

## Strengthening protection and support for victims of terrorism in criminal proceedings in Afghanistan

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**Title: Strengthening Protection and Support for Victims of Terrorism in Criminal Proceedings in Afghanistan.**

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**Abstract**

Afghanistan faces significant challenges as it seeks to emerge from 30 years of civil war and insurgent violence and promote lasting peace and security. Terrorist incidents, which have increased dramatically since 2004, continue to pose a major threat to security, destabilising governance and fracturing state initiatives to guarantee rule of law to citizens. An urgent priority for the government, as part of its development of counterterrorism policy, is to ensure that the formal criminal justice system responds effectively to the threat of terrorism by creating mechanisms and procedures that support the rights and needs of victims in accordance with international human rights standards. To date, examining victimhood in Afghanistan and accurately understanding the assistance and support that victims of terrorism receive and to which they are entitled during criminal justice processes have avoided academic scrutiny. Informed by empirical evidence and qualitative interviews with justice officials in Afghanistan, this article aims to fill this important gap in scholarship. It does so by drawing upon an international framework for good practices outlined in the Global Counterterrorism Forum's Madrid Memorandum to shed new light on gaps in existing national law. In doing so, it makes important recommendations for both institutional and legislative reform designed to strengthen protections and assistance for victims of terrorism and inform contemporary reviews of criminal procedural law being undertaken by justice ministries in Afghanistan.

## **Introduction**

Terrorism derives much of its potency as a form of political violence from its capacity for destroying property and the lives of both targeted and innocent victims. The 26,400 individuals killed and 27,211 injured from 10,900 terrorist attacks worldwide in 2017 stands as testament to the significance of victimization to terrorist causes.<sup>1</sup> While it is axiomatic to suggest that the magnitude of terrorist victimization should not be overlooked and its exploitation by terrorist organisations underestimated, it is noticeable that national, regional and international counter-terrorism legislative and policy-making responses to the terrorism typically focus less on the victims than on ‘securitization’ challenges. Similarly, greater academic attention has been paid in terrorism research to the perpetrators of terrorist attacks and security-related associations than on victims of terrorism.<sup>2</sup> An emerging body of academic work has contributed to reducing the deficit exploring a variety of inter-related thematic areas, including contested definitional constructs of terrorist victimization and their shaping by legal, cultural and political factors,<sup>3</sup> contemporary approaches to compensation<sup>4</sup> and the influential value of victims associations for mobilising political reform.<sup>5</sup> Recent analyses have also addressed the historical dimensions of terrorist victimization through the prism of the relationship between perpetrators and their victims in a variety of regions including Russia, Italy, Northern Ireland, Germany and the USA. These case studies have examined associated themes including the role victims can play in undermining the glorification of perpetrators of attacks,<sup>6</sup> the adequacy of state resources allocated to supporting those directly traumatised by terrorism<sup>7</sup> and the significance to reconciliation of mediation and opportunities for dialogue outside of the criminal justice

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process.<sup>8</sup> While these important contributions are evidence of developing academic interest in victims of terrorism their peripheral positioning of in terrorism research nevertheless continues to remain a reality.

This side-lining of victims in counter terrorism policy-making and terrorism research is perhaps symptomatic of the slow progress of international recognition of the rights of victims of terrorism. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (‘the UN Declaration 1985’) established rights for victims of crime and contained principles relevant to victims of terrorism on their codification in national law.<sup>9</sup> The adoption by the General Assembly of the Global Counter Terrorism Strategy, which emphasised the much needed promotion and protection of the rights of victims of terrorism, came more than 20 years later in 2006, following devastating terrorist attacks in a number of cities across the world, including New York, Bali, Madrid and London.<sup>10</sup> More recent calls by the United Nations (UN) Special Rapporteur, however, for an international instrument addressing the rights of terrorist victims and guaranteeing rights to compensation and rehabilitation have yet to be realised.<sup>11</sup> The same can be said of calls for the establishment of a UN Voluntary Fund to provide compensation to victims of terrorism subsidised by assets seized from terrorist organisations and their sponsors.<sup>12</sup>

There has, however, been a developing awareness amongst the international community of the privations of victims of terrorism and also the important contribution they can make to countering terrorism. The Global Counter-Terrorism Strategy called on Member States, to

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consolidate their national systems of assistance so that they are able to respond to the needs of victims of terrorism and their families, facilitate the normalisation of their lives and promote and protect their rights.<sup>13</sup> A Symposium on Supporting Victims of Terrorism, convened by the UN in 2008, urged states to support victims and protect their human rights in order to demonstrate their commitment to combatting terrorism and prevent radicalisation.<sup>14</sup> More recently, international institutions, including the UN, have intensified their interest in revitalising the role of victims of terrorism in the criminal justice processes of Member States. The UN published *The Criminal Justice Response to Support Victims of Acts of Terrorism* (2012)<sup>15</sup> and the *Good Practices in Supporting Victims of Terrorism Within the Criminal Justice Framework* (2015)<sup>16</sup> as technical assistance tools for use by practitioners and policymakers concerned with developing national criminal justice support mechanisms for victims of terrorism. Alongside these guides, the Global Counterterrorism Forum developed two further instruments containing recommended good practices and measures designed to support victims of terrorism in criminal justice procedures based on international standards enshrined in relevant UN treaties and the Global Counter Terrorism Strategy. These emerged as the *Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector*, published in 2012<sup>17</sup>, and the *Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately After the Attack and in Criminal Proceedings*, developed two years later in 2014.<sup>18</sup>

These initiatives demonstrate an emerging acknowledgement amongst the international community of the significance to countering terrorism of engaging, supporting and assisting

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victims in the criminal justice process against the perpetrators of terrorist acts. According to the UN ‘victims of acts of terrorism are victims of an offence that targets...and attacks the highest interests of a State. It is absolutely essential to identify the rights and needs of victims of acts of terrorism, to support them and to provide reparation for the damage they have suffered and, in doing so, to grant them a central role in the criminal proceedings.’<sup>19</sup> This victim-centred guidance recognises the importance to victims of their receiving support and assistance during the trial process which, it acknowledges, can be a transformative process in which they are able to assume active rather than passive roles to help them come to terms with the tragedy of the attack which has affected their lives. It also alludes to the instrumentalization of victims by states as deterrents of terrorism.<sup>20</sup> The participation of victims in the criminal justice process and allows them to publicly reference the devastating consequences of terrorism on their lives and expose the illegitimacy of terrorism as a form of political violence. Moreover, it demonstrates that victims of terrorism are protected by the state; that the state can meet their needs; that the state criminal justice system continues to function intact and remains the most appropriate means of determining justice.

The Madrid Memorandum was developed under the auspices of the Global Counter-terrorism Forum as a response to calls by the Cairo Declaration on Counterterrorism and the Rule of Law for its 30 member states and regional and international partner organisations to ‘develop good practices for an effective and rule-of-law based criminal justice sector response to terrorism.’<sup>21</sup> Its good practices are intended as a reference point and source of guidance for states worldwide. However, very little scholarly attention has been paid to date on their integration in criminal justice systems in jurisdictions outside Europe. Schwartz’s ‘stocktaking’ study in 2015 on the

progress of 24 non-European countries of implementing international good criminal justice practice recommendations to counter terrorism refers only twice to victims.<sup>22</sup> A report by the United Nations Office on Drugs and Crime (UNODC) in 2015 offered something more in this respect and provided brief insights into a number of practices supporting victims of terrorism within the criminal justice frameworks of a small number states outside the European Union (EU).<sup>23</sup> Neither of these reports, however, made any reference to Afghanistan, the second country in the world most impacted by terrorism.<sup>24</sup> The government of the Republic of Afghanistan's (GIRoA) ongoing conflict against the Taliban, the ISIL-KP and other anti-government entities has resulted in more than 8,000 civilian casualties every year since 2014.<sup>25</sup> Between 2016 and 2017 1,342 terrorist attacks resulted in 9,631 citizens killed or injured.<sup>26</sup> More recently, there have been 6,253 civilian casualties (2,029 killed and 4,224 injured) as a result of terrorist attacks perpetrated by the Taliban and ISIL in between January and December 2018.<sup>27</sup> In addition to the survivors, secondary victims, namely the family and dependents of these casualties, also suffer psychological, social and economic consequences as a result of these attacks.

While a developing body of scholarly work has examined the reform of the justice sector and programmes to develop rule of law in Afghanistan, particularly since international intervention in 2001, very little academic attention has been focussed on victimhood.<sup>28</sup> Saeed's 2016 study on victims marked a useful contribution to the field, noting the socio-economic and political contributors framing of victimhood in Afghanistan as well as the significance of empowering

victims to participate in transitional justice processes.<sup>29</sup> However, it was not located specifically within the national criminal justice process. Perhaps more relevant, the Afghanistan Independent Human Rights Commission's (AIHRC) Call for Justice report 2005, which involved interviews of more than 4,000 victims of human rights violations, noted a 'rich understanding of justice'<sup>30</sup> in relation to criminal offences, a desire for the development of measures and institutions which recognise the needs and desires of victims<sup>31</sup> and the need for more to be done to 'restore the dignity' of victims within the criminal justice process. However, it failed to articulate how any of this could be achieved. A more recent report by AIHRC published in 2018 found that the majority of more than 3000 victims interviewed, including victims of terrorism, wanted perpetrators to be prosecuted, to receive compensation and legal rules and institutions to be established to protect and support them.<sup>32</sup> The report's findings suggested that more could be done by the GOIRA to protect and support VOT within criminal proceedings. Much the same as the 2005 report, however, it did not offer solutions; nor did it advise on current criminal justice mechanisms providing assistance to victims of terrorism.

Accurately identifying gaps in existing provisions for support for victims of terrorism in the criminal justice process could not be more important. The necessity for states to support victims and recognise the role that they can play in countering terrorism has now become a priority concern for the UN and has been highlighted both in the Global Counter-Terrorism Strategy and in later General Assembly resolutions.<sup>33</sup> Empirically informed by semi-structured interviews with experts from the AIHRC and officials from Afghanistan's justice departments between 2014 and 2019 this paper aims to fill an important gap in scholarship by shedding new light on criminal justice approaches to victims of terrorism in Afghanistan.<sup>34</sup> It seeks to do this

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by critically reviewing the current criminal law legislative framework in Afghanistan relating to victims of terrorism in the light of international good practices. To achieve this aim it adopts a research framework which draws upon the Madrid Memorandum, grouping its nine good practices for assistance to victims of terrorism during the criminal justice process into three thematic areas of analysis, namely welfare needs; legal advice and representation; and the delivery of compensation, reparation and rehabilitation programmes.

This methodological approach has been designed to accord with Stromseth's synergistic model of rule of law reform.<sup>35</sup> This warns against foreign-led rule of law reform projects reliant on legal transplantation, a notable theme of legal development in Afghanistan, particularly since 2004, and instead advocates adaptation that builds on existing processes, laws and institutions and cultural commitments and emphasises the importance to legitimacy of local participation and expertise.<sup>36</sup> Consequently, this review entails both an extensive review of existing national legislation and policy and consultation with leading justice officials in Afghanistan. In the process, this paper provides the first empirically informed analysis of criminal justice support for victims of terrorism in Afghanistan and develops new and important recommendations for legislative and institutional reform for consideration at the national level. The findings have significant implications for strengthening protections and assistance for victims and contributing to countering terrorism in the country and also inform gap-analysis assessments of victim protection and support in criminal justice systems in other jurisdictions.

Part one considers the existing legislative framework that provides support and assistance to victims of terrorism in Afghanistan. Viewed through the prism of the thematic areas of analysis drawn from the Madrid Memorandum, part two reviews existing national legislation and details important findings and recommendations before concluding.

## Part 1

### Existing legislative frameworks

Afghanistan does not currently have one unified piece of legislation or code that ensures protection and support for victims of acts of terrorism during and after criminal proceedings. Instead, it has a number of substantive and procedural laws that provide a collection of rights, regulations and compensation measures which are directly or indirectly applicable. This is symptomatic of the fragmented nature of the criminal justice system in Afghanistan, typified by often competing state, customary and Islamic (*Shari'a*) legal traditions. It is also a legacy that years of conflict have had on the state justice sector, particularly since the Soviet invasion in 1979. The International Crisis Group noted its destruction following 23 years of misrule and conflict in 2003.<sup>37</sup> Judicial buildings had been damaged, judicial and legislative administration was deficient and correctional facilities were poor or absent in rural areas.<sup>38</sup> The following year the United States Institute of Peace assessed the state justice system as consisting of a 'patchwork of overlapping laws [and] elements of different types of legal systems, and an incoherent collection of law enforcement...structures.'<sup>39</sup>

There was initial confusion over the exact nature of applicable criminal law following international intervention in 2001. The years of civil war and the dependence by the Taliban during their period of rule exclusively on *Shari'a* without recourse to legislative instruments had left legislative record-keeping in disarray. No complete record of the country's criminal laws existed. The Taliban had burned legal texts at the Kabul Law Faculty and destroyed legislative documents at the Ministry of Justice. By 2004 it was established that an assortment

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of over 2,400 separate legal texts in Dari, Pashto and English had been passed between 1921 and 2001 formed the basis of Afghanistan's legal system.<sup>40</sup> Of these, only the Criminal Procedure Law 1965, the Penal Code 1976 and the Law on Crimes Against Internal and External Security 1987 offered some protections and support for victims of terrorism, though they evidenced minimal compliance with some of the key principles outlined in the UN Declaration, the central international reference point for guidance on promoting victim-centred criminal justice processes amongst Member States.

The Criminal Procedure Law 1965 enabled important victim participation in criminal proceedings, as well as opportunities for dispute resolution and conciliation. Nevertheless it, and its subsequent revisions, provided no statutory requirement for the provision of services and assistance to victims during criminal proceedings, which was a vital prerogative of the UN Declaration, nor for assisting them by confirming their role within the proceedings and informing them of the timing and progress of proceedings.<sup>41</sup>

The Penal Code 1976 confirmed that offenders should be responsible for paying compensation to victims of criminal offences. However, it omitted any reference to additional requirements of placing any responsibility on the State to offer restitution in circumstances where offenders could not make payment. Moreover, the Law on Crimes Committed Against Internal and External Security (1987) prescribed punishment tariffs for offences such as treason, espionage, sabotage and anti-state publicity, but did not articulate any rights specifically designed to support the victims of these offences.

Continued international engagement and development assistance in Afghanistan coincided with an extensive programme of criminal law reform, particularly between 2004 and 2010, largely sponsored by international donors, shaped by international actors and undertaken with a heavy reliance on legal transplantation.<sup>42</sup> This yielded a new Interim Criminal Procedure Code (2004)<sup>43</sup>, a Law on Counter Terrorism (2008),<sup>44</sup> a Law Combatting the Financing of Terrorism (2008)<sup>45</sup> and legislation providing compensation to victims suffering disabilities and ‘survivors of martyrs’<sup>46</sup> passed in 2010, all of which are relevant to the formal justice system’s provision of assistance to and protection of victims of terrorism in criminal proceedings. Later, in 2014, a new and more comprehensive Criminal Procedure Code replaced the 2004 interim Code, and a new Penal Code (2017) annulled the 1967 Code, the Law on Crimes Against Internal and External Security and sections of the Law on Counter Terrorism. A close inspection of these laws reveals that, reflecting principles of non-discrimination and solidarity, Afghanistan makes no distinction between victims of crime and victims of terrorism. Terrorist offences are therefore investigated and prosecuted as criminal offences and crime-victim protection, assistance and compensation mechanisms extend to victims of terrorism. Together with the Constitution, ratified in 2004, it is this body of legislation that provides the collection of rights, regulations and compensation measures directly or indirectly applicable to victims of terrorism in Afghanistan and which are examined through the prism of the good practices outlined in the Madrid Memorandum.

## **Part 2**

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## **Afghanistan's legislative framework and Madrid Memorandum Good Practices**

In broad terms the Madrid Memorandum guidelines relating specifically to criminal justice can be categorized into three separate areas of concern, namely: (1) ensuring a focus on the needs and welfare of victims during the investigation and prosecution stages; (2) providing legal advice and representation, as well as enabling participation during the prosecution of a terrorist case; and (3) delivering compensation, reparation and rehabilitation programmes to victims of terrorism. Afghanistan's legislative framework is assessed in the light of each of these strands in the three sub-sections below.

### **2.1 Welfare Needs of Victims of Terrorism during investigation and prosecution stages**

A number of the Madrid Memorandum guidelines are concerned with the welfare needs of victims of terrorism. These can be sub-divided into three distinct themes. These advocate that States should implement practices that: (1) ensure the protection and physical security of victims of terrorism; (2) enable criminal justice actors and institutions as well as professional services to provide coordinated and continued assistance to victims, including information about the criminal justice process and the progress of the investigation and prosecution; and (3) require judges and actors involved in the criminal process to receive sensitivity training on the needs of victims.

With regard to the first of these issues, Afghanistan's Criminal Procedure Code (CPC) provides that the police, prosecutor's office and the court should 'ensure the safety of victims' (article 6(2)). While 'safety' is not defined, it is clearly synonymous with protection and physical security. However, the only safety guaranteed by the law to victims is in the form of witness protection measures. These are specifically the responsibility of the court and the prosecutor's

office, and protection is to be provided by the security forces. These measures can be implemented during the investigative and trial stages at the discretion of the prosecutor's office or the court, or following successful application to the court by witnesses, and include: concealing the name, residential address, work place, occupation or any other document which could lead to the identity of the witness; forbidding a defense attorney from disclosing the identity of the witness or any information that could lead to their identity; and avoiding the disclosure of any record or document which could lead to the identity of the witness (article 53).

Other than these measures, the CPC is silent on how the safety of victims is to be ensured, and when and by what means the collective responsibility of guaranteeing their safety is to be conducted by the police, prosecution or the court. Moreover, the measures pertaining to protection only apply to witnesses to criminal acts assisting with investigations and/or giving evidence at trial or any relative of a witness whose security is at risk (article 54). It is unclear how the safety and security of other individuals who might be considered victims of terrorism, but who are not giving evidence at court, are protected by the law.

This is pertinent when considering the protection and safety of criminal justice officials, such as police, prosecutors and judges in Afghanistan. In the turbulent conflict that is being waged since the removal of the Taliban from power in 2001, the lives and safety of these officials and their families are exposed to considerable risk. An interviewed Supreme Court Judge, who presided over 510 terrorist cases in Afghanistan in one year alone, confirmed that he had received many threats to his life. He considered it too dangerous for his children to go to school,

as their lives had also been threatened, and the Taliban had issued a notice offering US \$1,000 to anyone who killed a Judge. He regarded himself and his colleagues as victims of terrorism.<sup>47</sup>

In 2015 2,259 policemen were killed in 543 separate terrorist attacks in Afghanistan.<sup>48</sup> Furthermore, in the first six months of 2016, 23 terrorist incidents targeting judicial staff, prosecutors and judges resulted in 36 killed and 68 injured.<sup>49</sup> These chilling statistics raise important questions about whether there are sufficient legal tools to ensure the protection and physical security of justice officials during criminal proceedings. If the CPC only ensures the safety of victims who are to be witnesses, then arguably this is not the case.

Mindful of international guidance on this issue, it is worth noting that in his report in 2012 the Special Rapporteur specifically acknowledged the potential threat to safety and life of victims who contribute to criminal investigations and give evidence at trial.<sup>50</sup> The 1985 UN Declaration, and the 2008 Symposium had made similar submissions. Crucially, the Special Rapporteur confirmed that criminal justice officials can be categorised as victims of terrorism and insisted that safeguarding measures should be provided by the State as a matter of course as part of its positive duty to take appropriate steps to protect its citizens under article 6 of the International Covenant on Civil and Political Rights (ICCPR). A comparable recommendation in the Rabat Memorandum advocated protection measures not only for direct victims of terrorism, but also for all ‘criminal justice actors’ during the investigative and trial stages of criminal proceedings.

Given that the CPC only guarantees safety to those victims who choose to act as witnesses, there appears to be no clear legislative safeguards that ensure the protection and security of other victims of terrorism, such as victims who do not act as witnesses and criminal justice officials. This lack of clarity stems from uncertainties about who can or cannot be regarded as a victim of terrorism. While recognising the lack of consensus amongst the international and, indeed, the academic community, on the definition of the politically charged terms of ‘terrorism’ and, consequently, ‘victims of terrorism,’ it would be injudicious to ignore the recommendation of the UN that Member States should ensure that ‘individuals who are entitled to hold the status of and receive support as victims of terrorism must be readily identifiable for the purposes of domestic legislation, policies and procedures.’<sup>51</sup>

This is currently not the case in Afghanistan. As there is no formal definition of a victim of terrorism in existing legislation it is necessary for legal practitioners to navigate a number of Codes and their definitions of terms such as ‘terrorist offences,’ ‘victims,’ ‘survivors and ‘martyrs and missing persons’ to determine whether an individual would be considered a victim of terrorism. These reveal a number of definitional ambiguities resulting from conflicting provisions contained in a developing corpus of criminal legislation in Afghanistan.

Reflecting this, the 1987 Law on Crimes Against Internal and External Security limited terrorist offences to the assassination of State representatives, political, social, tribal and religious leaders. At the time that the law was passed, when the government was sympathetic to Soviet Union engagement in the country, the mujahedeen was targeting these public officials. However, the resulting implication was that only this group of individuals could be considered victims of terrorist offences.<sup>52</sup> The later Law on Counter Terrorism, passed in 2008, provided



a broader definition of terrorism, which included criminal offences committed to ‘affect the political affairs of the Government of Afghanistan, a foreign government, national or international organizations or to destabilize the Government system of Afghanistan or of a foreign government.’<sup>53</sup> The 1987 law, however, was not annulled so that, confusingly, both narrow and broad definitions remained in force. It was not until 2017, when the Penal Code annulled the Law on Crimes Against Internal and External Security that this issue was resolved. However, the Penal Code unnecessarily repeats the definition of a terrorist offence in the Law on Counter Terrorism<sup>54</sup> so that both laws currently remain as authorities for this key issue.

Further uncertainty is revealed from an examination of how victims are defined in existing legislation. The definition contained in the CPC includes those who have ‘suffered bodily, physically or intellectually due to the committed crime.’<sup>55</sup> ‘Intellectually’ is not defined in the law, but has been interpreted as referring to reputation and intellectual property, rather than emotional or mental harm.<sup>56</sup> The definition in the 2017 Penal Code is similar but includes those who have suffered ‘ethically,’<sup>57</sup> which, according to an interviewed expert, was added to account for individuals who have been bribed, intimidated, blackmailed or suffered sexual harassment.<sup>58</sup> The narrower definition in the CPC was not annulled by the Penal Code, nor has it been by any other statutory instrument. The unsatisfactory result is there are currently two different definitions of a ‘victim’ on the statute books, neither of which clearly include those who suffer mental injury of emotional harm, or indeed any economic loss as a result of any criminal offences. For the latter issue, it is necessary, instead, to refer to two further pieces of legislation, namely the Law on Rights and Privileges of Disabled Persons and the Law on

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Rights and Privileges of Survivors of Martyrs and Missing Persons, which provide financial entitlements for those disabled as a result of a terrorist act<sup>59</sup> and the survivors of those killed by an attack.<sup>60</sup> The outcome of this analysis, supported by interviews with experts from Afghanistan's justice ministries, is that victims of terrorism are not 'readily identifiable' from existing legislation.

As a result of these conundrums, and to avoid confusion over who is or not potentially entitled to protection assistance and support from the state, consideration should be given at national level to discussing a number of options, namely: (1) clarifying the definition of a victim of a criminal offence and developing a definition for 'victim of terrorism' that draws from this, approaches in other jurisdictions and international recommendations, particularly those elucidated by the Special Rapporteur. In accordance with guidance from precedents such as those elucidated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the EU Victims Directive, these should include individuals who have suffered mental and emotional harm as well as economic loss. In developing this definition it should serve the purpose of clarifying the states responsibility to protect all victims of terrorism whose personal security is at risk due to threats and intimidation during criminal investigations and trials, not just those who are acting as witnesses during proceedings; and (2) amending the CPC so that it clearly articulates how, when and by what means the safety of victims, including criminal justice actors, will be ensured during criminal proceedings as well as which institution among the Ministry of Defence, the Ministry of Interior Affairs and the National Security Directorate will assume responsibility at which stages of the investigation and trial.

A second area of concern outlined in the Madrid Memorandum that relates to the welfare needs of victims of terrorism during criminal proceedings focuses on assistance needs during the investigation and trial stages. It recommends that there should be agreed procedures enabling continued communication between individuals and government institutions assisting victims of terrorism during judicial proceedings.<sup>61</sup> In addition, victims should be provided with information about the criminal justice process and the progress of investigations and prosecutions.<sup>62</sup>

The CPC provides that the police, prosecutor's office and court each shall, within their area of jurisdiction, take and enforce 'required measures' to ensure that victims have access to legal, physical, medical, psychological and social services. However, the measures that are to be undertaken, how and when they are to be conducted, completed and handed over are not articulated in the Code or in other legislation. The Code also fails to be prescriptive about the means and timing of communication and collaboration among the authorities tasked with providing access to services to victims of terrorism during proceedings or how they might coordinate the provision of these services. This is problematic, as a failure to understand each institution's role in victim assistance can translate into confusing and erroneous information and advice being provided to victims, resulting in damaging secondary victimization.<sup>63</sup>

There is a similar lack of prescription in the Code with regards to providing information about the criminal justice process and the progress of the investigation and prosecution. The Madrid Memorandum recommends that victims should be provided with 'timely, accurate and

complete information about rulings, verdicts [and] appeals.’<sup>64</sup> Although Afghan legislation contains some relevant elements in this regard, it falls short of international standards.

The CPC states that the police, prosecutor’s office and court each should take measures to ensure that the victim has access to their rights (article 6(2)). Appropriately, these include ‘access to information concerning the proceedings and prosecution results of the case in different stages of the legal prosecution’ (article 6(1)(5)). It also supplies relevant guidance on the provision of case information to victims. Accordingly, prosecutors are required to notify victims at the end of investigations if it is determined that there is no need to continue with investigations (article 163(1)). If an order is issued for the release of the accused, the victim and their legal representatives must be notified with reasons provided. The victim can file an appeal within 14 days (article 203(2)). In addition, it is the responsibility of the prosecutor to notify the victim about the filing of a case at court following investigation, with details of case number and the date of any hearing (article 175(3)).

There is, however, a lack of clear direction in the Code about providing information on case progress to victims during the criminal proceedings. It omits any reference to a time-limit within which information should be given, for confirmation between agencies that any particular information has been passed on to the victim, or of what it might have consisted. How and when information is to be provided to victims, who should provide it and its content are consequently left to the discretion of the relevant authorities. The result is an ad-hoc and piecemeal approach that falls short of the recommendations of the Madrid Memorandum.

Interviews with legal experts in Afghanistan reveal that in 2014, high-level Afghan justice officials agreed that law enforcement personnel, the courts, prosecutors, police investigators and agency officials should work to define each institutions function in connection with victim assistance.<sup>65</sup> This was reviewed two years later, in 2016. Officials interviewed then acknowledged that there continued to be a lack of co-ordinated communication between the police, the Attorney General’s Office and the courts regarding criminal investigations and proceedings and the information provided to victims. At the same time, it was accepted that there was a need to formalise and strengthen existing mechanisms for interagency collaboration, as well as training to improve understanding of interagency roles and coordination. At this stage, however, there was resistance to codifying the support functions of the relevant government institutions relative to victims of terrorism.

It is doubtful that training alone will narrow the gap between international good practices and the current provision of services and communication between government institutions supporting victims of terrorism. It is therefore recommended that efforts are made to clearly establish, through legislative prescription, the function and role of each institution in relation to victim assistance and the timing and manner in which they will communicate to each other and the victim, as well as co-ordinate the victims’ access to the services to which they are entitled during criminal investigations and proceedings. This should include stipulating specific time limits in legislation confirming when victims should be provided with information about rulings, verdicts, appeals and when hearings are adjourned or proceedings dismissed.

On issues concerning victim welfare, the Madrid Memorandum points out that it would be considered good practice for ‘victim professionals’ to accompany victim witnesses to court

when they are due to give evidence, in order to provide support and reduce the potential for secondary victimization.<sup>66</sup> In addition, UNODC recommends that inter-agency communication should be augmented by victim support specialists who can act as focal points for information and coordinating responses between agencies, whose role would include reviewing established practices and making recommendations for reform. It also urges states to develop victims associations and to establish victim support specialists within criminal justice agencies, in particular within the prosecutor's office, from where they would be well placed to assist and support victims of terrorism through the criminal justice process.<sup>67</sup>

In many jurisdictions a designated government-funded institution is responsible for co-ordinating information assistance to victims about criminal proceedings. Indonesia, Spain and the United Kingdom, for example, have designated agencies that provide support, information and assistance to victims of terrorism.<sup>68</sup> Afghanistan lacks any similar support agency. Interviews with legal experts confirm that it was agreed amongst high-level Afghan justice officials in 2016 that there should be national interagency discussions about the best means of co-ordinating the nature and timing of information given to victims during the criminal justice process.<sup>69</sup> These discussions are still on-going without having resolving this issue. It is understood that they have included exploring the potential for establishing a body that can provide professional services to victims, co-ordinate the assistance they receive from the police, prosecutors and the court, and assist them during criminal trials.<sup>70</sup> There is, however, by uncertainty over whether the GoIRA would be able to finance the development and staffing of such a body without considerable international assistance and financial support. This is

unlikely to be forthcoming at a time of international caution towards funding rule of law projects, following years of corruption and fraud perpetrated by high-ranking national officials which have undermined sustainable capacity-building of Afghan justice institutions.<sup>71</sup>

Another of the Madrid Memorandum recommendations concerned with the welfare of victims of terrorism advises that judges should receive sensitivity training to assist in preventing possible secondary and repeat victimization within the criminal justice process.<sup>72</sup> UN guidelines recommend that states should ‘ensure that investigators, prosecutors and any other professionals dealing with victims receive specific victim-sensitive training on the needs of victims, strategies for appropriately dealing with them and the need to prevent secondary victimization.’<sup>73</sup>

Judges in Afghanistan do not receive any training of this nature. A number of high-level Afghan justice officials recommended in 2014 that a notice should be added to the guidelines supplementing the CPC requiring judges and other legal actors to be sensitive to protecting against secondary and repeat victimization of victims when implementing the provisions of the Code.<sup>74</sup> In addition, it was recommended exploring at national level the potential for establishing mechanisms able to provide sensitivity training for all legal actors involved in criminal justice process as provided for in the Code. These recommendations were discussed again in December 2016 but have still to be implemented.<sup>75</sup> Interviews confirm that it was proposed in 2016, in the light of the Madrid Memorandum good practices, that at the procedural level consideration should be given to developing and adopting a curricula that would provide

specialised training to members of the criminal justice system, law enforcement officials and other parties involved with victims of terrorism.<sup>76</sup> Furthermore, it was observed that at the legislative level a formal provision should be included in the CPC requiring judges and other legal actors to be sensitive to protecting against and avoid secondary or repeat victimisation of victims of terrorism during criminal proceedings. According to an expert from the legislative department these proposals remain under consideration by the Afghan Ministry of Justice.<sup>77</sup>

## **2.2 Legal advice, representation and participation in criminal proceedings**

A second strand of guidelines in the Madrid Memorandum concern the rights of victims of terrorism during the prosecution of criminal cases. They call for victim to be eligible for legal aid and to be entitled to meet with prosecutors, attend hearings and, at appropriate stages, participate in court proceedings.<sup>78</sup>

Legal aid is essential to assist victims of terrorism in participating effectively in court proceedings.<sup>79</sup> The Madrid Memorandum states emphatically that ‘legal aid should be provided free of cost’ to victims of terrorism. In Afghanistan victims are entitled to access to legal services, though it is uncertain whether this translates into legal aid in the form of free legal advice and representation or equates to a defendant’s constitutional rights to such services. Article 31 of the Constitution refers only to a defendant’s right to free legal services and is silent with regard to victim’s rights in this respect, suggesting that there is no obligation placed on the state to provide free legal aid to victims of terrorism. Interviews with an official at the AIHRC reveal that it has called for consideration to be given to reconciling article 31 of

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the Constitution with article 6 of the CPC, as well as clarification that in the interests of justice free legal services should be provided automatically to victims of crimes where required.<sup>80</sup> Until this is resolved there remains some unsatisfactory uncertainty about the rights of victims of terrorism to legal aid during criminal proceedings.

In terms of meeting with prosecutors, there are a number of provisions in the CPC that promote communication between victims and criminal justice actors. The police, for example, are authorised to identify victims of criminal offences and take statements from them (article 80). Furthermore, prosecutors are required to visit crime scenes and listen to comments made by victims during the investigation (article 145(4)). The Code, however, falls short of specifically requiring prosecutors to meet with victims of crime, which international guidelines suggest can be a valuable means of empowering victims and helping them to gain realistic expectations of what to expect from the judicial process.

Victims of criminal offences in Afghanistan are entitled to attend court hearings and also participate in criminal trials. They are able to present their claims at the start of a trial once the indictment has been recited by the prosecutor and to question witnesses after they have given their testimony (articles 217-218) In addition, judges must consider the statements of victim witnesses before reaching a verdict (article 227). There is, then, provision for the important triangulation of interests between the prosecutor, the accused and the victim, which is essential for the prosecution of a terrorist-related crime and which reflects the recommendations of the Madrid Memorandum for victim participation in proceedings.

Arguably, however, there is more that could be done to enhance the participation of victims in criminal proceedings. Consideration should also be given to discussing at national level the establishment of a system whereby a designated officer is appointed to co-ordinate meetings between victims and lawyers in accordance with the provisions of the CPC, and to organise meetings between victims and prosecuting lawyers in the District courts as opposed to the Provincial courts in order to facilitate the travel of victims to court and their attendance at hearings.

In addition, it is recommended reviewing the potential for introducing the filing of impact statements at the sentencing stage upon a guilty verdict. Similar practices have been integrated into criminal justice processes in many other jurisdictions including Australia,<sup>81</sup> Canada, Israel, New Zealand and the UK<sup>82</sup> on the rationale that they offer victims a stronger voice in the criminal justice process than that provided merely by a witness statement. Concerns have been raised by criminal justice professionals and academics about their impact on increasing penalties for defendants and accentuating the risk of victims acting in, as Ashworth has coined it ‘the service of severity.’<sup>83</sup> Much of the academic criticism of victim impact statements, however, is not located in research relating to terrorist offences. Such statements can play a significant part within criminal proceedings of recognising the humanity of terrorist victims while at the same time publicly demonstrating the human costs of terrorism. They are capable of providing important information about the nature and extent of injuries suffered by the victim and the impact of the crime on their lives, including any financial losses. Perhaps more significantly, in terms of developing victim-centred criminal justice procedures, this form of participation in criminal proceedings can provide valuable therapeutic benefits to victims of

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terrorism. Dubber has argued that, ‘a victims testimony at the sentencing hearing (orally or in writing) may strengthen the victim’s sense of self after the traumatic experience of crime.’<sup>84</sup> This rationale for the use of impact statements may resonate strongly with victims of terrorism in Afghanistan. The majority of respondents in AIHRC’s Call for Justice survey, after all, sought a criminal justice process that not only allows for victims the ability to provide evidence but which also aims to ‘restore their dignity.’<sup>85</sup> The presentation of personal statements can help to achieve this. Giving victims the opportunity to express the devastating effect that a terrorist offence has had on them emotionally, financially and/or physically offers an important cathartic and empowering participatory experience during criminal proceedings, which can help promote restorative self-esteem and respect and contribute to healing processes.

Since the CPC was passed in 2014 there have been discussions amongst a number of justice officials about the potential for integrating victim impact statements into criminal procedure in Afghanistan. At the time that the CPC was drafted considerably more attention was paid to implementing international standards of human rights protections for defendants throughout the investigative, trial and sentencing stages of criminal proceedings than to those relating to victims.<sup>86</sup> The introduction of victim impact statements provides a means of recalibrating the criminal justice system to one that is equally victim-centred, while also conforming with guidance in the UN Declaration 1985 which states that the ‘views and concerns of victims’ should be ‘presented and considered at appropriate stages of the proceedings where their personal interests are affected.’<sup>87</sup> Interviewed expert justice officials confirm that the Criminal Law Reform Working Group (CLRWG) plans to undertake a review of CPC with a view to

assessing the need for its revision. It is recommended that as part of this process it considers the insertion of relevant procedures for victim impact statements in any new draft.

### **2.3 Compensation, reparation and rehabilitation programmes to victims of terrorism**

The third strand of guidance from the Madrid Memorandum concerns reparation to victims of terrorism. In this regard, victims should be informed of any entitlements and assisted with their claims for compensation, preferably by victim assistance professionals.<sup>88</sup> This international good practice guideline follows on from the advice of the Special Rapporteur, who urged states to ‘voluntarily accept a binding international obligation to provide reparation to the victims of all acts of terrorism occurring on their territory.’<sup>89</sup>

Afghanistan’s 2004 Constitution confers responsibilities on the state to provide compensation due to harm caused by government action, and to provide free health care, medical treatment and financial support to descendants of those martyred, missing, disabled or handicapped in accordance with the law (articles 51-53). The CPC also provides for the rights of victims to claim compensation (article 6(1)(4)) and file private claims (articles 189-194). In reality, however, perpetrators of terrorist acts are unlikely to ever be able to provide any compensation to victims. They face execution or long-term imprisonment in Afghanistan, if they have not been killed during the attack or have escaped capture.

More relevant rights are provided by the Law on the Rights and Privileges of Persons with Disabilities (2010) and the Law of Rights of Survivors of Martyrs and Missing Persons (2010), both amended in 2013. The former provides rights to financial assistance and support from the state by those rendered disabled as a result of a terrorist act (article 7(4)). The disabled victim

must have suffered loss to their health by way of physical, sensory and/or mental injury, to the extent that it has reduced their social and economic welfare. Claims by victims can include payment of wages, as well as pension provision, with rates and percentages varying depending on whether or not they are military personnel, government employees or otherwise, and on the extent of their disability. In this regard there is treatment available to disabled victims who were military personnel or government employees. In addition, victims disabled by terrorist acts are entitled to a range of support initiatives guaranteed by the State, including, for example, provision for higher education, health services and rehabilitation support. The Law on the Rights and Privileges of Survivors of Martyrs and Missing Persons (2010) provides similar rights to descendants of victims of terrorism to claim financial support and assistance, including percentage payments of the victim's salary, pension rights, higher education and allocation of land.

While the current legislative framework provides rights to reparation to victims of terrorism, the implementation of these measures has been problematic. In practice, victims of terrorism rarely receive any compensation or disability benefits from the state.<sup>90</sup> There is a lack of administrative support provided by government institutions to process claims for compensation and insufficient government funds available to meet them. Many individuals suffering disabilities due to terrorist attacks fail to receive monthly disability payments to which they are entitled as the administration is not in place to register them and their entitlements under existing legislation.<sup>91</sup> The AIHRC has recently prepared a draft Law on Compensation for Victims of Conflict, which proposes that direct and indirect victims should receive between 50,000 to 500,000 Afghanis depending on the nature and extent of injuries suffered as a result of a terrorist attack. Interviews with experts reveal, however, that the Ministry of Finance is

resistant to the introduction of these measures on the basis that the GoIRA would not have sufficient funds to settle anticipated claims.<sup>92</sup> Currently, the government risks breaching the responsibilities placed upon it by national legislation and should be encouraged to urgently address the challenges to the implementation of the national compensation programme and consider AIHRC's new draft law. Reparation is a key ingredient in the development of a victim-centred approach to criminal justice and an essential measure against which the state's resolve and ability to resist politically motivated terrorism will be judged.

## **Conclusion**

Investigating and prosecuting terrorist crimes while providing protections and support to victims of terrorism will not on their own act as a panacea to the conflict in Afghanistan. Furthermore, enhancing the current legal framework and the successful implementation of any new mechanisms of support for victims of terrorism will be dependent on addressing the many challenges facing the formal criminal justice system in Afghanistan, including those presented by insecurity, systemic corruption and weak institutions. Nevertheless, successful state support and assistance to victims during criminal trials can play an important part in undermining the appeal of terrorism and affirming the state's ability to provide protection to its citizens and political stability. This study finds that criminal justice approaches to victims of terrorism in Afghanistan can be strengthened across of all three separate areas of concern categorized in the Madrid Memorandum. The gaps that exist in the Criminal Procedure Code are indicative of a bias towards providing new protections for defendants by those involved in developing and drafting the law. This was perhaps understandable given the limitations of the earlier ICPC in this respect. New measures, for example, stipulating the requirements for grounds for arrest

and detention, challenging the legality of arrest and detention and providing non-custodial alternatives to detention were required.<sup>93</sup> However, the overarching emphasis on protecting the rights of defendants appeared to obscure or marginalise any necessity for ensuring a similar degree of safeguarding measures for victims of crime. To address the gaps this paper identifies, the Afghan government should consider initiating discussions at a national level focusing on the welfare needs of victims of terrorism during criminal proceedings, the extent to which they are provided with legal advice, assistance and representation and the compensation they receive, and consider the need for legislative reform. These discussions should seek input from relevant institutions representing law enforcement, prosecution, defence lawyers and the judiciary as well as the AIHRC, which is understood to be so concerned about the deficiency of support for victims of terrorism that it is launching a national inquiry into their situation.<sup>94</sup>

The recommendations in this paper may help to identify priority areas for reform during national discussions. They are intended to accord with a synergistic model of rule of law development, which advocates reform built around national, as opposed to purely international, desire to constructively build on processes, laws and institutions that already exist, and recognises the appeal and limitations of existing legislation and the potential for adaptation in ways that ensure legitimacy.<sup>95</sup> It also cautions against a foreign-led process of legal development driven by expediency and over-dependency on the transplantation of alien concepts, which has typified much of the reform of formal justice system in Afghanistan, particularly since 2004. Instead, it emphasises the importance of local expertise. Accordingly, the Ministry of Justice, the Attorney General Office, the Directorate for Border Affairs and Security Cooperation, the Supreme Court and the Afghanistan Independent Bar Association,

as well as the Parliamentary Legislative Committee and the CLRWG, should all be encouraged to engage with discussions on reform in this vital area of concern for the country.

There is much to be said for instilling a sense of urgency to convening discussions at this level, so that they may be aligned with current processes for the review of the CPC and a draft Law on Compensation for Victims of Conflict, which was prepared by AIHRC three years ago and submitted to the Legislative Department in March 2018.<sup>96</sup> This should provide excellent opportunities for including provisions that can strengthen legal protections and support for victims of terrorism during criminal proceedings. While the government works towards ‘realizing self-reliance,’ four years into its Transformation Decade (2015-2024)<sup>97</sup>, politically motivated acts of terrorism continue to plague the country with distressing regularity. These acts are likely to be intended to deliberately undermine the government and local confidence in the political system. Many result in the death or serious physical or psychological injury to civilians. The extent to which the government is able to respond to the needs of these victims constitutes a vital element of its ability to counter terrorism in Afghanistan. If it fails to recognise and respond to those needs by instituting reform, it risks demonstrating an indifference to the assistance needs of victims of terrorism, which can further undermine confidence in the government and its ability to ensure rule of law.

## Notes

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50. Emerson, “Framework,” 13.
51. UNODC, “Good Practices,” 14.
52. Interview with a former Judge from Afghanistan and legal expert.
53. Article 3(1).

54. Article 264.
55. Article 4(16).
56. Interview with a former Judge from Afghanistan and legal expert.
57. Article 4(13).
58. Interview with a former Judge from Afghanistan and legal expert.
59. Law on Rights and Privileges of Disabled Persons, article 7.
60. Law on Rights and Privileges of Survivors of Martyrs and Missing Persons, article 2. ‘Survivors’ are similarly defined in both laws and include spouses, parents, children under 18 and unmarried daughters and sisters (article 7 of the Law on Rights and Privileges of Survivors of Martyrs and Missing Persons and article 9 of the Law on Rights and Privileges of Disabled Persons).
61. Madrid Memorandum, 6.
62. Ibid, 7.
63. This term refers to the further victimisation of the victim as a result of insensitive treatment by criminal justice or other professionals in the aftermath of a crime.
64. Madrid Memorandum, 9.
65. Interviews, Afghan justice officials.
66. Madrid Memorandum, 6.
67. UNODC, “Good Practices,” 19-21.
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69. Interviews, Afghan justice officials.
70. Ibid.
71. Hartmann & Klonowiecka-Milart, “Lost in Translation,” 200.
72. Madrid Memorandum, 15-16.
73. UNODC, “Good Practices,” 27.
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94. Interview, Afghan justice official.
95. Stromseth, "Can Might Make Rights?"
96. Interview
97. A reform programme entitled "Realizing Self-Reliance: Commitments to Reforms and Renewed Partnership" ('Self-Reliance instrument') identifies strategic policy priorities for Afghanistan during a Transformation Decade (2015-2024). These include improving security and political stability, stabilizing the economy, advancing good governance, and promoting the rule of law and respect for human rights.