them to have quality education and improve their life prospects (Correa, 2014: 21). Uneducated youth are also more likely to join the Taliban in order to earn a livelihood, because this presents itself as a better solution than the possibility of facing poverty and unemployment (Gaan, 2015: 33-34).

Overall, the UN should continue and improve its work in the area of humanitarian assistance. It should try, however, to combine humanitarian efforts with development strategies. The focus should not be so much on relief, but more on sustainable development (Tanin, 2011: 65). The focus should be on making sure Afghans have their resources and know how to properly use them. There is no point in giving one a fishing rod if one is not taught how to fish. As there is no point either in simply providing one

with fish if one is going to become dependent on help and not learn how to sustainably develop oneself. Along these lines, the UN must also support in the transparent management and control of funding, as well as try to increase financial assistance without allowing it to reach a point where the country becomes dependent on foreign aid, as it has been in the past years (Tanin, 2011: 61; Carbonari and Deledda, 2008: 478-479). Carbonari and Deledda (2008) proposed the creation of a specific commission to act under the supervision of UN Secretary-General's Deputy Representative in Afghanistan with the aim of overseeing funding (Carbonari and Deledda, 2008: 478-479). Yet, more than the need for funding, Afghanistan is in need of assistance in the distribution of aid and transference of funds within the country (Menon, 2022). Even with sufficient funds, if these are not properly distributed across the country and they do not reach the most inaccessible and populated areas, Afghanistan cannot harvest the benefits of foreign aid and will never have the capability of developing itself.

As important as humanitarian aid and external funding is, if Afghans cannot provide for themselves, then the impact is not reaching the desired goal of sustainability necessary for a successful transition. Unfortunately, providing for themselves is hard when the economy is in a situation as dire as it is at the moment. As adverted by David Miliband, president of the International Rescue Committee, humanitarian aid and assistance will only be impactful if the Afghan economy functions properly, which is currently not the case (Menon, 2022). In addition, any flow of funding can be effectively made available for humanitarian assistance if the current banking incapacities are not addressed, as the latter would limit the former's impact (Human Rights Watch, 2022). The Taliban takeover led to international sanctions which forbade the access of the Afghan Central Bank to the international banking system. As a result, their currency devaluated and the country became immersed in inflation and unemployment (World Bank Group, 2022: iv). Hence, the problem with Afghanistan's economy, at the moment, is not a lack of supply, but a collapsed demand (World Bank). People cannot afford to buy the most basic products nor food because they are unemployed. The UN should try to use their leverage to try to revert the economic consequences of this situation and to attempt to bring the Afghan economy back to life, by perhaps contributing to the lifting of sanctions. Along with a responsible Afghan entity – be it the Taliban-led government or not –, the UN must work towards creating jobs in areas which can realistically provide a sustainable livelihood to Afghans, like in farming and agriculture, for instance, by offering poultry

and crop seeds to Afghans in need so they can earn a living. This would contribute to the mitigation of poverty and to the inclusion of women, which is also an extremely important part of the transition, as already mentioned.

Afghanistan is in need of many reforms at the social, political, economic and even human level. The country has been devastated by conflict, and now faces a panorama of broken institutions, human rights violations, extreme insecurity and poverty, and a scarred population, so assisting it is an intimidating challenge (United Nations, 2010: 3). However, there are positive prospects for Afghanistan, if a comprehensive transitional justice approach is well-employed and the errors of the past are avoided. Taking account of the root causes of distress and addressing the violations of all types of rights in a holistic yet integrated manner through transitional justice, with the ICC and the UN leading the way, is the way to go, as suggested in this chapter. Giving these two actors a central and leading role to play within the transitional justice efforts, might present a challenge, with the Taliban exercising pressure to rule, not to deal with justice and accountability. However, it might also be the only option for a stable and peaceful Afghanistan in the future. As Malikzada (2022) confessed in March, this year, "it is not too late" for Afghanistan.

6. Conclusion

After more than four decades of conflict and tensions, Afghanistan was left ravaged by regime changes, war, and oppression and is now nearly standing at the edge of no return, at the political, social and economic level. Serious humanitarian and human rights law violations have been committed in the country, leaving a wounded population aching for accountability. Amongst those who need to be held accountable are the Taliban, who are now in charge and whose actions have very much deteriorated the quality of life of the Afghan people, particularly women and children. There is, still, a high number of perpetrators who must face justice and an even bigger number of victims whose voices have to be heard in order to heal.

Despite the relatively vast amount of research on Afghanistan and its conflict, most studies did not comprehensively address the series of violations committed since the beginning of instability in the country, in the 1970s, until the present day, taking into account the events of August 2021 and the Taliban takeover. The present study attempted to do precisely that, while at the same time proposing a transitional justice strategy to put an end to impunity in Afghanistan and to find multi-leveled solutions to the many layers of instability in the country. Furthermore, this study suggested to foster the coordination and cooperation of two of the most prominent international actors – the International Criminal Court and the United Nations – in guiding such a transitional justice approach. The goal of the present work was, hence, twofold: proving that sustainable long-term peace and stability can only come to Afghanistan if the crimes committed there are dealt with and accountability is pursued; and suggesting a combined transitional justice approach in which both the ICC and the UN, being the leaders in the process, engaged more directly in Afghanistan.

Societies which, are scarred by a violent history and are marked by human rights violations and war crimes, faced with demands for justice, in need of reconciliation and sustainable peace, are the ideal receptors of transitional justice. Transitional justice, through its different mechanisms and instruments, seeks to reveal what it takes for these societies to move on from a troubled past into a brighter future and contributes to a sustainable development by working on preservation and prevention, as well. Through truth-seeking, reparations to victims, disarmament, reintegration of former offenders into society, institutional reforms, and so on, transitional justice is the fit candidate for solving the alarming situation in which Afghanistan stands. Having the United Nations and the

International Criminal Court work alongside Afghans and the international community towards the successful transition of the country is the best ultimate scenario for Afghanistan.

The International Criminal Court plays an obviously central prosecutorial role. Besides its contribution to accountability, it can also encourage long-term stability by preventing other crimes from occurring. To do so, there is a great urge for the investigations to proceed and for the Court to move more quickly in their pursuit to end impunity, while maintaining, at the same time, a certain transparency in the process so that more information is disseminated on the case. In this way, the Court would also be adopting an informative role which, combined with one in restorative justice by assisting in truth-seeking, reconciliation and reparations, would make it an indispensable leader in the process of transitional justice.

Along with the International Criminal Court, the United Nations, has an already formidable footprint in Afghanistan, and its work can potentially be extended and reinforced. Through a more coordinated engagement with, not only external actors and other organizations on the ground, but also with domestic entities and the civil sector, the UN can prove its value in assisting the country to proceed with its transition. The UN is, first and foremost, one of the main organizations, if not the sole entity, who is believed to be able to facilitate a national dialogue in Afghanistan, with all the parties and actors involved, including the Taliban, as well as promote cooperation with countries in the region. An inclusive dialogue where agendas are presented and priorities are organized, is a necessary first step in this case, and one which can only be led by an organization credible enough like the United Nations. Making sure reforms and disarmament, demobilization and reconciliation are included in an eventual agreement is crucial. Moreover, the UN should keep up its good work in documenting human rights violations and collecting related data and further contribute to uncovering the truth of those who wish to be heard. It should also reinforce its informative and educative role, through the demystification of standards and norms and through theme-specific reeducation – such as issues of corruption and narcotrafficking, for instance. In addition, it should also strengthen its humanitarian assistance activities, by providing Afghans with food, drinking water and healthcare. These measures, combined with financial assistance, which the Organization should oversee and manage, and the creation of jobs, can

contribute to a successful transition in the long-term and to a country which is, in a much better and sustainable position in terms of development.

The abovementioned suggestions are to be implemented in a coordinated, effective and transparent manner, with both entities – the International Criminal Court and the United Nations – leading the way in the transitional process, while engaging and communicating with each other and the remaining entities on the field. Only in this way can Transitional Justice thrive in Afghanistan.

A transition in Afghanistan will not come easily, especially now that the country's performance has been on a plunging trend. In an atmosphere as anarchic as the one in Afghanistan, any attempt at change will inevitably face its adversities. Challenges are found on the field and on the regional and international level. The question which now arises is whether Afghanistan, along with the international community, can overcome such hardships and commence a path towards addressing the root causes of its conflict, seeking accountability and instituting a sustainable way of living that prevents the recurrence of instability and violence.

The hope for a stable and peaceful Afghanistan still stands, and its lies within the hearts and minds of Afghans. As long as they remember, the world cannot forget.

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